सत्यमेव जयते

THE
INDIAN LAW REPORTS
HIMACHAL SERIES, 2015

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

APRIL, 2015

Vol. XLV (II)

Pages: HC 432 to 1034

Mode of Citation : I L R 2015 (II) HP 1

Containing cases decided by the High Court of

Himachal Pradesh and by the Supreme Court of India

And

Acts, Rules and Notifications.

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

INDIAN LAW REPORTS

HIMACHAL SERIES

(April, 2015)

INDEX

Nominal table
I L R 2015 (II) HP 1

****

SUBJECT INDEX

'C'

would have a proportionate share and in case they are permitted to be deleted, the Sale Consideration would not pass in their favour - in these circumstances, application dismissed.

Title: M/s.Mukut Hotels & Resorts Pvt. Ltd. Vs. M/s.Khullar Resorts Pvt. Ltd. & Ors.
Page- 995

Code of Civil Procedure, 1908- Order 6 Rule 17- Defendant sought amendment in the Written Statement to assert that ostensible nature of the trust was charitable but in reality, it was a partnership firm to run a school - plaintiff contended that this amendment would change the nature and character of the defence- application was filed when issues had not been framed- held, that the proposed amendment was necessary for passing an effective decree - proposed amendment would not change the nature of the suit and would not affect the rights of the plaintiff- application was rightly allowed.

Title: Sunil Kumar Bansal & another Vs. K.T.S Educational and Charitable Trust & others.
Page-682

Code of Civil Procedure, 1908- Order 7 Rule 11 read with Section 151- Parties had agreed that Court at Satara, Maharashtra will have the jurisdiction to try the dispute between them - hence, it was prayed that Court in Himachal Pradesh has no jurisdiction to hear and entertain the suit- plaintiff contended that cause of action had taken place within the territorial jurisdiction of Himachal Pradesh as plaintiff had Industrial Unit at Baddi and the devices were manufactured and shipped from Baddi – bills were issued and the payments were received and encashed at Baddi – purchase order mentions the words “subject to jurisdiction at Satara (Maharashtra) Court”, while invoices mention “all disputes are subject to Solan jurisdiction”- thus, parties had never agreed to limiting the jurisdiction in the dispute and they were at liberty to institute the suit at Satara or at Solan.

Title: M/s Spray Engineering Devices Limited Company Vs. Kay Bouvet Engineering Private Limited Page-1010

Code of Civil Procedure, 1908- Order 9 Rule 9- Plaintiff and his counsel did not appear before the Court on which suit was dismissed in default- subsequently, an application for setting aside the order was filed which was allowed- held, that Advocate had noticed date of hearing as 15.6.2014 and had not appeared on 13.6.2014- plaintiff should not suffer due to negligence of his counsel- therefore, application was rightly allowed.

Title: Sunil Kumar Vs. Mohinder Kumar Page-869

Code of Civil Procedure, 1908- Order 19 Rules 1 and 2- the affidavits are not included in the definition of evidence and can be used as evidence only if for Court passes an order for their admission.

Title: Mohd. Afzal (died) through his LRs Vs. Rehman Khan (died) through LRs and others
Page-978

Code of Civil Procedure, 1908- Order 21- a decree was passed for the specific performance of the agreement and J.D was directed to execute the conveyance deed- when the deed was not executed, plaintiff filed an execution petition- objections were taken by the objector stating that his father was missing since November, 2007 and no valid service was effected- objections were dismissed by the Executing Court- report of the process server showed that sons of the J.D had refused to accept the summons on which service was effected by way of affixation- Executing Court had issued summons for the service of J.D but the service could not be effected- held, that affixation of the summons on the house when the sons of the J.D

had refused to receive the summons cannot be said to be bad- Objector had claimed that his father had died, however, no declaration was sought regarding this fact- burden of proof that the person is dead is upon the person who asserts it, especially when daughter-in-law of the J.D had admitted that J.D was living in Delhi for last 2-3 years.
Title: Sh. Manohar Lal Vs. Smt. Kusum Lata Malhotra & ors. Page-865

Code of Civil Procedure, 1908- Order 23 Rules 1 and 2- An application for withdrawal of suit with permission to file a fresh suit was filed at appellate stage on the ground that there was a formal defect – suit was dismissed for want of proof- held, that the right of plaintiff to withdraw the suit at appellate stage is not an absolute right but is subject to rights acquired by defendant under a decree - non-joinder of necessary-party is not a formal defect- permission to withdraw the suit cannot be granted when the claim as set out in the original suit is weak and adverse findings have been recorded against the plaintiff- hence, application dismissed.
Title: Ram Swaroop & ors. Vs. Narinder Parkash & ors. Page-452

Code of Criminal Procedure, 1973- Section 127- Petitioner filed an application for claiming enhancement of maintenance allowance- held, that an application for enhancement can only be filed if it is a averred that respondent has become financially empowered after the grant of maintenance or the needs of the children have increased- Petitioner had specifically pleaded that salary of the respondent had increased and the children were going to the school which increased the expenses for their maintenance- in these circumstances, enhancement of maintenance by Magistrate was justified.
Title: Master Ajeet and others Vs. Rajiv Page-594

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal strengthens presumption of innocence in favour of accused- onus lies heavily upon the prosecution to dislodge the same- Appellate Court should not ordinarily set aside the judgment of acquittal where two views are possible- the Court should record the findings whether the view of the trial court is perverse or otherwise unsustainable- the Court can consider whether the trial Court had failed to take into consideration any admissible evidence and had not taken into consideration any evidence brought on record.
Title: State of Himachal Pradesh Vs. Avinash Katoch (D.B.) Page-491

Code of Criminal Procedure, 1973- Section 427- Accused was convicted of the commission of offences in two cases- it was pleaded that sentence in two cases should be ordered to be run concurrently- incident involved two financial years and Court has power to order that the sentence in the latter case should be run concurrently.
Title: Pratap Singh Vs. State of H.P. Page-631

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Section 498-A read with Section 306-A of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- petitioner being a female is entitled to special treatment- she has a minor children and parents- hence, it would be expedient to release her on anticipatory bail.
Title: Pawanbala wife of Prem Chand vs. State of H.P. Page- 614

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for commission of offence punishable under Section 498-A read with Section 306 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- investigation is at initial stage and it would be adversely affected by releasing the petitioner on bail- specific allegations were made against the petitioner- offence punishable under Section 306 of IPC is against the society, therefore, it would not be expedient to release the petitioner on bail.

Title: Prem Chand son of Jagdish Chand Vs. State of H.P. Page-640

Code of Criminal Procedure, 1973- Section 439- An FIR was registered for the commission of offences punishable under Sections 363, 366 and 376 of IPC read with Section 4 of Protection of Children from Sexual Offences Act 2012- allegation against the petitioner is that he had kidnapped the prosecutrix and had forcibly married her- prosecutrix was aged 16 years and one month on the date of incident- held, that as per Child Marriage Restraint Act, adult male below 21 years cannot marry a female below eighteen years – the age of the prosecutrix was not 18 years at the time of incident and the so called marriage was contrary to Child Marriage Restraint Act- therefore, the consent of the prosecutrix is not material- hence, bail application dismissed.

Title: Mohamad Iqbal son of Sh Jamal Din Mir Vs. State of H.P. Page-526

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the accused/applicant for the commission of offence punishable under Sections 457 and 380 of IPC- accused had broken into a ATM- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- In the present case, investigation was complete and the challan had been filed before the Court of Law- interest of the State would not be adversely affected by releasing the applicant/accused on bail- in these circumstances, bail granted.

Title: Balwinder Singh son of Sh.Gurcharan Singh Vs. State of H.P. Page-581

Code of Criminal Procedure, 1973- Section 482- A dispute arose between residents of the two villages regarding the water supply scheme- a Writ Petition was filed before the High Court who directed both the parties to remove the locks – further, direction was issued to SP to remove the locks in case locks are not removed by the parties- petitioner in the capacity of Additional Superintendent of Police along with SHO and SDO, I & PH visited the spot – parties removed their locks and submitted a report to the SP- the Writ Petition was disposed of with a liberty to the parties to approach the Civil Court – respondent No. 4 filed a Petition under Section 156 (3) of the Cr.P.C for registration of the criminal case against the residents of the other villages and petitioner- held, that delay of three months in reporting the matter to the police makes the case of the complainant improbable when such delay is not properly explained- the compliance report submitted by the petitioner was considered by the High Court and no fault was found with the same- the allegations made against the petitioner are vague- petitioner being a public servant cannot be harassed without any basis and if public servants are harassed on the basis of vague allegations it would not be possible for any

public servant to discharge his duties without fear and favour – in these circumstances, FIR registered against the petitioner quashed.
Title: Bhagat Singh Thakur Vs. State of Himachal Pradesh and others Page-805

Code of Criminal Procedure, 1973- Section 482- An FIR was registered on the basis of complaint filed by wife for the commission of offence punishable under Section 498-A read with Section 34 of IPC- the parties compromised the matter and agreed to withdraw the cases pending against each other- statement of wife was recorded in which she stated that she had no objection for quashing the FIR- held, that criminal offences which are personal in nature can be quashed to maintain peace between the parties, however, criminal offences relating to murder, rape, dacoity, Prevention of Corruption Act should not be allowed to be quashed-since the offences involving marriage were personal in nature, therefore, the petition for quashing the proceedings allowed.
Title: Mohit Khattar & others Vs. State of H.P. & another Page-723

Code of Criminal Procedure, 1973- Section 482- Applicant sought permission to go abroad on the ground that his son was working in Australia and the applicant and his wife intended to visit him- application was opposed on the ground that investigation against the applicant was continuing and in case, applicant is permitted to go to abroad, he would not return and the investigation would be hampered- held, that right of travel and go outside the country is a fundamental right- petitioner is working as ticket verifier in Haryana Roadways- he has roots in India- therefore, petitioner permitted to go to abroad subject to certain conditions.
Title: Rajbir Singh Vs. State of H.P. & ors. Page-963

Code of Criminal Procedure, 1973- Section 482- Matter stands compromised between the parties- therefore, petition dismissed as withdrawn.
Title: Indian Technomac Company Ltd. Vs. State of H.P. & others Page- 962

Code of Criminal Procedure, 1973- Section 482- Matter stands compromised between the parties- therefore, petition dismissed as withdrawn.
Title: Indian Technomac Company Limited Vs. State of H.P. & others Page-1023

Code of Criminal Procedure, 1973- Section 482- Parties had settled their dispute and wanted to reconcile- hence, it was prayed that FIR registered at the instance of wife be quashed- held, that criminal offence which are not against the society can be compounded- since, dispute between husband and wife is not related to the society, therefore, it can be compounded- consequently, FIR got registered by the wife ordered to be quashed.
Title: Sandeep Malachi son of Shri L.D. Malachi & others Vs. State of H.P. and another Page-929

Code of Criminal Procedure, 1973- Section 482- Petitioner is a partner in the firm manufacturing drugs under the license issued by the Drug Controller – Drug Inspector visited the premises of respondent No. 7 and took the sample of 13 drugs- two samples were not found to be a standard quality- complaint was lodged against the petitioner and other partners- petitioner contended that his prosecution is in violation of the provisions of Section 34 of Drugs and Cosmetic Act, 1940- there was no plea that petitioner was in-charge and was responsible for the conduct of the business of the firm and he could not be prosecuted simply on the ground that he happens to be a partner- held, that in order to prosecute a partner, it is necessary to assert that he is in-charge and responsible for the

conduct of the business of the firm- mere fact that one is a partner of firm is not sufficient to make him liable- petitioner has placed on record the certificate of renewal of license to manufacture bearing the details of the persons who are responsible for manufacturing the drug have been given and these names are other than those who are partners of the firm- petitioner has annexed copy of authorization in favour of 'M' which shows that 'M' would be responsible for the conduct of the business- copy of the letter issued by Drug Licensing Authority to the company acknowledging 'M' to be the holder of the manufacturing drug license was also placed on record- letter dated 9.12.2005 approving the names of certain persons other than the names of the petitioner was also placed on record- In these circumstances, forcing the petitioner to stand trial would be an abuse of process of Court- hence, complaint quashed.
Title: Ashok Kumar Tyagi Vs. State of H.P. and others Page-883

Code of Criminal Procedure, 1973- Section 482- Petitioners sought quashing of FIR registered against them for the commission of offences punishable under Sections 498-A 506 read with Section 34 IPC- record showed that FIR has culminated in to charge-sheet- held, that once the charge-sheet was submitted before the Court, quashing of FIR is not permissible and the Court before which charge-sheet has been filed should be left to deal with the case on its own merit.
Title: Nancy Bhatt and another Vs. State of Himachal Pradesh and another Page-550

Code of Criminal Procedure, 1973- Section 482- Predecessor-in-interest of the petitioner was an accused under Prevention of Corruption Act- Indira Vikas Patra worth Rs.1,55,000/- were taken into possession – petitioners applied for the release of Indira Vikas Patra but same were not released by the Court- held, that Courts are under obligation to pass the order regarding the case property at the time of conclusion of the trial- however, in the present case, there was abatement due to the death of the accused – further, petitioners had not obtained the succession certificate from the Court to establish their status as legal heirs of the deceased – mere legal heir certificate is not sufficient to entitle them to claim the Indira Vikas Patra- a direction issued to release Indira Vikas Patra on the production of succession certificate.
Title: Anurag son of late Sh.Mohinder Prakash Awasthi and others Vs. State of H.P. and another Page-881

Code of Criminal Procedure, 1973- Section 97 - Minor child 'K' was in the custody of her father- mother of the child moved an application under Section 97 of Cr.P.C on which search warrants were issued and the custody was handed over to the mother- held, that Magistrate is competent to issue search warrants for the production of minor child from the illegal confinement and to hand over the child to legal guardian- child was aged 1 ½ years who was being breast fed by her mother, therefore, the Court had rightly handed over the custody to the mother.
Title: Deepak Kumar & another Vs. State of H.P & another Page-546

Constitution of India, 1950- Article 226- Learned District Judge had awarded maintenance @ Rs. 4,000/- p.m. to the respondent- petitioner offered to pay an amount of Rs. 3000/- p.m. from the date of application which was accepted by the respondent- therefore, the order of the Learned District Judge modified to the extent that petitioner will pay maintenance @ Rs. 3,000/- p.m. from the date of application.
Title: Kapil Sharma Vs. Neelam Sharma Page-1023

Constitution of India, 1950- Article 226- Petitioner applied for the post of Assistant District Attorney on contract basis- a final select list was prepared in which name of the petitioner was not mentioned- she applied under RTI it was revealed that respondent No. 3 who had obtained equal marks was appointed on the basis of his having obtained higher marks in the screening test- held, that as per rule of business firmed by Public Service Commission, in case of two candidates scoring equal marks in the interview, a candidate scoring more marks in the screening test will be placed above the candidate scoring less marks in the interview - those Rules of Business are binding upon the petitioner, therefore, petitioner was rightly denied appointment- petition dismissed.
Title: Shweta Sadyal Vs. State of H.P. & ors. Page-876

Constitution of India, 1950- Article 226- Petitioner applied for the post of Assistant Manager and obtained the highest marks in the written test- he was interviewed but the Interview Committee did not find any person suitable for the appointment – no marks were awarded to the petitioner in the interview- held, that it is difficult to believe that a person who had secured 80% marks in the written test did not possess the personality, awareness and subject knowledge or general knowledge compelling the Interview Board not to evaluate him, hence, proceedings of Interview Board set aside and respondent directed to conduct the interview afresh by constituting a new Interview Board.
Title: Karan Sharma Vs. State of H.P & another (D.B.) Page-547

Constitution of India, 1950- Article 226- Petitioner applied for the post of lecturer in Automobile Engineering, Class-1 (Gazetted) – petitioner and two other persons were found suitable and were recommended for appointment- respondents No. 1 and 2 refused to appoint the petitioner on the ground that he did not have requisite qualification as qualification of B. Tech. in Automobile Engineering is not equivalent to the qualification of the B. Tech. in Mechanical Engineering- advertisement notice specifically mentioned that a candidate must have 1st Class Bachelor's Degree in Automobile Engineering/Technology or equivalent- Public Service Commission found that petitioner is eligible to appear in the written examination- petitioner has placed on record equivalence certificate issued by the Lovely Professional University, indicating that B. Tech. in Automobile Engineering is equivalent to B. Tech. in Mechanical Engineering – this certificate was not taken into consideration by the respondent- respondent had deprived the petitioner from his legitimate right- petition allowed and the respondent directed to consider the recommendation made by the petitioner.
Title: Anshul Sharma Vs. State of H.P. and others Page-751

Constitution of India, 1950- Article 226- Petitioner claimed that non-petitioner No. 5 had misappropriated amount which was confirmed in an inquiry conducted by SDM, Aani- Deputy Commissioner, Kullu ordered the registration of FIR, however, no FIR was registered despite the direction of Deputy Commissioner- respondents pleaded that complaint filed by the petitioner was referred to Director Panchayati Raj – respondents No. 3 and 4 claimed that forged entry was recorded in the muster roll which was also accepted by the petitioner- SHO Police Station Nirmand stated that no case was made out for the registration of the FIR- recovery proceedings of Rs.1,930/- were initiated against the non-petitioner No. 5 and the amount was deposited by him with the Treasury- held, that forgery in the muster roll and embezzlement of Rs.1,930/- were cognizable offences- SHO was under obligation to register the FIR in a cognizable case- mere deposit of money is not sufficient to exonerate the non-petitioner No.5.
Title: Chaman Negi Vs. State of H.P. and others. Page-936

Constitution of India, 1950- Article 226- Petitioner claimed that he is entitled to seniority and other consequential benefits right from the date he was denied appointment- held, that this question was also determined in case titled as **Neetu versus State of H.P. & others,** reported in **2014 (2) Him. L.R. (DB) 1233,** and **Balak Ram versus State of Himachal Pradesh & others,** reported in **2015 (1) Him. L.R. (DB) 32-** respondent directed to examine the case of the petitioner in the light of the judgments delivered by the Court and to take the decision within six weeks.

Title: Shankar Lal Vs. The State of Himachal Pradesh & others Page-558

Constitution of India, 1950- Article 226- Petitioner fell ill and was taken to IGMC for check up on 04.06.2005- his disease was detected as tuberculosis- he was admitted on 4.6.2005 and was discharged on 16.6.2005– his fitness certificate was issued on 23.07.2005 and he joined duties on 25.07.2005 – he developed chest pain on 30.07.2005 and was taken to IGMC where Doctor advised him to take bed rest – respondent asked the petitioner to appear before Medical Board vide letters dated 25.08.2005 and 21.10.2005- he was placed under suspension on 21.01.2006 when he failed to appear before the Medical Board- he submitted joining report on 20.02.2006 and sought revocation of his suspension order- he was charge-sheeted on the ground of disobedience of the order of superior willfully and absence from the duties- held, that absence of the petitioner was not deliberate or willful but due to the circumstances beyond his control- he was suffering from contagious disease and it was his duty to take precautions to prevent the spread of infection to the others- respondent had sanctioned the leave and had granted medical reimbursement, therefore, it could not be said that petitioner was not suffering from any disease or had willfully absented from the duties- Inquiry Officer had made up his mind to remove the petitioner from the services and to throw him out, without hearing him- hence, order passed by Disciplinary Authority was set aside.

Title: Himachal Pradesh State Electricity Board Vs. Mahesh Dahiya (D.B.) Page- 691

Constitution of India, 1950- Article 226- Petitioner filed a Writ Petition seeking direction to immediately construct/ repair the road from Bhathmana Bus Stand to Dharvidhar road – it was pleaded that demand for construction of link road was made by all residents but no action was taken by Gram Panchayat- Gram Panchayat passed a resolution seeking grant of Rs. 5 lacs for the construction of the road- Gram Panchayat constructed a jeepable road – Government sanctioned amount of Rs. 3,60,000/- but the amount is not being used for the construction of the road- respondent stated that private land was located adjacent to the road and it was not possible to acquire the private land for construction of the road- respondent No. 5 also contended that a direction to acquire the land of private land owners at the cost of the petitioner or the other beneficiaries of the road is in violation of letter and spirit of Article 300-A – held, that Court does not have jurisdiction to issue direction to acquire the land of the persons merely, because petitioner and other beneficiaries are willing to pay the price of the same- deprivation of property can only be for the public purpose when the cost of acquisition is born either wholly or partly by the Government- but when the cost is born by an individual, group of individual or a company, it cannot be treated to be an acquisition for the public purpose- in the present case, petitioner was seeking acquisition of the land on the payment of money by him which is not permissible- petition dismissed.

Title: Parkash Chand Vs. State of H.P. & ors. Page-843

Constitution of India, 1950- Article 226- Petitioner had not recorded his qualification in the application form and he was found ineligible due to the same- Counsel for the respondent No. 3 stated that he had no objection in case, petitioner approaches the

respondent for recording his qualification in the form and also produces the requisite certificate- in view of this, Writ Petition is disposed of with a direction to allow the petitioner to do the needful.

Title: Pawan Kumar Vs. State of Himachal Pradesh & others (D.B.) Page-569

Constitution of India, 1950- Article 226- Petitioner has filed a Writ Petition commanding the respondents to shift all the institutions/offices/Banks situated at Gadiyara Gram Panchayat Rajhoon- held, that relief sought was within domain of the Legislature and Court cannot sit in appeal over a policy decision- Writ Petition is not maintainable.

Title: The Residents of Rajhoon Vs. State of H.P. & Ors. Page-804

Constitution of India, 1950- Article 226- Petitioner is owner in possession of the land in which is old house is located- land was granted to the petitioner on 14.8.1986 – all the four brothers had relinquished their share in favour of petitioner and the petitioner is residing in the house for more than 40 years- petitioner applied for attestation of the mutation but the mutation was not sanctioned- respondent contended that petitioner had filed an application after the lapse of 28 years- held, that the Collector had ordered that the land bearing Khasra No. 77/2 measuring 6 biswas be granted to the petitioner on payment of the market price- no appeal was preferred against this order- therefore, respondents are under an obligation to grant ownership right to the petitioner and to attest the mutation in favour of the petitioner regarding Khasra No. 77/2.

Title: Hari Nand son of late Sh. Ishwar Dass Vs. State of H.P. and others Page-905

Constitution of India, 1950- Article 226- Petitioner joined the Indian Army in the year 1995- he was discharged in the year 2010- he registered his name with Employment Exchange, Paonta Sahib with basic qualification of matriculation- he passed Sahitya Sudhakar (Sampuran) on 8.10.2013 and got his educational qualification registered with the Employment Exchange on 26.11.2013- the posts of Constable for Ex-servicemen were advertised- petitioner appeared before the Interview Board but his candidature was rejected on the ground that he got himself registered in the Ex-servicemen cell in the year 2013- respondent contended that petitioner had not renewed his earlier candidature and his seniority was to be calculated from 26.11.2013- held, that interview of the petitioner was held on the strength of registration certificate issued on 18.11.2010- petitioner could not have been sponsored unless he was found eligible by the Employment Exchange and rejection of the candidature on the ground of lack of seniority was unjustified.

Title: Ex. Nk Puran Singh Vs. State of H.P & others (D.B.) Page-814

Constitution of India, 1950- Article 226- Petitioner sought a writ for quashing the decision of the respondent to conduct a fresh entrance test for filling up the vacant/left out seats of MBBS course and to direct the respondent to fill up the vacant/left out seats on the basis of AIPMT for the year 2014- petitioner claimed that he had remained unsuccessful and had sought the admission on the basis of merit of the qualifying the examination- respondent stated that petitioner had not qualified AIPMT –the permission was sought from the Government to conduct the admission on the basis of merit of qualifying examination but the permission was granted on the condition that competitive test would be conducted, which would form the basis for filling up the vacant seats- record showed that it was provided in the prospectus that State Quota seats would be filled up on the basis of merit of Himachal Pradesh State Rank in AIPMT-UG-2014 and in case the seats remain vacant, they would be filled up on the basis of merit of qualifying examination- respondent No. 1 is a

private university governed by an Act, which provides that admission in Professional and technical courses shall be made only through entrance test – the provision of the Act would override the provisions of the prospectus- further, State Government is competent to issue instructions to regulate admissions in private University- further, Government was not arrayed as a party and the decision of the Government was not challenged- hence, in these circumstances, petitioner cannot question the process of filling of the seats by a competitive examination.

Title: Dheeraj Vs. Maharishi Markandeshwar University and another (D.B.) Page-509

Constitution of India, 1950- Article 226- Petitioner was appointed as Drawing Teacher by Mother Teacher Association – her appointment was re-endorsed by Parent Teachers Association- Headmaster of the school recommended her case for release of the grant in aid – respondent submitted that appointment of the petitioner was made without conducting interviews and that the petitioner had given her written consent that she was not interested in receiving any emolument but she was only interested in gaining experience- record showed that petitioner was given the appointment in place of one 'A' who was not performing her duty diligently – held, that once appointment was given on substantive basis, it is difficult to believe that appointment was on honorary basis or without any remuneration – State being model employer cannot force a person to work on unreasonably low wages and should not take advantage of unequal bargaining power- act of the respondent amount to Begar which is specifically prohibited under Article 23 of the Constitution of India- State being a model employer is under an obligation to conduct itself with high probity and expected candour- a model employer should not exploit its employee and should not take advantage of helplessness and misery of employee –respondent directed to release grant-in-aid in favour of petitioner and to consider the case of the petitioner for regularization.

Title: Promila Devi vs. State of H.P. & ors. Page-538

Constitution of India, 1950- Article 226- Petitioner was appointed as a Clerk in Vidhan Sabha and was designated as Junior Assistant on placement- additional post of Senior Assistant was constituted- Departmental Promotion Committee recommended the name of 'M' – petitioner claimed that he was entitled to be promoted on the basis of reserved promotional vacancy for Scheduled Caste- respondent claimed that the post of Senior Assistant is a non-selection post and is to be filled up by way of promotion- held, that as per Rules, post of Senior Assistant is a non-selection post and the same should be filled by way of promotion from amongst the clerical cadre of Clerks/Junior Assistants having ten years of experience – there is no mention in the Rule that post will be reserved for Scheduled Caste only- State Government has taken a decision that provision of the Constitution (85th Amendment) Act, 2001 are not required to be implemented in the State, therefore, the benefit of reservation in promotion cannot be granted to the petitioner.

Title: Manohar Lal son of late Sh Dila Ram Vs. H.P.Vidhan Sabha through Secretary Page-522

Constitution of India, 1950- Article 226- Petitioner was appointed as Gram Vidya Upasak - he was deputed to join five days' Training w.e.f. 2.6.2009 till 6.6.2009- it was a holiday on 7.6.2009- he was to join his duty on 8.6.2009 but his daughter fell ill and he took her to Community Health Centre- a raid was conducted by a team of State Vigilance and Anti Corruption Bureau who found petitioner to be absent and one Inder Singh teaching the students- Inder Singh was stated to be hired by the petitioner- a show cause notice was issued against the petitioner- Inquiry was conducted and the agreement of the petitioner

was cancelled- he filed a Writ Petition which was dismissed- held, that petitioner is an employee of Gram Panchayat- remuneration for his services is being paid by the Gram Panchayat out of funds granted by State Government- release of funds will not authorize the Government to initiate the disciplinary action against a Gram Vidya Upasak, if he commits misconduct and fails to maintain discipline in discharge of his duties- petitioner was served with a show cause notice by second respondent- disciplinary proceedings were ordered to be initiated against him and the second respondent imposed the penalty of cancellation of the agreement- first and second respondent could have recommended the action to be taken against the petitioner to Gram Panchayat- hence, order passed by the second respondent was not sustainable- further, it was not proved that services of Inder Singh were hired by petitioner on payment basis- Inder Singh was working as education volunteer in the Village under an NGO, named 'Adhaar' – absence of the petitioner on 8.6.2009 was due to the illness of his daughter which was a circumstance beyond the control of petitioner- Writ Petition allowed and the petitioner ordered to be reinstated.

Title: Surender Singh Chauhan Vs. State of H.P and others Page-969

Constitution of India, 1950- Article 226- Petitioner was appointed on ad-hoc basis with the University- he sought regularization – his case was placed before the Board of Management of University who forwarded it to the State Government- State Government turned down the case- held, that University had already regularized the services of four incumbents and it cannot discriminate the petitioner by not regularizing his services- the case of the petitioner was denied only on the ground that he was appointed on ad hoc basis and not on daily wages- petitioner is superior to the daily waged workmen and should have been regularized on the analogy of daily waged workmen- State Government should have taken into consideration various regularization policies framed by it for its employees and the employees of State Government undertaking - it was open to the University to adopt the notifications governing the regularization or in the alternative to frame its own policy – petition allowed and the petitioner deemed to have been regularized after completion of seven years uninterrupted service.

Title: Yashpal Vs. Dr. Y.S. Parmar University of Horticulture and Forestry, Nauni Page-690

Constitution of India, 1950- Article 226- Petitioner was retired on attaining the age of superannuation- an order was passed by the Corporation reducing the last pay drawn by the petitioner- petitioner was called upon to refund the excess amount drawn by him- no show cause notice was issued to the petitioner- held, that any order having civil consequences should be passed after complying with the requirement of the principle of natural justice- order passed by the respondent had civil consequences- since, the pay of petitioner was reduced without hearing him, therefore, order passed by the respondent set aside.

Title: Bansi Ram Vs. Himachal Road Transport Corporation and others Page-449

Constitution of India, 1950- Article 226- Respondent invited the tender for supply of SMF UPS Batteries- petitioner was informed that his rates had been approved and he was requested to supply the items- petitioner procured the battery and was in the process of supply of the same to various offices when the approval granted in favour of the petitioner was kept in abeyance – respondent claimed that rates of the petitioner were approved erroneously by calculating the tax @ 5% against 'D' form – another participant informed the respondent that relaxation of tax on production of 'D' form had already been withdrawn- petitioner had misled the respondent at the time of quoting the rate- held that petitioner had

specifically stated that he would charge tax @ 5% and will not claim any difference of tax- rates quoted by the petitioner were the lowest- tender offered by the petitioner should not have been kept in abeyance only on a technical ground- petition allowed and letter keeping tender in abeyance quashed and set aside.
Title: M/s Rishubh Sales Corporation Vs. Union of India and others (D.B.) Page-482

Constitution of India, 1950- Article 226- Respondent issued an advertisement inviting applications for 21 clear cut vacancies of clerk and few anticipated vacancies- petitioner was placed at serial No. 6- some of the appointed person resigned and the persons at serial Nos. 1 to 5 in waiting list were appointed in their place – another person resigned but the post was not offered to petitioner and was advertised again- held, that Administrative Authority is bound to record reasons for rejecting the representation- no reason was recorded by the respondent for rejecting the representation of the petitioner- petitioner possessed same merit as the candidates at the place of at serial No. 1 to 5 and he was placed at serial No. 6 due to his age – when the persons of equal merit were appointed, there must be a justification for denying appointment to a similarly situated person - a selected person has no indefeasible right to appointment but the employer has to assign cogent reason for denying appointment to him- order of rejection set aside and the respondent directed to consider the case of the petitioner afresh for appointment to the post of clerk.
Title: Rishi Chandel Vs. Hon'ble High Court of H.P. Page- 910

Constitution of India, 1950- Article 226- Respondent was being paid ex gratia amount equivalent to 20% of pay and D.A. or two months and ten days' pay whichever was less but payment of the amount was stopped- a Writ Petition was filed which was allowed and the respondent was directed to pay the amount to the petitioner –SLPs were preferred before Hon'ble Supreme Court of India which were dismissed – subsequently, Rule-66-A was incorporated providing that the payment of the amount would be dependent upon the financial condition of the respondent and would require the approval of the Board of the Directors- the condition was imposed by the respondent due to precarious financial condition of the respondent- held, that economic capacity of the employer is a relevant yardstick while adjudicating the claim of the employees- financial restructuring was required due to the precarious financial condition- the corporation had to close some of the branches- payment of ex gratia amount on the basis of financial condition cannot be said to be arbitrary- employee cannot contend that he should be given the same benefits irrespective of the financial condition of the employer.
Title: Himachal Pradesh Financial Corporation Officer's Association Vs. Himachal Pradesh Financial Corporation Through its Managing Director (D.B.) Page-756

Constitution of India, 1950- Article 226- State of H.P. decided to provide exemption of 5% on the electricity duty for all the new industrial unit coming up in the State of H.P.- petitioner established a large scale unit- petitioner claimed that an amount of Rs. 39 lacs was wrongly demanded as electricity duty- held, that State is bound by promise made by it- notification entitled all new industrial unit for exemption of 5%- rates were also clarified in the notification- petitioner had made large investment on the basis of incentives provided to it- there is no lapse on the part of the petitioner in either adhering to or complying with any of the Policies or statutory rules/regulations - Government sought increase in industrial development in the State – therefore, full effect must be given to the same- petition allowed and respondent directed to refund the amount @ 5% per annum.
Title: M/s Winsome Textile Industries Ltd. Vs. State of Himachal Pradesh & others. (D.B.)
Page-596

Constitution of India, 1950- Article 226- The pay of the petitioner was revised- however, same was re-fixed and the recovery was ordered to be made- petitioner pleaded that he was not heard before re-fixing of his pay- held, that pay of the petitioner was re-fixed after 12 years- the recovery for a period in excess of five years should not be made in view of judgment of Hon'ble Supreme Court in the case of ***State of Punjab and others etc. versus Rafiq Masih (White Washer) etc., JT 2015 (1) SC 95***- therefore, the order for re-fixation of the pay quashed and respondent directed not to recover the amount from the petitioner.

Title: Arjun Singh Vs. State of H.P. & anr. Page- 1021

Constitution of India, 1950- Article 226- Writ Court directed the appellants to consider the case of the petitioner in terms of the judgment passed by the Court in ***Chaman Singh versus State of H.P. and another*** decided on 29th August, 2014- held, that Writ Court had not determined the right of the parties – judgment is not working adversely against the appellants- hence, appeal dismissed.

Title: State of H.P. and others Vs. Himanshu Shekhar Chaudhary and others Page-997

Constitution of India, 1950- Article 226- Writ Petitioner had filed a petition for quashing the order of re-fixation of his pay after the age of superannuation and for quashing the order of recovery – held, that there was no averment in the reply that fixation of the pay was made at the instance of the petitioner- entire exercise was made by the Board on its own, therefore, it is not permissible to effect the recovery- Appeal dismissed.

Title: H.P. State Electricity Board Ltd. Vs. K.C. Aggarwal (D.B.) Page-798

Constitution of India, 1950- Article 227- the Counsel for the petitioner submitted that Trial Court be directed to decide the suit on or before 15.5.2015- counsel for the respondent stated that he had no objection for the same- hence, direction issued to the Trial Court to dispose of the suit on or before 15.5.2015.

Title: Ram Lal Vs. Veena Dogra & others. Page-545

'H'

H.P. Land Revenue Act, 1954- Section 163- Defendant filed an application before the Settlement Collector for recording his possession over Khasra Nos. 973/1 and 965/1 – this application was referred by the Collector to Settlement Naib Tehsildar - the field agency of the settlement had carried out the local investigation and the name of the defendant was recorded to be in possession without any status- proceedings were initiated against the defendant under Section 163 of H.P. Land Revenue Act- defendant raised the claim of adverse possession, which was decided against him- held, that defendant had not filed any written statement to assert adverse possession- defendant had also not cross examined the Field Kanungo- he was ejected from the land as per record- held, that in view of these circumstances, finding recorded by the Court that defendant had failed to prove adverse possession cannot be faulted.

Title: Singhu Ram Vs. State of H.P. Page-465

H.P. Urban Rent Control Act, 1987- Section 13- It is the duty of landlord to keep the building in good repair and if the landlord neglects to keep the building in good repair then tenant may make the repair himself after giving prior notice to the landlord in writing - tenant can deduct the expenses of repair from the rent not exceeding one-twelfth of the rent payable by him to the landlord- landlord filed a Civil suit against the tenant for restraining him from raising construction or changing the existing structure of the building- tenant

admitted that the repairs were carried out in the building – no permission was obtained from M.C or Town and Country Planning Department- held, that tenant is not entitled to carry out the repairs without obtaining prior permission of the M.C and Town and Country Planning Department- further, permission of Rent Controller is required for carrying out any construction or repairing the premises within the municipal area- however, the tenant is entitled to take the benefit of H.P. Urban Rent Control Act in accordance with law.

Title: Rama Devi wife of Sh. Kewal Krishan and others Vs. Sushil Kumar Handa and others Page-659

H.P. Urban Rent Control Act, 1987- Section 14- Summons were issued to the petitioner for 21.8.2006 – process server reported that petitioner had retired and was living in the village- fresh summons were ordered to be issued for 29.9.2006- process server effected the service by way of affixation on which petitioner was proceeded exparte- held, that once it was reported that the petitioner had retired and was residing in the village, personal service was not possible- summons could have been affixed in the court house as well as residential house- summons were affixed on the residential house which is a proper service – hence, the petitioner was rightly proceeded exparte.

Title: Puran Dutt Vs. Salil Seth and another Page-849

Himachal Pradesh Agriculture and Horticulture Produce Marketing (Development and Regulation) Act, 2005- Section 70- Plaintiff filed a civil suit seeking permanent prohibitory injunction for restraining the defendant from dispossessing her from the shop in her possession- she filed an application under Section 80(2) of C.P.C for dispensing with the requirement of issuance of the notice – held, that there is specific bar under Section 70 of the Act for the institution of the suit until the expiration of two months period after notice- provision similar to Section 80 (2) of CPC has not been incorporated in Section 70- although, no specific provision has been prescribed, principles of Section 80 (2) of CPC can be read into provision of Section 70 of the Act to make it equitable and practicable.

Title: The Secretary Agriculture Produce Market Committee, Una Vs. Soma Devi Page-436

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 104- Suit land was earlier owned by 'V', plaintiff and 'K'- defendant claimed that 'V' had inducted 'K' as tenant during her life time- copy of jamabandi shows that land was jointly owned and possessed by plaintiff, 'V' and 'K' in equal share which shows that 'K' was co-owner, therefore, he could not have become the tenant- a person cannot be a tenant and the owner at the same time- he was never shown as tenant under 'V' regarding the suit land- defendant had failed to prove that 'K' was inducted as non-occupancy tenant by 'V'- no bilateral agreement of tenancy was proved on record -even in the column of rent, there was no entry regarding the payment of rent- no notice was issued prior to the conferment of proprietary rights- in these circumstances, conferment of proprietary rights upon 'K; was wrong.

Title: Joginder Paul & ors. Vs. Gauri Dutt Page-432

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 104- Predecessor-in-interest of the parties 'P' was a Gair Maurusi tenant- there was no order of relinquishment or abandonment of his tenancy in favour of land owners- 'S' used to help his father in the cultivation of the land- entries were recorded in favour of the predecessor-in-interest of the defendant No. 1 during the consolidation proceedings – 'S' cultivated the land on behalf of all the brothers and in absence of any relinquishment or abandonment, it is to be presumed that he remained tenant over the suit land – tenancy would not be affected by the death of

the landlord or tenant except where the tenant does not leave some male lineal descendants, mother or widow - tenancy after the death of the original tenant devolved upon his son- the entries showing 'S' to be an exclusive owner and defendant No. 2 and predecessor-in-interest of the defendants No. 3 and 4 as tenant at will are wrong.

Title: Pritam Singh Vs. Kishan Singh (deceased through LRs) & ors. Page-554

Hindu Marriage Act, 1955- Section 13- Desertion- the factum of separation and the intention to bring cohabitation permanently to an end must be established to prove desertion.

Title: Mahender Baroor Vs. Reena Kumari alias Bhawna Page-500

Hindu Marriage Act, 1955- Section 13- Husband filed a divorce petition claiming that his wife used abusive and filthy language and thereby created unhealthy atmosphere at home – she never used to clean the house and used to leave matrimonial home without any intimation- husband had not given any specific date, month and year when the wife had used abusive language against him and his parents- details of the words uttered by the wife were not given by the husband- father of the husband stated that he was not willing to take back his daughter-in-law- wife filed a petition for restitution of Conjugal Rights which was decreed exparte - maintenance was also awarded to the wife and her daughter- held, that these circumstances proved that husband was at wrong and he was trying to take advantage of his wrong.

Title: Mahender Baroor Vs. Reena Kumari alias Bhawna Page-500

'I'

Income Tax Act, 1961- Section 80IB (2)(iv)- Assessing Officer held that assessee had not employed 10 or more workers in the manufacturing process though at a given time the assessee had more than 10 workers out of whom 4 workers were engaged in two trucks owned by assessee- held, that once it was established that assessee had not employed 10 or more workers during the substantial part of year, assessee is not entitled for the benefit of deduction under Section 80IB (2)(iv).

Title: Commissioner of Income Tax Vs. M/s Shree Triveni Foods (D.B.) Page-947

Income Tax Act, 1961- Section 80IB(4)- Assessee is engaged in the manufacturing of various products- assessee claimed deduction under Section 80 IB which was disallowed on the ground that process of making daliya and besan did not amount to manufacture- assessee filed an appeal before ITAT which was allowed and it was held that necessary conditions for grant of deduction under Section 80 IB were satisfied- held, that gram Dal loses its shape and identification when it is converted into flour- product can be said to be different from gram dal – gram dal and besan are treated as different commercial products- process of converting gram dal into besan amounts to manufacture and assessee is entitled to deduction under Section 80IB(4).

Title: Commissioner of Income Tax Vs. M/s Shree Triveni Foods (D.B.) Page- 947

Indian Contract Act, 1872- Section 17- plaintiff claimed that sale deed was got executed from him by defendant No. 2 in favour of defendant No. 1 - he had litigation with one M- plaintiff had engaged defendant No. 2 as his counsel- defendant No. 2 had obtained his signatures on some blank judicial paper for moving application in the Court- defendant No. 2 got executed a sale deed in favour of defendant No. 1 by practicing fraud and taking

advantage of his position- it was established from the statement of the witnesses that sale deed was scribed by 'T'- it was read over and explained by him to the plaintiff- plaintiff put his signature after understanding the same- witnesses also put their signatures- sale deed was produced before Sub Registrar – Sub Registrar again explained the contents of the deed to the plaintiff and plaintiff put his signature after admitting the contents to be true- relation between the plaintiff and defendant No. 2 was terminated on 3.3.1994 when case was decided- the sale deed was executed on 8.3.1994- the sale deed was executed on non-judicial papers, which belies his version that his signatures were taken on blank judicial papers- plaintiff had also executed an affidavit - held, that in these circumstances, version of the plaintiff that sale deed was executed fraudulently cannot be accepted.

Title: Bhag Chand Vs. Virender Kumar & another Page-584

Indian Evidence Act, 1872- Section 3- Circumstantial Evidence – when there is no direct evidence of crime, the guilt of the accused can be proved by circumstantial evidence but the circumstances from which the conclusion of guilt is to be drawn, should be fully proved and must be conclusive in nature- all the links in the chain of circumstances must be established beyond reasonable doubt, proved circumstances should be consistent only with the hypothesis of guilt of the accused, and totally inconsistent with innocence of the accused- Court must adopt cautious approach while appreciating circumstantial evidence and great caution must be taken to evaluate the circumstantial evidence.

Title: Nasib Chand Vs. State of H.P. (D.B.) Page-725

Indian Evidence Act, 1872- Section 3- Sole testimony of a police official if found to be reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of his case – it will depend on the fact of the case- when evidence of the police official inspires confidence and is found to be trustworthy and reliable, it can form the basis for conviction - absence of independent witness of the locality does not affect the creditworthiness of the prosecution case.

Title: Shamshed Ali Vs. State of H.P. (D.B.) Page-665

Indian Evidence Act, 1872- Section 24- Extra Judicial Confession- as a matter of caution, Courts require some material corroboration to an extra judicial confessional statement.

Title: Kesang Tamang Vs. State of Himachal Pradesh Page-713

Indian Evidence Act, 1872- Section 27- it was contended that no independent person of the locality was present at the time of disclosure statement- held, that merely because marginal witness of the disclosure statement was resident of another place was not sufficient to doubt the recovery.

Title: Ayodhya Singh son of Sh. Charan Dass Vs. State of H.P. (D.B.) Page-570

Indian Evidence Act, 1872- Section 32- Dying declaration- prosecution relied upon the dying declaration made by the deceased- there was no evidence that deceased was under fear, threat or was in any manner tutored – minor variation regarding the person who spoke to the deceased is not sufficient to make the dying declaration doubtful- deceased had specifically stated in the dying declaration that when she was put on fire, her husband was alone in the house, therefore, the involvement of the accused 'R' was ruled out – Dying declaration corroborated by the testimonies of the independent witnesses proves the guilty

intent of the accused in murdering his wife – hence, husband was rightly convicted for the commission of offences punishable under Sections 302 read with Sections 109 and Section 498-A IPC - the accused 'R' was convicted of the commission of offence punishable under Section 498-A IPC and acquitted of the commission of offence punishable under Section 302 read with Section 109 of IPC.

Title: Rakesh Kumar & another Vs. State of Himachal Pradesh (D.B.) Page-643

Indian Evidence Act, 1872- Section 35- District Judge had relied upon the average value for one year- held, that average value is prepared by public official in discharge of his official duty and is relevant under Section 35- there was no infirmity in placing reliance upon average value by District Judge.

Title: State of HP and others Vs. Roshan Lal and others Page-965

Indian Evidence Act, 1872- Section 155- Evidence of the hostile witness may contain elements of truth and should not be entirely discarded- evidence can also be relied upon by the prosecution to the extent to which it supports the prosecution version.

Title: Nasib Chand Vs. State of H.P. (D.B.) Page-725

Indian Evidence Act, 1872- Section 155- Hostile witness- merely because a witness had turned hostile, his testimony cannot be termed to be untrustworthy of credence- it is for the Court to decide, whether as a result of contradiction, witness stands fully discredited or part of his testimony can still be believed- independent witness had turned hostile, however, he admitted that accused was riding the motorcycle which was stopped by the police for checking- he admitted that he was associated by the police during investigation and had signed his previous statement recorded by the police regarding the recovery of contraband substance in his presence - statement was also proved by the Investigating Officer - held, that these circumstances proved that independent witness had supported prosecution version.

Title: Shamshed Ali Vs. State of H.P. (D.B.) Page-665

Indian Penal Code, 1860- Section 302- Accused had a dispute with his wife- he gave beating with Danda on her head resulting in her death- he went to the police station and confessed to commission of murder- an FIR was registered at his instance- the fact that accused had made a confessional statement to the police on which FIR was registered was duly proved by the testimonies of the police officials- medical evidence also proved that death was caused by a stick blow- the fact that accused used to beat his wife was also proved by the prosecution witnesses- accused had not examined any person to prove the defence taken by him- held, that in these circumstances, prosecution version was duly proved and accused was rightly convicted by the Court.

Title: Roshan Lal Vs. State of H.P (D.B.) Page-789

Indian Penal Code, 1860- Section 302- Accused had quarreled with the complainant on 15.2.2010- accused pelted the stone on the house of the complainant and abused him- complainant and one 'A' went to the village of the accused to inquire the reasons for abusing the complainant- 'A' asked the accused as to why he had abused the complainant and had pelted the stones on his house **–** accused went inside the house and came out with an Axe and inflicted the blow on the head of 'A'- accused run away from the spot after the incident- according to PW-1, one blow was given on the head of the deceased 'A', however, PW-9,

Medical Officer, found two injuries on the body of the deceased- he noticed wound on the skull and neck of the deceased- prosecution did not explain the second injury- according to PW-1, wife of PW-2 was present but she was not examined- PW-1 also admitted that he had enmity with the accused- complainant had not lodged any report with the police regarding pelting of the stone- result was inconclusive regarding the blood group on the T-shirt of the accused- held, that in these circumstances, prosecution version is not proved- accused acquitted.

Title: Khem Singh alias Nitu Vs. State of Himachal Pradesh (D.B.) Page-818

Indian Penal Code, 1860- Section 302- Accused killed his wife and child – he climbed on the roof and shouted that he had sacrificed his wife and son- he jumped from the roof and ran towards the jungle- wife and child were found dead with injuries on their necks- alleged conduct of the accused in climbing on the roof and admitting that he had killed his wife and son was contrary to normal human conduct- witnesses also admitted that it was raining and it was dark in the night- hence, prosecution version that accused had climbed on the roof during the night when it was raining heavily was not acceptable – prosecution had also not brought any motive on record- held, that in these circumstances, prosecution version was not proved.

Title: Kesang Tamang Vs. State of Himachal Pradesh Page-713

Indian Penal Code, 1860- Section 302- Accused murdered his wife and misled the others that she had committed suicide on account of stomach pain- Doctor opined that deceased had died due to strangulation - mark of ligature, corresponding to the thickness of the nylon cord, was found on the body of the deceased- As per Medical Officer, death could have been caused with nylon cord- Doctor also ruled out the possibility of the deceased hanging herself- brother of the deceased admitted that he had told the police that accused had disclosed to him that there was a quarrel between him and the deceased and due to the anger he had strangulated the deceased- he also admitted that he had told the police that accused had disclosed to him that he had strangulated the deceased to get rid of her- this amounts to extra judicial confession on the part of accused- accused was last seen with the deceased and burden was on him to prove as to how deceased had died- held, that in these circumstances, conviction of the accused was justified.

Title: Nasib Chand Vs. State of H.P. (D.B.) Page-725

Indian Penal Code, 1860- Section 302- Marriage of the sister of the accused 'A' was fixed on 11.12.2005- deceased was called to make for lightning arrangement and decoration of the house - accused 'A' and PW-3 'T' were called to help 'R'- a telephonic call was received by 'T' and he went to attend the call- he found deceased 'R' with injuries on his body- blood was oozing out of his neck and he was found dead- prosecution alleged that deceased was talking to the sister of 'A' which led to the murder- accused 'A' had made a disclosure statement that he could get the weapon of offence recovered and three pieces of sword were recovered pursuant to the disclosure statement – Medical Officer also proved that injury on the neck could have been caused by means of sharp edged weapon- deceased had died in the residential houses of 'A'- he had sustained four injuries on his person- chain of circumstances clearly proved that accused had committed murder of the deceased.

Title: Ayodhya Singh son of Sh. Charan Dass Vs. State of H.P. (D.B.) Page-570

Indian Penal Code, 1860- Section 302 read with Section 34- Father of the complainant did not reach home - subsequently, complainant and his cousin found 'O' and 'G' lying dead-

wooden pieces were lying scattered at the spot- cause of the death of 'G' was ante-mortem injuries on the head – cause of death of 'O' was gross head injury and ante-mortem manual strangulation- alcohol was found in the blood and urine of the deceased- motive projected by prosecution is a double edged weapon- while it can furnish a reason for commission of crime, it can also furnish a reason for false implication - recovery of the danda was effected in the presence of inimical witness- no independent witnesses were associated at the time of recovery- the possibility of brawl taking place between the persons in a state of intoxication could not be ruled out- mere presence of blood group AB of the deceased on the seized clothes does not lead to any inference that accused had murdered the deceased- held, that in these circumstances, prosecution version was not proved.

Title: Varinder Verma & another Vs. State of Himachal Pradesh (D.B.) Page-559

Indian Penal Code, 1860- Section 363- Accused had kidnapped the prosecutrix who was aged 15 years at the time of incident- date of birth of the prosecutrix was proved by the original school register- accused had taken the prosecutrix during the night without the consent of her parents- consent of the minor is immaterial in case of kidnapping- since, there was no consent of the guardian, hence, accused convicted of the commission of offence punishable under Section 363 of IPC.

Title: State of H.P. Vs. Rajak Mohammad son of Sh Kamal Deen (D.B.) Page-739

Indian Penal Code, 1860- Section 366- Accused had kidnapped the prosecutrix and had raped her- prosecutrix was taken to various places- held that version of the prosecution that prosecutrix was kidnapped for sexual purposes is duly proved- accused convicted of the commission of offence punishable under Section 366 of IPC.

Title: State of H.P. Vs. Rajak Mohammad son of Sh Kamal Deen (D.B.) Page-739

Indian Penal Code, 1860- Section 376- Accused kidnapped the prosecutrix, aged 15 years old, in the truck- accused 'R' raped prosecutrix on the way to Kullu- Prosecutrix was taken to different destinations and was recovered from the house of 'R'- prosecutrix specifically stated that accused' R' gagged her mouth, kept a knife at her neck, threatened her with death and on the way to Kullu raped her- her testimony is cogent and reliable- her testimony is corroborated by other circumstances on record- medical evidence also corroborated the testimony of the prosecutrix- sole testimony of the prosecutrix is sufficient to convict the accused- her testimony is free from blemish and is trustworthy and reliable- hence, the accused convicted.

Title: State of H.P. Vs. Rajak Mohammad son of Sh Kamal Deen (D.B.) Page-739

Indian Penal Code, 1860- Sections 302, 109 and 498-A- Accused had married the deceased – marriage was not acceptable to the parents of the accused as the wife belonged to a different caste- complaint was lodged by the deceased against her husband and her in-laws- parties met at the police station for amicable settlement of the dispute but the matter could not be resolved and they agreed to meet again- deceased was brought to CHC, Palampur after having sustained serious burn injury- she made a statement in the presence of Naib Tehsildar and subsequently succumbed to her injury- police found on investigation that accused on instigation and abetment of his parents, had set the deceased on fire by pouring the kerosene oil – complaint filed by the deceased before the police clearly proved that there was a dispute between the accused 'R' and his parents- this corroborates the testimony of the prosecution witnesses that she was being maltreated by the accused- accused 'R' and

his mother had subjected the deceased to harassment and cruelty- hence, accused were rightly convicted of the commission of offence punishable under Section 498-A IPC.
Title: Rakesh Kumar & another Vs. State of Himachal Pradesh (D.B.) Page-643

Indian Penal Code, 1860- Sections 376 and 506- Accused raped the prosecutrix- prosecutrix narrated the incident to her mother when she was pregnant by 4-5 months- Investigating Officer admitted that prosecutrix had not disclosed the place where she was raped- Investigating Officer had not even prepared site plan- radiological age of the prosecutrix was between 17 to 19 years – the delay was not explained- held, that in these circumstances, prosecution version was not proved and acquittal of the accused was justified.
Title: State of Himachal Pradesh Vs. Kamal Dev (D.B.) Page-801

Indian Penal Code, 1860- Sections 498-A and 306- Deceased was married to the accused- deceased went to the cut grass on 22.8.2003 but she did not return- subsequently, a complaint was filed by her father that his daughter is missing since 22.8.2003 and that accused, his parents and nephew used to harass her- PW-1, PW-2 and PW-3 admitted that accused had refused to accept any dowry- PW-6 and PW-7 admitted that accused was living happily with his wife and she had never complained to them about the beating- View of the Court that the deceased might have slipped into the river Beas accidently cannot be termed as perverse – held, that in these circumstances, the acquittal of the accused was justified.
Title: State of H.P. Vs. Gian Chand Page-857

Indian Registration Act, 1908- Section 17- Partition may be effected orally, but if it is reduced into a writing, it will be necessary to register it - Same cannot be used as evidence in absence of registration in view of bar contained in Section 49.
Title: Mohd. Afzal (died) through his LRs Vs. Rehman Khan (died) through LRs and others Page-978

Indian Registration Act, 1908- Section 17- Plaintiff had purchased the land on 2.3.1964 from grand-father of the defendant on payment of Rs. 800/- by way of oral sale- held, that Transfer of Property Act was not applicable and oral sale was permissible.
Title: Govind & ors. Vs. Jiwan Singh Page-998

'L'

Land Acquisition Act, 1894- Section 18- Land of the petitioner was acquired for construction of the road- Land Acquisition Collector assessed the market value of acquired land at the rate of Rs. 3,500/- per bigha which was enhanced to Rs.3 lacs per bigha by the Reference Court- held, that when the land is acquired for construction of the road, the classification of the land loses its significance and the compensation has to be awarded uniformly.
Title: State of HP and others Vs. Roshan Lal and others Page-965

Limitation Act, 1963- Article 63- Plaintiff filed a suit for declaration that he had become owner of the land by way of adverse possession- suit was decreed by Learned Trial Court- an appeal was preferred which was partly allowed- held that no decree for declaration regarding the title can be passed on the basis of adverse possession, however, it was open for the

person to plead in defence that he has acquired the title over the suit land by way of adverse possession.

Title: Bhai Ashok Singh Vs. Lalita & others Page-1005

'M'

Motor Vehicle Act, 1988- Section 147- A Maruti Van was involved in the accident which was registered as a Light Motor Vehicle- definition of the light motor vehicle includes a transport vehicle – held that a Driver possessing a driving license to drive a light motor vehicle was competent to drive light motor vehicle and the Tribunal had rightly held Insurance Company liable to pay the compensation.

Title: Oriental Insurance Company Ltd. Vs. Amra Devi & Other Page-829

Motor Vehicle Act, 1988- Section 149- Claimant 'A' was riding the motorcycle and claimant was a pillion rider- motorcycle was hit by a maruti van in a rash and negligent manner- claimants pleaded that the owner was driving the vehicle and he did not have a valid driving licence- criminal case was registered against 'S' in which a charge-sheet was presented but he was ultimately acquitted- held, that when claimants had pleaded that owner was driving the vehicle and owner had also admitted that he was driving the vehicle, it was not permissible to say that 'S' was driving the vehicle- Insurance Company had not impleaded 'S' or had not examined him - as per evidence led by Insurance Company, 'S' had a valid driving licence at the time of accident- insurer had failed to prove that owner had committed the breach of the terms and conditions of the policy- hence, Insurance Company is liable to indemnify the insured.

Title: Zahid Ali Vs. Shubham Chauhan & others Page-988

Motor Vehicle Act, 1988- Section 149- Deceased was travelling in the vehicle as a gratuitous passenger- therefore, owner had committed willful breach; hence, Insurer was rightly directed to satisfy the award with the right of recovery.

Title: Jarnail Singh Vs. Ms. Deep Kaur & others Page-765

Motor Vehicle Act, 1988- Section 149- Driver had a licence which was valid w.e.f. 2001 to 14th April, 2006- dealing Assistant from Transport Office, Hoshiarpur stated that driving licence was renewed from 2001 till 2006 which shows that driving licence was valid on the date of the accident i.e. 29.3.2004- Insurer had failed to prove that licence was not valid and it was rightly held liable to pay compensation.

Title: United India Insurance Company Ltd. Vs. Sher Singh & another Page-855

Motor Vehicle Act, 1988- Section 149- Employer claimed that petitions were filed as a result of accident- appeals were preferred against some of the awards which were dismissed by the High Court- held, that Insurer had failed to prove the insured had committed breach of condition- no appeal was preferred- therefore, Insurance Company is directed to indemnify the insured.

Title: Chamel Singh (since deceased) through LRs Rajeshwar Pathania and others Vs. Raj Kumar (since deceased) through LRs Kamlesh Kumari and others Page-975

Motor Vehicle Act, 1988- Section 149- Insurance policy covered only 2+1 person meaning thereby that the policy covered the risk of the driver and two passengers – Insurer has to satisfy the two awards which are on the highest side and the compensation awarded in other cases is to be satisfied by the Insurer at the first instance with the right of recovery.

Title: National Insurance Company Ltd. Vs. Chandru Devi & others Page-767

Motor Vehicle Act, 1988- Section 149- Insurance policy covered only 2+1 person meaning thereby that the policy covered the risk of the driver and two passengers – Insurer has to satisfy the two awards which are on the highest side and the compensation awarded in other cases is to be satisfied by the Insurer at the first instance with the right of recovery.

Title: National Insurance Company Ltd. vs. Sumna @ Sharda & others Page-779

Motor Vehicle Act, 1988- Section 149- Insurer has to satisfy the liability with respect to 3rd party with the right of recovery if the insured and the driver had committed willful breach.

Title: United India Insurance Company Ltd. Vs. Kedar Singh and others Page-797

Motor Vehicle Act, 1988- Section 149- Insurer was held liable to pay the amount with the right of recovery- held, that insurer is supposed to satisfy the liability of 3rd party with the right of recovery, even if the owner/insured and driver had committed willful breach of the terms and conditions of the policy.

Title: Oriental Insurance Company Ltd. Vs. Shri Kewal Singh & others Page-786

Motor Vehicle Act, 1988- Section 149- Right of third party cannot be defeated due to the breach on the part of the owner/insured - compulsory duty has been imposed on the owners to get the vehicles insured so that rights of third party are not defeated- Tribunal had held that owner had committed breach and had directed the insurer to satisfy the award with the right of recovery which cannot be faulted.

Title: Oriental Insurance Company Ltd. vs. Champi Devi & others Page-840

Motor Vehicle Act, 1988- Section 149- The burden is upon the insurer to prove the breach of the policy- Insurer had not led any evidence to prove the breach- Insurer had failed to prove that driver of the offending vehicle did not have a valid and effective licence or vehicle was being plied in violation of the terms and conditions of the policy-held that the insurer was rightly held liable by the MACT.

Title: The New India Assurance Company Ltd. Vs. Janak Rani and others Page-784

Motor Vehicle Act, 1988- Section 149- The Insurance policy covered the risk of two passengers-held that policy was a package policy which covered risk not only of third party but also of the occupants of the vehicle.

Title: Shri Ranjit Singh Vs. Shri Ram Asra & another Page-787

Motor Vehicle Act, 1988- Section 157- Predecessor-in-interest of the petitioner died in a motor vehicle accident involving a three wheeler- insurer claimed that registered owner had sold his vehicle to one 'A' without intimating the insurer- held, that transfer of a vehicle cannot absolve insurer from third party liability and the insurer has to satisfy the award- therefore, insurer was rightly held liable to pay compensation.

Title: Oriental Insurance Company Ltd. Vs. Veena Devi & others Page-982

Motor Vehicle Act, 1988- Section 163-A- Claimant filed a Claim Petition for the death of 'S' who was driving the vehicle bearing registration no. HP-01-0517 - the vehicle was hit by a bus bearing registration no. HP-31-6555 - driver of the bus was rash and negligent in driving the bus- it was contended that the claimant had filed a Petition under Section 163-A of M.V. Act which was not maintainable- held, that it is not material whether the petition is

filed under Section 163-A and 166 of the Act- the purpose of the Act is to grant compensation as early as possible to save claimant from the social evil- the claimant had specifically stated that accident was outcome of rash and negligent driving of the bus driver- this fact was not denied specifically by the respondent - procedural wrangles and tangles, procedural-technicalities, mystic maybes, niceties of law and other technical grounds cannot be pressed into service to defeat the purpose of granting compensation to the victims of the motor vehicle accident - mere mentioning of wrong section cannot be a ground to dismiss the petition.

Title: National Insurance Company Ltd. Vs. Ranjeeta & others Page-771

Motor Vehicle Act, 1988- Section 166- Claimant asserted that driver was driving the vehicle in a rash and negligent manner- driver-cum-owner did not deny the Para regarding rashness or negligent specifically but asserted that the car was stationary and was hit by a Truck- however, the particulars of the Truck and the name of the driver were not mentioned in the reply- driver was not arrayed as a party- no evidence was led in support of the plea taken by the owner- evidence proved that the vehicle was being driven by the owner-cum-driver in a rash and negligent manner- Tribunal had not recorded any specific findings regarding the rashness and negligence but this fact was duly proved from the record- appeal dismissed.

Title: Oriental Insurance Company Vs. Bresti Devi & others Page-837

Motor Vehicle Act, 1988- Section 166- Claimant had contended that awarded amount was quite less- Tribunal had rightly applied multiplier keeping in view the age of deceased- held, that no case for enhancement is made out- Appeal dismissed.

Title: Hans Raj and others Vs. Rakesh Kumar and another Page-817

Motor Vehicle Act, 1988- Section 166- Deceased was hit by a motor cycle - he was earning Rs. 6,000/- per month- Tribunal deducted 1/4th of the income towards personal expenses of the deceased and held that claimants had lost source of the dependency to the extent of Rs. 4,500/- per month- multiplier of 14 was applied –held that MACT had calculated the compensation in accordance with the law laid down by Hon'ble Supreme Court of India.

Title: Rajesh Kumar & another Vs. Sangeeta Devi & others Page-852

Motor Vehicle Act, 1988- Section 166- Motorcycle of the claimant was hit by a Mahindra Utility- claimant sustained 30% disability- Insurance Company contended that Driver did not have a valid driving licence – photocopy of the Driving Licence proved that driver was competent to drive light motor vehicle- unladen weight of the vehicle was 1690 kg. and thus, vehicle would fall within the definition of light motor vehicle- burden was upon the Insurance Company to prove the breach of the terms and conditions of the policy – mere plea was not sufficient to exonerate the Insurance Company.

Title: New India Assurance Company Limited Vs. Kirpa Nand Negi and another Page-825

'N'

N.D.P.S. Act, 1985- Section 18- Accused was running a shop of Tudi- search of the shop was conducted during which two packets, one containing 1.6 kg and another containing 1.2 kg of opium, were recovered- Police Officials and independent witnesses duly supported the prosecution version- link evidence was also established- building was owned by one 'S' and no evidence was collected by prosecution to prove that accused was a tenant- however, this

fact would not make the prosecution case doubtful as the witness categorically deposed that accused was alone in the shop- he had not protested that someone else was owner of the goods- witnesses had no animosity with the accused and Court can infer culpable mental state after the possession of the accused is proved- onus is upon the accused to rebut the presumption- no evidence was led by the accused to rebut the presumption – held, that in these circumstances, accused was rightly convicted.

Title: Sonu Vs. State of H.P.(D.B.) Page-672

N.D.P.S. Act, 1985- Section 20- Accused 'C' was found in possession of gunny sack containing 16.2 kg. of charas- recovery was not effected in the presence of police officials- no independent witness was associated- testimonies of police officials are corroborating each other on material particulars- minor contradiction regarding the time spent in conducting the search and seizure operation was not sufficient to discard the testimony- incident had occurred at a lonely place and no independent witness was available- police did not have any prior information and the recovery was effected by chance- hence, there was no requirement of compliance of Sections 42 and 50 of N.D.P.S. Act- held, that in these circumstances, prosecution case was established beyond reasonable doubt and the accused was convicted.

Title: Chainka Ram Vs. State of Himachal Pradesh (D.B.) Page-468

N.D.P.S. Act, 1985- Section 20- Accused was driving an Alto Car and accused 'B' and 'G' were sitting on the rear seat - one bag was recovered from the back seat of the car, which was lying between accused 'B' and 'G' - bag was containing 4 kg 500 gms of charas- there was no entry of deposit of NCB form in the malkhana- it was also not explained as to who had brought the parcel from the FSL, Junga to police station - it was not explained as to why six seals out of nine were broken- possibility of tempering with the case property cannot be ruled out when six seals were broken- no entry was made when the case property was taken out from the Malkhana for production before the Court- held, that in these circumstances, prosecution had failed to prove exclusive and conscious possession of the contraband, hence, accused acquitted.

Title: Vikas Sharma Vs. State of H.P. (D.B.) Page-860

N.D.P.S. Act, 1985- Section 20- Accused was found carrying a polythene bag in his hand- he tried to run away on seeing the police- he was caught and his search was conducted during which 1.5 kg. of charas was recovered- prosecution version was duly proved by PW-1, PW-7 and PW-10- there was no evidence to show that they had any hostile animus against the accused- link evidence was duly proved- minor contradictions in the testimonies of the witnesses is not sufficient to discard them when the witnesses were deposing after a period of about three years from the date of incident- held, that in these circumstances, conviction recorded by Trial Court was justified.

Title: Mehar Singh son of Shri Khubi Ram Vs. State of Himachal Pradesh. Page-1024

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3 kg. of charas – independent witnesses have not supported the prosecution version- witnesses were not residents of the neighbourhood and they did not have their place of work nearby- testimonies of police officials can be relied upon, if found reliable- police officials stated that driving licence was recovered by them but licence was not placed on record- no Registration Certificate or Insurance of the vehicle was seized by the police- PW-6 did not depose about the presence of the independent witness- Malkhana Register does not mention NCB forms-

held, that in these circumstances, view taken by Trial Court that prosecution case was not proved beyond reasonable doubt could not be faulted.

Title: State of Himachal Pradesh Vs. Avinash Katoch (D.B.) Page-491

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3.8 k.g of charas- prosecution has relied upon the testimonies of police officials- testimonies were corroborating each other on material particulars- minor contradictions regarding the genesis of the prosecution version and the presence of light are not sufficient to discard the prosecution case- incident had occurred at a lonely place- difference of three and a half grams in the weight of sample is not sufficient to discard the prosecution version as the weighing scale used by police officials was traditional and was not electronic - held, that in these circumstances, prosecution version was proved beyond reasonable doubt and the accused was rightly convicted.

Title: Rakesh Kumar Vs. State of Himachal Pradesh (D.B.) Page-486

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 4kg. of charas in a handbag being carried by him- there was contradiction regarding the time at which police left the spot- time of the deposit was mentioned in malkhana as 3:30 P.M, whereas, PW-7 stated that police party remained at the spot till 3:30 P.M- PW-4 stated that case property was produced before him at 3:00 P.M- further, the person carrying the case property to FSL, Junga stated that he had handed over the case property on the same day and returned but the receipt showed the next day as the date of deposit - no independent witness was associated- held, that in these circumstances, prosecution version was not proved.

Title: Budh Ram Vs. State of H.P. (D.B.) Page-931

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 4.5 k.g of charas- testimonies of the police officials corroborated each other- minor contradictions regarding the number of vehicle and time spent by the police officials at the spot are not sufficient to discard the prosecution version.

Title: Shamshed Ali Vs. State of H.P. (D.B.) Page-665

N.D.P.S. Act, 1985- Section 20- Accused were found in possession of blue bag containing 18.850 kg. of charas – bag was found torn when it was produced in the Court- MHC deposed that the case property was intact when it was sent to the Court - he came to know from the Naib Court that one parcel was found in torn condition and the entry in the daily diary was made in the police Station- police officials who carried the case property from the Malkhana to the Court deposed that case property was put on an old bench and in the process of lifting the same one parcel was torn by nails on the bench- Case property was handed over to the Naib Court and was taken in the same condition to the police Station- the manner of producing the case property in torn condition casts doubt on the prosecution version- case property was required to be produced in the Court in intact condition- the version that the case property was torn in the police station cannot be believed as the matter was not reported to MHC immediately- FIR number was mentioned in the abstract of register No.19 as 35 which was changed to 37 of 2009- the figure of 25 was also changed to 27- the FIR number was initialed but the date was not initialed- only one seal impression of 'R' was legible and the others were not legible- it was not explained as to what happened to the remaining seals - similarly third seal was not legible in the second parcel- - date must be shown in Malkhana register- the fact that parcel was torn in the police Station was not brought in the notice of MHC- police had not associated independent witnesses, although,

place of incident was a busy highway- complainant had conducted the investigation which is prejudicial to the accused- Held, that all these circumstances casts doubt on the prosecution version, hence, accused acquitted.

Title: Pardeep Kumar Vs. State of H.P. (D.B.) Page-529

N.D.P.S. Act, 1985- Section 20- Petitioner was apprehended with a bag- the bag was opened and was found to be containing 4 kg. of charas- register No. 19 regarding the deposit and taking out of the case property was not paginated which casts doubt, whether the case property was ever deposited in the malkhana and was taken out for chemical analysis- PW-7 was sent to bring independent witness but he could not find any person which was highly unbelievable - no passengers of the vehicle was associated- held, that in these circumstances, prosecution version was not proved.

Title: Deu Bhan Buda Vs. State of H.P. (D.B.) Page-957

N.D.P.S. Act, 1985- Section 20(b) (ii) (C)- police party stopped the bus for checking- as soon as the bus stopped, accused opened the door of bus and ran towards the fields with black coloured bag- he was apprehended and his search was carried during which 5 kg. of charas and 250 grams of opium were found in the bag- PW-1 stated in his cross- examination that accused re-entered the bus after recovery of the contraband which suggested that bag remained inside the bus- police had prepared a concocted and false story regarding the possession of the bag by the accused- police had given an option to the accused to be searched by the police or Gazetted Officer, which was not required and suggested that document was brought into existence subsequently - option to be searched before the police was not in accordance with Section 50 of N.D.P.S. Act- held, that in these circumstances, prosecution version is not proved- accused acquitted.

Title: Chuni Lal Vs. State of H.P. Page-810

N.D.P.S. Act, 1985- Section 29- Accused 'R' was carrying a knapsack from which 4.3 k.g. of charas was recovered - accused 'J' was with accused 'R'- accused 'J' shouted on seeing the police "there is police run away"- both the accused turned and started running away- however, they were apprehended after a distance of about 30 meters – held, that both the accused were found together – nakka was set up in a jungle- it was not explained as to why both the accused should be together in a jungle and why accused 'J' should have asked his co-accused to run on seeing the police- the conduct of the accused was to facilitate the crime as otherwise he would not have reacted in the manner in which he did – all these circumstances proved that he was a conspirator.

Title: Jitender Kumar @ Nardu Vs. State of Himachal Pradesh (D.B.) Page-704

N.D.P.S. Act, 1985- Section 37- An FIR was registered against the petitioner for the commission of offences punishable under Sections 20 and 29 of N.D.P.S. Act- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- FIR was registered against the petitioner for criminal conspiracy - at the stage of bail, it cannot be said whether petitioner had committed criminal conspiracy or not- trial of the case will be adversely affected by releasing the petitioner on bail- in these circumstances, it is not expedient to release the petitioner on bail at this stage – hence, petition dismissed.

Title: Gurpreet Singh son of Gurbachan Singh Vs. State of H.P. Page-903

N.D.P.S. Act, 1985- Section 42- Police had not obtained any search warrant or authorization prior the conducting search but Dy. S.P. a Superior and Gazetted Officer was associated, hence, in these circumstances; there was no requirement of complying with Section 42 of N.D.P.S. Act.

Title: Sonu Vs. State of H.P. (D.B.) Page-672

N.D.P.S. Act, 1985- Sections 18 and 20- 14 kg. of charas and 570 grams of opium were recovered from the mud guard of the vehicle being driven by accused 'P'- accused 'M' was sitting beside him in the vehicle- the mere fact that seizure witness had turned hostile is not significant- testimonies of police officials were corroborating each other- there was nothing in the cross-examination to doubt their testimonies- police did not have any prior information- independent witness had turned hostile but had corroborated the testimonies of police officials on all accounts on the question of signing of documents- this fact was duly reflected in their prior statement proved by Investigating Officer which could be used as corroborative piece of evidence- Section 42 of N.D.P.S. Act was not attracted- the discrepancy in the weight is not significant- held, that in these circumstances, Learned Trial Court had rightly convicted the accused.

Title: Mansha Ram Vs. State of Himachal Pradesh (D.B.) Page-474

N.D.P.S. Act, 1985- Sections 20 and 29 - 3.500 kg of charas was recovered from the car in which the accused were travelling- accused belonged to District Kaithal- they were travelling together in the vehicle from which contraband was recovered- driver also belonged to District Kaithal- an inference can be drawn that driver was aware of the fact that vehicle was transporting contraband in it- testimonies of the police officials corroborated each other- link evidence was also established before the Court- mere failure to associate independent witness is not sufficient to discard the prosecution version- the order convicting the accused was sustainable.

Title: Kanwar Singh Vs. State of H.P. (D.B.) Page-589

N.D.P.S. Act, 1985- Sections 20 and 29- Accused 'A' was apprehended by the police and on his search 4 kg. 800 grams of charas and 300 grams of opium were recovered- he made a disclosure statement that 'G' had given charas to him- visiting card of accused 'B' was recovered from the possession of 'A'- accused 'A' also identified the house and shop of accused 'B'- testimonies of police officials were consistent- there were no contradictions in their testimonies- however, no independent witness was associated by the police which shows that the investigation at the spot were conducted to conceal the truth and were 'intransparent'- hence, accused acquitted.

Title: Bhupender Chauhan Vs. State of H.P.(D.B.) Page-871

N.D.P.S. Act, 1985- Sections 20 and 29- Accused 'P' and accused 'Y' were walking together- they started walking briskly on seeing the police- they were apprehended and their search was conducted during which 600 grams of charas was found from the possession of accused 'P' – testimonies of prosecution witnesses were reliable- they corroborated each other on material particulars- documents prepared by the police also corroborated the testimonies of eye-witnesses- mere non-association of independent witnesses, was not sufficient to doubt the prosecution case as it was not a case of prior information but was a case of chance recovery- minor contradictions in the testimonies of the witnesses are not sufficient to discard them as the witnesses were deposing after the lapse of more than three years from the date of recovery and the contradictions are bound to come with the passage of time-

held, that in these circumstances, prosecution version is duly proved and accused 'P' was rightly convicted by the Trial Court.

Title: Piare Lal son of Shri Hari Ram Vs. State of Himachal Pradesh Page-617

N.D.P.S. Act, 1985- Sections 42 and 52- Police had effected a chance recovery- it had no prior information of the accused carrying any contraband- accused was informed of his ground of arrest- contraband was deposited in the safe custody – superior officers were informed, there is no question of violation of mandatory provision of Sections 42 and 52 of N.D.P.S. Act.

Title: Shamshed Ali Vs. State of H.P. (D.B.) Page-665

'P'

Prevention of Corruption Act, 1988- Section 13(2)- **Indian Penal Code, 1860-** Sections 420, 409, 467, 468, 471, 477 A IPC- Accused had additional charges of various offices- he was entrusted with cash amounting to Rs. 92,936/ - he misappropriated various amounts and forged the documents for misappropriation- amount of Rs. 27,000/- was drawn for purchase of fuel wood, however, no such supply was ever made – accused had drawn various amounts on different dates- some of the amount was shown to have been paid but no particulars of the payment were given - no receipt was obtained regarding the payment- it was the duty of the accused to make entries correctly duly supported by the documents – held, that in these circumstances, prosecution version was duly proved and he was rightly convicted.

Title: Pratap Singh Vs. State of H.P. Page-631

Prevention of Corruption Act, 1988- Sections 7 & 13(2)- Complainant wanted to purchase a revolver – he was required to annex a certificate that he knew the handling of the fire arm – he approached the accused who demanded Rs.1,000/- for issuance of the certificate- the matter was reported to police on which FIR was registered and accused was caught red handed with the money- PW-2 and PW-3 did not support the prosecution version- there were contradictions in the testimonies of remaining material witnesses regarding the time of opening the door and the person who opened the door- accused did not have any statutory power to issue certificate- certificate issued by the accused did not have any diary number- mere recovery of money paid by complainant is not sufficient to prove the prosecution case- hence, accused acquitted.

Title: Ram Rattan Vs. State of H.P Page-457

Prevention of Corruption Act, 1988- Sections 7 & 13 (2)- Petitioner had demanded bribe of Rs.10,000/- from the complainant and was caught red handed by the police party- there was contradiction regarding the person who had given the signal to the raiding party- case of the prosecution was not supported by shadow witness- complainant admitted that supplies were stopped due to irregularities- affairs of society were investigated by the Government- license of the society was already renewed prior to the date of the demand which shows that there was no occasion for the accused to demand the amount from the complainant- mere recovery of the amount without demand is not sufficient- complaints were pending against the complainant which were being investigated by the accused- this shows that complainant was malafide- held, that in these circumstances, the case of the prosecution was not proved and accused acquitted.

Title: Ajit Singh Rana Vs. State of Himachal Pradesh Page-440

Protection of Women from Domestic Violence Act, 2005- Section 12- Respondent No. 1 filed a petition- notices were issued to the petitioner but they did not appear despite service, hence, they were proceeded ex-parte- petitioner filed a petition for setting aside the ex-parte order on the ground that petitioner No. 1 was out of India and was not served personally- record showed that application was filed on 14.7.2014 and was barred by 9 months and 16 days- petitioners were repeatedly served and were proceeded ex-parte on 28.10.2013- they had not signed the pleadings and had not filed affidavit in support of averments- hence, order passed by Ld. CJM rejecting the application for setting aside ex-parte order was appropriate.

Title: Major Paras Rehni & ors. Vs. Abha Rehni Page-508

Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1952- Section 3 - Sons of 'G' were possessing suit land as occupancy tenants on payment of rent- 'H' son of 'G' died on 18.2.1951- his widow 'S' re-married 'N'- she claimed that she had succeeded to the estate of 'H' prior to the re-marriage- she claimed an absolute ownership on the basis of Vestment Act- oral evidence of the parties did not prove the exact date of marriage- her date of re-marriage was also not recorded in the revenue record- there is nothing on record to establish the exact date of re-marriage of 'S' and it cannot be said that such marriage had not taken place prior to 15.6.1952- her pre-existing jural relationship in the premises stood extinguished conferring absolute right of ownership upon her by the provisions of the Vestment Act.

Title: Garib Dass & others Vs. Mulakh Raj & another Page-513

'S'

Specific Relief Act, 1963- Section 34- Plaintiff sought declaration that sale made by defendant No. 1 in favour of defendants No. 2 to 5 was illegal- defendant No. 1 claimed that suit land was gifted to him in the year 1947 by the plaintiff- copy of roznamcha showed that gift was made by the plaintiff in favour of defendant No. 1- mutation was also attested- the entries in the roznamcha was got recorded by the plaintiff himself- suit was instituted in the year 1987 and was clearly barred by limitation- further, it cannot be said that plaintiff was not aware of these entries.

Title: Parkash Singh & ors. Vs. Girdhari & ors. Page-1002

Specific Relief Act, 1963- Section 36- Plaintiff pleaded that he had purchased Khasra No.1078/310 from one 'R' of Rs.2,800/-- mutation was attested and revenue staff only recorded gair mumkin room on 0-2-0 bighas of land but vacant courtyard was not recorded- area was also reduced from 0-2-10 to 0-2-0- it was pleaded that Revenue Officer had no power to reduce the ownership- respondent pleaded that 'R' was allotted 0-2-0 bighas of land- inadvertently land was recorded to be 0-2-10 which was later on corrected- plaintiff had encroached upon the land of the defendant on which the proceedings under Section 163 were initiated- plaintiff was ejected from the land legally occupied by him- now plaintiff had encroached upon the land of the defendant- proceedings under Section 163 are pending against him- held, that 0-2-0 bighas of land was allotted to 'R', however, land was recorded as 0-2-10 bighas in the jamabandi- this was rectified in the year 1989-90- a vendor cannot alienate the land, which is not owned by him- therefore, 'R' could have only alienated 0-2-0 bighas of land- entries in jamabandi are not proof of the title but is merely made for fiscal purposes- mutation does not confer any right.

Title: Charan Dass son of Sh. Biptu Ram Vs. The Secretary (Revenue) to Govt. of H.P. and another Page-939

'T'

Transfer of Property Act, 1882- Section 41- Plaintiff claimed specific performance of agreement executed by it with defendant on 13.10.1993- defendants No. 12 and 13 claimed that they had purchased the land from defendant No. 1 in the year 2005 and that they were bona-fide purchaser for consideration- execution of agreement was duly proved by plaintiff by examining the scribe and the marginal witness- permission was obtained by plaintiff on 25.2.2005- defendants No. 12 and 13 belong to the same village where the suit land was located which shows that they were aware of the earlier agreement- sale deed could be registered after the permission was to be accorded by the State Government, time was not the essence of the agreement- suit was filed within two years of the receipt of the permission- predecessor-in-interest of the plaintiff had received the payment and plaintiff was put in possession – plaintiff was ready and willing to perform his part of the contract- in these circumstances, defendants No. 12 and 13 cannot be deemed to be bona-fide purchaser for consideration. Title: Bhagwant Rai & anr. Vs. M/S Pankaj Spinners Pvt. Ltd. & ors. Page-426

TABLE OF CASES CITED

'A'

A. S. Naidu vrs. The State of Madhya Pradesh, 1975 Cri.L.J. 498

A.P. Steel Re-Rolling Mills Ltd. Versus State of Kerala and others, (2007) 2 SCC 725

Abdul Moid and others Vs. The State 1977 Cri. L.J. 1325

Abdul Rashid Ibrahim Mansuri vs. State of Gujarat, (2000) 2 SCC 513

Adarsh Marwah and another Vs. Nehar Ranjan Bhattacharya and another 1990 EFR 387

Aher Raja Khima v. State of Saurashtra, AIR 1956

All India Reserve Bank Retired Officers Association and others versus Union of India and others AIR 1992 SC 767

Allarakha K Mansuri v. State of Gujarat, (2002) 3 SCC 57

Amar Nath vrs. Alfa, AIR 1969 Delhi 133

Amarsingh Ramjibhai Barot vs. State of Gujarat, (2005) 7 SCC 550

Anant R. Kulkarni versus Y.P. Education Society and others, (2013) 6 Supreme Court Cases 515

Aneeta Hada Vs. Godfather Travels and Tours Private Limited (2012) 5 Supreme Court Cases 661

Anjlus Dungdung Vs. State of Jharkhand (2005) 9 SCC 765

Anukul Chandra Pradhan vs. Union of India and others (1996) 6 SCC 354

Aravind Babu Vs. State of Kerala 2002 (1) Criminal Court Cases 375 (Kerala)

Arulvelu & Anr. v. State, (2009) 10 SCC 206

Aruna Ramchandra Shanbaug vs. Union of India, AIR 2011 SC 1290

Arunachal Pradesh Versus Nezone Law House Assam, (2008) 5 SCC 609

Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh, (2011) 5 SCC 123

Ashok Kumar Chatterjee Vs. State of M.P. 1989 Supp. (1) SCC 560

Avtar Singh and others v. State of Punjab, (2002) 7 SCC 419

'B'

B.B. Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753

B.S. Joshi and others vs. State of Haryana and another, JT 2003(3) SC 277

Bachchan Lal vs. State, AIR 1957 (Allahabad) 184

Bahadur Singh and others vs. Shangara Singh and others, (1995) 1 SCC 232, 1995 PLJ 256 (Supreme Court of India)

Balak Ram & Anr. v. State of U.P., AIR 1974 SC 2165

Balak Ram versus State of Himachal Pradesh & others, 2015 (1) Him. L.R. (DB) 32

Balbir Vrs. Vazir and others and connected matters, (2014) 12 SCC 670

Baldev Singh and others vrs. Chhota Singh and another, AIR 2002 Punjab and Haryana 47

Baldev Steel Limited versus Empire Dyeing and Manufacturing Company Limited LAWS(DLH)-2001-5-141

Balwinder Singh v. State of Punjab, 1995 Supp (4) SCC 259

Balwinder Singh Vs. State of Punjab 1987 (1) SCC 1

Bannari Amman Sugars Ltd. Versus Commercial Tax Officer and others, (2005) 1 SCC 625

Bhajju alias Karan Singh vs. State of Madhya Pradesh, (2012) 4 SCC 327

Bharatbhai Bhagwanjibhai vs. State of Gujarat AIR 2003 SC 07

Bhee Ram vs. State of Haryana AIR 1980 SC 957

Bhubaneswar Development Authority and another versus Adikanda Biswal and others, (2012) 11 SCC 731

Bhugdomal Gangaram and others Vs. The State of Gujarat, AIR 1983 SC 906

Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors., 2009 AIR SCW 4298

Bipinchandra Jaisinghbai Shah versus Prabhavati, AIR 1957 SC 176

'C'

C. Satyanarayana versus Kanumarlapudi Lakshmi Narasimham LAWS (APH)-1966-9-2

Cauveri Coffee Traders, Mangalore Versus Hornor Resources (International) Co. Ltd., (2011) 10 SCC 420;

Central London Property Trust India Limited Versus High Trees House Limited, (1956) 1 All ER 256: 1947 KB 130

Century Spinning and Manufacturing Company Limited and another Versus The Ulhasnagar Municipal Council and another, (1970) 1 SCC 582

Chahat Khan Vs. The State of Haryana AIR 1972 SC 2574

Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791

Chandrakala Trivedi versus State of Rajasthan and others (2012) 3 SCC 129

Chandrakant Vs. State of Maharashtra AIR 1999 SC 1557

Chandrappa and Ors. v. State of Karnataka, (2007) 4 SCC 415

Charan Singh Vs. The State of Uttar AIR 1967 SC 520

Charan Singh Vs. The State of Uttar Pradesh AIR 1967 SC 520

Cherotte Sugathan (Dead) through LRs. & others, vs. Cherotte Bharathi & others, (2008) 2 SCC 610

Chhel Singh versus MGB Gramin Bank, Pali and others, (2014) 13 Supreme Court Cases 166

Chiman Lal Hargovinddass Vs. Special Land Acquisition Officer, AIR 1988 SC 1952

Chuhniya Devi vs. Jindu Ram, 1991 (1) Sim.L.C. 223

Collector of Bombay Versus Municipal Corporation of the City of Bombay and others, A.I.R. (38) 1951 SC 469

Collector, District Gwalior and another Versus Cine Exhibitors Private Limited and another, (2012) 4 SCC 441

Combe Versus Combe, (1951) 2 KB 215: (1951) 1 All ER 767

Commissioner of Central Excise, Surat –I Versus Favourite Industries, (2012) 7 SCC 153

Commissioner of Income Tax (Central) – I, New Delhi Versus Vatika Township Pvt. Ltd., (2015) 1 SCC 1

Commissioner of Income Tax versus Pawan Aggarwal 2014 (3) HLR 1981

Commissioner of Income Tax versus Sree Senha Valli Textiles P. Ltd., [2003] 259 I.T.R. 77

Commissioner of Income Tax, Lahore vs. Krishan Kishore, AIR 1940 Lahore 113

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

'D'

D. K. Javer and others Vs. The State 1985 Cri. L. J. 1572

Dalbir Singh Vs. State of Punjab, AIR 1987 S.C. 1328

Dasaundhi Ram and another vrs. Hans Raj, 1985, S.L.J. 293

Dayal Singh vs. State of Maharashtra, (2007) 12 SCC 452

Deepak Kumar Vs. State of Haryana EFR 2003(1) 523

Dehal Singh vs. State of Himachal Pradesh, (2010) 9 SCC 85
Delhi Development Horticulture Employees' Union versus Delhi Administration, Delhi and others AIR 1992 SC 789
Desh Raj and others Vs. Meena 2007(3) Shim LC 1
Devi Singh v. Hyderabad Municipality reported in AIR 1972 SC 2510
Dharampal Singh vs. State of Punjab, (2010) 9 SCC 608
Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622
Dipa and others vs. Ganga Datt and others, 1969 Current Law Journal 750 (Punjab and Haryana High Court)
Director, Horticulture, Punjab and others versus Jagjivan Parshad (2008) 5 SCC 539,
Dr. Ashok Kumar Maheshwari Versus State of U.P. and another, (1998) 2 SCC 502
Dr. Basavaiah v. Dr. H.L. Ramesh and others with Dr. Manjunath v. H.L. Ramesh and others 2010 AIR SCW 5907
Dulcina Fernandes & Ors. versus Joaquim Xavier Cruz & Anr., 2013 AIR SCW 6014
Dulcina Fernandes and others versus Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646

'E'

Earabhadrappa Vs. State of Karnataka 1983 (2) SCC 330
Eliamma Simon and another vrs. Seven Seas Transportation Ltd. and others, AIR 2002 Kerala 219
Express Newspapers Pvt. Ltd. and others Versus Union of India and others, (1986) 1 SCC 133)

'G'

G. Govindan versus New India Assurance Company Ltd. and others, AIR 1999 SC 1398
Ganga Kumar Srivastava vs. State of Bihar 2005 (6) SCC 211
Gappulal vs. Thakurji Shriji Dwarkadheeshji and another AIR 1969 SC 1291
Gian Singh vs. State of Punjab and another, JT 2012(9) SC 426
Giano Devi vs. Mangal Singh and others, 1985 Sim.L.C. 170
Girja Prasad (dead) by LRs vs. State of M.P., (2007)7 SCC 625
Gopaldas Udhavdas Ahuja and another v. Union of India and others, (2004) 7 SCC 33
Goura Venkata Reddy vs. State of A.P., (2003) 12 SCC 469
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722
Gulam Hussain and another vs. State of Delhi, (2000) 7 SCC 254
Gunmala Sales Private Limited Vs. Anu Mehta and others (2015) 1 Supreme Court Cases 103
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
Gurcharan Singh Vs. State of Haryana, AIR 1972 SC 2661
Gurdwara Sahib Versus Gram Panchayat Village Sirthala and another, (2014) 1 SCC 669
Guru Amarjeet Singh vs. Rattan Chand and others AIR 1994 SC 227

'H'

Hanil Era Textiles Ltd. versus Puromatic Filters (P) Ltd. (2004) 4 SCC 671
Harbans Singh and another vs. The State of Punjab, AIR 1962 SC 439
Harishchandra Ladaku Thange v. State of Maharashtra, (2007) 11 SCC 436
Harpal Singh and others Vs. H.R.T.C. and another 2013 (3) Shim. L.C. 1222

Himachal Road Transport Corporation and another versus Jarnail Singh and others, Latest HLJ 2009 (HP) 174

HP Housing Board Vs. Ram Lal and others, 2003 (3) Shim L.C 64

Hukam Singh Vs. State of Rajasthan 1977 (2) SCC 99

'I'

Idandas versus Anant Ram Chandra Phadke (dead) by L.Rs., AIR 1982 SC 127

Inder Sain v. State of Punjab, (1973) 2 SCC 372

Ismailkhan Aiyubkhan Pathan v. State of Gujarat, (2000) 10 SCC 257

'J'

Jadumani Khanda vrs. State, 1993 Cri.L.J. 2701

Jagroop Singh v. State of Punjab, (2012) 11 SCC 768

Jai Karan vs. State of Delhi (MCT), (1999) 8 SCC 161

Jaishree Anant Khandekar vs. State of Maharashtra, (2009) 11 SCC 647

Jakia Nasim Ahesan and another vs. State of Gujarat and others (2011) 12 SCC 302

Janta Sirap Co. v. Murti Shri Raghunath Ji Maharaj, 1996 (49) RCR 117

Jattu Ram vs. Hakam Singh, SLJ 1994(1) page 68 SC

Java Beans vs. Union Territory of Pondicherry, (2010) 1 SCC 199

Jayaraj Vs. The State of Tamil Nadu AIR 1976 SC 1519

Jose Vs. the State of Kerala AIR 1973 SC 944

'K'

K.Ramachandra Reddy and another vs. The Public prosecutor, (1976) 3 SCC 618

K.S.Bhoopathy and ors. Vrs. Kokila and others, (2000) 5 SCC 458

Kamalavva and another vs. State of Karnataka, (2009) 13 SCC 614

Kanti Lal vs. State of Rajasthan, (2009) 12 SCC 498

Kartar Kaur vs. Amarjit Singh and others 1994(2) S.L.J. 1735 (Punjab & Haryana)

Kasinka Trading and another Versus Union of India and another, (1995) 1 SCC 274

Khushal Rao vs. State of Bombay, AIR 1958 SC 22

Kishore Lal vs. State of H.P., (2007) 10 SCC 797

Koli Chunilal Savji vs. State of Gujarat, (1999) 9 SCC 562

Kranti Associates Private Limited and another versus Masood Ahmed Khan and others (2010)9 SCC 496

Krishna Mohan Kul alias Nani Charan Kul and another vs. Pratima Maity and others AIR 2003 SC 4351

Krushnakant B. Parmar versus Union of India and another (2012) 3 Supreme Court Cases 178

KSL and Industries Limited vs. Arihant Threads Limited & others, (2015) 1 SCC 166

Kuldeep Singh versus The Commissioner of Police and others, AIR 1999 Supreme Court 67

Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110

'L'

L.I.C. of India vrs. Anuradha, AIR 2004 SC 2070

Lachman Utamchand Kirpalani versus Meena alias Mota, AIR 1964 SC 40

Lal Chand versus Oriental Insurance Co. Ltd., 2006 AIR SCW 4832,

Lalita Kumari Vs. State of UP and others, AIR 2014 SC 187

Lallu Manjhi and another vs. State of Jharkhand AIR 2003 SC 854

Laxman vs. State of Maharashtra, (2002) 6 SCC 710

LML Ltd. Versus State of Uttar Pradesh and others, (2008) 3 SCC 128

'M'

M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449

M/S JHS Svendgaard Laboratories Limited versus M/S Procter and Gamble Home Product Limited and others 2014 (1)Shim. LC 1.

M/s Motilal Padampat Sugar Mills Co. Ltd. Versus State of Uttar Pradesh and others, (1979) 2 SCC 409

M/s Sponge Iron India Ltd., versus M/s Andhra Steel Corporation Ltd., Bangalore AIR 1989 Andhra Pradesh 206

Madan Gopal Kakkad Vs. Naval Dubey and another, 1992 (3) SCC 204.

Madan Lal & another vs. State of Himachal Pradesh, (2003) 7 SCC 465

Madan Mohan and another, 2013 AIR (SCW) 3120

Mahabir Vegetable Oils (P) Ltd. and another Versus State of Haryana and others, (2006) 3 SCC 620

Maiben D/o Danabhai Tulshibai Maheria vs. State of Gujarat, (2007) 10 SCC 362

Maya Devi (dead) through LRs. Versus Raj Kumari Batra (dead) through LRs and others (2010) 9 SCC 486

Meneka Gandhi vs. Union of India and another (1978) 1 SCC 248

Messrs. Delux Roadlines versus National Insurance Co Ltd LAWS (MAD)-1986-9-25

Mohammad Iqbal vs. Government of Indian and others 1996(4) SLJ 2982 HP

Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

Mohammed Asif vs. State of Uttaranchal (2009) 11 SCC 497

Mohan Lal and others vs. State of Haryana (2007) 9 SCC 151

Mohar Singh vs. Manjoo 1997(1) SLJ 304 H.P.

Mohd. Alam Vs. State (NCT of Delhi), 2007 Cr.L.J 803

Mohd. Aslam Khan v. Narcotics Control Bureau and another, (1996) 9 SCC 462

Monaben Ketanbhai Shah and another Vs. State of Gujarat and others (2004) 7 Supreme Court Cases 15

Monika Kumar & another vs. State of U.P. & others, 2008 (8) SCC 781

Monnet Ispat and Energy Ltd. Versus Union of India and others, (2012) 1 SCC 1

MRF Ltd. Versus Asstt. CST, (2006) 8 SCC 702

Mst. Karmi and others vs. Bachna and others, 1959 (Vol.LXI) The Punjab Law Reporter 313

Mulakh Raj and another Vs. Satish Kumar and others 1992 (3) SCC 43

Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and others AIR 1983 Supreme Court 67(1)

Murari Lal Arora Vs. State of H.P. 2010(2) Him. L.R. 742

'N'

N. Dandapani and another Vs. State of A.P. 2005 Drugs Cases (DC) 339

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354

Nallapati Sivaiah vs. SDO, (2007) 15 SCC 465

Nanhar Vs. State of Haryana (2010) 11 SCC 423

Narcotics Control Bureau, Jodhpur vs. Murlidhar Soni & others, (2004) 5 SCC 151

Narender Singh & others vs. State of Punjab and another, 2014 (4) SC 573 Judgment Today

Narender v. Pradeep Kumar, 2005 (1) RCR (Rent) 549

Narendra Champakali Trivedi vs. State of Gujarat, AIR 2012 SC 2263

Narinder Singh and others vs. State of Punjab and another, JT 2014(4) SC 573

Nathu Singh vs. State of Madhya Pradesh, AIR 1973 SC 2783

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

National Insurance Company Limited versus Anjana Shyam & others, 2007 AIR SCW 5237

National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906

National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and another (2010) 3 Supreme Court Cases 330

Naval Shankar Ishwar Lal Dave and another vs. State of Gujarat AIR 1994 SC 1496

Neetu versus The State of H.P. & others, 2014 (2) Him. L.R. (DB) 1233

New India Assurance Company Limited versus Smt. Anuradha and others, 2014 (1) Him. LR 208

'O'

Officers & Supervisors of I.D.P.L. versus Chairman & M.D., I.D.P.L and others (2003) 6 SCC 490

Om Prakash alias Baba v. State of Rajasthan, (2009) 10 SCC 632

Ongole Ravikanth vs. State of Andhra Pradesh, (2009) 13 SCC 647

Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81

Oriental Insurance Company Limited versus Premlata Shukla & others, 2007 AIR SCW 3591

Oriental Insurance Company Limited vrs. Sorumai Gogoi and others, (2008) 4 SCC 572,

'P'

P.K. Arjunan v. State of Kerala, (2007) 8 SCC 516

P.T. Munichikkanna Reddy and others Versus Revamma and others, (2007) 6 SCC 59

P.U.Joshi and others versus Accountant General, Ahmedabad and others (2003) 2 SCC 632

Padala Veera Reddy v. State of Andhra Pradesh and others, 1989 Supp (2) SCC 706

Paniben (Smt.) vs. State of Gujarat, (1992) 2 SCC 474

Pannalal Sunderlal Choksi and others Vs. State of Maharashtra and another 2001 Drugs Cases 7

Paparambaka Rosamma vs. State of A.P. (1999) 7 SCC 695

Pargan Singh vrs. State of Punjab and another, (2014) 14 SCC 619

Parkash vrs. State of Karnataka, (2014) 12 SCC 133

Parkash Vs. State of Haryana AIR 2004 SC 227

Partap Kaur vs. Harchand Singh, 1970 P.L.J. 383 (Punjab & Haryana High Court)

Pawan Alloys and Casting (P) Ltd. Versus U.P. SEB (1997) 7 SCC 251 and STO Versus Shree Durga Oil Mills, (1998) 1 SCC 572

Pawan Alloys and Casting Private Ltd., Meerut Versus U.P. State Electricity Board and others, (1997) 7 SCC 251

Pepsico India Holdings Pvt. Ltd. Versus State of Kerala and others, (2009) 13 SCC 55

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

Perla Somasekhara Reddy & Ors. v. State of A.P., (2009) 16 SCC 98

Pournami Oil Mills and others Versus State of Kerala and another, 1986(Supp.) SCC 728

Prandas v. The State, AIR 1954 SC 36

Pratima Chowdhury Versus Kalpana Mukheerjee and another, (2014) 4 SCC 196

Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196

Punjab Communications Ltd. Versus Union of India, (1999) 4 SCC 727

'R'

R.L.Jain Vs. DDA and others, 2004 (4) SCC 79

R.V. E. Venkatachala Gounder vs. Arulmigu Veswesaraswami & V.P. Temple and another AIR 2003 SC 4548

Rachna Kapoor Etc. Etc. Vs. State (N.C.T. of Delhi) & Ors. 2006 Cri. L.J. (NOC) 70 (DEL)

Raghunath v. State of Haryana, (2003) 1 SCC 398

Rai singh vs. State of Haryana, AIR 1971 SC 2505

Raj Mohammed alias Raju v. State of H.P., 2001(2) SLC 81

Raja versus State of Delhi 1997 Cri.L.J 1873

Rajasthan State Electricity Board versus Universal Petrol Chemicals Limited (2009) 3 SCC 107

Rajeev Chauhan versus Shri Hari Chand Bramta & others alongwith National Insurance Company Ltd. versus Shri Hari Chand Bramta & others, Latest HLJ 2014 (HP) 1253

Rajesh Kumar and others versus Dy. CIT and others, 2007 (2) SCC 181

Ram Bihari Yadav Vs. State of Bihar and others, (1998) 4 SCC 517

Ram Nath vs. State of Madhya Pradesh, AIR 1953 SC 420

Ram Singh alias Chhaju v. State of Himachal Pradesh, (2010) 2 SCC 445

Ram Swaroop & another vs. Mahindru & others, (2003) 12 SCC 436

Ramesh Harijan vs. State of Uttar Pradesh, (2012) 5 SCC 777

Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172

Ratan Gond vrs. The State of Bihar, AIR 1959 SC 18

Ratti Ram vs. Smt. Basanti & others, 1985 Sim. L.C. 10

Ravi and another vs. State of T.N. (2004) 10 SCC 776

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

Ravinder Narain and anothers Vs. Union of India, 2003 (4) SCC 481

Ravinder Singh @ Laddi and others vs. State of H.P. and another, Latest HLJ 2014 H.P. 1248

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

Rikhi Ram and another versus Smt. Sukhrania and others, AIR 2003 SC 1446

Rohtash Kumar Vs. State of Haryana 2013 (14) SCC 434

Roop Singh Negi versus Punjab National Bank and others, (2009) 2 Supreme Court Cases 570

Roshan Singh and others vs. Zile Singh and others, AIR 1988 SC 881

'S'

S. Iyyapan versus United India Insurance Company Limited and another, (2013) 7 SCC 62

S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors., AIR 2008 SC 2066

S.M.S. Pharmaceuticals Ltd. Vs. Neeeta Bhalla and another (2005) 8 SCC 89

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

Sadan Petrochemical Industries Co. Ltd. Versus Electricity Inspector and ETIO and others, (2007) 5 SCC 447

Sadashiv Chhokha Sable vrs. State of Maharashtra, 1993 Cri. L.J. 1469

Sahadevan and another vrs. State of Tamil Nadu, (2012) 6 SCC 403,

Sambhaji Hindurao Deshmukh & Ors. v. State of Maharashtra, (2008) 11 SCC 186
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702
Sanjeev Kumar Vs. State of HP.AIR 1999 SC 782
Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121
Sat Pal vs. State of Himachal Pradesh, 2012 (3) Sim. L.C. 1673
Shaik Nagoor vs. State of Andhra Pradesh represented by its Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2008) 15 SCC 471
Sham Shankar Kankaria vs. State of Maharashtra, (2006) 13 SCC 165
Sharad Birdhichand Sarda Vs. State of Maharashtra 1984 (4) SCC 116
Sharma Transport represented by D.P. Sharma Versus Government of A.P. and others, (2002) 2 SCC 188
Sheikh Zakir Vs. State of Bihar, AIR 1983 S.C 911
Sheo Swaroop and Ors. v. King Emperor, AIR 1934 PC 227
Shish Ram and others vs. State of H.P. and others, (1996) 10 SCC 166
Shivaji Sahabrao Bobade & another vs. State of Maharashtra, (1973) 2 SCC 793
Shri Ram vs. The State of U.P., (1975) 3 SCC 495
Shrimati Pato and another vs. Shrimati Muli and another, 1970 P.L.J. 278 (Punjab & Haryana High Court)
Shyamal Saha and another vrs. State of West Bengal, (2014) 12 SCC 321
Smt. Harbheji vs. Kare and others, 1977 P.L.J. 66 (Punjab & Haryana High Court)
Smt. Rohini Kumari versus Narendra Singh, AIR 1972 SC 459
Sohan Lal alias Sohan Singh and others vs. State of Punjab, (2003) 11 SCC 534
Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627
Sorabkhan Gandhkhan Pathan & another vs. State of Gujarat, (2004) 13 SCC 608
State (Delhi Administration) Vs. Gulzarilal Tandon AIR 1979 SC 1382
State (NCT of Delhi) vs. Sanjay, (2014) 9 SCC 772
State of Gujarat vs. Raghunath Vamanrao Baxi, AIR 1985 SC 1092
State of Haryana and others Versus Mahabir Vegetable Oils Pvt. Ltd., 2011(3) SCC 778
State of Haryana v. Jarnail Singh and others, (2004) 5 SCC 188
State of Haryana Vs. Brij Lal Mittal and others AIR 1998 Supreme Court 2327
State of Haryana vs. Ranbir @ Rana, AIR 2006 SC 1796
State of HP Vs. Lekh Raj and another, 2000 (1) SCC 247.
State of HP Vs. Om Parkash Latest HLJ 2003 HP 541
State of Karnataka vs. Shariff (2003) 2 SCC 473
State of Karnataka vs. Shariff, (2003) 2 SCC 473
State of Karnataka Vs. Pratap Chand and others Drugs Cases 1981-1
State of M.P. vs. Surendra Singh AIR 2015 SC 398
State of Madhya Pradesh Vs. Rumi 1999 (1) JLT 49
State of Maharashtra Vs. R.A. Chandawarkar and others 1999 Drugs Cases 94
State of Punjab and others etc. vs. Rafiq Masih (White Washer) etc. 2015 AIR SCW 501
State of Punjab and others etc. versus Rafiq Masih (White Washer) etc., JT 2015 (1) SC 95,
State of Punjab v. Lakhwinder Singh and another, (2010) 4 SCC 402
State of Punjab vs. Dharam Vir Singh Jethi 1994 SCC (Cri.) 500
State of Punjab Vs. Gurmit Singh and others AIR 1996 (2) SCC 384

State of Rajasthan v. Raja Ram, (2003) 8 SCC 180
State of Rajasthan vrs. Kashi Ram, (2006) 12 SCC 254
State of Rajasthan Vs. N.K.Rao, 2000 (5) SCC 30
State of U.P. v. Ashok Kumar Srivastava, (1992) 2 SCC 286
State of U.P. v. Ram Veer Singh & Ors., (2007) 13 SCC 102
State of U.P. vs. Kishanpal and others JT 2008(8) SC 650
State of U.P. Vs. Sukhbansi and others, 1985 supp. SCC 79
State of Uttar Pradesh v. Banne @ Baijnath & Ors., (2009) 4 SCC 271
State of Uttar Pradesh Vs. Ram Sagar Yadav and others AIR 1985 S.C 416
State v. Raju @ Mohammad and others, Latest HLJ 2010 (HP) 913
Sudha Devi vs. M.P. Narayanan and others, AIR 1988 SC 1381
Sukanti Moharana vs. State of Orissa, (2009) 9 SCC 163
Sunder Kukreja and others vrs. Mohan Lal Kukreja and ors., (2003(1) RCR 426
Suraj Mal vs. The State (Delhi Administration), AIR 1979 SC 1408
Surinder Kumar Arora & another versus Dr. Manoj Bisla & others, 2012 AIR SCW 2241
Swastik Gases Private Limited versus Indian Oil Corporation Limited (2013) 9 SCC 32
Syed Abdul Qadir and other versus State of Bihar and others, (2009) 3 SCC 475

'T'

Tahir v. State (Delhi), (1996) 3 SCC 338
Tejinder Singh vrs. State of Punjab and connected matters, (2013) 12 SCC 503
The Commissioner of Income-Tax, Punjab, Jammu and Kashmir and Himachal Pradesh vs Daulat Ram Khanna, AIR 1967 SC 1552
The State Vs. Captain Jagjit Singh AIR 1962 SC 253
The Union of India and others Versus M/s Angelo Afghan Agencies etc., AIR 1968 SC 718
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Transmission Corporation of Andhra Pradesh Ltd. and another Versus Sai Renewable Power Pvt. Ltd. and others, (2011) 11 SCC 34
Trinath Parida vrs. Sobha Bholaini and another, AIR 1973 Orissa 37

'U'

U.P. Power Corporation Ltd. and another Versus Sant Steels and Alloys (P) Ltd. and others, (2008) 2 SCC 777
Umesh Sharma and another Vs. S.G. Bhakta and others 2002 Cri L.J. 4843
Union of India and another vs. S.B.Vohra and others (2004) 2 SCC 150
Union of India and others versus R.P. Singh, 2014 AIR SCW 3475
Union of India and others vs. Arun Kumar Roy, AIR 1986 SC 737
Union of India Vs. Harinder Pal Singh and others 2005 (12) SCC 564.
Union of India vs. Madras Telephones Scheduled Castes and Scheduled Tribes Social Welfare Association (1997) 10 SCC 226
United India Insurance Co. Ltd., Shimla versus Tilak Singh and others, (2006) 4 SCC 404
United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917

'V'

V.K. Bansal vrs. State of Haryana and another, (2013) 7 SCC 211
Vadilal Chemicals Ltd. v. State of A.P. and Others, (2005) 6 SCC 292
Vidhydhar Dube and ors. Vrs. Har Charan and others, AIR 1971 All. 41
Vijayan Vs. State of Kerala AIR 1999 SC 1086

Vineet Narain and others vs. Union of India and another (1996) 2 SCC 199,
Vinobabai and others versus K.S.R.T.C. and another, 1979 ACJ 282
Virabhai Kalabhai Aayar vs. State of Gujarat, 2008 (3) Crimes 234
Virender v. State of Himachal Pradesh, 2014(3) SLC 1180
Vishwanath Agrawal vs. Sarla Vishwanath Agrawal (2012) 7 SCC 288

'Y'

Yasihey Yobin and another v. Department of Customs, Shillong, (2014) 13 SCC 344
Yomeshbhai Pranshankar Bhatt vs. State of Gujarat, (2011) 6 SCC 312

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

Joginder Paul & ors. .....Appellants.

Versus

Gauri Dutt .....Respondent.

RSA No. 418 of 2006.
Reserved on: March 10, 2015.
Decided on: March 17, 2015.

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 104- Suit land was earlier owned by 'V', plaintiff and 'K'- defendant claimed that 'V' had inducted 'K' as tenant during her life time- copy of jamabandi shows that land was jointly owned and possessed by plaintiff, 'V' and 'K' in equal share which shows that 'K' was co-owner, therefore, he could not have become the tenant- a person cannot be a tenant and the owner at the same time- he was never shown as tenant under 'V' regarding the suit land- defendant had failed to prove that 'K' was inducted as non-occupancy tenant by 'V'- no bilateral agreement of tenancy was proved on record -even in the column of rent, there was no entry regarding the payment of rent- no notice was issued prior to the conferment of proprietary rights- in these circumstances, conferment of proprietary rights upon 'K; was wrong. (Para-12 to 14)

Code of Civil Procedure, 1908- Section 9- Plaintiff had challenged the conferment of proprietary right upon 'K'- it was proved that conferment of proprietary rights of 'K' was without jurisdiction and in violation of principle of natural justice- Land Reforms Officer had failed to comply with the mandatory provision of H.P. Tenancy and Land Reforms Act- held, that when the conferment of proprietary rights is without jurisdiction, in violation of principles of natural justice and contrary to fundamental provisions of law, the Civil Court has jurisdiction to hear and entertain the suit. (Para-17)

For the appellants: Mr. R.K.Gautam, Sr. Advocate, with Mr. Mehar Chand, Advocate.

For the respondent: Mr. Neel Kamal Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree dated 7.6.2006 of the learned District Judge, Hamirpur, H.P., rendered in Civil Appeal No. 60 of 2005.

2. Key facts, necessary for the adjudication of this second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff, for the convenience sake) has filed a suit for declaration against the appellants-defendants (hereinafter referred to as the defendants, for the convenience sake). According to the plaintiff, the suit land was owned and possessed by Vidya Devi widow of late Sh. Bhaskara Nand till her death. Upon the death of Vidya Devi, the plaintiff and Kedar Nath, the predecessor-in-interest of the defendants, succeeded to her estate in equal share being her next reversioners. However, Kedar Nath predecessor-in-interest of the defendants, in collusion with Revenue Officer, got proprietary rights of the suit land under Section 104 of the H.P. Tenancy and Land Reforms Act, conferred in his name vide mutation No. 548 dated 10.9.1982. These entries and mutation were without jurisdiction, null and void because Kedar Nath was never inducted

as tenant at will. Some dispute arose between the plaintiff and Kedar Nath in the year 1992 with regard to use and occupation of the suit land. Defendant No. 1, being the Karta of the joint Hindu family, agreed to make necessary correction in the revenue papers regarding the possession and ownership of the plaintiff with regard to the suit land and executed affidavit on 9.9.1992. The plaintiff asked the defendants time and again to admit the claim of the plaintiff regarding suit land and make correction in the revenue record qua ownership and possession of the plaintiff but the defendants did not pay any heed to the request. In these circumstances, the civil suit was filed.

3. The suit was contested by the defendants. The defendants have admitted that the suit land was originally owned and possessed by Vidya Devi. Vidya Devi inducted Kedar Nath as tenant during her life time on payment of rent. The entries of rent were not challenged by the plaintiff during the life time of Vidya Devi nor any appeal filed under the provisions of the H.P. Tenancy and Land Reforms Act, when proprietary rights were conferred upon Kedar Nath.

4. The plaintiff filed the replication. The issues were framed by the learned trial Court on 9.6.2003. The learned Civil Judge (Junior Divn.), Hamirpur, decreed the suit on 12.1.2005. The defendants preferred an appeal against the judgment and decree dated 12.1.2005 before the learned District Judge, Hamirpur, H.P. The learned District Judge, Hamirpur, dismissed the same on 7.6.2006, hence this regular second appeal.

5. This regular second appeal was admitted on the following substantial questions of law on 25.04.2007:

> "1. Whether the judgment of the learned court below can be sustained when it does not consider the question of limitation which is otherwise apparent from the pleadings of the parties?
>
> 2. Whether the Civil Court has jurisdiction to try the controversy in the suit?"

6. Mr. R.K.Gautam, Sr. 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, more particularly, the question of limitation. He then contended that the Civil Court has no jurisdiction to decide the controversy raised in the suit. On the other hand, Mr. Neel Kamal Sharma, Advocate has supported the judgments and decrees passed by both the Courts below.

7. I have heard the learned Advocates for both the sides and gone through the records of the case carefully.

8. The plaintiff has appeared as PW-1. He testified that Vidya Devi was his Aunt and Kedar Nath was his real brother. Bhaskara Nand was the husband of Vidya Devi. He died prior to Vidya Devi and Vidya Devi died in the year 1956-57. He alongwith his brother Kedar nath succeeded to the estate of the Vidya Devi and after her death both of them came into possession of the suit land. Vidya Devi never inducted Kedar Nath or Joginder Kumar as tenant. He was not issued any notice at the time of the mutation. He never parted with the possession of the suit land. The dispute arose with the defendants after the death of his brother Kedar Nath. Joginder Kumar tried to dispossess him from the suit land, however, he did not part with the possession. The defendant had executed affidavit mark "X" qua the suit land, however, he did not got the revenue entries corrected as per the affidavit. Kedar Nath died in the year 1990-91. He denied the suggestion in his cross-examination that he used to render services to Vidya Devi and Vidya Devi had

inducted Kedar Nath as tenant. He also denied the suggestion that Kedar Nath used to pay rent to Vidya Devi. The suit land was situated at two places.

9. PW-2 Dina Nath has testified that he has seen both the brothers cultivating the suit land. He was not aware that Kedar Nath has remained tenant of the suit land.

10. Defendant No. 1 has appeared as DW-1. He testified that he was in possession of the suit land. His father was tenant in the suit land and lateron he became owner of the same. The plaintiff never raised any objection when they were tenants. The plaintiff and Kedar Nath were living separately prior to 1956. The plaintiff has not raised any objection at the time when proprietary rights were conferred upon his father. He admitted in his cross-examination that he has done M.A. in two subjects. He admitted his signatures on Ext. PX dated 9.9.1992. He also admitted that he was not forced to execute the affidavit. Lateron, he stated that the affidavit was got executed from him forcibly. However, he did not move any application to cancel the affidavit. Vidya Devi was the owner of the suit land. The name of her husband was Bhaskara Nand. Vidya Devi was real Aunt of Gauri Dutt and Kedar Nath. She died issueless. According to him, Kedar Nath succeeded to Vidya Devi's property. Vidya Devi had inducted his father Kedar Nath as tenant during her life time. He could not produce any receipt of rent paid to Vidya Devi. He admitted that he was not present at the time of attestation of the mutation in favour of his father. Gauri Dutt was also not present at that time. He was not aware that the Land Reforms Officer had issued any notice to Gauri Dutt. He has not led evidence to prove that his father and Gauri Dutt were living separately since 1956. His father and Gauri Dutt were joint owner of the land prior to consolidation. He was not aware when the consolidation proceedings commenced. The plaintiff was serving in the Army. He retired in the year 1974-75.

11. According to the jamabandi for the year 1957-58 Ext. P-5, prior to the consolidation Kh. No. 1361 min, 1730/685, 1715/686 and 1729/685 were jointly owned and possessed by the plaintiff, Kedar Nath and Vidya Devi in equal shares. It is established from the pre-consolidated revenue record that Kedar Nath was co-owner. If he was co-owner, he could not become tenant and owner at the same time. There is no tangible evidence placed on record that joint holding was ever partitioned before the consolidation in the year 1962-63. According to the jamabandies for the year 1957-58 Ext. P-9 to P-16, the suit land alongwith some other land was in joint ownership and possession of plaintiff, Kedar Nath the predecessor in interest of defendants, Vidya Devi widow of Bhaskara Nand and other co-sharers. Vidya Devi was recorded as co-owner, but she was not recorded in exclusive possession or joint possession of any portion of the suit land or other joint land. Kedar Nath was never shown as tenant under Vidya Devi qua the suit land or any other land. Vidya Devi died on 22.8.1958. Her death was got registered in the month of June,1980 i.e. after lapse of 22 years. The defendants have failed to prove that Kedar Nath was inducted as non-occupancy tenant of the suit land by Vidya Devi. There is no evidence on record to suggest even remotely as to what rent was paid by Kedar Nath to Vidya Devi. The tenancy is a bilateral act. There has to be some bilateral agreement or some understanding or payment of rent to determine tenancy.

12. According to Misal Hakiyat for the year 1962-63 Ext. P-6, Kedar Nath the predecessor in interest of the defendants, has been recorded in possession as non-occupancy tenant but column No. 9 relating to rent does not show payment of rent in favour of Vidya Devi. Rather, column No. 9 of Misal Hakiyat for the year 1962-63 Ext. P-6 is totally blank. In Ext. P-15 also, in column No. 9 of the rent, it is recited "Jimgi Gair Marusi Lagan Mashkuk". The expression "Mashkuk" means doubtful. The defendants could not prove the payment of rent. Since Kedar Nath was co-owner of the suit land alongwith the plaintiff, the Land Reforms Officer, could not confer proprietary rights vide mutation No. 548

dated 10.9.1982. Moreover, the plaintiff was never issued any notice by the Land Reforms Officer while conferring the proprietary rights upon Kedar Nath.

13. Mr. R.K.Gautam, learned Senior Advocate, has argued that the vestment was automatic. However, the vestment may be automatic if the person is admitted or proved to be tenant in respect of the land in question under the land owner. Both the Courts below have rightly come to the conclusion that the entries made with regard to non-occupancy tenancy of Kedar Nath were fictitious. Rather Kedar Nath was not entitled for conferment of proprietary rights being co-owner with the plaintiff. Thus, the jamabandi for the year 1978-79 Ext. P-7 and Ext. D-2 copy of jamabandi for the year 1988-89, copy of jamabandi for the year 1988-89 and jamabandi for the year 1957-58 Ext. P8 and P-9 relating to mutation No. 548 are to be discarded since the defendants have failed to prove any bilateral agreement of tenancy or liability to pay rent. Mr. R.K. Gautam, learned Senior Advocate, has also argued that there is presumption of truth attached to the revenue entries. However, it is settled law that the same are rebuttable. The entries made in favour of Kedar Nath showing him as tenant have been successfully rebutted by the plaintiff by leading cogent and reliable evidence that infact, he alongwith Kedar Nath was the co-owner in possession of the suit land.

14. The matter is required to be considered from another perspective. The proprietary rights were conferred upon Kedar Nath vide mutation No. 548 Ext. P-2. It was attested on 10.9.1982. According to mutation No. 548, Kedar Nath, the predecessor-in-interest of the defendants and Gauri Dutt were recorded as co-owners of the suit land. Since Gauri Dutt plaintiff was recorded as co-owner of the suit land, it is not explained by the defendants as to why said mutation was sanctioned and attested in his absence. Notice was required to be issued to the plaintiff at the time of attestation of mutation in order to enable him to raise objections. There is no contemporaneous material available on record to suggest even remotely that the plaintiff was ever heard before the mutations were attested in favour of Kedar Nath while conferring proprietary rights upon him.

15. Mr. Neel Kamal Sharma, Advocate, has drawn the attention of the Court to Ext. PX, affidavit dated 9.9.1992. DW-1 has admitted that the affidavit was prepared out of his free will and without any pressure. He has tried to explain that it did not pertain to the suit land. It is recital of Ext. PX that it is in respect of the suit land whereby defendant No. 1 has agreed to make necessary correction in the revenue record. The facts admitted in the affidavit clearly establish that there was dispute with regard to the suit land regarding entry relating to ownership and possession.

16. Mr. R.K.Gautam, Sr. Advocate, has argued that the suit was barred by limitation. According to him, the plaintiff Gauri Dutt has obtained copy of rapat Ext. D-6 on 20.12.1990 and the suit was filed only on 20.3.1993. The plaintiff has filed the suit within three years after the receipt of the rapat Ext. D-6. It has also come in the statement of PW-1 that he has tried to settle the dispute with the defendants and when he failed to do so, he filed the Civil Suit before the competent court of law within three years from the date of threat of his dispossession from the suit land.

17. Mr. R.K.Gautam, Sr. Advocate, has further argued that the Civil Court has no jurisdiction to decide the matter. The Court, as noticed hereinabove, has noticed that the conferment of proprietary rights on Kedar Nath was wholly without jurisdiction and in violation of the principles of natural justice. Besides, the Land Records Officer was required to comply with the mandatory provisions of the H.P. Tenancy and Land Reforms Act. Thus, the Civil Court had the jurisdiction to try and decide the lis between the parties. The

learned Courts below have correctly appreciated the oral as well as documentary evidence on record. The substantial questions of law are answered accordingly.

18. Consequently, there is no merit in this regular second appeal, the same is dismissed. No costs.

****

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

The Secretary Agriculture Produce Market Committee, Una ... Petitioner
Versus
Soma Devi .....Respondent

CMPMO No. 69/2015
Decided on: 17.3.2015

Himachal Pradesh Agriculture and Horticulture Produce Marketing (Development and Regulation) Act, 2005- Section 70- Plaintiff filed a civil suit seeking permanent prohibitory injunction for restraining the defendant from dispossessing her from the shop in her possession- she filed an application under Section 80(2) of C.P.C for dispensing with the requirement of issuance of the notice – held, that there is specific bar under Section 70 of the Act for the institution of the suit until the expiration of two months period after notice- provision similar to Section 80 (2) of CPC has not been incorporated in Section 70- although, no specific provision has been prescribed, principles of Section 80 (2) of CPC can be read into provision of Section 70 of the Act to make it equitable and practicable. (Para-7)

Case referred:
Devi Singh v. Hyderabad Municipality reported in AIR 1972 SC 2510

For the petitioner : Mr. Sanjay Ranta, Advocates.
For the respondent : None

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This petition is instituted against Order dated 14.8.2014 rendered by learned Civil Judge (Junior Division) Court No. II, in CMA No. 808/2014 in Civil Suit No. 126/2014.

2. "Key facts" necessary for the adjudication of the present petition are that respondent-plaintiff (hereinafter referred to as 'plaintiff' for convenience sake instituted a suit against the petitioner-defendant (hereinafter referred to as 'defendant' for convenience sake), for declaration. According to the plaintiff, she was put in possession of Shop No. 8 in Sub Market Yard Santokhgarh on 2.7.2009. She is coming in possession of the same. Shop in question was allotted after completing all codal formalities as required in law. Plaintiff received a show cause notice from the Secretary, Agriculture Produce Market Committee, Una, wherein it was specifically mentioned that an enquiry was conducted by the Vigilance Department. It was found that the Shop No. 8 allotted to the plaintiff was against Rules and recommended for cancellation of the allotment of Shop No. 8. A detailed reply was filed to the show cause notice through her counsel on 19.4.2014. She has not received any notice

from the Vigilance Department to participate in any inquiry proceedings instituted against her. She has requested the defendant to supply documents of the inquiry. Defendant instead of supplying documents, issued cancellation letter of Shop no. 8 vide letter dated 3.7.2014. She was directed to vacate Shop in question and to hand over possession to the defendant within 30 days. Plaintiff also moved an application under Section 80 CPC for permitting to file suit without service of notice under Section 80 read with Section 174 of the Himachal Pradesh Agriculture Produce Markets Act. According to the averments made in the application bearing No. 808/2014, she has filed an application under Order 39 Rules 1 and 2 CPC for the grant of ad-interim injunction against the defendant for not dispossessing the plaintiff from the Shop premises in suit. Relief sought was imminent and urgent. Application was contested by the defendant. Preliminary objection has taken that the suit was barred under Sections 69 and 70 of the Himachal Pradesh Agriculture and Horticulture Produce Marketing (Development and Regulation) Act, 2005 (hereinafter referred to as Act' for convenience sake). Learned Civil Judge (Junior Division) allowed the application on 14.8.2014 by holding that matter appeared to be imminent and urgent in nature and if the plaintiff had to serve a notice and wait for expiration of statutory period of two months, defendant might have dispossessed her from the suit premises and purpose of filing the suit would have been defeated. In these circumstances, the application was allowed. Hence, this petition.

3. Mr. Sanjay Ranta has drawn the attention of the Court to Section 70 of the Himachal Pradesh Agriculture and Horticulture Produce Marketing (Development and Regulation) Act, 2005, which reads as under:

> **"70. Notwithstanding anything contained in this Act, no suit shall be instituted against the Board or any Committee, until the expiration of two months after notice in writing stating the cause of action, name and place of abode of the intending plaintiff and the relief which he claims has been delivered or left at its office. Every such suit shall be dismissed unless it is instituted within six months from the date of accrual of the alleged cause of action."**

4. He vehemently argued that the in view of bar imposed under Section 70 of the Act, application could not be allowed by learned trial Court. He also argued that the plaintiff had alternative remedy available to her under Section 80 of the Act.

5. I have heard the learned counsel for the defendant and also gone through the record carefully.

6. Shop No. 8 was allotted to the plaintiff on 2.7.2009. She was put in possession. It is stated that some Vigilance inquiry was instituted against the plaintiff qua the allotment of the Shop. Plaintiff was served a notice to vacate the premises. She filed reply to the same. However, fact of the matter is that thereafter she has been served with a letter dated 3.7.2014 whereby allotment of the shop has been cancelled. It is in these circumstances that plaintiff was constrained to file suit. She also moved an application under Order 39 Rules 1 and 2 CPC for grant of ad-interim injunction. According to the language employed in Section 70, no suit shall be instituted against the Board or any Committee, until the expiration of two months after notice in writing stating the cause of action, name and place of abode of the intending plaintiff and the relief which he claims has been delivered or left at its office. Similar provision also exists in Section 80 CPC. According to Sub Section 1 of Section 80, no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been

delivered to, or left at the office of:- (a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government; (b) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway; (bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorised by that Government in this behalf; (c) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the District. However, there is Sub-section 2 of Section 80 which provides that a suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted , with the leave of the court, without serving any notice as required by sub-section (1); but the court shall not grant relief in the suit, whether interim or otherwise, except after giving to the government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit.

7. According to the plaint, language of Sub-section 1 and 2 of Section 80, a suit can not be instituted against Government until the expiration of two moths, after notice in writing has been delivered to or left at the office of the officer mentioned therein. However, when an urgent or imminent relief is sought against the Government or any public officer, suit can be instituted with the leave of the Court without serving any notice as required by Sub-section 1 with a rider that reasonable opportunity to show cause is to be given to the Government or the public officer. There is specific bar under Section 70 of the Act whereby suit can not be instituted until expiration of two months but there is no provision like Sub-section 2 of Section 80 CPC, whereby suit can be instituted where an urgent or imminent relief is sought for. Though there is no specific provision prescribed what would happen when imminent and urgent relief is sought to be obtained, under Section 70 of the Act, however, in the interest of justice, principles of Section 80 (2) can be read into provision of Section 70 of the Act to make it equitable and practicable. A person can not be left without remedy if imminent / urgent relief is to be obtained. In case, a litigant has to wait for two months, in that eventuality, the very purpose of filing the suit shall be defeated and it may cause irreparable loss and injury to the party concerned. In the instant case, plaintiff, to be on safer side, moved an application on the principles laid down under Sub-section 2 of Section 80, seeking leave of the Court to file suit. Plaintiff has also moved an application under Order 39 Rules 1 and 2 CPC seeking injunction against the defendant. Plaintiff has been issued letter to vacate the premises. She came into possession of Shop No. 8 after allotment was made in her favour. Case of the plaintiff, as per averments contained in the plaint is that she was not associated during inquiry conducted by the Vigilance Department. Plaintiff would have suffered irreparable loss and injury if leave was not granted by the trial Court to institute the suit. In these circumstances, she could not wait for two months' period as stipulated under Section 70 to file the suit. Provisions contained in Sub-section 2 of Section 80 CPC are just and fair to avoid injustice to the parties concerned, in case urgent and imminent relief is to be obtained. Trial Court, taking into consideration, principles contained in Section 80 (2), has rightly allowed the application on 14.8.2014.

8. Their Lordships of the Hon'ble Supreme Court in **Devi Singh v. Hyderabad Municipality** reported in AIR 1972 SC 2510, have held that where any suit for injunction against a municipality restraining it from interfering with plaintiff's peaceful enjoyment and possession of the Bazar in suit, the whole controversy was whether the Bazar was the property of the plaintiff and was in his possession at the time of the institution of the suit, no notice of suit under Section 447 is necessary since the suit had nothing to do with any act done or purported to be done in pursuance of execution or intended execution of any provision of the Corporation Act. Their Lordships have held as under:

> "12. We may dispose of the legal points. As regards the requirement of a notice under Section 447 of the Corporation Act that section provides that no suit shall be instituted against the Corporation, Commr, Municipal Officer or servant in respect of any act done in or purported to be done pursuance of execution or intended execution of the Act or in respect of any alleged neglect or default in the execution of the Act until the expiration of one month next after a notice had been served on the Corporation or Officer concerned in the manner indicated in the section. This is what the High Court said on the point :
>
> It cannot be gain said that the acts complained of by the plaintiff were acts done by the Corporation in pursuance of its powers and duties under the Act. Under Section 59 of the Act the Corporation is empowered to make provision for public parks, gardens play grounds and recreation grounds, while under Section 56 of the Act the Corporation is empowered to remove obstructions upon public places.
>
> The question whether a notice under the aforesaid section was necessary has to be decided on the averments made. It was never the case of the plaintiff that the defendant Corporation was acting or purported to act under the provisions of the Act. The dispute raised related to the ownership of the property as also its possession. We have not been shown any provision in the Corporation Act by which the Corporation or its officers were entitled to either take possession of another person's property or retain its possession or dispossess a person who is already in possession without having recourse to the ordinary remedies under the law. We are wholly unable to understand how Section 56 of the Corporation Act could be of any avail to the Corporation in the matter of notice under Section 447 of the Act. The whole controversy between the parties centered on the question whether the Bazaar was the property of the plaintiff and was in his possession at the time of the institution of the suit. That had nothing to do with any act done or purported to be done in pursuance of execution or intended execution of any provision of the Corporation Act. The learned Counsel for the Corporation has not been able to show how the suit as laid and framed attracted the applicability of Section 447 of the Corporation Act. We would, accordingly, hold that under the aforesaid section no notice was necessary any before the institution of the suit."

9. Purpose contained in Section 70 is similar to that of Section 80 CPC but there is no specific provision contained therein to institute a suit, wherein urgent relief is to be sought for.

10. Plaintiff has also sought prohibitory injunction restraining the defendant from ousting the plaintiff from the Shop in question forcibly and illegally and, in the alternative, decree for restoration of possession of Shop No. 8 to the plaintiff, in case defendant succeeds in forcibly dispossessing the plaintiff from the Shop, during the pendency of the suit, under Section 34 and 38 of the Specific Relief Act.

11. Mr. Sanjay Ranta has also argued that the plaintiff has alternative remedy available to her, as per Section 80 of the Regulation Act. However, he has not placed on record copy of any agreement for providing/ referring the matter to an Arbitrator. Defendant has also not taken any objection in the reply filed to CMA No. 808/2014 about alternative remedy available to the plaintiff.

12. In view of above discussion and analysis, there is neither any illegality nor perversity in the Order passed by learned trial Court below. There is no merit in the present petition and the same is dismissed, so also the pending applications, if any.

****

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

Ajit Singh Rana ..... Appellant
Versus
State of Himachal Pradesh .....Respondent

Cr. Appeal No. 371/2011
Reserved on: 18.3.2015
Decided on: 20.3.2015

Prevention of Corruption Act, 1988- Sections 7 & 13 (2)- Petitioner had demanded bribe of Rs.10,000/- from the complainant and was caught red handed by the police party- there was contradiction regarding the person who had given the signal to the raiding party- case of the prosecution was not supported by shadow witness- complainant admitted that supplies were stopped due to irregularities- affairs of society were investigated by the Government- license of the society was already renewed prior to the date of the demand which shows that there was no occasion for the accused to demand the amount from the complainant- mere recovery of the amount without demand is not sufficient- complaints were pending against the complainant which were being investigated by the accused- this shows that complainant was malafide- held, that in these circumstances, the case of the prosecution was not proved and accused acquitted. (Para-23 to 27)

Cases referred:
Ganga Kumar Srivastava vs. State of Bihar 2005 (6) SCC 211
Narendra Champakali Trivedi vs. State of Gujarat, AIR 2012 SC 2263

For the appellant : Mr. Jagdish Vats and Mr. Anoop Chitkara, Advocates.
For the respondent : Mr. Parmod Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This appeal is instituted against judgment dated 9.9.2011 rendered by learned Special Judge, Hamirpur, HP in Corruption Case No. 05 of 2010, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Sections 7 & 13 (2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'Act' for convenience sake), was convicted and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.5,000 under Section 7 of the Act and in default of payment of fine, to further undergo simple imprisonment for three months, and was further sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.10,000/- under Section 13 (2) of the Act, in default of payment of fine, to undergo simple imprisonment for six months.

2. Case of the prosecution, in a nutshell, is that the complainant PW-1 Roshan Lal, was Pradhan of Jahu Agriculture Co-operative Society Limited, Jahu. He gave a written complaint to the Superintendent of Police, Hamirpur on 20.7.2009, whereby he reported that the accused, District Controller, Food, Civil Supplies & Consumer Affairs, Hamirpur was demanding Rs.10,000/- from him. It is further alleged in the complaint that Devi Raj, Secretary-cum-Salesman of the Society had committed some irregularities and accused had stopped supply of grocery articles under the Public Distribution System. The General House of the Society, by passing a resolution had removed Secretary-cum-Salesman of the Society. The Society completed all codal formalities and requested the accused to restore supply of grocery articles to the Society under Public Distribution System. However, accused evaded to supply grocery articles on one pretext or the other. On 20.7.2009, the accused demanded bribe of Rs.10,000/- from the complainant for restoring the supply of grocery articles to the Society under the Public Distribution System (for short 'PDS'). Complainant did not want to give bribe to the accused, therefore, he gave written complaint to the Superintendent of Police, Hamirpur. Superintendent of Police, Hamirpur forwarded the complaint to the SHO Police Station Sadar, District Hamirpur in order to register a case under the Act and, on the basis of said complaint, FIR No. 234/09 dated 20.7.2009 was registered under Sections 7 & 13 (2) of the Act.

3. Trap party was formed by the Superintendent of Police, Asif Jalal, and Shri Shiv Dev Singh Tehsildar, Kartar Chand, Superintendent of the Tehsil Office, Hamirpur and some other police officials were included in the trap party including the complainant. Superintendent of Police gave demonstration of mixing sodium carbonate and phenolphthalein separately in water and on mixing mixture of both the chemicals together, colour of the same turned pink. Roshan Lal handed over ten currency notes in the denomination of Rs.1000 each to the Superintendent of Police and numbers of the currency notices were noted down in a memo. These notes were treated with powder of phenolphthalein and were handed over to Roshan Lal, with a direction that he should hand over the same to the accused as and when the latter would demand bribe money. Witness Kartar Chand was also sent with Roshan Lal to the office of the accused. Superintendent of Police alongwith other members of the raiding party went to the parking place of Deputy Commissioner Office Hamirpur. After some time witness Kartar Chand gave signal to the trap party after the complainant gave bribe money to the accused. Superintendent of Police, Hamirpur alongwith other members of the trap party went to the office of accused. HC Ranjeet Singh and HC Kapil caught the accused from his hands. Superintendent of Police, Asif Jalal, disclosed his identity to the accused. Accused was made to wash his hands in a plate and the hand-wash water was mixed with sodium carbonate and colour of the same turned pink. The mixture was put in a nip and the same was sealed. On search, ten currency notes of denomination of Rs.1000/- each were recovered from a file kept in the office of the accused. Numbers of the currency notes were tallied with the numbers already written in the memo Ext. PW1/C. All the ten currency notes were packed and sealed in an envelope. Case was investigated. Challan was put in the Court after completing all codal formalities.

4. Prosecution has examined as many as twelve witnesses to prove its case against the accused. Accused was also examined under Section 313 of the Criminal Procedure Code. He denied the Prosecution case and claimed himself to be innocent. He has further taken a defence that an inquiry was conducted by him against the Society and complainant, Roshan Lal was president of the same. The complainant was held to have committed irregularity, therefore, the complainant in connivance with Partap Chand fabricated this false case against him. Learned trial Court convicted and sentenced the accused as noticed herein above.

5. Mr. Jagdish Vats and Mr. Anoop Chitkara have vehemently argued that the Prosecution has failed to prove its case against the accused.

6. Mr. Parmod Thakur has supported the judgment of conviction.

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

8. PW-1 Roshan Lal is the complainant. He has lodged a complaint with the Superintendent of Police Hamirpur vide Ext. PW1/A on 20.7.2009. According to him, accused had asked him to come to his office to get restored the supply of grocery articles and for renewal of licence. He has also deposed that even after renewal of licence, supply of articles under the PDS was not restored. The Superintendent of Police called the Executive Magistrate Shiv Dev Singh and Superintendent Kartar Chand to his office. Superintendent of Police gave demonstration. Memo of demonstration Ext. PW1/B was prepared. Currency notes of Rs.10,000/- in the denomination of Rs.1000 each were shown to the police party. Their numbers were noted down vide Ext. PW1/C. Currency notes were treated with some powder. Currency notes then were handed over to him vide Ext.PW1/C. Police party advised him that as and when he made payment to the accused he should come out and give signal to the raiding party. Kartar Chand was to accompany him to the office of accused. He alongwith Kartar Chand went to the office of accused, who was present there. He told him that the licence of the Society would be renewed and that he should make payment of Rs.10,000/- to him. Accused took money from him and counted the notes. He put the currency notes in an envelope and placed the envelope under folder of the file and file was kept in the drawer. Kartar Chand came out of the office and he gave a signal to the police party, as told to him. Police party came to the office of the accused and other police officials caught hold of the accused from his hands on each sides. SP was also present there. Then hand wash of the accused was collected in a plate. Colour of hand wash was natural. One separate mixture of sodium carbonate was prepared and mixed with the hand wash. Colour of hand wash turned pink. Memo of hand wash is Ext. PW1/D, which was signed by him and Kartar Chand and also Shiv Dev. Number of currency notes was tallied with Ext. PW1/C. They were found to be the same. Memo Ext. PW/1F was prepared. It was signed by him, Shiv Dev and Kartar Chand. In his cross-examination, he has admitted that licence of their Depot was renewed on 9.3.2009 on payment of official fee of Rs.305/-. He had deposited the renewal fee. He did not remember that he had told the police that licence had been renewed earlier. Accused had telephoned him on 20.7.2009. He came with currency notes to his office. He had received call on his mobile telephone but did not remember the mobile number. He had changed the mobile telephone numbers subsequently. Tehsildar Shiv Dev and Kartar Chand reached the office of accused after about half an hour. He further deposed that prior to 20.7.2009, accused was demanding Rs.10,000/-a number of times but they were offering only Rs.5,000/-. He carried notes of Rs.10,000/- to the office of SP on 20.7.2009. He further deposed that the office of District Controller, Food, Civil Supplies & Consumer Affairs is a double storeyed building. Apart from Kartar Chand, rest of the members of raiding party were outside the office of DFSC Hamirpur.

9. PW-2 Kartar Chand deposed that he was posted as Superintendent Grade II in Tehsil Office Hamirpur. He and Executive Magistrate, Shiv Dev Singh went to the office of SP Hamirpur. SP gave them demonstration. In his examination-in-Chief, he stated that he did not accompany the complainant to the office of DFSC Hamirpur. He denied the suggestion that in his presence, accused had put demand of Rs.10,000/- to the complainant. He also denied that money was handed over to the accused by the complainant in his presence. He also denied that thereafter, he and complainant Roshan Lal went outside the office and gave signal to the raiding party. According to him, police party

had entered the office of DFSC, thereafter he entered the room. He also deposed that when he entered the office of DFSC, office superintendent was also there, but he did not know his name.

10. PW-3 Shiv Dev Singh was also member of the raiding party. He also deposed the manner in which demonstration was given by Superintendent of Police. Superintendent of Police had directed him and Kartar Chand to accompany the complainant. They took position alongwith police party at about 4 pm. The complainant went to the upper floor of the building and then came out. He gave a signal and then all of them went to the office of the accused. He denied the suggestion that PW-2 Kartar Chand accompanied the complainant to the room of the accused. In his cross-examination, he has admitted that no signal was .given by him to the raiding party.

11. PW-4 is a formal witness.

12. PW-5 Pratap Singh has proved Ext. PW5/A, PW5/B, PW5/C, PW5/D and PW5/E.

13. PW-6 is a formal witness.

14. PW-7 is also a formal witness.

15. PW-8 Vijay Parkash deposed that on 20.7.2009, Dy.SP Rajesh Kumar deposited with him four sealed parcels sealed with seal 'J' i.e. Ext. P1-nip of demonstration, Ext. P2, Pint of hand wash, Ext. P13-envelope containing currency notes and Ext. PW1/E-sample seal 'J', one sealed envelope alleged to contain file cover was also deposited with him. On 4.3.2010, one sealed envelope Ext. P15 alleged to contain two packets of sodium carbonate and phenolphthalein powders Ext. P16 and Ext. P17 were received by him through dak from Asif Jalal, SP Hamirpur. He entered the aforesaid property in Register No. 19. On 24.7.2009 vide RC No. 91/09, he sent one pint Ext. P2 alongwith sample seal to the FSL Junga through Sunil Kumar for chemical examination.

16. PW-9 is a formal witness.

17. PW-10 ASI Praveen Kumar also deposed the manner in which raiding party was constituted. Demonstration was given by Superintendent of Police. He testified that SP Hamirpur asked complainant Roshan Lal to go to the office of accused and hand over currency notes on demand. Kartar Chand was also sent with Roshan Lal to represent as a member of the Society. Roshan Lal and Kartar Chand were directed that as and when bribe money is handed over to accused, one of them should give signal by scratching head to the raiding party. He also stated that when raiding party was entering the office, one person came out from the room of DFSC and Superintendent of Police asked him to disclose his identity and he told that his name was Onkar Chand working as Superintendent in the office of DFSC Hamirpur. In his cross-examination, he has admitted that Onkar Chand, Superintendent was present in the office throughout the proceedings.

18. PW-11 Asif Jalal deposed the manner in which he has given demonstration, after receipt of complaint from PW-1 Roshan Lal. Kartar Chand was sent with Roshan Lal to the office of accused to hand over currency notes. Kartar Chand was directed to give signal by rubbing head, after currency notes were handed over to accused. After some time, Kartar Chand gave signal by rubbing his head. He alongwith other members of raiding party went to the office of DFSC Hamirpur.

19. PW-12 Rajesh Kumar deposed that the Superintendent of Police Hamirpur had handed over case file to him, for further investigation. He recorded the statements of Kartar Chand, Shiv Dev Singh, ASI Praveen Kumar.

20. According to PW-1, accused had demanded a sum of Rs.10,000/- for the supply of grocery articles and renewal of licence. He has admitted in his examination-in-chief that supply of articles under PDS was stopped by accused due to some irregularities. However, in his cross-examination, he has admitted that licence was already renewed on 9.3.2009 on payment of official fee of Rs.305/-. In case, licence had already been renewed, there was no occasion for the accused to have demanded Rs.10,000/-. PW-1, has categorically deposed that Kartar Chand accompanied him to the office of accused. Thereafter, he and Kartar Chand (sic. Kartar Singh) went to the office of the accused. Accused told that the licence would be renewed if he made payment of Rs.10,000/-. However, in his cross-examination, he has admitted that Tehsildar Shiv Dev Singh and Kartar Chand reached the office of accused half an hour after him. Accused telephoned him on 20.7.2009 to come with currency notes. He received call of accused on mobile telephone but did not remember the mobile number. Version of the complainant that accused telephoned him to come with currency notes, can not be believed. He was supposed to remember the telephone number.

21. PW-2 Kartar Chand, in his examination-in-chief has denied that he had ever accompanied the complainant to the office of DFSC. He also denied that in his presence, accused raised demand of Rs.10,000/- from the complainant. He also denied that money was handed over to accused by the complainant in his presence. He also denied that he and complainant Roshan Lal went outside the office and gave signal to the raiding party. According to him, police party entered office of DFSC and thereafter he entered his room. He denied that he and complainant gave any signal to the police party. PW-3 Shiv Dev Singh Tehsildar, has also deposed that complainant was not accompanied by Kartar Chand. Thus, he has also not supported the version of PW-1 Roshan Lal that Kartar Chand accompanied him to the room of DFSC, Hamirpur. He has specifically denied in his examination-in-chief that Roshan Lal and Kartar Chand also accompanied him. He also deposed in his cross-examination that no signal was given by Kartar Chand to raiding party.

22. PW-9 ASI Praveen Kumar also deposed that Kartar Chand, witness was sent with Roshan Lal to represent as a member of the Society. Roshan Lal and Kartar Chand were directed as and when bribe money is handed over to accused, one of them should come out and give signal to the raiding party. He also admitted that when raiding party entered the office one person came out of room of DFSC. In his cross-examination, he has admitted that Onkar Chand, office Superintendent was present in the office throughout the proceedings. However Prosecution has not examined Onkar Chand though material witness. According to PW-1, he gave signal to the police. PW-3 Shiv Dev Singh has also admitted in his cross-examination that no signal was given by Kartar Chand to the raiding party. However, PW-11 Asif Jalal says that Kartar Chand gave signal by rubbing his head.

23. Thus, there are major contradictions as to who gave signal to the raiding party. Case of the prosecution has not at all been supported by shadow witness Kartar Chand, PW-2. PW-1 as noticed above, has admitted that supplies were stopped due to irregularity. Affairs of society were also investigated by the department. Licence of the Society was already renewed on 9.3.2009. Thus, there was no occasion for the accused to demand an amount of Rs.10,000/-. Shri Onkar Chand, Superintendent who was present throughout the proceedings as per statement of PW-10, ASI Praveen Kumar, was not examined though a material witness.

24. Mr. Parmod Thakur submitted that a sum of Rs.10,000/- was recovered from the possession of the accused.

25. Their Lordships of Hon'ble Supreme Court in **Ganga Kumar Srivastava vs. State of Bihar** 2005 (6) SCC 211 have held as under:-

> **"20. We must not forget that in a trap case the duty of the officer to prove the allegations made against a government officer for taking bribe is serious, and therefore, the officers functioning in the vigilance department must seriously endeavour to secure really independent and respectable witnesses so that the evidence in regard to raid inspires confidence in the mind of the court and the court is not left in any doubt whether or not any money was paid to be public servant by way of bribe. It is also the duty of the officers in the vigilance department to safeguard for the protection of public servants against whom a trap case may have been laid."**

26. Their Lordships of Hon'ble Supreme Court in **Narendra Champakali Trivedi vs. State of Gujarat**, AIR 2012 SC 2263 have held that recovery of tainted money from the accused by itself is not sufficient to record conviction. Their Lordships have held as under:-

> **"12. At the outset, we may state that the recovery part has gone totally unchallenged. Though a feeble attempt was made before the High Court and also before us, yet a perusal of the evidence and the test carried out go a long way to show that the amount was recovered from the possession of the accused-appellants. It is the settled principle of law that mere recovery of the tainted money is not sufficient to record a conviction unless there is evidence that bribe had been demanded or money was paid voluntarily as a bribe. Thus, the only issue that remains to be addressed is whether there was demand of bribe and acceptance of the same. Be it noted, in the absence of any evidence of demand and acceptance of the amount as illegal gratification, recovery would not alone be a ground to convict the accused. This has been so stated in T. Subramanian v. The State of Tamil Nadu."**

27. It is also clear from Ext. D1, Ext. D2 dated 15.6.2007 and Ext. D4 dated 11.7.2002 that there were complaints against the complainant and these were looked into by the accused. Thus, filing of the complaint by the complainant against accused was mala fide and to settle scores with him.

28. Accordingly, the appeal is allowed. Judgment of conviction passed by learned Special Judge, Hamirpur, HP in Corruption Case No. 05 of 2010 on 9.9.2011, is set aside. Sentence of the accused was suspended on 15.10.2011. The bail bonds are discharged. Pending applications, if any, are also disposed of.

****

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

Bhagwant Rai & anr. .....Appellants.
Versus
M/S Pankaj Spinners Pvt. Ltd. & ors. .....Respondents.

RSA No. 4105 of 2013.
Reserved on: March 18, 2015.
Decided on: March 24, 2015.

Transfer of Property Act, 1882- Section 41- Plaintiff claimed specific performance of agreement executed by it with defendant on 13.10.1993- defendants No. 12 and 13 claimed that they had purchased the land from defendant No. 1 in the year 2005 and that they were bona-fide purchaser for consideration- execution of agreement was duly proved by plaintiff by examining the scribe and the marginal witness- permission was obtained by plaintiff on 25.2.2005- defendants No. 12 and 13 belong to the same village where the suit land was located which shows that they were aware of the earlier agreement- sale deed could be registered after the permission was to be accorded by the State Government, time was not the essence of the agreement- suit was filed within two years of the receipt of the permission- predecessor-in-interest of the plaintiff had received the payment and plaintiff was put in possession – plaintiff was ready and willing to perform his part of the contract- in these circumstances, defendants No. 12 and 13 cannot be deemed to be bona-fide purchaser for consideration. (Para-15 to 18)

Case referred:
Baldev Singh and others vrs. Chhota Singh and another, AIR 2002 Punjab and Haryana 47

For the appellants: Mr. P.S.Goverdhan, Advocate.
For the respondent: Mr. Ramakant Sharma, Advocate, for respondent o. 1.
Mr. Vinod Chauhan, Advocate, Court Guardian for respondents No. 6 to 8 & 14.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree dated 30.3.2013 of the learned Addl. District Judge, Fast Track Court, Solan, H.P., rendered in Civil Appeal No. 29 FTC/13 of 2011.

2. Key facts, necessary for the adjudication of this second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff, for the convenience sake) has filed a suit for specific performance of Agreement against the appellants-defendants (hereinafter referred to as the defendants) and proforma respondents, alleging therein that the plaintiff was Private Ltd. Company registered under the Companies Act. Sh. Joginder Khanna was the Director of the Company. He was authorized by the Board of Directors to file the suit against the defendants. The predecessor-in-interest of the defendants i.e. proforma defendants entered into agreement with the plaintiff on 13.10.1993 in respect of their share in the land comprised in khata/khatauni No. 192/201 kh. No. 1287 (0-14), 1288 (0-11), 1290(1-19), plots-3, measuring 3 bighas 4 biswas, situated in village Madhala,

Pargana Doon, Tehsil Kasauli, Distt. Solan, H.P.. Out of this land, the subject matter of the dispute is land measuring 1-19 biswas (hereinafter referred to as the suit land). The plaintiff had paid full and final payment of the suit land as per the agreement and has been in possession of the suit land. The plaintiff has sought permission from the Government on 23.2.2005 to purchase the suit land and thereafter requested the defendants to execute the sale deed in his favour and to perform their part of the agreement as the plaintiff was ready and willing to perform its part of the agreement. The defendants were not coming forward to perform their part of the agreement for the purpose of registration of the sale deed of the suit land.

3. The suit was contested by the defendants by filing written statement. According to the defendants, their predecessor-in-interest has not executed any agreement in favour of the plaintiff. The agreement was false, frivolous and result of outcome of fraud. It was denied that as per the agreement, plaintiff has paid full and final payment of the suit land. It was denied that plaintiff was in the possession of the suit land. It was alleged that plaintiff could not take the possession of the suit land in view of the restrictions under Section 118 of the H.P. Tenancy and Land Reforms Act, 1972. It was alleged that plaintiff was not ready and willing to act upon the alleged agreement and did not apply for permission after the agreement. The suit was also barred by limitation.

4. No replication was filed. The issues were framed by the learned trial Court on 7.3.2008. The learned Civil Judge (Sr. Divn.), Kasauli, decreed the suit on 24.5.2011. Defendants No. 12 & 13, namely, Jaswant Singh and Bhagwant Rai, preferred an appeal against the judgment and decree dated 24.5.2011 before the learned Addl. District Judge, (FTC), Solan, H.P. The learned Addl. District Judge, (FTC), Solan, dismissed the same on 30.3.2013, hence this regular second appeal.

5. Mr. P.S.Goverdhan, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that his clients were bona fide purchasers and they had no notice of agreement to sell Ext. P-1 and P-2. He then argued that both the courts below have not correctly appreciated the oral as well as documentary evidence on record. On the other hand, Mr. Ramakant Sharma, Advocate for respondent No. 1 has supported the judgments and decrees passed by both the Courts below.

6. I have heard the learned Advocates for both the sides and gone through the records of the case carefully.

7. Sh. Joginder Khanna, PW-1 has led his evidence by filing affidavit Ext. PW-1/A. He has produced the original agreements Ext. P-1 & P-2, copy of resolution Ext. P-3, jamabandi Ext. P-4 and permission of government of Himachal Pradesh Ext. P-5. In his cross-examination, he testified that pursuant to the agreement Ext. P-1, entire payment was made by cheque of PNB, Madhala Branch amounting to Rs. 23000/- per bigha to the defendants. The date of agreement Ext. P-1, entered into between the predecessor-in-interest of the defendants, was 13.10.1993. The agreement was entered into with Nathu Ram, Jainti Dass, Janki Ram, Sant Ram and Sharda Ram, which was scribed by PW-2 Raj Kumar. The agreement was signed by the predecessor-in-interest of the defendants. It was attested by Salig Ram PW-3. The contents of the agreement were read over and explained to Sh. Nathu Ram, Jainti Dass, Janki Ram, Sant Ram and Sharda Ram. They after understanding the agreement had affixed their signatures and thumb impressions in the presence of PW-3 Salig Ram.

8. PW-2 Raj Kumar deposed that he scribed agreement Ext. P-1 dated 13.10.1993. It was entered at Sr. No. 646 of the register maintained by him. He has

prepared agreements Ext. P-1 and P-2. Ext. P-2 was made on 12.10.1994. The payment was made by cheque to predecessor-in-interest of the defendants and entry was incorporated at Sr. No. 749 dated 12.10.1994.

9. PW-3 Salig Ram, is the marginal witness. He was '*Lambardar*' of the Village. He was witness to agreements Ext. P-1 and P-2. According to him, agreement Ext. P-1 was written in his presence and he had read over and explained the contents of the agreement to predecessor-in-interest of the defendants. They had affixed their thumb mark and signatures, respectively.

10. Sh. Narinder Kumar, an official of D.C.Office, Solan has appeared as DW-1 and proved letter dated 1.11.2004 Ext. DW-1/A.

11. DW-2 Narinder Singh has proved permission of the State Government Ext. P-5, dated 23.2.2005.

12. Defendant No. 2, namely, Shiv Charan, has led his evidence by affidavit Ext. DW-3/A. He denied that the appellants-defendants No. 12 & 13 have purchased the share of defendant No. 1 despite knowledge that her predecessor-in-interest have already executed the agreement of her share.

13. Defendants No. 12 & 13, namely, Jaswant Singh and Bhagwant Rai, have stepped into the witness box as PW-4 and PW-5 and tendered their affidavits Ext. DW-4/A and Ext. DW-5/A, respectively. According to them, they have purchased the land from defendant No. 1 in the year 2005 and claimed that they are the bona fide purchasers. They denied that despite knowledge of agreement, they purchased the share of defendant No. 1.

14. DW-6 Sher Mohd. and DW-7 Kanshi Ram, also tendered their evidence by way of affidavits Ext. DW-6/A and Ext. DW-7/A, respectively. They have shown ignorance about the execution of agreement by the predecessor-in-interest of the defendants in favour of the plaintiff.

15. The plaintiff has duly proved the execution of the agreement Ext. P-1 dated 13.10.1993 and another agreement Ext. P-2. These agreements were scribed by PW-2 Sh. Raj Kumar. It was witnessed by PW-3 Salig Ram as marginal witness. The plaintiff, being non-agriculturist had to obtain prior permission from the State Government before the execution of the sale deed. The permission was received only on 25.2.2005 vide Ext. P-5. The defendants, namely, Jaswant Singh and Bhagwant Rai have purchased the suit land on 16.10.2005 vide Mark "Y". The land has been purchased by them at a very lower price. It has come in the evidence that the value of the land had gone up to 40-50 lac per bigha. Thus, the land could not be sold for a meager amount, as per sale dated 16.10.2005. Defendants Jaswant Singh and Bhagwant Rai belong to the same village where the suit land is situated i.e Village Madhala. Thus, they were aware of the earlier agreements Ext. P-1 and P-2. They have purchased the land despite having knowledge of the earlier agreements Ext. P-1 and P-2. In the instant case, time was not the essence of the agreement but sale deed could be registered after the permission was to be accorded by the State Government under Section 118 of the H.P. Tenancy and Land Reforms Act, 1972. The permission was accorded as per Ext. P-5 dated 25.2.2005 and the aforesaid suit was filed on 17.10.2007, thus it was filed within the limitation.

16. It has come on record that the predecessor-in-interest of the defendants have received the payment and the plaintiff was put in possession. The amount has been paid by cheques drawn at PNB, Madhala Branch. Mr. P.S.Goverdhan, Advocate, has also argued that the issue was not framed whether the defendants Jaswant Singh and Bhagwant Rai

were bonafide purchasers or not. However, the fact of the matter is that the parties knew the case fully and have adduced their evidence. Thus, the objection of non-framing of issue, at this stage, cannot be raised. Moreover, in case they were aggrieved of non-framing of issue, the application under Order 14 Rule 5 CPC could be moved for framing of additional issue.

17. In the case of ***Baldev Singh and others vrs. Chhota Singh and another,*** reported in ***AIR 2002 Punjab and Haryana 47,*** the learned Single Judge has held that since the suit land was situated in small village and all parties also belong to that village, subsequent purchaser must be knowing earlier transaction of sale of land and cannot be held to be bonafide purchaser. The learned Single Judge has held as under:

> "23. For the reasons given above, the conclusion reached is that Nachhatar Singh had entered into an agreement to sell land with Chhota Singh vide agreement dated 23.6.1990 and had received Rs. 30,000/- as earnest money, Chhota Singh was always ready and willing to perform his part of the contract and the breach was committed by Nachhatar Singh. Agreement dated 23.5.1990 set up by Baldev Singh etc. was false, forged and ante-dated, Baldev Singh etc. are not bona fide purchasers of the land, as when they purchased the land, they were aware of agreement in favour of Chhota Singh dated 23.6.1990, as it is a small village and all of them belong to this village. In small villages if any transaction takes place, it spreads like wild fire."

18. In the instant case, the plaintiff was always ready and willing to perform his part of the contract after the permission was granted by the State Government vide Ext. P-5. The contention of the plaintiff is also supported by the entries made in Jamabandi Ext. P-4. The agreement was entered into between the predecessor-in-interest of the defendants and the plaintiff on 13.10.1993 and the subsequent sale deed is dated 16.10.2005, Mark "Y". The defendants through Jaswant Singh and Bhagwant Rai cannot be held to be bona fide purchasers of the suit land.

19. Mr. P.S.Goverdhan, Advocate, has faintly argued towards the end of his submission that the agreement dated 13.10.1993 was the outcome of fraud. However, there is no pleading to this effect. The Courts below have correctly appreciated the oral as well as the documentary evidence placed on record.

20. Consequently, there is no merit in this regular second appeal, the same is dismissed. No costs.

****

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

Bansi Ram .....Petitioner

Versus

Himachal Road Transport Corporation and others ....Respondents

CWP No. 648/2015
Decided on 25.3.2015

Constitution of India, 1950- Article 226- Petitioner was retired on attaining the age of superannuation- an order was passed by the Corporation reducing the last pay drawn by

the petitioner- petitioner was called upon to refund the excess amount drawn by him- no show cause notice was issued to the petitioner- held, that any order having civil consequences should be passed after complying with the requirement of the principle of natural justice- order passed by the respondent had civil consequences- since, the pay of petitioner was reduced without hearing him, therefore, order passed by the respondent set aside. (Para- 2 and 3)

Cases referred:
Rajesh Kumar and others versus Dy. CIT and others, 2007 (2) SCC 181
Syed Abdul Qadir and other versus State of Bihar and others, (2009) 3 SCC 475

For the Petitioner : Mr. Onkar Jairath, Advocate.
For the Respondents : Mr. B.N. Sharma, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge

Petitioner retired from the post of Conductor on attaining the age of superannuation on 31.3.2014. Respondent-Corporation issued an office order dated 13.11.2014 whereby last pay drawn by the petitioner was revised and reduced from Rs.17,650/- to Rs.17,320/- . This exercise was undertaken by the Corporation after 28 years. Petitioner was called to pay an amount of Rs.71,796/- as per communication dated 31.12.2014. Petitioner has neither misled nor mis-represented the authorities at the time when his pay was fixed in the year 1986. Petitioner has not been issued any show cause notice before revising his pay and ordering recovery of Rs.71,796/-. It is settled law by now that any order which has civil consequences must be passed in conformity with principles of natural justice. Petitioner has suffered civil consequences since his pay has been fixed without hearing him that too after 28 years. Reduction of petitioner's salary from Rs.17,650/- to Rs.17,320/- would also affect his pension.

2. Their Lordships of the Hon'ble Supreme Court in **Rajesh Kumar and others versus Dy. CIT and others,** 2007 (2) SCC 181 have held that

> "26. Effect of civil consequences arising out of determination of lis under a statute is stated in State of Orissa v. Dr. (Miss) Binapani Dei and Others [AIR 1967 SC 1269: (1967) 2 SCR 625]. It is an authority for the proposition when by reason of an action on the part of a statutory authority, civil or evil consequences ensue, principles of natural justice are required to be followed. In such an event, although no express provision is laid down in this behalf compliance of principles of natural justice would be implicit. In case of denial of principles of natural justice in a statute, the same may also be held ultra vires Article 14 of the Constitution."

Their Lordships of the Hon'ble Supreme Court in **Syed Abdul Qadir and other versus State of Bihar and others,** (2009) 3 SCC 475 have culled out the following principles governing the circumstances in which the excess amount cannot be recovered by the employer:

> "56. That apart, it also appears from the record produced before us that while the Finance Department of the Government of Bihar was in

favour of making the amended provisions of FR. 22-C applicable to the appellants- teachers after having come to know that the said rule did not exist and had been substituted, the Department of Human Resource Development, Government of Bihar, wanted to apply the unamended provision to the appellants-teachers so as to make available the benefit of additional increment provided for under FR.22-C to its teachers, unaware of the fact that even under FR.22-C they were not entitled to the additional increment as they were not discharging duties and responsibilities of greater importance on the promoted post.

56. This further goes on to show that the authorities in the State of Bihar were not even aware of the basic requirement for grant of additional increment and the decision appears to have been taken without proper application of mind. Otherwise, there was no reason for the Finance Department to state in the counter affidavit filed before the High Court that any affidavit filed on behalf of the Education Department may be ignored as Finance Department was the competent authority. In this very affidavit, the Finance Department while admitting that the pay fixation by the Education Department was wrong, stated as under:-

> "...the fixation of pay under Fundamental Rule 22-C has wrongly been made as it was not in existence. Pay fixation on the basis of a non-existent rule is a bona fide mistake."

57. This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. See Sahib Ram vs. State of Haryana, 1995 Supp. (1) SCC 18, Shyam Babu Verma vs. Union of India, [1994] 2 SCC 521; Union of India vs. M. Bhaskar, [1996] 4 SCC 416; V. Ganga Ram vs. Regional Jt., Director, [1997] 6 SCC 139; Col. B.J. Akkara [Retd.] vs. Government of India & Ors. (2006) 11 SCC 709; Purshottam Lal Das & Ors., vs. State of Bihar, [2006] 11 SCC 492; Punjab National Bank & Ors. Vs. Manjeet Singh & Anr., [2006] 8 SCC 647; and Bihar State Electricity Board & Anr. Vs. Bijay Bahadur & Anr., [2000] 10 SCC 99.

59. Undoubtedly, the excess amount that has been paid to the appellants - teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellants-teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellants-teachers should be made.

60. Learned counsel also submitted that prior to the interim order passed by this Court on 7.4.2003 in the special leave petitions, whereby the order of recovery passed by the Division Bench of the High Court was stayed, some instalments/amount had already been recovered from some of the teachers. Since we have directed that no recovery of the excess amount be made from the appellant- teachers and in order to maintain parity, it would be in the fitness of things that the amount that has been recovered from the teachers should be refunded to them.

3. Accordingly, the present petition is allowed. Impugned orders annexure P-1 dated 13.11.2014 and annexure P-2 dated 31.12.2014 are quashed and set aside. In normal circumstances, we would have given liberty to the respondent-Corporation to issue notice to the petitioner, however, since the petitioner has retired now, in these circumstances, no fruitful purpose will be served by initiating fresh proceedings in the matter. Pending applications, if any, are also disposed of.

****

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

Ram Swaroop & ors. .....Applicants/Appellants.

Versus

Sh. Narinder Parkash & ors. .....Non-applicants/Respondents.

CMP No. 18448 of 2013 in
No. 263 of 2013.
Reserved on: March 17, 2015.
Decided on: March 25, 2015.

Code of Civil Procedure, 1908- Order 23 Rules 1 and 2- An application for withdrawal of suit with permission to file a fresh suit was filed at appellate stage on the ground that there was a formal defect – suit was dismissed for want of proof- held, that the right of plaintiff to withdraw the suit at appellate stage is not an absolute right but is subject to rights acquired

by defendant under a decree - non-joinder of necessary-party is not a formal defect- permission to withdraw the suit cannot be granted when the claim as set out in the original suit is weak and adverse findings have been recorded against the plaintiff- hence, application dismissed. (Para-6 to 10)

Cases referred:
Vidhydhar Dube and ors. Vrs. Har Charan and others, AIR 1971 All. 41
Trinath Parida vrs. Sobha Bholaini and another, AIR 1973 Orissa 37
K.S.Bhoopathy and ors. Vrs. Kokila and others, (2000) 5 SCC 458

For the applicants: Mr. G.D.Verma, Sr. Advocate, with Mr. B.C.Verma, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

CMP No. 18448 of 2013.

The applicants-appellants (hereinafter referred to as the applicants) have instituted this regular second appeal against the judgment and decree passed by the learned Addl. District Judge, Fast Tract Court, Solan, in Civil Appeal No. 10 FTC/13 of 2010, decided on 5.1.2013. The applicants have moved an application under Order 23 Rules 1 & 2 read with Section 151 CPC to withdraw the suit with liberty to file a fresh suit.

2. The applicants have filed Civil Suit bearing No. 42-K/1 of 1999 in the Court of Civil Judge, Kandaghat on 7.5.1999. It was dismissed by the learned trial Court on 30.3.2010. The applicants filed an appeal before the learned Addl. District Judge, Fast Track Court, Solan against the judgment and decree dated 30.3.2010. The appeal was dismissed by the learned Addl. District Judge, Fast Track Court, Solan on 5.1.2013.

3. According to the averments made in the application, the trial Court instead of relying upon map Ext. PW-1/A has relied upon map Ext. DW-4/C. The learned trial Court has returned the findings that there is no water source named as *Patru-ka-Nal* and *Kuhal* No. 5 originating from *Patru-Ka-Hall*. The location of *Kuhal* Nos. 4 & 5 was also in dispute. Thus, there was formal defect in the plaint. The plaintiff also could not implead all the beneficiaries of the different water sources and the plaint was also lacking material particulars. The khasra numbers of *Sharratu-ka-Nala, Patru-ka-Nala and Patru-ka-hall* at village Dhangheel and Bhuira were not given, therefore, the suit was bad for want of better particulars. There was non-compliance of Section 91 CPC read with Order 1 Rule 8 CPC. It is, in these circumstances, the present application has been preferred.

4. The application was contested by the defendants/non-applicants. It is averred specifically in the reply that the suit remained pending in the trial Court for about a decade and the appeal remained pending before the learned Addl. District Judge for a period of three years. The application was abuse of the process of the Court. The applicants have miserably failed to prove their case. There was no formal defect in the suit. No benefit could be derived by applicants at the belated stage regarding non-joinder of the necessary parties, more particularly, when the suit remained pending for almost 14 years. The applicants cannot be permitted to take advantage of their own negligence. The suit has been dismissed for lack of evidence and cannot be termed as formal defect. The applicants cannot, at this belated stage, claim that there was non-compliance of Section 91 CPC read with Order 1

Rule 8 CPC. The suit was never instituted in the representative capacity. Rather, there was no issue regarding non-joinder of necessary parties.

5. I have heard the learned Advocates and gone through the pleadings carefully.

6. The suit has remained pending, as noticed hereinabove, for a period of more than 10 years before the trial Court and appeal was pending before the learned Addl. District Judge, for almost three years. There is no formal defect in the plaint. The suit has been dismissed for lack of evidence. The map Ext. PW-1/A was not prepared by an expert. Ext. DW-4/C, map has been prepared by an expert. The applicants have failed to prove khasra numbers of water source called *Sharratu-ka-Nala, Patru-ka-Nala and Patru-ka-hall* at village Dhangheel and Bhuira. It was necessary for the applicants to verify the facts, more particularly, the khasra numbers of the water sources before filing the suit. No issue has been framed by the trial Court with regard to non-joinder of necessary parties. The suit was never filed in representative capacity. The negligence on the part of the applicants cannot be terms as formal defect in the plaint. The non-applicants cannot be permitted to face another round of litigation by permitting the applicants to withdraw this suit after lapse of about 15 years.

7. In the case of ***Vidhydhar Dube and ors. Vrs. Har Charan and others,*** reported in ***AIR 1971 All. 41,*** the Division Bench of the Allahabad High Court has held that the right of plaintiff to withdraw suit at appellate stage is not an absolute right but is subject to rights acquired by defendant under decree. It has been held as follows:

> "4. The learned counsel for the applicant has contended that the court below was in error in holding that the plaintiffs had no absolute right to withdraw the suit at the appellate stage under Order 23, Rule 1(1), Civil P. C. His submission is that appeal is a continuation of the suit and hence even in appeal the plaintiffs can withdraw the suit. We do not find any merit in this contention. A plaintiff has a right to continue or withdraw a suit till a decree comes into existence. Once the court makes a final adjudication and passes a decree, certain rights become vested in the party in whose favour the decree is made. Where the suit is dismissed, certain rights become vested in the defendants inasmuch as the findings given in the judgment become binding on the parties and operate as res judicata in subsequent litigation between the parties. The right of a plaintiff to withdraw the suit at the appellate stage thus becomes subject to the rights acquired by the defendants under the decree and ceases to be an absolute right.
>
> 5. Even when a suit is at the stage of trial and no decree therein has been passed, there may be cases where conceding an absolute right of withdrawal of suit to the plaintiff might result in serious injury to or jeopardise some valuable and substantive right of the defendant. A suit for accounts for instance may be filed by one of the partners of a dissolved firm. The defendants in such a suit may plead that the plaintiff himself is the accounting party and that on proper accounting they would be entitled to receive from him large sums of money, during the pendency of the suit it may become apparent that the suit is likely to culminate in a decree against him and he may seek to withdraw the suit. To hold that even under such circumstances that plaintiff has an absolute right to withdraw the suit, would be to acknowledge that the plaintiff's has an unfettered right to perpetrate fraud and dishonesty by defeating the legitimate rights of the defendants whose rights to file a fresh suit may have become barred by

limitation. If under such or similar circumstances, it becomes difficult to concede an absolute right to the plaintiff of withdrawal of suit, much less can any such right be recognized when a decree has been passed and an appeal against the same has been preferred, Sub-rule (1) of Rule 1 of Order 23 of the Code does not in terms apply to appeals and, whatever may be the legal position in the trial court, in the appellate court the plaintiff, be he an appellant or a respondent, cannot be held to possess any absolute right to with draw the suit.

6. The appellate court may permit the plaintiff to withdraw the suit when by such withdrawal no vested or substantive right of the defendant is to be adversely affected but the plaintiff may not be permitted to withdraw the suit at the appellate stage if it results in depriving the defendant of some vested or substantive right. In the appellate court, the appellant may be held to have an absolute right to withdraw the appeal by equating the words "suit", "plaintiff" and "defendants" occurring in Order 23, Rule 1(1) of the Code with the words "appeal", "appellant" and "respondents" but he has no absolute right to withdraw the suit. The withdrawal of the appeal will not adversely affect the respondents if they have filed any separate appeal or a cross-objection as the same will remain unaffected.

10. In our opinion at the stage of appeal, the plaintiff, if he had filed the appeal, has the right to withdraw the appeal but not the suit except with the leave of the Court. The order of the court below thus suffers from no error of law or jurisdiction."

8. In the case of ***Trinath Parida vrs. Sobha Bholaini and another,*** reported in ***AIR 1973 Orissa 37,*** the learned Single Judge has held that non-joinder of a necessary party is not a formal defect so as to attract the applicability of this rule. It has been held as follows:

"7. Opinion appears to be unanimous in all the High Courts that non-joinder of a necessary party is not a formal defect within the meaning of this rule. It is a defect which affects the root of the plaintiff's case and cannot be said to be a mere formal defect, (see AIR 1950 Bom 378 (Asian Assurance Co. Ltd. v. Madholal Sindhu and AIR 1956 Bom 632, (Tarachand Bapuchand v. G.A. Bagwan). In the circumstances, the application filed under Order 23, Rule 1, Civil P. C. has to be dismissed."

9. In the case of ***K.S.Bhoopathy and ors. Vrs. Kokila and others,*** reported in ***(2000) 5 SCC 458,*** the Hon'ble Supreme Court has held that before granting permission for withdrawal of suit, the Court is duty-bound to satisfy itself that proper grounds exist for granting such permission. Their lordships have further held that the permission to withdraw the suit with leave to file suit afresh cannot be taken recourse to where the claim as set out in the original suit is weak and adverse findings have been recorded against the plaintiff. It has been held as follows:

"13. The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non sait Therefore on principle an application by a plaintiff under sub-rule 3 cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule 1, In (he former it is actually a prayer for concession from the Court after satisfying the Court regarding existences of the circumstances justifying the grant of the such concession. No doubt, the grant of leave envisaged in sub-rule (3) of

Rule 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; (1) where the Court is satisfied that a suit roust fail by reason of some formal defect, and the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule (1) is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or courts below. Grant of permission for withdrawal of a suit with leave to file afresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of the cases.

17. From the above it appears that the approach of the High Court was that the plaintiff should have prayed for declaration of title which they had omitted to include in the plaint. It was for the plaintiffs to frame their suit in any form as advised. If they felt that there was a cause of action for declaration of their title to the suit property they could have made a prayer in that regard. If they felt that a declaration of their right to exclusive user of the pathway was necessary they should have framed the suit accordingly. One the other hand the plaintiffs merely sought a decree of injunction permanently restraining the defendants from disturbing their right of user of the property. From the facts and circumstances of the case as emanating from the judgments of the trial court and the first appellate court it is clear that the plaintiffs realised the weakness ia the claim of exclusive right of user over the property and in order to get over the findings against them by the first appellate court they took recourse of Order XXIII Rules 1(3) CPC and filed the application for withdrawal of the suit with leave to file fresh suit. The High Court does not appear to have considered the relevant aspects of the matter. Its approach appears to have been that since the interest of the defendants can be safeguarded by giving them permission for user of the pathway till adjudication of the controversy in the fresh suit to be filed, permission for withdrawal of the suit as prayed for can be granted. Such an approach is clearly erroneous. It is the duty of the Court to feel satisfied that

mere exist proper grounds/reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied by merely stating that grant of permission will not prejudice the defendants. In case such permission is granted at appellate or second appellate stage prejudice to defendant is writ large as he loses the benefit of the decision in his favour in the lower court."

10. In the instant case, the applicants have failed to satisfy the requirements of Order 23 Rule 1(3) in order to withdraw the suit with liberty to file fresh suit. The non-applicants have acquired rights after the suit was dismissed and the appeal was also dismissed by the learned Addl. District Judge. The defect was vital defect and not formal.

11. Accordingly, there is no merit in this application, the same is dismissed.

****

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

Ram Rattan. ...Appellant

Versus

State of H.P. ...Respondent.

Cr. Appeal No. 48 of 2013
Reserved on : 21.3.2015
Decided on: 26.3. 2015

Prevention of Corruption Act, 1988- Sections 7 and 13(2)- Complainant wanted to purchase a revolver – he was required to annex a certificate that he knew the handling of the fire arm – he approached the accused who demanded Rs.1,000/- for issuance of the certificate- the matter was reported to police on which FIR was registered and accused was caught red handed with the money- PW-2 and PW-3 did not support the prosecution version- there were contradictions in the testimonies of remaining material witnesses regarding the time of opening the door and the person who opened the door- accused did not have any statutory power to issue certificate- certificate issued by the accused did not have any diary number- mere recovery of money paid by complainant is not sufficient to prove the prosecution case- hence, accused acquitted. (Para-19 to 25)

Case referred:
Suraj Mal vs. The State (Delhi Administration), AIR 1979 SC 1408

For the Appellant : Mr. Anoop Chitkara, Advocate vice Mr. J.R. Poshwal, Advocate.
For the Respondent : Mr. Neeraj K. Sharma, Dy. A.G.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 22.2.2013 rendered by the Special Judge, Solan in Corruption Case No. 1-S/7 of 2012, whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offence punishable under section 7 and 13 (2) of the Prevention of

Corruption Act (hereinafter referred to as 'Act'), has been convicted and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.10,000/- and in default of payment of fine, to undergo further imprisonment for two months under Section 7 of the Act and he was also convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.20,000/- and in default of payment of fine to undergo imprisonment for six months under Section 13 (2) of the Act.

2. Case of the prosecution, in a nutshell, is that son of PW-1 Surender Singh was injured by one Mohan Singh by firing a gunshot in his leg. Mohan Singh used to threaten the complainant and his family members. In order to safeguard himself and his family members, complainant wanted to have a revolver and for this purpose, he was required to know handling of the fire arm. The complainant came to know that Commander Home Guard will give certificate to this effect. Thus on 9.5.2011, he visited the office of the Accused at Nalagarh alongwith application Ext. PG. The complainant was told by the accused that he would issue certificate to him subject to some 'Sewa Paani'. Complainant assured the accused to do his work and that he would see this aspect. On 11.5.2011, complainant contacted the accused on telephone. The accused told him that his work has been done. He demanded Rs.1,000/-. Complainant told accused that he would come to his office on 13.5.2011. Complainant did not want to give bribe. He was told on 13.5.2011 by some person to report the matter to vigilance officials. He was told that Vigilance Officers were present in the rest house. He went to the rest house alongwith PW-2 Amarjeet and PW-3 Dhiraj Kumar. He met PW-3 Ramesh Sharma, the then Deputy S.P., SV & ACB Solan. He handed over the application /complaint Ext. PA to him. He after, making endorsement, sent the same to the police station through PW-6 HHC Balbir Singh. FIR Ext. PW-10/A was registered by PW-10 Inspector Deep Ram. The raiding party was constituted. Complainant Surender Singh produced two currency notes each of Rs.500/- denomination to the police through PW-2 Amarjeet Singh. The currency notes were treated with Phenolphthalein powder. The same were handed over to Amarjeet. He put the currency notes in the pocket of the shirt of the complainant. Amarjeet Singh was directed to dip his fingers in a solution of sodium carbonate and its colour changed to pink. PW-2 Amarjeet was asked to remain in close vicinity of the complainant and to give signal to the trap party after the bribe money was given to the accused by the complainant. Pre-demonstration memo Ext. PB was prepared. The members of the trap party proceeded to the office of accused and they reached there at 5.15 pm. Complainant and shadow witness PW-2 Amarjeet Singh went ahead, whereas remaining members of the trap party remained behind. The complainant met the accused outside his office. The office was locked. The complainant enquired from the accused about his work. Accused replied that it has been done. Thereafter, accused handed over certificate Ext. PE to the complainant. He handed over Rs.1000/- to the accused. He put the currency notes in a diary on which signal was given by the complainant to the shadow witness and he further gave signal to the remaining members of the trap party. The Vigilance Officials arrested the accused. The key of office room of the accused was procured from Home Guard personnel and office room was got opened. Thereafter, the hand wash of the accused was conducted with plain water in a plate, whose colour did not change. Thereafter, solution of Sodium Carbonate was prepared in a separate glass which was mixed with the hand wash of the accused and it turned to light pink in colour. The solution so prepared was put in a glass nip, which was packed and sealed with seal impression "Y" and was sealed vide memo Ext. PC. Impression of seal was taken separately vide Ext. P3. Numbers of currency notes were tallied. Complainant produced certificate Ext. PE which was seized vide memo Ext. PF and application Ext. PG was seized vide memo Ext. PH alongwith diary Ext. P1. Site plan was prepared. The case property alongwith sample seal was deposited with PW-7 Anil Kumar. He made entry in the Malkhana Register vide Ext. PW7/A. The sealed nip alongwith sample seal was forwarded to the State Forensic Science

Laboratory, Junga through constable PW-11 Krishan Lal vide RC Ext. PW-7/B. Admitted handwriting Ext. PW-9/F to Ext. PW-9/P of the accused was obtained from the record of the office from Ramanand Kashyap vide letter Ext. PW-13/D. The specimen signature, Ext. PW-9/B to Ext. PW-9/E of accused were obtained in the presence of JMIC Solan. The report of FSL Junga is Ext. PW-9/Q. The police completed the investigation and challan was put up in the Court after completing all the codal formalities.

3. Prosecution examined as many as 16 witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He has admitted that complainant visited his office on 9.5.2011, as he was posted as Company Commander in Home Guards, Nalagarh. Complainant visited with application Ext. PG for the purpose of obtaining a certificate. He told him that he cannot give any such certificate. Therefore, he did not entertain the application. He has denied that he has demanded and accepted Rs.1000/- from the complainant. Learned trial Court convicted and sentenced the accused, as noticed hereinabove.

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

5. Mr. Neeraj K. Sharma, Deputy Advocate General, has supported the judgment of conviction passed by the trial Court.

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

7. PW-1 Surender Singh is the complainant. He has testified that Mohan Singh used to threaten him and members of his family. He used to demand Rs.15.00 Lakh. Mohan Singh had fired at his son and injured his leg. In order to safeguard his body and the members of his family, he wanted to have a revolver. He was told that he should be knowing the handling of the arms. In this connection, he came to know that the Commandant Home Guards would give a certificate to this effect. On 9.5.2011, he visited the office of the accused alongwith application Ext. PG. Accused told him that he would do it subject to some 'Sewa Pani'. He told him to do the work and he would see this aspect. Thereafter he contacted the accused on telephone on 13.5.2011. The accused told him that his work has been done and asked him to bring Rs.1,000/-. He told him that he would come on 13.5.2011. He wrote an application and went to the rest house alongwith Amarjeet and Dheeraj Kumar. He handed over the application to the DY.SP. He handed over two currency notes of Rs.500/- denomination each to Amarjeet Singh, who further gave these notes to the police. The Police noted down the serial numbers of the currency notes. Pre-trap demonstration was given. Police instructed him to give a signal by raising his hand over his head after delivery of the currency notes to the accused. When he reached near the office of the accused, he was found standing outside his office. His office room was locked. He went to the accused. When he enquired from the accused about his work, he told that it has been done. The accused gave him certificate after taking it out from the diary. Then he read the certificate and gave him Rs.1,000/-. Accused had also made a demand on 13.5.2011. He had given the money after the demand by the accused. The accused had taken the currency notes in his hands. Thereafter, he put those currency notes in the diary and then he had given the assigned signal. The police raiding party appeared and caught hold of the accused from his wrists. Thereafter, the police told the accused to open his office room. It was got opened after taking the telephone number from the accused of some Home Guard, who came and opened the lock. The police have taken into possession currency notes, which were delivered by the accused to the police after taking the same from his diary. Police compared the serial numbers of these currency notes. In his cross-examination, he has

admitted that Ext. PG was got written by him at Nalagarh. He has categorically admitted that he has not mentioned in Ext. PG that he wanted a certificate to the effect that he knows handling of weapons and maintaining the same. Ext. PA was also written by some other person.

8. PW-2 Amarjeet has deposed that no proceedings have taken place in his presence in the rest house. He was declared hostile and cross-examined by the learned Public Prosecutor. He did not know that Surender Singh in order to obtain certificate had approached accused, who was a Company Commander. He has denied that Surender Singh had given two currency notes of Rs. 500/- denomination to the Police through him. He has denied that police have obtained his handwash with plain water in a glass tumbler and put some powder, but its colour did not change. He has denied that currency notes were treated with another powder and serial numbers of the currency notes were noted down. He has denied that Police had given him treated currency notes for putting in the pocket of shirt of the accused. He has also denied that his hands were got immersed in the already prepared solution in a glass tumbler. He had denied that the colour changed to pink. He has denied that he was given instructions to remain close to the complainant and accused and to witness the occurrence and also to hear the conversation. He has admitted his signatures Ext. PB. He has also denied that he had accompanied Surender Singh and thereafter to the office of the accused. He has also denied that accused met them outside his office. He has denied his presence there. He has also denied that there was some talk between Surender Singh and the accused and accused handed over him certificate after taking the same from his diary. He has also denied that they were directed by the police to give signal after handing over the money to accused. He has also denied that police officials immediately came there and caught hold of accused. He has also denied that solution with some other powder was prepared separately in a glass and when two solutions were mixed, the colour changed to pink. He has also denied that the same was put in a nip. He has denied his signature Ext. P2. He has denied that Ext. PC was prepared in his presence though he has signed at point 'B'. He has denied that accused handed over two currency notes of Rs. 500/- denomination from his diary, numbers of which tallied with the numbers already noted down. He has admitted his signatures Ext. P1. He has admitted that sample seal Ext. P3 bears his signatures. He has also admitted that memo Ext. PD bears his signatures. According to him, the same was not prepared by the police in his presence. He has denied that Surender Singh handed over the certificate Ext. PE to the police in his presence through memo Ext. PF.

9. PW-3 Dheeraj Kumar has also not supported the case of the Prosecution. He was declared hostile. He was cross-examined by the learned Public Prosecutor. His statement is on the same and similar lines as made by PW-2 Amarjeet.

10. PW-4 Raj Kumar has deposed that he went to the Superintendent of Division, where Vigilance official was sitting. He was directed by the Superintendent to go alongwith the Vigilance officials. He was taken to the office of Home Guards in a vehicle. He saw that Vigilance police has caught hold of the accused outside the office of the Company Commander of the Home Guards. Thereafter, the room of the office of accused was got opened by the Vigilance police. Accused was taken inside. The hands of accused were got washed in a plate with plain water. The colour of which remained clear. Thereafter, a powder was put in a glass alongwith some water. The hands of accused were washed with the solution of glass tumbler. Solution of glass tumbler put in the hand was drained in the plate and colour of mixture changed to red. The mixture was taken in a nip, which was packed with seal impression "Y". His signatures were taken on a nip Ext. P3. The numbers of currency notes were tallied. The notes Ext. P5 and Ext. P6 were the same.

11, PW-5 Bhag Singh has deposed that he was working as a Clerk. Ext. PE was in his handwriting and bears signatures of Ram Rattan accused, in circle 'A'. In his cross-examination, he has deposed that Surender Singh had come again after two three days for the certificate but the accused had told him that he has no such powers to issue certificate. Surender Singh got annoyed and left the office.

12. Statement of PW-6 is formal in nature.

13. PW-7 Anil Kumar, on 16.5.2011, delivered the sealed nip to Krishan Lal for its onward delivery to FSL vide RC No. 14/11. On 5.7.2011, report of FSL was received by head constable Yog Raj.

14. Statement of PW-8 Yograj is formal in nature.

15. PW-9 Dr. Jagjit Singh has proved Ext. PW-9/B to Ext. PW-9/Q. In his cross-examination, he has admitted that he has given the reasons Ext. PW-9/R for the first time in the court.

16. Statements of PW-10 Inspector Deep Ram, PW-11 Krishan Lal, PW-12, Madan Lal and PW-13, Pawan Kumar, are formal in nature.

17. PW-14 Ramanand Kashyap has supplied the record containing admitted handwriting of Ram Rattan vide Ext. PW-9/F to Ext. PW-9/P.

18. PW-15 Inspector Hari Ram has deposed that complainant Surender Singh alongwith Amarjeet and Dheeraj Kumar came to PWD rest house. He lodged complaint against Ram Rattan. Thereafter, Ramesh Kumar DY.S.P. gave pre-trap demonstration. He has also deposed the manner, in which currency notes were treated with Phenolphthalein powder and handed over to Amarjeet. He put those currency notes in the left pocket of the shirt of Surender Singh. The fingers of Amarjeet were got washed in the solution of Sodium Carbonate and the colour of solution turned pink. The complainant was instructed to give signal to shadow witness Amarjeet, after the bribe was given to the accused. The complainant and shadow witness were sent ahead and rest of the witnesses followed them. When they reached near the office of accused, they found him standing outside his office. The complainant was standing besides him and after some time at about 5.15 pm, shadow witness gave signal and thereafter, SI Naresh Kumar and HHC Karam Chand caught hold of the accused from his wrists. He asked the accused for the keys of the office room of the accused, who gave him telephone number of one Home guard personnel. The key was obtained and the office of the accused was got opened. Thereafter, the hands of the accused got washed with plain water in a plate whose colour did not change and thereafter a solution of sodium carbonate was prepared in a glass tumbler. This solution was mixed with the hand wash in the plate. It turned into light pink which was taken in a glass nip packed and sealed with seal impression "Y". In his cross-examination he has admitted that there are many residential houses near the office of the accused. The office of PWD official who was joined in the investigation was at a distance of 1½ k.m. from the office of accused. No person was joined from the residential houses near the house of the accused. The statement of the home guard jawan, who had allegedly brought the keys was not recorded nor he knew his name. He did not remember his telephone number on which he informed nor he made any note of it anywhere in the investigation. He has admitted in his cross-examination that in the statements of SI Naresh Kumar and Head Constable Karam Chand under Section 161 Cr.P.C., there was a mention that key of the office of the accused was taken from the accused himself. They reached the office of the accused at 5 p.m. He has admitted that the office time of the accused was 10 a.m. to 5 p.m. He has admitted that certificate Ext. PE did not bear any diary number. PW-16 Ramesh Sharma has deposed that Surender Singh along

with two other persons Amarjit and Dheeraj came to rest house Nalagarh and gave a written complaint Ext. PA. Thereafter, a raiding team was constituted. In his cross-examination, he has admitted that no separate memo of hand wash of raiding party was prepared. He did not preserve the hand wash solution of pre-trap demonstration. He has admitted that he has not mentioned in pre-trap memo Ex.PB that Amarjeet shadow witness would see and hear everything between Surender and accused. He has also admitted that it has been recorded in statement under section 161 of the Code of Criminal Procedure that he came to know at about 4.30 P.M. that the accused had been taken into custody in trap case. He did not know at what distance the office of the accused was situated from the Rest House. He did not know from whom Surender Singh got the application Ex.PA written.

19. Case of the prosecution, in a nutshell, is that complainant Surender wanted to have a revolver and for that purpose it was required that he should know handling of the fire arm. He moved an application Ex.PG before the accused on 9.5.2011. He contacted the accused on 11.5.2011. The accused demanded a sum of Rs. 1000/- from the complainant. He told that he would visit his office on 13.5.2011. Thereafter, raiding party was constituted. Accused was apprehended and the money was seized.

20. According to PW-1 Surender Singh, every thing has happened in presence of PW-2 Amarjeet and PW-3 Dheeraj Kumar. The Court has already noticed that neither PW-2 Amarjeet nor PW-3 Dheeraj Kumar has supported the case of prosecution. They were cross-examined by the learned Public Prosecutor. PW-2 Amarjeet, in his cross-examination by the Public Prosecutor has deposed that Surender had not told him that accused had demanded Rs. 1000/- for the issuance of certificate. He has denied that Surender had given two currency notes of Rs. 500/- denomination to police through him. He has also denied that he had accompanied Surender to the office of the accused. Similarly, PW-3 Dheeraj Kumar has denied that Surender had told him that accused has demanded Rs. 1000/- for the issuance of certificate. He has also denied that Surender had given two currency notes of Rs. 500/- denomination to police through Amarjeet. He has also denied that police had obtained hand wash of Amarjeet with plain water in a glass tumbler and put some powder but its colour did not change. He has also denied that police had given treated currency notes to Amarjeet for putting the same in the pocket of the shirt of the complainant. He has denied that he was given instructions to remain closer to the complainant and accused and to witness the occurrence and also to hear the conversation. He has denied that accused met them outside his office. He has also denied that accused demanded Rs. 1000/- from Surender which was handed over by Surender to him and was put by the accused in his diary.

21. PW-4 Raj Kumar has deposed that he saw that Vigilances Police had caught hold of the accused outside the office of the Company Commander of the Home Guard. Thereafter, the room of the office of the accused was got opened by the Vigilance Police. The accused was taken inside. PW-5 Bhag Singh has deposed that accused told the complainant that he had no power/authority to issue certificate. The accused got annoyed and left the office. PW-9 Dr. Jagjeet Singh has proved report Ex.PW-9/Q. PW-15 Inspector Hari Ram has deposed that when they reached near the office of the accused, they found him standing outside his office and complainant was standing besides him. After sometime at about 5.15 P.M. shadow witness gave signal and thereafter SI Naresh Kumar and HHC Karam Chand caught hold of the accused from his wrists. He has also deposed that he asked the accused for the key of his office, who gave him a telephone number of one Home Guard Personnel. The key was obtained and the office room of the accused was got opened and thereafter the hands of the accused were got washed with plain water in a plate whose colour did not change. In his cross-examination, he has admitted that in the

statements of SI Naresh Kumar and HC Karam Chand under section 161 of the Code of Criminal Procedure, there is a mention that the key of the office of the accused was taken from the accused. PW-15 has also admitted that the office time of the accused was 10.00 A.M.to 5.00 P.M. PW-16 Ramesh Sharma has admitted that he has not mentioned in pre-trap memo Ex.PB that Amarjeet shadow witness would see and hear everything between Surender and accused. According to PW-1 Surender Singh and PW-15 Hari Ram accused gave telephone number of Home Guard Personnel and thereafter, key was obtained and the office room of accused was got opened. The hands of the accused were got washed with plain water in a plate. However, PW-15 Hari Ram, in his cross-examination, as noticed hereinabove, has admitted that statement of the home guard jawan, who had allegedly brought the key was not recorded. He did not remember his telephone number on which he was informed to come nor he made any note of it anywhere in the investigation record. It has also come in the statement of PW-15 Hari Ram that as per the statements of Naresh Kumar and Karam Chand under section 161 Cr.P.C., the key of the office of accused were taken from the accused and thereafter the office was opened. Thus, there are contradictions in the statements of the material witnesses at what time the door was opened and who opened the door.

22. Case of the prosecution, in a nutshell, is that the accused demanded Rs. 1000/- from the complainant for the issuance of certificate. There is a detailed procedure the manner in which the arms licence is to be issued under the Arms Act, 1959. Section 13 of the Arms Act, 1959 provides that an application for the grant of a licence shall be made to the licensing authority and shall be in such form, contain such particulars and be accompanied by such fee, if any, as may be prescribed. It is further prescribed that on receipt of an application, the licensing authority shall call for the report of the officer in charge of the nearest police station on that application and such officer shall send his report within the prescribed time. Rule 51 of the Arms Rules, 1962 provides that every application shall be submitted in form 'A'. In form 'A', column No.6, prepared under rule 51 of the Arms Rules, 1962, it is written as "nearest police station" and not the Commandant of the Home Guards. The accused had already told the complainant that he has no authority/power to issue certificate as his defence has been supported by PW-5 Bhag Singh. PW-5 Bhag Singh has admitted that accused had told the complainant that he has no power to issue certificate.

23. Mr. Neeraj Sharma, learned Deputy Advocate General has vehemently argued that certificate Ex.PE was issued by the accused. The Court has seen Ex.PE, but there is no diary number on it. PW-15 Hari Ram has admitted that certificate Ext. PE did not bear any diary number. PW-9 Dr. Jagjeet Singh should have given his reasons at the time of preparing the report Ex.PW-9/Q. He has submitted the reasons only in the court while appearing as PW-9 vide Ex.PW-9/R. The prosecution has also not examined any independent witness though there were residential houses near the place where the accused was allegedly apprehended. Thus, the place neither was isolated nor secluded. Mr. Neeraj Sharma has also argued that the currency notes were recovered from the possession of the accused.

24. Their Lordships of the Hon'ble Supreme Court in ***Suraj Mal*** vs. ***The State (Delhi Administration)***, AIR 1979 SC 1408 have held that mere recovery of money from accused is not sufficient. Their Lordships have held as under:

> **"2. The defence of the appellant was that he was falsely implicated and nothing was recovered from him nor did he make any demand for bribe. The Special Judge on the basis of the evidence led before the Court held that the evidence was extremely shaky and unconvincing and was not**

sufficient to convict Ram Narain but nevertheless the trial court convicted the appellant on that very evidence. In upholding the conviction of the appellant the High Court completely overlooked the fact that the very evidence on which the conviction of the appellant was based, had been rejected with respect to the same transaction and thus if one integral part of the story given by witnesses was not believable, then the entire case failed. In other words, the position was that while P.Ws. 6, 8 and 9 were disbelieved both in regard to the factum of payment of the bribe and the recovery of the money, regarding Ram Narain, the very same witnesses were believed so far as the appellant was concerned. It is well settled that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses. For these reasons, therefore, when the Special Judge disbelieved the evidence of P.Ws. 6, 8 and 9 in regard to the complicity of Ram Narain, it was not open to him to have convicted the appellant on the same evidence with respect to the appellant, which suffered from same infirmities for which the said evidence was disbelieved regarding the complicity of Ram Narain. If the witnesses drew no distinction in the examination-in-chief regarding acceptance of bribe by Ram Narain and by the appellant and the witnesses were to be disbelieved with respect to one, they could not be believed with respect to the other. In other words, the evidence of witnesses against Ram Narain and the appellant was inseparable and indivisible. Moreover, there is an additional circumstance which throws a serious doubt on the complicity of the appellant Suraj Mal. Although, in his statement at p. 71 of the paper-book, the complainant has clearly stated that all the three accused including the appellant had met him and demanded bribe of Rs. 2,000, the appellant having demanded Rs. 100, yet in the report which he lodged before Mr. Katoch, there is no mention of the fact that the appellant at any time demanded any bribe at all. Even the presence of the appellant at the time when the demand was made by Devender Singh has not been mentioned, in this document. This report, undoubtedly contains reference to a demand having been made by the S.H.O. Devender Singh on behalf of the appellant, but there is no statement in this report that any demand was made by Suraj Mal directly from the complainant. If, in fact, the appellant would have demanded bribe from the complainant just on the previous evening, it is not understandable why this fact was not mentioned in the report which the complainant submitted to the D.S.P. Katoch and which is the F.I.R. constituting the evidence. We have perused the statements of P.Ws. 6, 8 and 9 and we find that while in the examination-in-chief they have tried to implicate all the three accused persons equally without any distinction, in their cross-examination, they have tried to save Ram Narain and made out a different story so far as Ram Narain is concerned and have even gone to the extent of stating that he did not demand any money and that he refused to accept the money which was offered to him. In this state of the evidence, we feel that the High Court was not right in convicting the appellant. Mr. Lalit appearing for the State vehemently submitted that

whatever be the nature of the evidence in the case, it is an established fact that money had been recovered from the bush-shirt of the appellant and that by itself is sufficient for the conviction of the accused. In our opinion, mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. Moreover, the appellant in his statement under S. 342 has denied the recovery of the money and has stated that he had been falsely implicated. The High Court was wrong in holding that the appellant had admitted either the payment of money or recovery of the same as this fact is specifically denied by the appellant in his statement under S. 342 Cr. P. C. Thus mere recovery by itself cannot prove the charge of the prosecution against the appellant, in the absence of any evidence to prove payment of bribe or to show that the appellant voluntarily accepted the money. For these reasons, therefore, we are satisfied that the prosecution has not been able to prove the case against the appellant beyond reasonable doubt. We, therefore, allow the appeal set aside the conviction and sentences passed against the appellant. The appellant will now be discharged from his bail bonds."

25. Consequently, in view of analysis and discussion made hereinabove, the prosecution has failed to prove the case for the offence alleged against the accused beyond reasonable doubt against the accused.

26. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 22.2.2013 rendered in Corruption Case No. 1-S/7 of 2012 is set aside. Accused is acquitted of the charge framed against him by giving him benefit of doubt. Fine amount, if already deposited, be refunded to the accused. Bail bonds are discharged.

****

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

Singhu Ram .....Appellant.
Versus
State of H.P. .....Respondent.

RSA No. 433 of 2002.
Decided on: March 26, 2015.

H.P. Land Revenue Act, 1954- Section 163- Defendant filed an application before the Settlement Collector for recording his possession over Khasra Nos. 973/1 and 965/1 – this application was referred by the Collector to Settlement Naib Tehsildar - the field agency of the settlement had carried out the local investigation and the name of the defendant was recorded to be in possession without any status- proceedings were initiated against the defendant under Section 163 of H.P. Land Revenue Act- defendant raised the claim of adverse possession, which was decided against him- held, that defendant had not filed any written statement to assert adverse possession- defendant had also not cross examined the Field Kanungo- he was ejected from the land as per record- held, that in view of these circumstances, finding recorded by the Court that defendant had failed to prove adverse possession cannot be faulted. (Para-8 and 9)

For the appellant: Mr. G.D.Verma, Sr. Advocate, with Mr. B.C.Verma, Advocate.
For the respondent: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree dated 8.7.2002, of the learned District Judge, Kinnaur, Civil Division at Rampur Bushahr, H.P., rendered in Civil Appeal No. 1 of 2002.

2. Key facts, necessary for the adjudication of this second appeal are that the appellant-defendant had instituted application on 19.5.1993 before the Settlement Collector and requested that he be recorded in possession of Kh. Nos. 973/1 and 965/1, measuring 0-19-73 hectare of revenue estate Karoli. The Settlement Collector referred the application to the A.C. Ist Grade-cum-Tehsildar, Rampur for necessary action. The A.C. Ist Grade-cum-Tehsildar, Rampur Bushahr, referred the application to Settlement Naib Tehsildar. The field agency of the settlement had carried out the local investigation and proceeded to record the appellant in possession of Kh. Nos. 973/1 and 965/1, measuring 0-19-73 hectare without any status. The proceedings were initiated against the appellant under Section 163 of the H.P. Land Revenue Act, 1953 (hereinafter referred to as the Act). These proceedings were transferred to A.C. IInd Grade, Nankhari for necessary action. The A.C. IInd Grade, Nankhari, on 17.9.1997 issued order of ejectment of appellant from the land in question. The appellant preferred Civil Appeal No. 23 of 1997 against the order dated 17.9.1997, before the learned District Judge, Kinnaur at Rampur Bushahr. The learned District Judge, Kinnaur at Rampur Bushahr, allowed the appeal vide judgment dated 20.2.1998 and remanded the matter to A.C. IInd Grade for disposal afresh in accordance with law. The appellant did not appear before the A.C. IInd Grade, Nankhari on 6.3.1998. The ejectment order was passed by the A.C. IInd Grade, Nankhari. The warrant of ejectment was issued against the appellant on 6.4.1998. The appellant was ejected on 18.7.1998. Report No. 492 was registered by the Field Kanungo in the Daily Diary of the village Patwari on 18.7.1998. The appellant moved an application for setting aside the ex-parte order dated 6.3.1998. The A.C. IInd Grade, on 3.7.1998 rejected the applications of the appellant on the ground of limitation. The appellant preferred an appeal bearing FAO No. 282/98 in this Court against the order dated 3.7.1998. This Court allowed the FAO No. 282/98 on 28.8.1998 and ex-parte order dated 6.3.1998 was set aside. The parties were directed to appear before the A.C. IInd Grade, Nankhari on 25.9.1998.

3. The A.C. IInd Grade, Nankhari, referred the proceedings to the Collector. Vide order dated 2.11.2000, the Collector transferred the proceedings under Section 163 of the Act against the appellant to the A.C. Ist Grade, Rampur. The A.C. Ist Grade, Rampur has taken up the proceedings on 26.12.2000. The appellant did not file any written statement despite opportunity granted. The matter was adjourned repeatedly. The A.C. Ist Grade, Rampur, decided the question of adverse possession against the appellant. The A.C. Ist Grade, Rampur returned the findings that the respondent-plaintiff was in possession of the suit land comprised in Kh. Nos. 973/1 and 965/1, measuring 0-19-73 hectare, situated in Chak Karoli and the appellant has encroached upon the suit land. It was also observed by him that the appellant stood dispossessed from the suit land. The appellant has filed an appeal before the learned District Judge, Rampur Bushahr. The learned District Judge, Rampur Bushahr, dismissed the same on 8.7.2002. Hence, this regular second appeal.

4. This regular second appeal was admitted on 22.10.2002 on the following substantial questions of law:

> "1. Whether the Hon'ble High Court of H.P. having set-aside the order dated 6.3.1998 in FAO No. 282/98, on which date, the appellant was proceeded exparte, therefore, trial of the suit was required to be carried afresh and, since, this has not been done, therefore, findings by both the courts below are vitiated.
>
> 2. Whether in the absence of plaint on behalf of the respondent, ld. Assistant Collector Ist Grade was not competent to proceed in the matter and the appellant could have been required to file written statement, only when there was a valid plaint."

5. Mr. G.D.Verma, learned Senior 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. He then contended that after the judgment rendered by this Court in FAO No. 282 of 1998 dated 6.3.1998, the trial of the suit was required to be carried out afresh. He lastly contended that his client was not required to file written statement. On the other hand, Mr. Parmod Thakur, Addl. Advocate General for the respondent-State has supported the judgment and decree/orders passed by the Courts below.

6. I have heard the learned Advocates for both the sides and gone through the records of the case carefully.

7. Since both the substantial questions of law are interconnected, hence are being taken up together for disposal.

8. The appellant has moved an application for recording his possession over Kh. Nos. 973/1 and 965/1, measuring 0-19-73 hectare, situated in Chak Karoli. The Field Agency has carried out local inspection. The Agency has proceeded to record the appellant in possession of Kh. Nos. 973/1 and 965/1, measuring 0-19-73 hectare, situated in Chak Karoli, as encroacher. The eviction proceedings were initiated against the appellant under Section 163 of the Act. The order of ejectment was passed against the appellant on 17.9.1997. The learned District Judge, Kinnaur at Rampur Bushahr set aside the order dated 17.9.1997 and order the parties to appear before the A.C. IInd Grade on 6.3.1998. The appellant was proceeded exparte by the A.C. IInd Grade, Nankhari and warrant of ejectment was issued against him on 6.4.1998. It was duly executed on 18.7.1998. The necessary entries were made in the daily dairy of the village Patwari on 18.7.1998 vide report No. 492. The appellant moved an application on 27.6.1998 for staying the operation of the order dated 6.3.1998 and also moved an application for setting aside the orders dated 6.3.1998. The A.C. IInd Grade, Nankhari, dismissed the application(s) of the appellant, which led to the filing of FAO No. 282/1998 before this Court. This Court vide order dated 28.8.1998, allowed the first appeal. The Collector has transferred the proceedings to A.C. Ist Grade, Rampur. The appellant did not file any written statement, though numerous opportunities were granted to him. Since no written statement was filed, the matter was decided by the A.C. Ist Grade, Rampur on 5.9.2001 by passing a detailed and speaking order. The A.C. Ist Grade, Rampur has framed the issues and has found the appellant to be encroacher upon the suit land i.e. over Kh. Nos. 973/1 and 965/1, measuring 0-19-73 hectare.

9. The appellant had already been ejected when the FAO No. 282 of 1998 was allowed by this Court on 28.8.1998. It was incumbent upon the appellant to file written

statement and lead his evidence to prove the plea of adverse possession by taking specific plea. The A.C. IInd Grade, Nankhari, has examined Sh. Bala Nand, Field Kanungo on 30.8.2000. The appellant was given full opportunity to cross-examine the witness but the appellant despite opportunity has not cross-examined Sh. Bala Nand, Field Kanungo on 30.8.2000. The appellant has not disclosed in the grounds of appeal in FAO No. 282 of 1998 that he stood ejected on 18.7.1998. His wife and son were present on the spot at the time of his dispossession. There is no merit in the contention of Mr. G.D.Verma, learned Senior Advocate that the trial of the suit was required to be carried out afresh after the orders dated 6.3.1998 rendered in FAO No. 282 of 1998. The appellant, as noticed hereinabove, was given opportunity to file written statement, lead his evidence and cross-examine the witness produced by the respondent-State. He has neither filed any written statement to the notice served upon him under Section 163 of the Act, nor has he led any evidence. The learned Courts below have correctly appreciated the oral as well as the documentary evidence on record. The substantial questions of law are answered accordingly.

10. Consequently, there is no merit in this regular second appeal, the same is dismissed. No costs.

****

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

Chainka Ram ... Appellant

Versus

State of Himachal Pradesh ... Respondent

Cr. Appeal No. 208 of 2011
Judgment reserved on : 17.3.2015
Date of Decision : March 30, 2015

N.D.P.S. Act, 1985- Section 20- Accused 'C' was found in possession of gunny sack containing 16.2 kg. of charas- recovery was not effected in the presence of police officials- no independent witness was associated- testimonies of police officials are corroborating each other on material particulars- minor contradiction regarding the time spent in conducting the search and seizure operation was not sufficient to discard the testimony- incident had occurred at a lonely place and no independent witness was available- police did not have any prior information and the recovery was effected by chance- hence, there was no requirement of compliance of Sections 42 and 50 of N.D.P.S. Act- held, that in these circumstances, prosecution case was established beyond reasonable doubt and the accused was convicted. (Para-10 to 30)

Cases referred:

Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722

Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760

Girja Prasad v. State of M.P., (2007) 7 SCC 625

Aher Raja Khima v. State of Saurashtra, AIR 1956

Tahir v. State (Delhi), (1996) 3 SCC 338

For the appellant : Mr. Ajay Chandel, Advocate, for the appellant.

For the respondent : Mr. Ashok Chaudhary and Mr. V. S. Chauhan, Addl. Advocate Generals with Mr. J. S. Guleria, Asstt. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 30.4.2011, passed by learned Special Judge, Fast Track Court, Chamba, District Chamba, H.P., in Sessions Trial No. 11 of 2010, titled as State of Himachal Pradesh vs. Chainka Ram & another, 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 10 years and pay fine of Rs.1,00,000/- and in default of payment of fine to undergo simple imprisonment for one year, 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 14.1.2010, at about 1.35 p.m. police party headed by Inspector Brij Mohan Sharma (PW-7), comprising of Constable Yog Raj (PW-1), HC-Ashok Kumar (PW-5), HC-Deep Kumar (PW-6), HC-Avinder Singh (not examined) and HHG-Sudershan left Police Station Tissa on a patrol duty, in connection with detection of crime. At about 3.45 p.m., when they reached at a place known as Maseu Naala, they saw two persons coming from Himgiri side. Seeing the police party, they got perplexed and tried to flee away but were apprehended by the police officials. On query, both disclosed their names as Chainka Ram (appellant herein) and Sanju Kumar (co-accused), respectively. Suspecting that they might be carrying some contraband substance, after apprising them of their legal right of being searched in accordance with law, both the accused, who consented to be searched by the police party vide memo (Ext. PW-5/A), were searched. Though from personal search nothing incriminating was recovered but however, from the sack so carried by Chainka Ram, charas in the shape of sticks was recovered, which upon weighment was found to be of 16.2 kilograms. The sack was sealed with five seals of seal impression – P. Specimen of seal impression (Ext. PW-5/C) was taken on a piece of cloth. NCB forms (Ext.PW-4/F), in triplicate, were filled up on the spot and contraband substance seized vide memo (Ext. PW-5/D). Inspector Brij Mohan Sharma sent Ruka (Ext. PW-2/A) through HC-Deep Kumar (PW-6), on the basis of which HC-Madan Lal (PW-4) registered F.I.R. No. 8/2010, dated 14.1.2010 (Ext. PW-4/A) at Police Station Tissa, Distt. Chamba, H.P., under the provisions of Sections 20 and 29 of the Act. Necessary investigation was also conducted and completed on the spot. Also accused were arrested. Case property along with the NCB forms was handed over to HC-Madan Lal (PW-4), also officiating as MHC at the police station, who kept the same in the maalkhana. Special Report (Ext. PW-2/B) was sent to the superior officer which was received in the office of the Superintendent of Police Chamba by HC-Subhash Sharma (PW-2). For Chemical analysis, Const. Som Parkash (PW-3) took the parcel along with NCB forms and deposited the same at the State Forensic Science Laboratory, Junga. Report (Ext. PX) so received was taken on record. With the completion of investigation, challan was presented in the Court for trial.

3. Accused Chainka Ram (appellant herein) was charged for having committed offences punishable under the provisions of Section 20 and 29 of the Act and his co-accused Sanju Kumar was charged for having committed an offence punishable under Section 29 of the Act, to which they did not plead guilty and claimed trial.

4. In order to prove its case, in all, prosecution examined as many as seven witnesses and statements of both the appellant-accused as also his co-accused under Section 313 Cr. P.C. were recorded, in which appellant took the following defence:

> "I am innocent. I alongwith my son were picked up by the police from our home and taken to Tissa where a false case was planted."

In defence he also examined Jaram Singh (DW-1), Sudershan Kumar (DW-2) and Amar Singh (DW-3), as witnesses.

5. Appreciating the material on record, including the testimonies of the witnesses, trial Court found the prosecution not to have proved the charge so framed under Section 29 of the Act, as such, both the appellant as also co-accused were acquitted. However, appellant Chainka Ram was found guilty of having committed an offence punishable under the provisions of Section 20 of the Act and thus sentenced as aforesaid. Hence, the present appeal.

6. We have extensively heard learned counsel appearing on both sides and perused the record.

7. Learned Additional Advocate General, under instructions, has clarified that no appeal either stands filed or is sought to be filed against the judgment of acquittal of the other accused person. Also finding qua acquittal of appellant, with respect to other charge, is also not assailed.

8. Before us, Mr. Ajay Chandel, learned counsel for the appellant has made the following submissions: (i) Testimony of police officials being contradictory in nature, renders the genesis of the prosecution case to be doubtful. In any event their version stands belied by a member of the raiding party who was so examined in defence as DW-2; (ii) Record reveals that though police had prior information, yet they did not take any action under Section 42 of the Act, rendering the prosecution case to be fatal; (iii) Prosecution version of having searched the accused only after complying with the provisions of Section 50 of the Act, is not borne out from the record; and (iv) In view of the law laid down by this Court in Cr. Appeal No. 178 of 2012, titled as *Pawan Kumar vs. State of Himachal Pradesh*, accused is liable to be acquitted even with regard to the charge so framed under Section 20 of the Act.

9. On the other hand, Mr. Ashok Chaudhary, learned Addl. Advocate General has supported the judgment for the reasons set out therein.

10. Undisputedly, prosecution has not examined any independent witness. Recovery was also not effected from the conscious possession of the appellant in the presence of any independent witness. In order to establish its case, beyond reasonable doubt, prosecution has referred to and relied upon the testimonies of police officials namely Constable Yog Raj (PW-1), HC-Ashok Kumar (PW-5), HC-Deep Kumar (PW-6) and Inspector Brij Mohan Sharma (PW-7).

11. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required, duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have

some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people, in that event, no credibility can be attached to the statement of such witness.

12. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

13. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction. [See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

14. Apex Court in *Tahir v. State (Delhi)*, (1996) 3 SCC 338, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

15. In view of the aforesaid statement of law, we shall now examine the testimony of police officials.

16. Inspector Brij Mohan Sharma (PW-7) categorically states that in his officiating capacity as the Station House Officer of Police Station Tissa, on 14.1.2010, he along with police party comprising HC-Ashok, HC-Avinder Singh, Const. Yog Raj, Const. Deep Kumar and HHG Sudershan left towards Nakrod and Himgiri area in connection with patrol duty. Entry (Ext. PW-4/G) was made in the record. At about 3.45 p.m., when police party reached at Maseu Naala, both the accused were seen coming from Himgiri side. Seeing the police party, accused got frightened and were nabbed. Accused Chainka Ram was carrying a 'boru' (sack) on his shoulder. Suspecting that they may be carrying some

contraband substance, he apprised the accused of their legal rights of being searched in accordance with the provisions of law. After obtaining their consent (Ext. PW-5/A), accused were searched. Prior thereto, police officials also gave their personal search to the accused vide memo (Ext.PW-5/B). From the 'boru' which Chainka Ram was carrying, charas in the shape of sticks was recovered. The same was weighed with the help of scale and weights so carried by the witness in the investigating kit and found to be 16.2 kilograms. Charas so recovered was packed in the same 'boru' and sealed with five impressions of Seal-P, sample of which was also taken on a piece of cloth (Ext. PW-5/C). Relevant columns of the NCB form (Ext. PW-4/F) were filled up and seal handed over to HC-Ashok Kumar. He sent ruka (Ext. PW-7/A) through Const. Deep Kumar. With the registration of F.I.R., further proceedings were completed on the spot. Accused were arrested vide memos (Ext. PW-5/E and 5/F). The sample seals, NCB forms as also the sealed contraband substance were handed over to the MHC. He also sent special report (Ext. PW-2/B) through HHG-Sanjay Kumar to the superior officer. Report (Ext. PW) of the State Forensic Science Laboratory was also taken on record. In our considered view, witness has withstood the test of cross examination. His testimony cannot be said to be false, unbelievable or to have been impeached in any manner. He is the Station House Officer of the police station. At all times he complied with all the statutory provisions.

17. Significantly testimony of Inspector Brij Mohan Sharma stands corroborated by Constable Yog Raj (PW-1), HC-Ashok Kumar (PW-5) and HC-Deep Kumar (PW-6). From the conjoint reading of their testimonies prosecution case cannot be said to be rendered doubtful. Their testimonies are natural, cogent and consistent.

18. Contradictions, in our considered view, are minor. They are with regard to the exact time, which the police party spent in conducting the search and seizure operations. Whereas according to Inspector Brij Mohan Sharma it took them 15 – 20 minutes to weigh the charas, HC-Deep Kumar states the time to be one and a half hour. Variation in time, by no stretch of imagination, can be said to be substantial rendering the prosecution case to be doubtful. Benefit of loss of memory has to be given to the witnesses. In any event, on the material aspect of recovery of the contraband substance from the conscious possession of the accused, there is no contradiction. All the witnesses universally state that appellant herein was carrying the 'boru' from which contraband substance in question was recovered. No doubt these witnesses have proved presence of co-accused Sanju on the spot, but then trial Court has acquitted him of the charge of abetment and conspiracy. With respect to the said charge nothing was stated by the witnesses. It is not as though they have falsely deposed in Court. In the instant case, charge under Section 20 of the Act stands conclusively proved against the present appellant.

19. The witnesses have explained that so long as they remained on the spot, none else met them. From the testimony of Inspector Brij Mohan Sharma it has come on record that the place in question is in a remote area and only vehicles of N.H.P.C. (which has set up a Hydro Electric Power Project in this remote corner of the State), ply there. It stands clarified that even at that time no vehicle passed by. Thus there was no question of associating any independent witness for carrying out search and seizure operations. The witnesses have also disclosed that scale and weights were kept in the I.O. Kit.

20. We find that the incident in question was immediately reported to the superior authority as is evident from the testimony of HC-Suhash Sharma (PW-2) who categorically states that Special Report (Ext. PW-2/B) was promptly placed before the Superintendent of Police, Chamba.

21. Police party, as has come on record, did not have any definite information of the accused dealing in the trade of contraband substance. Recovery was not effected from the house of the accused or any enclosed place. It is a case of chance recovery. By chance, accused were seen by the police party and on suspicion apprehended. This was when accused became perplexed and tried to run away. Thus there is no infraction of any provisions of the Act.

22. From memo (Ext. PW-5/A) it is evident that appellant was informed of his statutory right of being searched by a Magistrate, Gazetted Officer or police officials present on the spot. Accused consented to be searched by the S.H.O., who was otherwise duly authorized to do so. Appellant Chainka Ram, being illiterate put his thumb impression on the memo. It stands explained by the police officials that he was explained the contents of the consent memo. Though such fact is not so recorded therein, but is established from uncontroverted testimonies of police officials. In any event, non compliance of Section 50 of the Act, would in no manner render the prosecution case to be fatal for it is not a case of personal search but recovery effected from the 'boru' carried by the appellant.

23. We find the defence of the accused not to have been probablized at all, nor can it be said that testimonies of prosecution witnesses stand belied and/or controverted by defence witness Sudershan Kumar (DW-2).

24. Record reveals that Const. Omkar Singh and HHG Sudershan Kumar were given up by the prosecution for their testimonies would have been repetitive in nature. However, Sudershan Kumar (DW-2) stands examined in Court as a defence witness. Careful reading of his testimony reveals and uncontrovertedly establishes the following facts: (i) Accused were nabbed at Maseu Naala. This was on 14.1.2010 at 3.45 p.m.; (ii) At that time witnesses HC-Ashok Kumar (PW-5), HC-Avinder, Constable Yog Raj (PW-1) and Deep Kumar (PW-6) were present; (iii) Appellant Chainka Ram and his co-accused Sanju were coming from Himgiri side; (iv) Accused were not nabbed on the road but at a place which was on a walking trail of 2 k.m.; and (v) At that time Chainka Ram was carrying a 'boru'. In fact he corroborates the prosecution witnesses, rendering the defence taken by the accused to be false. In the teeth of this admission so made by him, his version, that all proceedings were completed at Police Station Tissa where accused were brought, is uninspiring in confidence, more so, when he admits that he remained present outside the police station and was not aware of any proceedings which took place inside. On the question of recovery proceedings we are inclined to rely upon the testimony of police officials.

25. Through the testimony of Jaram Singh (DW-1), appellant wants the court to believe that on 14.1.2010 police party came in a vehicle and forcibly took away the appellant and his son (co-accused) from village Shimni. We do not find this version to be inspiring in confidence. He is the vice president of the very same gram panchayat and wants the court to believe that though he had come to Chamba to report the matter to the Superintendent of Police but since the officer was not present, he could not do so. After all, Superintendent of Police is not the only person with whom report could be lodged. He could have conveniently reported the matter to the police at Police Station Tissa, Sub Divisional Magistrate Chamba or any other officer. Also it is not his specific case that it is the police or the police officials so examined in court who forcibly took away the accused from village Shimni. He simply states that three persons in plain clothes, came in a vehicle (white commander) and took away the accused. Neither he is aware of their identity nor does he know the number of the vehicle. Thus this witness, in no manner, probablizes the defence of the accused.

26. Testimony of Amar Singh (DW-3) is to similar effect. Even he could not state as to who were the persons who took the accused from village Shimni. He is not aware of the number of the vehicle. Also he did not report the matter to anyone.

27. Significantly even the appellant did not protest his alleged forcible arrest at the time when he was produced before the Court.

28. We find the prosecution case to have been established even by way of link evidence. MHC (PW-4) categorically states that after receiving the contraband substance as also the NCB forms, he recorded entry in the maalkhana register (Ext.PW-4/C). Alongwith the road certificate (Ext. PW-4/D) the seized parcel was handed over to Constables Som Parkash and Omkar Singh to be deposited at the State Forensic Science Laboratory, Junga. Such version stands corroborated by Som Parkash who is categorical that so long as the parcel remained with him, it was intact and not tampered with. It was deposited in the laboratory. From the NCB form (Ext. PW-4/F) as also report of F.S.L. Junga (Ext. PX) it is apparent that the parcel contained the seals of impression-P and the contraband substance was extract of cannabis and sample of Charas.

29. In *Pawan Kumar (supra)*, the Court has not laid down the law that if the accused or a co-convict is acquitted under Section 29, he must, under all circumstances, be also acquitted in relation to an offence, punishable under Section 20 of the Act. Charges framed under the provisions of Sections 20 and 29 are different, distinct and separate.

30. 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 contraband substance i.e. charas weighing 16.2 kilograms was recovered from the conscious possession of Chainka Ram who in no manner has rebutted the statutory presumption.

31. For all the aforesaid reasons, there is 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. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any. Records of the Court below be immediately sent back.

****

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

Criminal Appeals No.73 & 75 of 2012
Reserved on : 17.3.2015
Date of Decision: March 30, 2015.

Cr.A No.73/2012
Mansha Ram ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.
Cr.A No.75/2012
Parkash Chand ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

N.D.P.S. Act, 1985- Sections 18 and 20- 14 kg. of charas and 570 grams of opium were recovered from the mud guard of the vehicle being driven by accused 'P'- accused 'M' was sitting beside him in the vehicle- the mere fact that seizure witness had turned hostile is not significant- testimonies of police officials were corroborating each other- there was nothing in the cross-examination to doubt their testimonies- police did not have any prior information- independent witness had turned hostile but had corroborated the testimonies of police officials on all accounts on the question of signing of documents- this fact was duly reflected in their prior statement proved by Investigating Officer which could be used as corroborative piece of evidence- Section 42 of N.D.P.S. Act was not attracted- the discrepancy in the weight is not significant- held, that in these circumstances, Learned Trial Court had rightly convicted the accused. (Para-14 to 29)

Cases referred:

Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh, (2011) 5 SCC 123
Yomeshbhai Pranshankar Bhatt vs. State of Gujarat, (2011) 6 SCC 312
Bhajju alias Karan Singh vs. State of Madhya Pradesh, (2012) 4 SCC 327
Virender v. State of Himachal Pradesh, 2014(3) SLC 1180
Raj Mohammed alias Raju v. State of H.P., 2001(2) SLC 81

For the Appellants	:	Mr. J.R. Poswal, Advocate.
For the Respondent	:	Mr. Asok Chaudhary & Mr. V.S. Chauhan, Additional Advocates General, and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Since both these appeals arise out of the very same impugned judgment, they are being disposed of by a common judgment.

2. Appellants-convicts Mansha Ram and Parkash Chand, hereinafter referred to as the accused, have assailed the judgment dated 14.12.2011, passed by Special Judge, Bilaspur, Himachal Pradesh, in Sessions Trial No.12 of 2010, titled as *State of Himachal Pradesh v. Parkash Chand & another,* whereby they stand convicted of the charged offences and each of them sentenced to undergo rigorous imprisonment for a period of two years and pay fine of Rs.20,000/-, each, and in default of payment thereof, to further undergo simple imprisonment for a period of two months, in relation to offence, punishable under Section 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the Act); and rigorous imprisonment for a period of 12 years and pay fine of Rs.1,00,000/- each, and in default thereof to further undergo simple imprisonment for a period of six months, in relation to offence, punishable under the provisions of Section 20 of the Act.

3. It is the case of prosecution that on 19.6.2010 at about 5.45 p.m., Inspector (SHO) Puran Chand (PW-11), alongwith Police Party, comprising of SI Mathru Ram (PW-1), SI Sanjit Kumar, ASI Amar Nath (PW-4), ASI Ranjhu Ram, Constable Ramjan Mohammed, Constable Husan Lal and Constable Balbir were on traffic checking duty at NTPC Chowk (Office), Barmana, Himachal Pradesh. Vehicle Bearing No.HP-1M-3819 came from Salappar side. On signal the same was stopped, in which accused Parkash Chand was on the wheels and accused Mansha Ram was sitting on the front seat. Finding something fishy, police party, on suspicion, wanted to do the checking. Accordingly, after informing the accused of

their statutory rights, in compliance of Section 50 of the Act, the accused offered themselves to be searched by the police party, vide Memos (Ex. PW-2/A and 2/B), which were also signed by the accused. Independent witnesses present on the spot, namely Sushil Kumar (PW-2) and Raj Kumar (PW-3) were also associated. Police party, after giving its search to the accused, searched them and the vehicle. Nothing was recovered from the person of the accused persons, but however from the front mudguard of the vehicle (driver side), one packet, wrapped in a plastic sheet, was recovered, which contained four parcels of charas in the shape of sticks and chappatis. On checking the other side the mudguard, four packets, wrapped in a plastic sheet, were also recovered, out of which three parcels contained charas in the shape of sticks and chappatis and the fourth packet contained opium. Constable Ramjan Mohammed was asked to fetch scales and weights, which were brought from the shop of Raj Kumar (PW-9). Upon weighment the contraband substance(s), which appeared to be charas, was found to be of 14 kgs and opium was found to be 570 grams. Out of the recovered charas, two samples (A-1 & A-2), each weighing 6 kgs were taken out and the remaining stuff, i.e. 2 kgs was packed in a separate packet (A-3), and sealed with 12 seals of seal impression 'M'. Also opium(A-4) was packed separately and sealed with the very same seal impression. Inspector Puran Chand prepared Rukka (Ex. PW-4/A), which was taken by ASI Amar Nath (PW-4) to the Police Station, Barmana, on the basis of which FIR No.130, dated 19.6.2010 (Ex. PW-7/A), under the provisions of the Act, was registered there. File was taken back to the spot. Thereafter, all the necessary formalities were completed. NCB form was filled up on the spot; accused were arrested and informed of the grounds; contraband substance was also seized. Seized parcels as also the NCB form was deposited with the MHC Kishori Lal (PW-7), who sent two sealed parcels through Constable Hussan Lal (PW-10) for chemical analysis at the Forensic Science Laboratory, Junga and report (Ex. PW-7/B) obtained. Also, Special Report (Ex. PW-5/A) was sent to the Superior Officer, through Constable Shiv Ram (PW-6), which was received by ASI Kishori Lal (PW-5) in the Office of Superintendent of Police, Bilaspur. 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.

4. Both the accused persons were charged for having committed offence punishable under the provisions of Sections 18 & 20, read with Section 29 of the Act, to which they did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 11 witnesses and statements of the accused, under the provisions of Section 313 of the Code of Criminal Procedure were also recorded. Accused Mansha Ram took the following defence:

> "I am innocent. I boarded the vehicle in question at Bus Stand, Mandi as I was requested by the co-accused Parkash Chand to accompany him to Kiratpur and back as he told me that he would be alone on coming back from Kiratpur. I acceded to his request and accompanied him from Mandi. I do not know about the contraband kept in the vehicle. I also do not know Tule Ram."

Accused Parkash Chand took the following defence:

> "I am innocent. Tule Ram met me one day prior to 19.6.2010 and had told me to hire my vehicle for going to Kiratpur and the fare was fixed at Rs.3500/-. He had also hired my vehicle on 2/3 occasion earlier. Tule Ram told me to go on the night of 18.6.2010, but I expressed my inability to go during the night hours and on 19.6.2010 at about 12.30 P.M. Tule Ram came to Banjar and I had lunch alongwith him and thereafter we proceeded

> from Banjar at 12.30 P.M. From Banjar, I requested my co-accused Mansha Ram on telephone to accompany me to Kiratpur and back as I would be alone while returning from Kiratpur. On this, he acceded to my request. My vehicle was also checked by the police at Brindabani check point near Mandi. Mansha Ram met me at Bus Stand, Mandi. Thereafter, we proceeded from Mandi alongwith my co-accused Mansha Ram and when we reached near Barmana, Tule Ram alighted from the jeep alongwith one bag on the pretext that he was going to answer the call of nature. However, after alighting from the vehicle, he fled away and I drove my vehicle a little ahead, where the police party signaled me to stop the vehicle. On the signal of the police party, I stopped my vehicle and thereafter, the police party searched the vehicle and during the search of the vehicle when the police party found that there was contraband in the front tyres of my vehicle, the police party asked me to bring my vehicle to police station and thereafter, all the formalities were completed at police station. The police party told me to trace Tule Ram and also told me that if Tule Ram was traced then we would be kept as witnesses otherwise, we would be arrested. On this, I made various attempts on telephone/mobile to trace Tule Ram, but he could not be traced and police party also tried to locate him, however, he could not be traced and ultimately at 11.30 P.M. we were arrested at the police station."

Accused persons led evidence in their defence. Significantly, accused Parkash Chand examined himself as a defence witness (DW-3), and two other witnesses were also examined.

6. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused persons of the charged offences and sentenced them as aforesaid. Hence, the present appeal by the accused.

7. Learned counsel for the accused assails the judgment by making the following submissions: (i) from the evidence on record, it is apparent that police had prior information and as such there is infraction of the provisions of Section 42 of the Act, which is fatal to the prosecution case; (ii) there is contradiction with regard to the person who filled up the NCB form, rendering the prosecution version of having conducted the search and seizure operations to be doubtful; (iii) seal impression, so embossed on the documents is different from the one so disclosed by the prosecution witnesses; and (iv) reduction of case property by 150 grams, remains unexplained by the prosecution, rendering the prosecution story to be fatal.

8. We have examined the entire evidence on all points, including the one so argued before us.

9. For establishing the factum of recovery of the contraband substance from the conscious possession of the accused, prosecution seeks reliance upon the testimonies of SI Mathru Ram (PW-1), Sushil Kumar (PW-2), Raj Kumar (PW-3), ASI Amar Nath (PW-4), and Inspector Puran Chand (PW-11). It be only observed that independent witnesses Sushil Kumar and Raj Kumar have not supported the prosecution case. They were declared hostile and extensively cross-examined. It is a settled proposition of law that merely because a witness has turned hostile, his entire evidence cannot be termed to be unworthy of credence. It is for the Court to consider, whether as a result of contradiction, witness stands fully discredited or part of his testimony can still be believed. If the credit of a witness is not fully shaken, Court can rely upon that part of the testimony which appears to be creditworthy. We shall independently deal with their testimonies, but at this juncture, we may observe that their testimonies do not render the prosecution case to be doubtful or

testimonies of prosecution witnesses to be belied or contradicted on material points. Also it cannot be said that another view has emerged on record.

10. Their Lordships of the Hon'ble Supreme Court in *Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh,* (2011) 5 SCC 123 have held that seizure witnesses turning hostile may not be very significant by itself, as it is not an uncommon phenomenon in criminal trials, particularly in cases relating to NDPS Act.

11. Their Lordships of the Hon'ble Supreme Court in *Yomeshbhai Pranshankar Bhatt vs. State of Gujarat,* (2011) 6 SCC 312 have held that evidence of hostile witness may contain elements of truth and should not be entirely discarded. Their Lordships have held as under:

> "22. The learned counsel for the appellant further submitted the doctor had not given his written opinion that the deceased was fit enough to give her statement. Though orally, the doctor said so. Relying on this part of the evidence especially the evidence of the husband of the deceased, the learned counsel for the appellant submitted that even though the husband may have been declared hostile, the law relating to appreciation of evidence of hostile witnesses is not to completely discard the evidence given by them. This Court has held that even the evidence given by hostile witness may contain elements of truth.
>
> 23. This Court has held in State of U.P. vs. Chetram and others, AIR 1989 SC 1543, that merely because the witnesses have been declared hostile the entire evidence should not be brushed aside. [See para 13 at page 1548]. Similar view has been expressed by three-judge Bench of this Court in Khujji alias Surendra Tiwari vs. State of Madhya Pradesh, [AIR 1991 SC 1853]. At para 6, page 1857 of the report this Court speaking through Justice Ahmadi, as His Lordship then was, after referring to various judgments of this Court laid down that just because the witness turned hostile his entire evidence should not be washed out."

12. Their Lordships of the Hon'ble Supreme Court in *Bhajju alias Karan Singh vs. State of Madhya Pradesh,* (2012) 4 SCC 327 have held that evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. Their Lordships have held as under:

> "36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.
>
> 37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which

has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases:

(a) Koli Lakhmanbhai Chanabhai v. State of Gujarat (1999) 8 SCC 624

(b) Prithi v. State of Haryana (2010) 8 SCC 536

(c) Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1

(d) Ramkrushna v. State of Maharashtra (2007) 13 SCC 525

13. We find the prosecution witnesses to be worthy of credence. Their testimonies are natural, reliable and inspiring in confidence. They are consistent and cogent in their deposition.

14. Inspector Puran Chand states that on 19.6.2010, he had set up a Naaka at NTPC Office Barmana. He records presence of other police officials on the spot. It was on the NH-21. At about 5.45 p.m., vehicle bearing No.HP01M-3819 came from Salappar side. Accused Parkash Chand was sitting on the wheels and accused Mansha Ram was sitting on the front seat alongwith the driver. On signal, the vehicle was topped. The driver was asked to produce documents. However, it was observed that his hands were trembling and accused Mansha Ram got perplexed. On suspicion, he desired of checking the accused and the vehicle. Accordingly, he associated independent witnesses Sushil Kumar and Raj Kumar. After informing the accused of their statutory right of getting themselves searched before a Gazetted Officer, Magistrate or the police officials, accused opted to be searched by him. Consent Memos (Ex. PW-2/A & 2/B) were signed by the accused persons. Thereafter, members of the police party gave their personal search to the accused. In this regard, Memo (Ex. PW-2/C) was drawn. In the mudguard, towards the driver seat, there was a hole in which a parcel, wrapped in Khaki cover, was concealed. On opening the same, four packets, wrapped in plastic sheet, were found. The same were opened and charas, in the shape of sticks and chappatis, was found. From the other side of the mudguard, again four packets were found, out of which three packets contained charas, in the shape of sticks and chappatis, and the fourth packet contained opium. On his asking, Constable Ramjan Mohammed brought the scales and weights and packing material. Upon weighment, the contraband substance was found to be 14 kgs of charas and 570 grams of opium. The samples were repacked in separate parcels and sealed with 12 seals of impression 'M'. NCB form, in triplicate, was filled up on the spot and the sample of the seal drawn separately on a piece of cloth (Ex. PW-11/A). The sealed parcels of charas were marked as A-1, A-2 & A-3 (A-1 & A-2 of 6 kgs each and A-3 of 2 kgs) and parcel containing opium was marked as A-4. Ruka (Ex. PW-4/A) was sent through Amar Nath for registration of FIR at Police Station, Barmana. With the completion of formalities on the spot, accused were arrested and Memos (Ex. PW-4/B & PW-4/C) were prepared to such effect. He prepared Special Report (Ex. PW-5/A), which was sent to the Superintendent of Police, Bilaspur, Himachal Pradesh for information. Also, sealed samples were sent to the FSL, Junga and report (Ex. PW-7/B) taken on record.

15. This witness, in our considered view, has withstood the test of cross-examination. Suggestions put to the witness, with an endeavour of probablizing the defence, in our considered view, are of no avail. Witness does state that finding the accused to have got perplexed, he became suspicious and thus checked the vehicle. This witness does record accused Parkash Chand of having informed the police about the contraband substance being loaded in the vehicle by one Tule Ram. But then he clarifies that an

attempt was made to trace Tule Ram, and except for the disclosure statement of the accused there was nothing else against him. As such, for this reason no further proceedings were initiated. Witness also states that Mansha Ram and Parkash Chand are members of the same Panchayat and Mansha Ram was also sitting in the vehicle at the time when recovery was effected from their conscious possession. Mansha Ram has not been able to probablize his defence.

16. Testimony of this witness, in our considered view, stands materially corroborated by Mathru Ram and ASI Amar Nath, who have also deposed that search and seizure operations were carried out in their presence. This factor having been proved on record, beyond reasonable doubt, statutory presumption would automatically into play.

17. Now, police had no prior information and only after informing the accused of their statutory right(s) and completing the statutory formalities, checking was done.

18. Police officials do admit that Mansha Ram, who is a tractor driver, had boarded the vehicle at Mandi on the request of Parkash Chand, but then it has not come on record the purpose for which Mansha Ram agreed to travel in the vehicle upto Kiratpur, which is snot closeby. Why the vehicle was to be taken to Kiratpur, has not been explained. There were no goods in the vehicle. Also none were to be brought from there. Simply because he is a friend of accused Parkash Chand, that fact would not, in any manner, render the prosecution case to be weak or doubtful. Neither Parkash Chand nor Mansha Ram have stated the purpose of their visit either from Kullu or from Mandi towards Bilaspur. Mansha Ram has not examined his employer to establish the factum of his leave.

19. Significantly, independent witnesses, when examined by the Public Prosecutor, have admitted the case of the prosecution. Except for the factum of signing the papers on the spot, in our considered view, they have corroborated the testimonies of police officials, on all counts, on the question of signing of documents, we find these witnesses to have not deposed truthfully, for their statements, so recorded by the police, recording the events, including signing the papers, which took place on the spot, at the time of conducting the search and seizure operation, to be duly reflected in their prior statements (Mark X & Z)(Ex. PW-11/C & PW-11/D), so proved by the Investigating Officer, which can be used only as a corroborative piece of evidence. These witnesses admit that prior to conduct of search, accused were informed of their statutory rights and their consent obtained. Also police officials were searched by the accused persons. Witnesses admit it to be correct that from the vehicle, contraband substance was recovered; it was weighed; repacked and sealed with seal impression 'M'. Witness states that accused persons did make an attempt to contact Tule Ram, but then that is all and nothing more, to show, that the contraband substance actually belonged to Tule Ram and that it was he who had hired his vehicle. Prosecution witnesses admit accused Parkash Chand of having informed about the alleged involvement of Tule Ram. We are not inclined to disbelieve the prosecution version of recovery of the contraband substance from the conscious possession of the accused on this count. This we say so for the reasons: (i) it has come in the testimony of police officials that involvement of Tule Ram was ruled out; (ii) assuming hypothetically that Tule Ram was involved, that fact itself would not absolve complicity of the accused persons in the crime, after all Tule Ram was not in the vehicle; (iii) Testimony of accused Parkash Chand (DW-3).

20. Accused Parkash Chand, who stepped into the witness box admits himself to be owner of the vehicle from which the contraband substance was recovered. He never allowed anyone else to drive his vehicle. He admits his presence on the spot. He admits police having associated independent witnesses for carrying out search operations. He admits that during such search, contraband substance was recovered from the tyres of the

vehicle. Now, if this witness never allowed anyone else to drive his vehicle, then how is it that Tule Ram concealed the contraband substance inside the mudguard of the vehicle. For it is not his case that Tule Ram was left alone in the vehicle for some time. Also, defence of vehicle being hired by Tule Ram stands not probablized. There is no receipt of hiring the vehicle on record. His version that he called up Mansha Ram on telephone to accompany him to Kiratpur does not inspire confidence, for it has not come on record that Mansha Ram was free on that date and was not required to ply the tractor. He admits himself to be a paid driver and there is no record of his having obtained leave from his employer. Also, version of this witness that seeing the police party, Tule Ram deboarded the vehicle and ran away from the spot does not appear to be true. Defence so taken, of involvement of Tule Ram, was never taken at the first opportune moment.

21. We further find that even by way of link evidence prosecution has been able to establish its case, beyond reasonable doubt. Raj Kumar (PW-9) does state that Ramjan Mohammed took electronic weighing machine from his shop, which is at Kainchi Mor Barmana.

22. HC Kishori Lal does state that Rukka was brought by ASI Amar Nath, on the basis of which FIR was registered by him. He further states that the contraband substance as also the NCB forms were deposited with him, which he kept in the Malkhana. So long as the parcels/samples remained with him, they were not tampered with. The samples were sent for chemical analysis through Constable Hussan Lal alongwith Road Certificate. Report (Ex. PW-7/B) was also taken on record.

23. Hussan Lal also states that the samples, bearing 12 seals of impression 'M', handed over to him by HC Kishori Lal, were deposited by him at the FSL, Junga and so long as the samples remained with him, these were not tampered with.

24. From the testimony of the prosecution witnesses and also Road Certificate, Malkhana Register and the report, it is evident that the seal impression put on the samples was of seal 'M' and not 'H', as is so urged before us.

25. In the instant case, police has taken all precautions of informing the superior authorities, as is evident from the testimonies of ASI Kishori Lal and Shiv Ram.

26. From the testimonies of defence witnesses (DW-1 & DW-2), defence of the accused cannot be said to have been probablized. These witnesses have simply produced relevant extract of the case diaries and the entries made in the police record, but then this does not falsify the prosecution case at all, more so in view of the admitted position of the accused and the independent witnesses, with regard to the fact that police had set up Naaka; checked the vehicle, from which recovery of charas and opium was effected.

27. There is no question of violation of provisions of Section 42 of the Act, for it is a case of chance recovery. None of the police officials has, even remotely, admitted factum of prior information. Investigating Officer states that he did fill up the NCB form.

28. Considering the quantity of the contraband substance, reduction in weight is negligible. In any case, weighment is done only for determining the quantity and that too for the purpose of sentencing. (*Virender v. State of Himachal Pradesh,* 2014(3) SLC 1180). Here, there cannot be dispute with regard to quantity being commercial in nature.

29. A Division Bench of this Court in *Raj Mohammed alias Raju v. State of H.P.,* 2001(2) SLC 81, has already held that the discrepancy relating to difference in weight is trivial.

30. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Pending application(s), if any, also stand disposed of.

****

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

M/s Rishubh Sales Corporation ...Petitioner

Versus

Union of India and others . ...Respondents.

CWP No. 1287 of 2015
Judgment reserved on: 24.3.2015
Date of Decision : March 30, 2015.

Constitution of India, 1950- Article 226- Respondent invited the tender for supply of SMF UPS Batteries- petitioner was informed that his rates had been approved and he was requested to supply the items- petitioner procured the battery and was in the process of supply of the same to various offices when the approval granted in favour of the petitioner was kept in abeyance – respondent claimed that rates of the petitioner were approved erroneously by calculating the tax @ 5% against 'D' form – another participant informed the respondent that relaxation of tax on production of 'D' form had already been withdrawn- petitioner had misled the respondent at the time of quoting the rate- held that petitioner had specifically stated that he would charge tax @ 5% and will not claim any difference of tax- rates quoted by the petitioner were the lowest- tender offered by the petitioner should not have been kept in abeyance only on a technical ground- petition allowed and letter keeping tender in abeyance quashed and set aside. (Para-2 to 17)

For the Petitioner : Mr. Ajay Sharma, Advocate.
For the respondents : Mr. Ashok Sharma, Assistant Solicitor General of India.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

By medium of this writ petition, the petitioner has claimed the following substantive reliefs:

> *"(a). That impugned letter dated 21.1.2015, Annexure P-9, may very kindly be quashed and set aside with suitable directions to the respondents to adhere to letter dated 14.1.2015, Annexure P-5, issued with respect to approval of the tender of the petitioner and allow the petitioner to complete the said work in accordance with the terms of the tender, in the interest of law and justice.*
>
> *(b) That in the alternative, it is submitted that petitioner having been put to heavy losses – financial and mental, and in the reputation of business of*

the petitioner also, although the same is not able to be calculated in terms of money, but respondents may very kindly be directed to pay a sum of Rs. *50.00 lacs to the petitioner in lumpsum. This prayer is being made in the alternative and respondents can be left with the option to recover the said amount from the erring officers/officials."*

The facts as pleaded in the petition are thus.

2. On 12.9.2014 the respondents invited tenders for supply of ISO certified Indian Manufacturers' Make SMF UPS Batteries with two years' warranty for the year 2014-15 for supplying the same to various Post Offices in H.P. Postal Circle on buy-back scrap of old batteries scheme. This tender was cancelled and a fresh tender for the same items was issued on 24.11.2014 and the date of opening of the technical bid was fixed on 19.12.2014 and commercial bid on 20.12.2014. However, the respondents opened the technical bid which was fixed on 20.12.2014 earlier on 19.12.2014 itself without intimation to the petitioner.

3. The petitioner vide communication dated 14.1.2015 (Annexure P-5) was informed by the respondents that the competent authority had approved his rates for the supply of 12V 18 AH and 12 V 42 AH SMF ETDC/JIS certified UPS Batteries under buy back with two years warranty at the rate of Rs.1585.40 and Rs. 2843.75 paise respectively. It was further mentioned that the rates approved would be applicable for a period of one year w.e.f. 14.1.2015 to 13.1.2016.

4. The petitioner was directed to produce the sample of batteries for verification and checking and after approving the same the petitioner was informed through e-mail for supply order whereby it was required to supply these items to the incumbents/ incharges of Post Offices/Sub Post Offices in the State of Himachal Pradesh. The respondents asked for security in the shape of FDR and pledge the same in the name of the respondents which was duly pledged on 17.1.2015.

5. It is then pleaded that since the requirement of the respondents was emergent, the petitioner immediately contacted M/s Exide Batteries Ltd. manufactures of Batteries and procured the requisite batteries. As the supplies were to be made to far and distinct places, the petitioner also purchased a vehicle, the invoice whereof has been annexed as Annexure P-8 with the petition. All of a sudden vide letter dated 21.1.2015 the approval granted in favour of the petitioner on 14.1.2015 was ordered to be kept in abeyance till further orders.

6. After making desperate attempts here and there to know the reasons why the approval in its favour had been kept in abeyance, the petitioner was compelled to make a representation dated 10.2.2015 to the respondents but to no avail and thereafter constraining him to approach this Court by way of present petition.

7. In reply to the petition, the respondents have raised preliminary submission to the effect that the rates of the petitioner were approved erroneously by calculating tax @ 5% against 'D' form but no order was placed with the petitioner by respondent No.2. The petitioner was asked to furnish performance security in the shape of bank FDR vide letter dated 14.1.2015. However, in the meanwhile, M/s R.B. Enterprises, SCO 135, Sector 28D, Chandigarh and M/s Dynamic Powers, HSIIDC, Kundli, Sonipat, Haryana who also participated in the tender process and allotted partial work, had intimated/objected telephonically as well as in writing that the relaxation of tax on production of 'D' form for Central/State Government had already been withdrawn w.e.f. 1.4.2007 as finds mention in the letter of Excise and Taxation Department, Government of Himachal Pradesh bearing No.

12-18/80-EXN-Tax-0758-10838 dated 9th May, 2007. Subsequently, the copy of this letter was collected for confirmation and after satisfying itself, a tender Re-evaluation Committee was constituted to re-evaluate the commercial bids in the light of instructions issued by the competent authority on 21.1.2015 and thereafter the approval of tender rates for supply of UPS batteries was ordered to be held in abeyance till further orders.

8. According to the respondents the petitioner had misled the respondent with his letter dated 'Nil' received in the office of respondent No.2 on 22.12.2014 i.e. after opening of tender wherein the petitioner had stated that "*tax will be charged @ 5% against 'D' form if the tax will be more, I will not claim the difference from the Department" which was in violation to the provision of Rule 160 (xi) of GFR wherein it was clearly provided "Bidders should not be permitted to alter or modify their bids after expiry of the deadline for receipt of bids*". The tax relaxation against form 'D' had already been withdrawn by the Central/State Government on 9.5.2007 consequent upon change in the rate structure of Sales Tax (VAT) and such purchaser accordingly attracted clearly VAT rate applicable within the State vide Excise and Taxation Department letter dated 9.5.2007. The rates quoted by the petitioner were approved by calculating tax @ 5% against 'D' form which in fact were required to be calculated @ 13.75%.

9. Respondents did not deny the receipt of the earnest money but claimed that the same stood released by respondent No.2 to the petitioner vide his letter dated 19/24.2.2015. Even the performance security amounting to Rs.3,66,900/- which was received by the respondent was ordered to be returned to the petitioner vide letter dated 24.2.2015.

10. In rejoinder, the petitioner has stated that it was owing to earlier practice as is prevalent in the respondent department that petitioner while submitting his bid calculated the tax against 'D' form at the rate of 5% and incorporated the same in the bid forms, which were accepted by the respondents and therefore, they could not now turn around and question the same. The petitioner has reiterated that in the event of tax being charged at higher rate, it was ready to bear the said liability and would not claim the difference from the respondents. It is lastly averred that even after deducting the tax at the rate claimed by the respondents themselves, even then the rates offered by the petitioner are the lowest.

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

12. The respondents in order to justify their stand that the tender of the petitioner in fact was not the lowest have relied upon the re-evaluation made by the Tender Re-evaluation Committee on 30.1.2015 which is as under:

Sr No.	Name of tenderer	Rate quoted for 12V/7AH	Rate quoted for 12V/18AH	Rate quoted 12V/26AH	Rate quoted for 12V/42AH
1.	Dynamic Powers	Rs. 530.46	Rs.1809.78	Rs. 2936.37	Rs.4197.50
2.	Rishubh Sales Corporat-ion	Rs. 768+105.60 (13.75%ST) = Rs.105.60-100 = Rs. 791.60	Rs.1748+240.35 (13.75%ST) =Rs.1984.35-250 = Rs.1734.35	Rs.2397+329.59 (13.75%ST) =Rs.2726.59-400 = Rs. 2326.59	Rs. 3375+464.06 (13.75%ST) =Rs.3839.06-700 = Rs. 3139.06

3.	RB Enterprise -s	Rs. 657.00	Rs. 1628.00	Rs. 1842.00	Rs. 2867.00
	Lowest Rates	Rs. 530.46	Rs. 1628.00	Rs. 1842.00	Rs. 2867.00

13. Admittedly the petitioner vide letter dated 'Nil', which was received by the respondents on 22.12.2014 had already informed them that though in the tender offered by it regarding supply of UPS Batteries the tax shown to be charged was at the rate of 5% against form 'D' but in case the tax would be more, it would not claim the difference of the tax from the department. It is relevant to quote in verbatim the letter which reads thus:

"To

Chief Post Master General
H.P. Circle,
Shimla.

Subject: Vide your Reference letter number Tech/2-33/2014-15.

Sir,

Refer to our tender dated 27.12.2014 regarding supply of UPS Battery in this regard. It is submitted that tax will be charged @ 5% against FORM 'D'/ If the tax will be more, I will not claim the difference of the tax from the department.

For Example: The rate of the 12 Volt 42 AH Battery= Rs. *3375+5% tax* =Rs. *3543.75* - Rs. *700.00 (old scrap battery rate)* = Rs. *2843.75 net."*

14. Based upon such communication, the petitioner was informed vide letter dated 14.01.2015 that its tender for the supply of 12 V 18 AH & 12 V 42 AH SMF ETDC/JIS certified UPS Batteries under buy back with two years warranty in various Post Offices in Himachal Pradesh Circle i.e. Rs. 1585.40 and Rs. 2843.75 paise respectively had been approved. It is apt to reproduce the contents of this letter which reads thus:

"To

M/s Rishubh Sales Corporation
Didwin Tikker Hamirpur,
Distt. Hamirpur – 177401

Sub: Approval of Tender Rates for supply of 12V7 AH and 12V 42 AH UPS batteries.

With reference to your Tender dated 24.11.2014, it is intimated that the competent authority has approved your rates for the supply of 12 V 18 AH & 12 V 42 AH SMF ETDC/JIS certified UPS Batteries under buy back with 2 (two) years warranty in various Post Offices in Himachal Pradesh Circle i.e. Rs. *1585.40 (Rs. One thousand five hundred eighty five and paise forty only) and* Rs. *2843.75 (Rs. Two thousand eight hundred forty three and paise seventy five only) respectively. The rates approved by this office will be applicable for the period of one year w.e.f. 14.01.2015 to 13.01.2016.*

You are requested to show the sample of the above mentioned UPS battery to be supplied to the undersigned on any working day. The specification of the above approved item should be as per parameters and technical specifications given in the Tender. The above rates are F.O.R. for Post

Offices in H.P.Circle. You are also requested to deposit in cash in any Post Office under UCR (Unclassified Receipts)/F.D.R. pledged to Asstt. Director (Technology) O/o CPMG H.P. Circle, Shimla an amount equal to 5% of the value of the work allotted to you i.e. Rs.67,36,819.55 (Rs. Sixty seven lakhs thirty six thousand eight hundred nineteen and paise fifty five only) security deposit within 7 days from the date of acceptance of the tender order."

15. Now when the rates approved in favour of the petitioner are compared with the re-evaluation made by the Tender Re-evaluation Committee on 30.1.2015 it would be seen that though according to the respondents the lowest rates for 12 V 18AH batteries is Rs. 1628/- whereas the rates approved in favour of the petitioner are definitely lower at Rs. 1585.40. Similarly, the rates approved for 12 V 42 AH batteries according to the respondents is Rs. 2867/-, whereas the rate of the petitioner is lower at Rs. 2843.75 paise. Once this be the position, then it can definitely be concluded that petitioner had not only offered the lowest price but the same in turn had been approved by the respondents themselves and thereafter even orders had been placed.

16. The supplies being made by the petitioner are indisputably to a Government Department i.e. Department of Posts, once the department itself is a beneficiary on account of the lowest tender being offered by the petitioner, then the tender offered by the petitioner cannot be kept in abeyance that too only on a technical ground. The action of the respondents is thus not only perverse, unreasonable but also arbitrary and if allowed to stand would seriously affect the public interest and therefore, cannot be sustained and is accordingly set-aside.

17. In view of the aforesaid discussion there is merit in this petition and the same is accordingly allowed and the letter dated 21.1.2015 (Annexure P-9) is quashed and set-aside. Pending application, if any, is also disposed of. The parties are left to bear their own costs.

****

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

Rakesh Kumar ... Appellant
Versus
State of Himachal Pradesh ... Respondent

Cr. Appeal No. 129 of 2009
Judgment reserved on : 17.3.2015
Date of Decision : March 30 , 2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3.8 k.g of charas- prosecution has relied upon the testimonies of police officials- testimonies were corroborating each other on material particulars- minor contradictions regarding the genesis of the prosecution version and the presence of light are not sufficient to discard the prosecution case- incident had occurred at a lonely place- difference of three and a half grams in the weight of sample is not sufficient to discard the prosecution version as the weighing scale used by police officials was traditional and was not electronic - held, that in these circumstances, prosecution version was proved beyond reasonable doubt and the accused was rightly convicted. (Para-7 to 28)

Cases referred:
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625); and Aher Raja Khima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338

For the appellant	:	Mr. Lakshay Thakur, Advocate, for the appellant.
For the respondent	:	Mr. Ashok Chaudhary and Mr. V. S. Chauhan, Addl. Advocate Generals with Mr. J. S. Guleria, Asstt. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 25.5.2009, passed by learned Special Judge, Chamba, Division, Chamba, H.P., in Sessions Trial No. 7 of 2009, titled as State of Himachal Pradesh vs. Rakesh Kumar, 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 10 years and pay fine of `1,00,000/- and in default of payment of fine to undergo rigorous imprisonment for two years, 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 16.12.2008, police party headed by ASI Kuldeep Singh (PW-9), ASI Lal Singh, HC-Anirudh, Const. Yakub Mohammad (all not examined) and Const. Latif Mohammad (PW-1) were on a patrol duty on the Sidhkund – Mani Road in their official vehicle bearing No. HP48-0068, driven by Constable Neeraj Kumar (PW-2). At about 6.30 a.m. when they reached at a place known as Zero Point Bhamuie, they noticed that the accused who was carrying a bag, got frightened and trying to run away. On suspicion, PW-9 intercepted him. Further suspecting that the accused may be carrying some contraband substance, after apprising him of his legal right of being searched in accordance with law, accused, who consented to be searched by the police party vide memo (Ext. PW-1/A), was searched. From the bag (Ext.P-2), charas (Ext. P-4) wrapped in a polythene bag (Ext. P-3) in the shape of sticks and balls was recovered. Upon weighment it was found to be 3.8 kilograms. Two samples of 25 grams each were drawn and sealed with seal impression-A. Remaining bulk parcel was also sealed with the same seal impression. Specimen of seal impression (Ext.PW-1/C) was taken. NCB forms (Ext.PW-8/C), in triplicate, were filed up on the spot and contraband substance seized vide memo (Ext. PW-1/B). ASI-Kuldeep Singh sent Ruka (Ext. PW-9/A) through Constable Neeraj Kumar (PW-2), on the basis of which ASI Dharam Pal (PW-8) registered F.I.R. No. 258/2008, dated 16.12.2008 (Ext. PW-8/A) at Police Station Sadar, Distt. Chamba, H.P., under the provisions of Section 20 of the Act. File was taken back to the spot and accused arrested. Necessary investigation was also conducted and completed on the spot. Case property along with the NCB forms was handed over to ASI-Dharam Pal (PW-8) who resealed the same with his seal impression-H, whereafter it was deposited with MHC-Kailash Chand (PW-4) in the maalkhana. Sample was sent for chemical analysis to the State Forensic Science Laboratory, Junga through

Constable Prabhat Chand (PW-5) and report (Ext. PX) received and taken on record. With the completion of investigation, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 20 of the Act, to which he did not plead guilty and claimed trial.

4. In order to prove its case, in all, prosecution examined as many as nine witnesses and statement of the accused under Section 313 Cr.P.C. recorded, in which he took plea of innocence and false implication. In defence accused also examined Dinesh Kumar(DW-1) as his witness.

5. Appreciating the material on record, including the testimonies of the witnesses, trial Court convicted the accused for the charged offence and sentenced him as aforesaid. Hence, the present appeal.

6. We have extensively heard learned counsel appearing on both the sides and perused the record.

7. Undisputedly, prosecution has not examined any independent witness. Recovery was also not effected from the conscious possession of the accused in the presence of any independent witness. In order to establish its case, beyond reasonable doubt, prosecution has referred to and relied upon the testimonies of police officials namely ASI Kuldeep Singh (PW-9), Const. Latif Mohammad (PW-1), Constable Neeraj Kumar (PW-2), MHC-Kailash Chand (PW-4) and Constable Prabhat Chand (PW-5).

8. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required, duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in the success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people, in that event, no credibility can be attached to the statement of such witness.

9. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

10. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction. [See: ***Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722***; ***Tika Ram v.***

State of Madhya Pradesh, (2007) 15 SCC 760; ***Girja Prasad v. State of M.P., (2007) 7 SCC 625); and Aher Raja Khima v. State of Saurashtra, AIR 1956***].

11. Apex Court in ***Tahir v. State (Delhi), (1996) 3 SCC 338***, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

12. In view of the aforesaid statement of law, we shall now examine the testimony of police officials.

13. ASI-Kuldeep Singh states that on 16.12.2008 at about 6.30 a.m. when he reached Zero Point Bhamuie, he saw the accused carrying a bag. When accused tried to flee away he was apprehended and disclosed his name and address. The Investigating Officer identifies the accused to be the very same person. He further states that the accused, who was apprised of his statutory right, opted to be searched by him vide memo (Ext. PW1/A). Before conducting search and seizure operations, he also got himself searched from the accused. On search, from the bag (Ext. P-2), so carried by the accused, charas (Ext. P-4), in the shape of sticks and balls, wrapped in a polythene bag (Ext.P-3), was recovered. With the scale carried by him in the investigating kit, contraband substance was weighed and found to be 3.8 kilograms. He drew two samples of 25 grams each and sealed it with seal impression-A. Also remaining bulk parcel was sealed with the very same seal impression. He sent ruka (Ext. PW-9/A) to the police station through Constable Neeraj Kumar. Upon receipt of the case file, on the spot, he completed the necessary formalities. NCB forms were prepared on the spot. After arresting the accused he handed over the case property as also the NCB forms to ASI Dharam Pal who resealed the parcels with his own seal impression-H.

14. We find version of this witness to be materially corroborated by Constables Latif Mohammad (PW-1) and Neeraj Kumar (PW-2), whose testimonies remain unimpeached in their cross examination.

15. Learned counsel invites our attention to the contradictions in the testimonies of police officials who conducted the search and seizure operations. Much emphasis is on non association of independent witnesses. We find the same not to be material at all, rendering genesis of the prosecution story, in any manner, to be doubtful. ASI Kuldeep Singh has clarified that before the police party left the police station, entry of departure was made in the Daily Diary Register. Even on return it was so done. He clarifies that no independent witness could be associated for carrying out the search and seizure operations as none were available on the spot. Significantly it has come in the testimony of the witnesses that till such time the police party remained on the spot, neither any vehicle nor any person passed by. One cannot lose sight of the fact that the place of occurrence of the incident is not an urban area, but the remotest corner of the state, which in fact is lonely

and without much habitation. PW-9 further clarifies that the nearest residential house was at a distance of more than one and a half to two kilometers from the spot.

16. Significantly there is no contradiction with regard to the place and time of recovery of the contraband substance.

17. Contradictions, brought to our notice, pertain only to the manner in which the search and seizure operations were carried out. According to Const. Latif Mohammad (PW-1) search operations were carried out without the help of any artificial light as there was enough natural light, whereas, according to Const. Neeraj Kumar (PW-2) search light was used by them. Evidently this issue stands settled by ASI Kuldeep Singh, who in his deposition, has clarified that on 16.12.2008 at 6.30 a.m. it was not pitch dark as at that time there was enough light. He further clarifies that light of the vehicle was used to conduct the proceedings.

18. It be only observed that accused was apprehended and proceedings took place just at the break of dawn when there is enough natural light. In the hills prior to rising of the sun there is ample natural light. Thus police party carried out the proceedings at the time when though there was enough natural light, also used artificial light on the spot. Accused was apprehended at 6.30 a.m. and it took some time for the police to interrogate, and then carry out search and seizure operations on the spot. Possibly when the accused was apprehended it was dark but at the time when he was searched and papers prepared, day had broken and there was enough natural light for the police to have conducted the investigation.

19. On the question of link evidence, learned counsel points out that there is contradiction in the testimonies of police officials with regard to the number of seals affixed on the sample. Having perused the material on record, we find this contradiction not to be fatal at all, for it stands clarified by ASI Dharam Pal and ASI Kuldeep Singh that they affixed their own seals bearing seal impressions “A” and “H” respectively. From the testimony of MHC-Kailash Chand (PW-4), it is evidently clear that the contraband substance deposited with him bore such seals. In the NCB forms, as also report of the Forensic Science Laboratory, there is reference of seal impressions “A” and “H”. The difference is only with regard to the number of seals. Whether it is three or four. This, in our considered view, would not render the prosecution case to be doubtful at all. The difference is only of one seal and benefit of loss of memory can be given to the police officials, more so, when their testimonies were recorded after some time.

20. In the instant case non-production of the seal in Court, which was handed over to HC-Anirudh, cannot be said to be fatal for there is no doubt with regard to the impression of seal so put by different police officials.

21. Even by way of link evidence, we find the prosecution case to have been established on record. MHC Kailash Chand (PW-4) with whom the case property was deposited, as also Constable Prabhat Chand (PW-5) who took the sample parcel to the Forensic Science Laboratory, have categorically deposed that so long the parcel remained with them, it was kept in safe custody and not tampered with.

22. Entry recorded in the maalkhana register stands proved vide document (Ext.PW-4/A) and report of the Forensic Science Laboratory (Ext. PX) conclusively establishes the sealed sample, so recovered from the conscious possession of the accused, to be contraband substance.

23. It is next urged that there is difference in the weight of the sample so sent by the police for chemical analysis. Difference is not substantial. It is of three and a half grams

only, which is explainable from the testimony of ASI Kuldeep Singh, who has clarified that the weighing scale kept by him was traditional and not electronic.

24. Through the testimony of ASI Kuldeep Singh it also stands proved that accused was apprised of his statutory right of being searched and was also informed of grounds of his arrest. Significantly at no point in time did the accused raise any protest against his false implication.

25. In the instant case prosecution has been able to establish, beyond reasonable doubt, recovery of contraband substance from the conscious possession of the accused. In this backdrop, in our considered view, accused failed to discharge the statutory burden so laid upon him.

26. His defence that upon his refusal to furnish information of the persons dealing in drugs, police falsely implicated him, cannot be said to have been established on record by leading credible evidence. The only witness examined by accused is Dinesh Kumar (DW-1) who sates that Zero Point Bhamuie is about 200 feet from village Bhamuie where eight – nine families reside and during winters, day breaks at 7.30 a.m. But then witness clarifies by stating that such version is only on the basis of guess work and estimation. It is not the case of the accused that any of the police officials were harbouring any hostility towards him. Why would they falsely implicate him in a case of such like nature? Special Report (Ext. PW-6/B) was sent to the superior officer.

27. 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 accused was carrying contraband substance i.e. charas weighing 3.8 kilograms.

28. For all the aforesaid reasons, there is 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. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any. Records of the Court below be immediately sent back.

****

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

State of Himachal Pradesh ...Appellant.

Versus

Avinash Katoch ...Respondent.

Cr. Appeal No. 97 of 2008
Judgment reserved on:17.03.2015
Date of Decision: March 30, 2015

Code of Criminal Procedure, 1973- Section 378- Appeal against acquittal strengthens presumption of innocence in favour of accused- onus lies heavily upon the prosecution to dislodge the same- Appellate Court should not ordinarily set aside the judgment of acquittal where two views are possible- the Court should record the findings whether the view of the trial court is perverse or otherwise unsustainable- the Court can consider whether the trial

Court had failed to take into consideration any admissible evidence and had not taken into consideration any evidence brought on record.(Para- 7, 20 and 23)

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3 kg. of charas – independent witnesses have not supported the prosecution version- witnesses were not residents of the neighbourhood and they did not have their place of work nearby- testimonies of police officials can be relied upon, if found reliable- police officials stated that driving licence was recovered by them but licence was not placed on record- no Registration Certificate or Insurance of the vehicle was seized by the police- PW-6 did not depose about the presence of the independent witness- Malkhana Register does not mention NCB forms- held, that in these circumstances, view taken by Trial Court that prosecution case was not proved beyond reasonable doubt could not be faulted. (Para-7 to 30)

Cases referred:

Prandas v. The State, AIR 1954 SC 36
Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh, (2011) 5 SCC 123
Yomeshbhai Pranshankar Bhatt vs. State of Gujarat, (2011) 6 SCC 312
Bhajju alias Karan Singh vs. State of Madhya Pradesh, (2012) 4 SCC 327
Ramesh Harijan vs. State of Uttar Pradesh, (2012) 5 SCC 777
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722;
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625
Aher Raja Khima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338
Balak Ram & Anr. v. State of U.P., AIR 1974 SC 2165
Allarakha K Mansuri v. State of Gujarat, (2002) 3 SCC 57
Raghunath v. State of Haryana, (2003) 1 SCC 398
State of U.P. v. Ram Veer Singh & Ors., (2007) 13 SCC 102
S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors., AIR 2008 SC 2066
Sambhaji Hindurao Deshmukh & Ors. v. State of Maharashtra, (2008) 11 SCC 186
Arulvelu & Anr. v. State, (2009) 10 SCC 206
Perla Somasekhara Reddy & Ors. v. State of A.P., (2009) 16 SCC 98
Ram Singh alias Chhaju v. State of Himachal Pradesh, (2010) 2 SCC 445
Sheo Swaroop and Ors. v. King Emperor, AIR 1934 PC 227
Chandrappa and Ors. v. State of Karnataka, (2007) 4 SCC 415
State of Uttar Pradesh v. Banne @ Baijnath & Ors., (2009) 4 SCC 271
Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the Appellant: M/s Ashok Chaudhary and V.S. Chauhan, Addl. AGs., with Mr. J.S.Guleria, Asstt. AG, for the appellant-State.
For the Respondents: Mr. Vikas Rathore, Advocate, for the respondent.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 26.09.2007, passed by Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, H.P., in S.C. No. 13-D/VII/07/S.T.

No.17/2007, titled as *The State of Himachal Pradesh Versus Avinash Katoch*, State has filed the present appeal under the provisions of Section 378 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that on 27.12.2006, police party comprising of Constable Sanjeev Kumar (PW.5), Santosh Patial (PW.6) and Inspector R.P. Jaswal (PW.10) had laid a Naka at Tapoban Chowk, Dhramshala, District Kangra, H.P. At about 10.35 PM, accused came on a motorcycle which was stopped. On suspicion, accused was checked and from the bag carried by him, contraband substance, which appeared to be charas, was recovered. Prior thereto, independent witnesses Bishan Giri (PW.1) and Sarwan (PW.2) were associated by the police. Upon weighment, charas was found to be 3 kilograms. Two samples of 25 grams each were drawn and sealed with seal having impression 'A'. Rukka (Ex.PW.10/C) was sent to the Police Station, on the basis of which FIR No.303/2006, dated 27.12.2006 was registered at Police Station, Dharamshala, under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act), against the accused. Necessary formalities were completed on the spot, including filling up of the forms; arrest of the accused and preparation of record. Thereafter contraband substance was deposited with MHC Anil Kumar (PW.7), who kept it in the Malkhana. Sealed sample was taken by Joginder Singh (PW.8) to be deposited with the Central Forensic Science Laboratory, Chandigarh and after chemical analysis, report (Ex.PA) was 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. The accused was charged for having committed an offence punishable under the provisions of Section 20 of the NDPS Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as ten witnesses. Statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took plea of innocence and false implication. No evidence in defence was led.

5. Trial Court, after appreciating the testimony of prosecution witnesses acquitted the accused. Hence the present appeal.

6. We have heard M/s Ashok Chaudhary, V.S. Chauhan, learned Addl. AGs., assisted by Mr. J.S. Guleria, learned Asstt. AG., on behalf of the State as also Mr. Vikas Rathore, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

7. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish the essential ingredients so required to constitute the charged offence.

8. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:
>
> > "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

9. In the instant case, we find that independent witnesses Bishan Giri (PW.1) and Sarwan (PW.2) have not supported the prosecution case at all. They were declared hostile and extensively cross-examined by the Public Prosecutor, yet nothing fruitful could be elicited from their testimony. On the contrary a different version has emerged on record.

10. Their Lordships of the Hon'ble Supreme Court in *Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh,* (2011) 5 SCC 123 have held that seizure witnesses turning hostile may not be very significant by itself, as it is not an uncommon phenomenon in criminal trials, particularly in cases relating to NDPS Act.

11. Their Lordships of the Hon'ble Supreme Court in *Yomeshbhai Pranshankar Bhatt vs. State of Gujarat,* (2011) 6 SCC 312 have held that evidence of hostile witness may contain elements of truth and should not be entirely discarded. Their Lordships have held as under:

> "22. The learned counsel for the appellant further submitted the doctor had not given his written opinion that the deceased was fit enough to give her statement. Though orally, the doctor said so. Relying on this part of the evidence especially the evidence of the husband of the deceased, the learned counsel for the appellant submitted that even though the husband may have been declared hostile, the law relating to appreciation of evidence of hostile witnesses is not to completely discard the evidence given by them. This Court has held that even the evidence given by hostile witness may contain elements of truth.

> 23. This Court has held in State of U.P. vs. Chetram and others, AIR 1989 SC 1543, that merely because the witnesses have been declared hostile the entire evidence should not be brushed aside. [See para 13 at page 1548]. Similar view has been expressed by three-judge Bench of this Court in Khujji alias Surendra Tiwari vs. State of Madhya Pradesh, [AIR 1991 SC 1853]. At para 6, page 1857 of the report this Court speaking through Justice Ahmadi, as His Lordship then was, after referring to various judgments of this Court laid down that just because the witness turned hostile his entire evidence should not be washed out."

12. Their Lordships of the Hon'ble Supreme Court in *Bhajju alias Karan Singh vs. State of Madhya Pradesh,* (2012) 4 SCC 327 have held that evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. Their Lordships have held as under:

> "36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.
>
> 37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases:
>
> (a) Koli Lakhmanbhai Chanabhai v. State of Gujarat (1999) 8 SCC 624
>
> (b) Prithi v. State of Haryana (2010) 8 SCC 536
>
> (c) Sidhartha Vashisht @Manu Sharma v.State (NCT of Delhi) (2010) 6 SCC 1
>
> (d) Ramkrushna v. State of Maharashtra (2007) 13 SCC 525"

13. Their Lordships of the Hon'ble Supreme Court in *Ramesh Harijan vs. State of Uttar Pradesh,* (2012) 5 SCC 777 have again reiterated that any portion of evidence consistent with case of prosecution or defence can be relied upon. Their Lordships have further held that seizure/recovery witnesses though turning hostile, but admitting their signatures/thumb impressions on recovery memo, they could be relied on by prosecution. Their Lordships have held as under:

> "23. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on

a careful scrutiny thereof. (Vide: Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).

24. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla v. Daroga Singh & Ors., AIR 2008 SC 320; and Subbu Singh v. State by Public Prosecutor, (2009) 6 SCC 462. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. (See also: C. Muniappan & Ors. v. State of Tamil Nadu, AIR 2010 SC 3718; and Himanshu @ Chintu v. State (NCT of Delhi), (2011) 2 SCC 36)"

14. Both the independent witnesses have disputed any recovery having been effected, from the custody of the accused, in their presence. Sarwan (PW.2) on the asking of Suresh Kumar, Pradhan, went to his shop where he found the SHO sitting, informed him that a bag containing charas was recovered from the accused. In fact, witnesses deny being present on the spot or any recovery having been effected, in the manner, prosecution wants us to believe, in their presence. Significantly police officials do not state who called these witnesses. Also witnesses are not residing in the neighbourhood or have their place of work closeby. Thus, version of prosecution of having associated these witnesses, for carrying out search and seizure operations, in the dark hours of night, is uninspiring in confidence. Notice can be taken of the fact that on a cold wintery night, in the month of December, generally local residents are not found on the streets.

15. Thus, in our considered view, two views with regard to the manner in which search and seizure operations were carried out by the police, have emerged on record. In fact we disbelieve the prosecution story of having conducted the search and seizure operations in the manner they want the Court to believe.

16. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

17. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any

other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

18. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction.

> [See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

19. Apex Court in *Tahir v. State (Delhi)*, (1996) 3 SCC 338, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

20. It is also well established principle of law that (i) the appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be more probable; (ii) while dealing with a judgment of acquittal, the appellate court must consider entire evidence on record, so as to arrive at a finding as to whether views of the trial court are perverse or otherwise unsustainable; (iii) the appellate court is entitled to consider whether in arriving at a finding of fact, trial Court failed to take into consideration any admissible fact; and (iv) the trial Court failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law. (See: *Balak Ram & Anr. v. State of U.P.,* AIR 1974 SC 2165; *Allarakha K Mansuri v. State of Gujarat*, (2002) 3 SCC 57; *Raghunath v. State of Haryana*, (2003) 1 SCC 398; State of *U.P. v. Ram Veer Singh & Ors.*, (2007) 13 SCC 102; *S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors.*, AIR 2008 SC 2066; *Sambhaji Hindurao Deshmukh & Ors. v. State of Maharashtra*, (2008) 11 SCC 186; *Arulvelu & Anr. v. State*, (2009) 10 SCC 206; *Perla Somasekhara Reddy & Ors. v. State of A.P.*, (2009) 16 SCC 98; *and Ram Singh alias Chhaju v. State of Himachal Pradesh*, (2010) 2 SCC 445).

21. In *Sheo Swaroop and Ors. v. King Emperor*, AIR 1934 PC 227, the Privy Council held that:

> "...the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses...."

22. In *Chandrappa and Ors. v. State of Karnataka*, (2007) 4 SCC 415, the apex Court observed as under:

> "(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
>
> (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
>
> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

23. In *State of Uttar Pradesh v. Banne @ Baijnath & Ors.*, (2009) 4 SCC 271, the apex Court gave illustrations of certain circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court, which principle, in our considered view, would squarely apply to the judgment under review by us. The circumstances include; (i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position; (ii) The High Court's conclusions are contrary to evidence and documents on record; iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice; (iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case; (v) Apex Court must always give proper weight and consideration to the findings of the High Court; and (vi) the apex Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an

order of acquittal. The apex Court further held that "Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court in a routine manner, where the other view is possible should be avoided, unless there are good reasons for such interference." (Emphasis supplied).

24. From the conjoint reading of testimonies of Sanjeev Kumar (PW.5), Santosh Patial (PW.6) and Inspector R.P. Jaswal (PW.10), we find prosecution story of having apprehended the accused while he was driving the motorcycle to be doubtful. Police officials state that the driving licence of the accused was recovered by them. But where is this licence, it has not been placed on record. Also on record, there is no registration certificate or insurance of the said vehicle.

25. Contradictions, embellishments and exaggerations in the testimonies of police officials further render the prosecution case to be doubtful. Inspector R.P. Jaswal (PW.10) states that before Rukka was sent to the Police Station for registration of FIR, NCB form was not filled up, in complete. But then, there is no reference therein, as to whether contraband substance stood weighed or not. This only renders testimonies of prosecution witnesses to be doubtful, in the backdrop of contrary version which has emerged on record. PW.10 further admits that source of contraband substance was not enquired from the accused. Why so? has not been clarified on record. After all large contraband was recovered by the police, yet no endeavour was made to further trace the source from which it was procured.

26. Santosh Patial (PW.6) who happens to be present on the spot, nowhere records presence of independent witnesses, in whose presence alleged recovery was effected. Version of R.P. Jaswal (PW.10) that he filled up the NCB forms, in triplicate, on the spot and also filled up number of FIR after receipt of the file from the Police Station, does not appear to be true. Significantly, in the malkhana register, there is no mention of any NCB forms. Now where these NCB forms were kept has not been established, beyond reasonable doubt, by the prosecution.

27. Even by way of link evidence, we find prosecution has not been able to establish its case, beyond reasonable doubt.

28. According to Anil Kumar (PW.7), on 29.12.2006, sample was handed over to Joginder Singh (PW.8) to be taken to CFSL, Chandigarh. It has come on record that on account of holidays, sample could only be deposited on 02.01.2007. Delay is sought to be explained on the ground that initially NCB forms were not sent with the sample as a result of which Constable returned and only thereafter, after collecting the same, sample was deposited. But then, prosecution witnesses Anil Kumar (PW.7), Joginder Singh (PW.7) and SHO Gulzari Lal (PW.9) admits that no record pertaining to delay stands prepared by the police. Also there is no record that NCB forms were collected from Dharamshala, whereafter only same were deposited in the Laboratory. Thus delay remains unexplained. The possibility of tampering cannot be ruled out in the instant case, more so when the sample seal has not been produced in Court. Trial Court found the prosecution case to be doubtful and we see no reason to interfere with the findings, so returned vide impugned judgment dated 26.09.2007, in S.C. No.13-D/VII/07/S.T. No.17/2007, titled as *The State of Himachal Pradesh Versus Avinash Katoch.*

29. We do not find prosecution to have proved its case, beyond reasonable doubt, by leading clear, cogent, convincing piece of evidence with regard to recovery of contraband substance from the conscious possession of the accused. Contradictions in the statements of police officials are glaring, material and relevant, totally shaking the edifice of prosecution story. Witnesses are unreliable and their testimonies not free from embellishments/ contradictions/variations.

30. The Court below, in our considered view, has correctly and completely appreciated the evidence so placed on record by the prosecution. It cannot be said that judgment of trial Court is perverse, illegal, erroneous or based on incorrect and incomplete appreciation of material on record resulting into miscarriage of justice.

31. The accused person has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others* versus *Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, since it cannot be said that trial Court has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice, no interference is warranted in the instant case.

For all the aforesaid reasons, present appeal, being devoid of merit, is dismissed, so also the pending application(s), if any. Bail bonds furnished by the accused are discharged. Record of the trial Court be immediately sent back.

****

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

Mahender Baroor .....Appellant.
Versus
Reena Kumari alias Bhawna .....Respondent.

FAO No. 327 of 2014.
Decided on: 31.03.2015.

Hindu Marriage Act, 1955- Section 13- Husband filed a divorce petition claiming that his wife used abusive and filthy language and thereby created unhealthy atmosphere at home – she never used to clean the house and used to leave matrimonial home without any intimation- husband had not given any specific date, month and year when the wife had used abusive language against him and his parents- details of the words uttered by the wife were not given by the husband- father of the husband stated that he was not willing to take back his daughter-in-law- wife filed a petition for restitution of Conjugal Rights which was decreed exparte - maintenance was also awarded to the wife and her daughter- held, that these circumstances proved that husband was at wrong and he was trying to take advantage of his wrong. (Para-8)

Hindu Marriage Act, 1955- Section 13- Desertion- the factum of separation and the intention to bring cohabitation permanently to an end must be established to prove desertion. (Para- 10 to 13)

Cases referred:

Bipinchandra Jaisinghbai Shah versus Prabhavati, AIR 1957 SC 176
Lachman Utamchand Kirpalani versus Meena alias Mota, AIR 1964 SC 40
Smt. Rohini Kumari versus Narendra Singh, AIR 1972 SC 459

Vishwanath Agrawal vs. Sarla Vishwanath Agrawal (2012) 7 SCC 288

For the appellant: Mr. J.R.Poswal Advocate.
For the respondent: Mr. Sanjay Kumar Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J (oral).

This FAO is directed against the judgment dated 14.5.2014, passed by the learned Addl. District Judge, Ghumarwin, Distt. Bilaspur, H.P. in HMA No. 18/3 of 2008.

2. Key facts, necessary for the adjudication of this appeal are that the appellant-petitioner (hereinafter referred to as the appellant) has instituted a petition under Section 13 of the Hindu Marriage Act, 1955, against the respondent. The marriage between the parties was solemnized on 27.2.2004 according to Hindu rites and customs. A son and daughter were born out of the wed lock. According to the averments contained in the petition, the respondent had been using abusive and filthy language and thereby created unhealthy atmosphere at home. She also threatened the petitioner and his family members with dire consequences. The appellant's father had allotted them a separate house, however, the respondent never used to clean the house. She had been leaving the matrimonial house without any information. False complaints were filed by the respondent against the appellant and his family members.

3. The petition was contested by the respondent. She denied the averments made in the petition. She has never threatened the appellant with dire consequences; rather she was ill-treated by the appellant and his parents. She has never demanded separate house. She was turned out of the matrimonial home in September, 2008. She was neither provided proper food nor clothing. The petition for restitution of conjugal rights was filed by her before the learned District Judge, Hamirpur.

4. The rejoinder was filed by the appellant. The issues were framed by the learned Addl. District Judge, Ghumarwin, Distt. Bilaspur on 14.6.2011. The learned Addl. District Judge, Ghumarwin, Distt. Bilaspur, dismissed the petition on 14.5.2014.

5. I have heard Mr. J.R.Poswal, Advocate for the appellant at length and gone through the impugned judgment very carefully.

6. The appellant has appeared as PW-2. According to him, his wife used to maltreat him. She used to abuse his parents. On 26.9.2008, the respondent had left him without any cause. A missing report was also lodged by him. He has suffered psychiatric problem after the marriage. He admitted in his cross-examination that prior to the filing of the petition; there were physical relations between him and his wife occasionally. He also admitted that his wife had also filed petition under Section 9 of the Hindu Marriage Act, 1955. He also admitted that the judgment was passed against him. He has received the summons but he did not appear before the Court. In his cross-examination, he admitted that his wife wanted to reside with him but he himself does not want to live with her. PW-3 Duni Chand and PW-4 Geeta Mahajan have stated that the respondent was abusing, neglecting and quarreling with the appellant and his family members. PW-5 Dy. S.P. Gurdial Singh, has proved Ext. PW-5/A to Ext. PW-5/C. Jagar Nath PW-6 has proved the copies of statements of Ram Pyari and respondent in case No. 118/1 of 2009, titled as State Vrs. Mahinder etc. PW-7 Sandeep Jamwal has proved the copy of complaint under Section 12 of the Protection of Woman from Domestic Violence Act, 2005.

7. The respondent has appeared as RW-1. She has led her evidence by filing affidavit Ext. RW-1/A. According to her, the appellant and his family members were harassing her. She was abused by them. She was not provided food and clothing. She was turned out of her matrimonial home. They used to level false allegations against her. She tried to come back to her matrimonial home but was not allowed by her in-laws. She denied in her cross-examination that all the cases were instituted by her just to harass her husband. RW-2 Smt. Ram Pyari is the mother of the respondent. She deposed that the behavior of the appellant and his family members was not good towards her daughter. Her daughter wanted to reside at her matrimonial home, however, her family members never wanted to take her back. RW-3 Sarvo Devi deposed that the respondent wanted to reside at her matrimonial home but the appellant and his family members refused to take her back. She has tried to convince the appellant and his family members, however, they did not budge and turned the respondent out of the house.

8. According to the appellant, he has suffered psychiatric problem, however, it was not pleaded in the petition that he had suffered psychiatric problem after his marriage. The appellant while appearing as PW-2 has not given any specific date, month or year when the respondent has used abusive language against him and his parents. No particular words uttered by the respondent have been stated by the appellant. Rather PW-3 Duni Chand, the father of the appellant, in his cross-examination has testified that he was not ready and willing to take back his daughter-in-law. The respondent was constrained to file petition under Section 9 of the Hindu Marriage Act, 1955 against the appellant. The appellant did not appear and it was decreed by the learned District Judge. The respondent also filed a petition under Section 125 of the Code of Criminal Procedure seeking maintenance for her and minor daughter. The Judicial Magistrate Ist Class, awarded the maintenance to her minor daughter but not to the respondent. However, the learned Addl. Sessions Judge (FTC), Hamirpur, has granted maintenance to the respondent @ Rs. 3000/- per month, as well. The learned Addl. Sessions Judge, has held that the appellant has refused to cohabit with his wife and thus, she had valid reason to live separately. It is the appellant who does not want to keep the respondent with him. The respondent was always ready and willing to reside with him. The appellant and his family members had been harassing the respondent. The appellant has failed to prove that the respondent has deserted him. The appellant cannot be permitted to take advantage of his own wrong.

9. Mr. J.R.Poswal, Advocate, appearing on behalf of the appellant has vehemently argued that the respondent has filed false cases against his client. However, the fact of the matter is that when the respondent was harassed, she had to file complaint under Sections 498-A and 506 IPC read with Section 34 IPC. The case No. 118/1 of 2009 titled as State of H.P. vrs. Mahinder (Ext. PX) was dismissed since the respondent in those proceedings has failed to prove the case against the accused beyond reasonable doubt. The statement made by the respondent in those proceedings was not found to be incorrect or false. There is no question of filing the complaints by the respondent against the appellant to superior officers for the simple reason that as per the statement of PW-3 Duni Chand, his son was serving in his shop as servant. Mr. Poswal, Advocate, has also argued that in the Police Station also, the respondent has used filthy language against the appellant and his family members. However, PW-5 Dy. S.P. Gurdial Singh has not stated so.

10. Their Lordships of the Hon'ble Supreme Court in ***Bipinchandra Jaisinghbai Shah*** *versus* ***Prabhavati***, AIR 1957 SC 176 have held that two essential conditions must be there to prove the desertion: (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Their Lordships

have held that desertion is a matter of inference to be drawn from the facts and circumstances of each case. Their Lordships have held as under:

> “What is desertion? "Rayden on Divorce" which is a standard work on the subject at p.128 (6th Edn.) has summarized the case-law on the subject in these terms:-
>
> "Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".
>
> The legal position has been admirably summarized in paras 453 and 454 at pp. 241. to 243 of Halsbury's Laws of England (3rd Edn.), VoL 12, in the following words:-
>
> "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated. The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.
>
> The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".
>
> Thus the quality of permanence is one of the essential elements which differentiate desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature

may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances to each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co- exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the (animus deserendi) coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end, and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard CJ. in the case of Lawson v. Lawson, 1955-1 All E R 341 at p. 342(A), may be referred to :-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution..... "

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back."

11. Their Lordships of the Hon'ble Supreme Court in ***Lachman Utamchand Kirpalani*** *versus* ***Meena alias Mota***, AIR 1964 SC 40 have held that in its essence

desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. Their Lordships have further held that the burden of proving desertion - the 'factum' as well as the 'animus deserendi' is on the petitioner and he or she has to establish beyond reasonable doubt to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. Their Lordships have held as under:

> "The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal for Bombay where the Court had to consider the provisions of S. 3(1) of the Bombay Hindu Divorce Act, 1947 whose language is in pari materia with that of S. 10(1) of the Act. In the judgment of this Court in Bipin Chandra v. Prabhavati, 1956 SCR 838; ((S) AIR 1957 SC 176) there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion were considered and the following summary of the law in Halsbury's Laws of England (3rd Edn.) Vol. 12 was cited with approval :
>
> "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the order without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases." The position was thus further explained by this Court. "If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently the cease cohabitation, it will not amount to desertion. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention of bring cohabitation permanently to an end (animus deserndi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.. . . . . Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi coexist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time." Two more matters which have a bearing on the points in dispute in this appeal might also be mentioned. The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. It is settled Law that the burden of proving desertion -
>
> the "factum" as well as the "animus deserendi" - is on the petitioner; and he or she has to establish beyond reasonable doubt, to the satisfaction of the

Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause. As Dunning, L. observed : (Dunn v. Dunn

(1948) 2 All ER 822 at p. 823) :

"The burden he (Counsel for the husband) said was on

her to prove just cause (for living apart). The argument

contains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a failure to distinguish between a legal burden of proof laid down by law and a provisional, burden raised by the state of the evidence . . . . . The legal burden throughout this case is on the husband, as petitioner, to prove that this wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal; and, indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the Court has still, at the end of the case, to ask itself: Is the legal burden discharged? Has the husband proved that she deserted him without cause? Take this case. The wife was very deaf, and for that reason could not explain to the Court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herself stated that they operated on her mind. Counsel for the husband says that the judge ought not to have done that. If there were a legal burden on the wife he would be right, but there was none. The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himself at the end of the case: Has that burden been discharged?"

12. Their Lordships of the Hon'ble Supreme Court in ***Smt. Rohini Kumari versus Narendra Singh***, AIR 1972 SC 459 have explained the expression 'desertion' to mean the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage.

"Under Section 10 (1) (a) a decree for judicial separation can be granted on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. According to the Explanation the expression "desertion" with its grammatical variation and cognate expression means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage. The argument raised on behalf of the wife is that the husband had contracted a second marriage on May 17, 1955. The petition for judicial separation was filed on August 8, 1955 under the Act which came into force on May 18, 1955. The burden under the section was on the husband to establish that the wife had deserted him for a continuous period of not less than two years

immediately preceding the presentation of the petition. In the presence of the Explanation it could not be said on the date on which the petition was filed that the wife had deserted the husband without reasonable cause because the latter had married Countess Rita and that must be regarded as a reasonable cause for her staying away from him. Our attention has been invited to the statement in Rayden on Divorce, 11th Edn. Page 223 with regard to the elements of desertion According to that statement for the offence of desertion there must be two elements present on the side of the deserting spouse namely, the factum, i.e. physical separation and the animus deserendi i.e. the intention to bring cohabitation permanently to an end. The two elements present on the side of the deserted spouse should be absence of consent and absence of conduct reasonably causing the deserting spouse to form his or her intention to bring cohabitation to an end. The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be subject to the qualification that if without just cause or excuse a man persists in doing things which he knows his wife probably will not tolerate and which no ordinary woman would tolerate and then she leaves, he has deserted her whatever his desire or intention may have been. The doctrine of "constructive desertion" is discussed at page 229. It is stated that desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves the wife and the case of a man who with the same intention compels his wife by his conduct to leave him."

13. Their Lordships of the Hon'ble Supreme Court have held in **Vishwanath Agrawal vs. Sarla Vishwanath Agrawal** reported in **(2012) 7 SCC 288** as under:

> "22. The expression 'cruelty' has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.
>
> 28. In Praveen Mehta v. Inderjit Mehta, AIR 2002 SC 2582 it has been held that mental cruelty is a state of mind and feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment, and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The facts and circumstances are to be assessed emerging from the evidence on record and thereafter, a fair inference has to be drawn whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other."

14. As a sequel to the above discussion, it is proved the respondent was thrown out of the matrimonial house by the appellant. She has not been provided with food and clothing. She has to look after her minor daughter. The burden to prove the cruelty was upon the appellant. He has failed to discharge the same. The respondent is forced to live

separately by the circumstances for which, the appellant alone is responsible. The appellant has also failed to prove that the respondent has deserted him. The respondent has to leave the matrimonial house due to harassment and maltreatment meted out to her by the appellant and his family members.

15. Consequently, there is no merit in this appeal, the same is dismissed. Pending application(s), if any, shall stand dismissed.

****

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

Major Paras Rehni & ors. .....Petitioners.
Versus
Abha Rehni .....Respondent.

CRMMO No. 73 of 2015.
Decided on: 31.3.2015.

Protection of Women from Domestic Violence Act, 2005- Section 12- Respondent No. 1 filed a petition- notices were issued to the petitioner but they did not appear despite service, hence, they were proceeded ex-parte- petitioner filed a petition for setting aside the ex-parte order on the ground that petitioner No. 1 was out of India and was not served personally- record showed that application was filed on 14.7.2014 and was barred by 9 months and 16 days- petitioners were repeatedly served and were proceeded ex-parte on 28.10.2013- they had not signed the pleadings and had not filed affidavit in support of averments- hence, order passed by Ld. CJM rejecting the application for setting aside ex-parte order was appropriate. (Para-4)

For the petitioners: Mr. Anshul Attri, Advocate, vice counsel.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is instituted against the order dated 2.2.2015, rendered by the learned Chief Judicial Magistrate, Shimla, H.P. in CMA No. 388/4 of 2014 in Main Petition No. 141/3 of 14/2012.

2. Key facts, necessary for the adjudication of this petition are that the marriage between petitioner No. 1 and respondent was solemnized on 24.2.2011. Respondent No. 1 has filed petition under Section 12 of the Protection of Women From Domestic Violence Act, 2005 (hereinafter referred to as the Act), on 18.6.2012 against the petitioners. It was registered on 21.6.2012. The notices were issued to the petitioners for 16.7.2012, 27.8.2012, 17.11.2012, 15.1.2013, 23.5.2013, 12.7.2013, 27.8.2013 and 28.10.2013. The petitioners were duly served and despite their service, they did not appear before the trial Court. They were proceeded against ex-parte on 28.10.2013. The petitioners filed an application seeking setting aside of order dated 28.10.2013 whereby they were proceeded against ex-parte. According to the averments contained in the application, petitioner No. 1 was out of India for one year course. It is averred in the application that Mr. Chadha has informed petitioner No. 1 that a case was pending against him under the Act.

According to him, he was never served personally by the Process Serving Agency. The petitioner No. 1 informed his counsel through SMS on 15.6.2014 and thereafter, the counsel of the applicant investigated the case file.

3. The application was contested by the respondent. The averments made in the application were denied.

4. I have heard Mr. Anshul Attri, Advocate, appearing vice Mr. Neel Kamal Sood, Advocate, for the petitioners and gone through the records of the case very carefully.

5. The petitioners were proceeded ex-parte on 28.10.2013. Thereafter ex-parte evidence of the respondent was recorded on 7.3.2014 and 28.3.2014. The petition was fixed for arguments on 20.5.2014 and 17.6.2014. One Sh. J.P.S. Chadha, Advocate, appeared before the trial Court on 17.6.2014 and sought time for setting aside the order vide which the petitioners were proceeded ex-parte. The fact of the matter is that the application itself was filed on 14.7.2014. The same was barred by 9 months and 16 days. The application has been filed by the petitioners belatedly to prolong the litigation. The notices were issued to them on 16.7.2012, 27.8.2012, 17.11.2012, 15.1.2013, 23.5.2013, 12.7.2013, 27.8.2013 and 28.10.2013. They were proceeded ex-parte only on 28.10.2013. The petitioners have not even cared to sign the pleadings. The application, surprisingly, has been signed by their Advocate. The petitioners have not filed even their affidavit in support of the averments contained in the application. The reasons assigned in the application are neither cogent nor convincing. There is neither any illegality nor perversity in the order dated 2.2.2015, passed by the learned trial Court.

6. Accordingly, there is no merit in this petition, the same is dismissed. The learned trial Court is directed to decide the matter within a period of one month from today, if not already decided.

****

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

Dheeraj ...Petitioner

Versus

Maharishi Markandeshwar University and another . ...Respondents.

CWP No. 6664 of 2014
Judgment reserved on: 25.3.2015
Date of Decision : April 01, 2015.

Constitution of India, 1950- Article 226- Petitioner sought a writ for quashing the decision of the respondent to conduct a fresh entrance test for filling up the vacant/left out seats of MBBS course and to direct the respondent to fill up the vacant/left out seats on the basis of AIPMT for the year 2014- petitioner claimed that he had remained unsuccessful and had sought the admission on the basis of merit of the qualifying the examination- respondent stated that petitioner had not qualified AIPMT –the permission was sought from the Government to conduct the admission on the basis of merit of qualifying examination but the permission was granted on the condition that competitive test would be conducted, which would form the basis for filling up the vacant seats- record showed that it was provided in the prospectus that State Quota seats would be filled up on the basis of merit of Himachal Pradesh State Rank in AIPMT-UG-2014 and in case the seats remain vacant, they

would be filled up on the basis of merit of qualifying examination- respondent No. 1 is a private university governed by an Act, which provides that admission in Professional and technical courses shall be made only through entrance test – the provision of the Act would override the provisions of the prospectus- further, State Government is competent to issue instructions to regulate admissions in private University- further, Government was not arrayed as a party and the decision of the Government was not challenged- hence, in these circumstances, petitioner cannot question the process of filling of the seats by a competitive examination. (Para- 6 to 14)

Cases referred:
Union of India and others vs. Arun Kumar Roy, AIR 1986 SC 737
Shish Ram and others vs. State of H.P. and others, (1996) 10 SCC 166
Union of India vs. Madras Telephones Scheduled Castes and Scheduled Tribes Social Welfare Association (1997) 10 SCC 226

For the Petitioner : Mr. Jai Subhash Thakur and Mr. R. L. Chaudhary, Advocates.
For the respondents : Mr. Ajay Dhiman, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Petitioner has approached this Court for grant of following substantive reliefs:

> *"(i). That writ of certiorari may kindly be issued, quashing the decision dated 05.09.2014 of the respondents, whereby the respondents are going to take a fresh entrance test for filling up the vacant/left out seats (All India Open Seats and State Quota Seats) of MBBS course, since the said decision is in violation of the rules and regulation framed by the respondent University for filling up the vacant seats of MBBS course as per Annexure P-5.*
>
> *(ii) That writ of mandamus may kindly be issued, directing the respondents to fill up the vacant/left out seats (All India Open Seats & State Quota Seats) of MBBS course on the basis of merit of AIPMT/Merit of Qualifying examination as provided in the prospectus for the year 2014, Annexure P-5."*

2. The case set up by the petitioner is that though he had appeared in All India Pre-Medical Entrance Test (AIPMT) but he remained unsuccessful and thereafter had sought admission in the respondent No.2-College to MBBS course on the basis of the merit of the qualifying examination, which has wrongly been denied to him despite the petitioner being fully eligible.

3. In reply to the petition, the respondents No. 1 and 2 have stated that the petitioner was not entitled to the admission as he had not qualified AIPMT. Insofar as his claim for admission on the basis of qualifying examination is concerned, it was stated that after second counselling when the seats of the college remained unfilled, it had sought permission from the State Government for filling up these seats which permission though was granted but on the condition that another competitive test would have to be conducted which in turn would form the basis of filling up the vacant seats. The respondents

conducted the competitive examination and filled up the seats but since the petitioner failed to appear in this examination he could not be admitted and now therefore cannot complain at this stage.

4. The petitioner filed rejoinder wherein it has been reiterated that the unfilled seats in the respondent No.2-College were required to be filled up on merit of qualifying examination which is ten plus two (10+2) and the petitioner was entitled to be admitted as he possessed the requisite percentage.

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

6. No doubt, there exists a provision in the prospectus that at the first instance, the State Quota seats are firstly required to be filled up on the basis of merit of Himachal Pradesh State Rank in AIPMT-UG-2014 in Reserved and General Categories seats and seats under Open Quota will be filled up on the basis of merit of AIPMT-2014 on All India Category Rank and if the requisite number of AIPMT qualified candidates are not available, the resultant vacant seats will be filled up from the candidates on the basis of merit of the qualifying examination. But then it was not the respondent, who refused the admission to the petitioner. It in fact after second counselling had referred the matter to the State Government who refused to grant permission to fill up the seats on the basis of qualifying examination on the ground that this provision ran contrary to not only provisions of the instructions issued by the MCI but it was also in violation to Section 31 of the Act under which the respondent No.1 was established and further directed the respondents to conduct a competitive examination.

7. Admittedly, the respondent No.1-University is a private University established under H.P. Government Act No. 22 of 2010 and approved under Section 22 of the UGC Act, 1956. Under Section 31 of the Maharishi Markandeshwar University (Establishment & Regulation) Act, 2010, it has been provided as under:

> *"31.(1). Admissions in the University shall be made strictly on the basis of merit.*
>
> *(2) Merit for admission in the University may be determined either on the basis of marks or grade obtained in the qualifying examination for admission and achievements in co-curricular and extra-curricular activities or on the basis of marks or grade obtained in the entrance test conducted at State level either by an association of the Universities conducting similar course or by any agency of the State.*
>
> ***Provided that admission in professional and technical courses shall be made only through entrance test.***
>
> *(3) Seats for admission in the University for the students belonging to SC,ST and OBC and handicapped students, shall be reserved as per the policy of the State Government.*
>
> *(4) At least 25% seats for admission to each course shall be reserved for students who are bonafide Himachalis."*

8. Once a mode of making admissions has been prescribed under Section 31 of the Act ibid, then no provision of the rules, byelaws, regulations or even the prospectus which provide anything contrary to the provisions of Section 31 can prevail. It is settled law that an Act will prevail over the rules, byelaws, regulations and even the prospectus.

9. According to the "pure theory of law" of the eminent jurist Kelsen, in every legal system there is a hierarchy of laws, and the general principle is that if there is a conflict between a norm in a higher layer of the hierarchy and a norm in a lower level of the hierarchy, then the norm in the higher layer prevails, and the norm in the lower layer becomes ultra vires.

10. In our country this hierarchy is as follows:

(1) The Constitution of India.

(2) Statutory law, which may be either law made by the Parliament or law made by the State Legislature.

(3) Delegated legislation which may be in the form of rules, regulations etc. made under the Act.

(4) Administrative instructions which may be in the form of GOs, Circulars etc.

11. Therefore, in the event of there being a conflict between the Act, Rules and regulations, the Act will prevail and if there is a conflict between the Act, Rules and the regulations on the one hand and the circular or prospectus on the other hand, the Act will prevail and the later becomes ultra vires. (Refer: ***Union of India and others*** vs. ***Arun Kumar Roy, AIR 1986 SC 737, Shish Ram and others*** vs. ***State of H.P. and others, (1996) 10 SCC 166*** and ***Union of India*** vs***. Madras Telephones Scheduled Castes and Scheduled Tribes Social Welfare Association (1997) 10 SCC 226***).

12. The State Government has clearly observed in its letter dated 6.9.2014 (Annexure R-4) that the provisions of the prospectus wherein it was stipulated that if the requisite number of AIPMT qualified candidates are not available, the resultant vacant seats will be filled up from the candidates on the basis of qualifying examination was contrary not only to the provisions of Section 31 of the Act but also to the MCI guidelines.

13. Now insofar as the question regarding competence of the State Government to issue instructions and regulate admissions in private University is concerned, this issue is no longer res integra in view of the judgment passed by this Bench in ***H.P. Private Universities Management Association vs. State of H.P. and others, decided on 23rd July, 2014, CWP No. 7688 of 2013,*** wherein as many as 16 private Universities had questioned the competence of the State Government to regulate admissions in professional colleges and this Court held as follows:

> ***"20.*** *In view of the various pronouncements of the Hon'ble Supreme Court, it can safely be concluded that in a right to establish an institution, inherent is the right to administer the same which is protected as part of the freedom of occupation under Article 19 (1) (g). Equally, at the same time, it has to be remembered that this right is not a business or a trade, given solely for the profit making since the establishment of educational institutions bears a clear charitable purpose. The establishment of these institutions has a direct relation with the public interest in creating such institutions because this relationship between the public interest and private freedom determines the nature of public controls which can be permitted to be "permissible". Even the petitioners concede that they have established the institutions to ensure good quality education and would not permit the standard of excellence to fall below the standard as may be prescribed by the State Government. The petitioners also conceded that the State makes it mandatory for them to maintain the*

standard of excellence in professional institutions. Thus, ensuring that admissions policies are based on merit, it is crucial for the State to act as a regulator. No doubt, this may have some effect on the autonomy of the private unaided institution but that would not mean that their freedom under Article 19 (1) (g) has in any manner been violated. The freedom contemplated under Article 19 (1) (g) does not imply or even suggest that the State cannot regulate educational institutions in the larger public interest nor it be suggested that under Article 19 (1) (g), only insignificant and trivial matters can be regulated by the State. Therefore, what clearly emerges is that the autonomy granted to private unaided institutions cannot restrict the State's authority and duty to regulate academic standards. On the other hand, it must be taken to be equally settled that the State's authority cannot obliterate or unduly compromise these institutions' autonomy. In fact it is in matters of ensuring academic standards that the balance necessarily tilts in favour of the State taking into consideration the public interest and the responsibility of the State to ensure the maintenance of higher standards of education.

23. *The State has power to regulate academic excellence particularly in matters of admissions to the institutions and, therefore, is competent to prescribe merit based admission processes for creating uniform admission process through CET. Any prayer for seeking dilution or even questioning the authority of the State to act an regulator is totally ill-founded in view of the various judicial pronouncements, particularly in* ***Visveswaraiah Technological University*** *(supra) and reiterated in* ***Mahatma Gandhi University*** *(supra)."*

The judgment passed by this Court has attained finality inasmuch as the SLP preferred against this judgment has been dismissed by the Hon'ble Supreme Court on 21.11.2014.

14. Surprisingly, the petitioner has not even arrayed the Government of Himachal Pradesh as a party, let alone laying challenge to its decision as communicated vide letter dated 6.9.2014 (Annexure R-4). Therefore, in absence of any challenge having been laid by the petitioner to the directions issued by the State Government on the basis of which the respondents have filled up the seats in question by conducting a competitive examination, no relief whatsoever can be granted to the petitioner.

15. In view of the aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed, so also the pending application(s) if any. The parties are left to bear their own costs.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Garib Dass & others ...Appellants/plaintiffs

Versus

Mulakh Raj & another ... Respondents/defendants

RSA No. 478 of 2003-G
Judgment reserved on : 26.3.2015
Date of Decision : April 2, 2015

Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1952- Section 3 - Sons of 'G' were possessing suit land as occupancy tenants on payment of rent- 'H' son of 'G' died on 18.2.1951- his widow 'S' re-married 'N'- she claimed that she had succeeded to the estate of 'H' prior to the re-marriage- she claimed an absolute ownership on the basis of Vestment Act- oral evidence of the parties did not prove the exact date of marriage- her date of re-marriage was also not recorded in the revenue record- there is nothing on record to establish the exact date of re-marriage of 'S' and it cannot be said that such marriage had not taken place prior to 15.6.1952- her pre-existing jural relationship in the premises stood extinguished conferring absolute right of ownership upon her by the provisions of the Vestment Act. (Para- 8 to 19)

Cases referred:

Chuhniya Devi vs. Jindu Ram, 1991 (1) Sim.L.C. 223
Commissioner of Income Tax, Lahore vs. Krishan Kishore, AIR 1940 Lahore 113
Giano Devi vs. Mangal Singh and others, 1985 Sim.L.C. 170
Ratti Ram vs. Smt. Basanti & others, 1985 Sim. L.C. 10
Dipa and others vs. Ganga Datt and others, 1969 Current Law Journal 750 (Punjab and Haryana High Court)
Bahadur Singh and others vs. Shangara Singh and others, (1995) 1 SCC 232, 1995 PLJ 256 (Supreme Court of India)
Shrimati Pato and another vs. Shrimati Muli and another, 1970 P.L.J. 278 (Punjab & Haryana High Court)
Partap Kaur vs. Harchand Singh, 1970 P.L.J. 383 (Punjab & Haryana High Court)
Smt. Harbheji vs. Kare and others, 1977 P.L.J. 66 (Punjab & Haryana High Court)
Mst. Karmi and others vs. Bachna and others, 1959 (Vol.LXI) The Punjab Law Reporter 313
KSL and Industries Limited vs. Arihant Threads Limited & others, (2015) 1 SCC 166
State (NCT of Delhi) vs. Sanjay, (2014) 9 SCC 772
Ram Swaroop & another vs. Mahindru & others, (2003) 12 SCC 436
Cherotte Sugathan (Dead) through LRs. & others, vs. Cherotte Bharathi & others, (2008) 2 SCC 610

For the appellant	:	Mr. N. K. Thakur, Senior Advocate with Mr. Rohit Bharoll, Advocate, for the appellants.
For the respondent	:	Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Ajit Singh Jaswal, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Plaintiffs' Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, stands admitted on the following substantial question of law:-

> "Whether the impugned judgment and decree are vitiated because of mis-construction and mis-interpretation by the lower appellant Court of the provisions of Punjab Occupancy Tenure Act, 1952 and Hindu Widow Remarriage Act, 1856?"

2. The points which arise for consideration in the present appeal are: (i) What is the exact date of remarriage of Shankari. (ii) Did such remarriage take place prior to

15.6.1952, the appointed day under the provisions of Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1952, (hereinafter referred to as the Vestment Act), (iii) Whether rights of Shankari, after the enactment of the Vestment Act, continued to be governed and regulated by the provisions of the Punjab Tenancy Act, 1887 (hereinafter referred to as the Tenancy Act) and Hindu Widows Re-marriage Act, 1856 (hereinafter referred to as the Re-marriage Act), (iv) Whether by virtue of the Vestment Act any pre-existing jural relationship of Shankari in the demised premises, stood extinguished, conferring absolute right of ownership and title upon her.

3. Hans Raj, Dalipa, Nasib Chand and Garib Dass, all sons of Gokal, as occupancy tenants on payment of rent, were possessing the land in question. With the death of Hans Raj on 18.2.1951, his widow Shankari remarried Nasib Chand. This was as per customary rights of "Chaddar – Andaji". Prior thereto, as sole surviving heir, she succeeded to the estate of Hans Raj. Shankari Devi got mutation of succession recorded in the revenue record. By virtue of the provisions of the Vestment Act, Shankari Devi as an occupancy tenant, claimed absolute ownership of her right. Unpalatable as it were to other co-owners/co-tenants, they filed a suit for declaration, claiming themselves to be owners in possession of share of Hans Raj.

4. Based on respective pleadings of the parties, trial Court framed the following issues:

1. Whether the defendant No. 1 remarried in the year 1952? OPP

2. If issue No. 1 is proved whether plaintiff No. 1 and father of the plaintiff Nos. 2 to 4 Dalip Chand succeeded to the occupancy tenancy of the suit land after the death of Hans Raj, if so, its effect? OPP

3. Whether the suit is not maintainable in the present form? OPD

4. Whether the suit is barred by limitation? OPD

5. Whether plaintiffs have no cause of action, if so, its effect? OPD

6. Relief.

5. Relying upon the school leaving certificate (Ext. DW-4/A), reflecting date of birth of Mulakh Raj, born to Shankari through the loins of Nasib Chand, to be 15.6.1956, trial court rejected date of remarriage of Shankari to be 13.4.1957. Reliance was also placed on entries of mutations dated 27.11.1952 (Ext. P-5) and dated 14.11.1953 (Ext. P-6) while deciding issue No. 1 in favour of the plaintiffs. Assuming Shankari to have remarried in the year 1952 and the right devolved upon her to be limited in nature, in view of provisions of the Re-marriage Act, trial court held Shankari to have lost all rights in the estate of deceased Hans Raj. Issue No. 2 was thus decided accordingly.

6. Hence plaintiffs' suit was decreed holding (i) Brothers of Hans Raj/their successor-in-interest to be owners in possession of share of Hans Raj; (ii) entries reflecting Shankari to be owner in possession to be null & void and (iii) restraining her from cutting and removing the trees; alienating the suit land till it is partitioned by metes and bounds.

7. Plaintiff's Civil Suit No. 226 of 1994, titled as Garib Dass & others vs. Mulakh Raj & others, decreed by the learned Sub Judge (II), Una, H.P., vide judgment and decree dated 7.11.2000 stands dismissed in terms of impugned judgment and decree dated 8.10.2003, passed by the learned District Judge Una, District Una, H.P., in Civil Appeal No. 190 of 2000, titled as Mulakh Raj & another vs. Garbi Dass & others.

8. Sh. Naresh Thakur, learned Senior Advocate made the following submissions: (i) Documents Ext. DW-4/A, Ext. P-5 and Ext. P-6 clearly establishes that Shankari could not have remarried on 13.4.1957. (ii) With her remarriage, prior to the enforcement of the Vestment Act, all of her rights in the estate of Hans Raj stood extinguished. (iii) Assuming date of such remarriage is 13.4.1957, even then her rights would continue to be governed by the provisions of the Re-marriage Act and the Tenancy Act. In support, reliance is sought upon the following decisions: *Chuhniya Devi vs. Jindu Ram,* 1991 (1) Sim.L.C. 223; *Commissioner of Income Tax, Lahore vs. Krishan Kishore,* AIR 1940 Lahore 113; *Giano Devi vs. Mangal Singh and others,* 1985 Sim.L.C. 170.

9. On the other hand Sh. Bhupinder Gupta, learned Senior Advocate, has argued that (i) plaintiffs' failure in not discharging the onus of proving the exact date of remarriage of Shankari rightly resulted into dismissal of the suit. (ii) By virtue of the provisions of Vestment Act, Shankari acquired absolute right in the estate of her husband. In support, reliance is sought upon the following decisions: *Ratti Ram vs. Smt. Basanti & others,* 1985 Sim. L.C. 10; *Dipa and others vs. Ganga Datt and others,* 1969 Current Law Journal 750 (Punjab and Haryana High Court); *Bahadur Singh and others vs. Shangara Singh and others,* (1995) 1 SCC 232, 1995 PLJ 256 (Supreme Court of India); *Shrimati Pato and another vs. Shrimati Muli and another,* 1970 P.L.J. 278 (Punjab & Haryana High Court); *Partap Kaur vs. Harchand Singh,* 1970 P.L.J. 383 (Punjab & Haryana High Court); *Smt. Harbheji vs. Kare and others,* 1977 P.L.J. 66 (Punjab & Haryana High Court); *Mst. Karmi and others vs. Bachna and others,* 1959 (Vol.LXI) The Punjab Law Reporter 313.

10. Appellants insist that Shankari was remarried in the year 1952, whereas respondents want the Court to believe that such marriage took place on 13.4.1957. Oral evidence of the parties, as is held by the lower appellate Court, does not conclusively establish the exact date of such remarriage. When the customary practice of "Chaddar – Andaaji" was performed is not clear.

11. School leaving certificate (Ext. DW-4/A) does not record date of remarriage of Shankari. It only reflects Mulakh Raj to be born on 15.6.1956. But then who got such entry recorded is not proved, making it inadmissible. It is not in dispute that Mulakh Raj, eldest son of Shankari, was born through the loins of Naseeb Chand. Though in the revenue record (Ext. P-5 and P-6 – mutations effected on 27.11.1952 and 14.11.1953 respectively), it is recorded that Shankari remarried Naseeb Chand but even her, date of such marriage is neither recorded nor can it be inferred. It be only observed that these documents were merely tendered in evidence by the plaintiffs and not proved by any revenue officer. The lower appellate Court has rightly dealt with the admissibility and evidentiary value of such document in paragraphs 24 and 25 of the judgment. Mere exhibiting of a document would not dispense the requirement of proving contents thereof, in accordance with law. Even otherwise, factum of remarriage so reflected therein, is not recorded in any other revenue record effecting mutation of right of succession. Respondents have proved such documents from the year 1955-56 up to 1985-86 (Ext.D-1 to D-7).

12. Assuming that Shankari did remarry in the year 1952, even then date of such remarriage would continue to gain significance. Was it prior or after the enforcement of the Vestment Act, remains unanswered by the plaintiffs. No error can be found with the findings returned by the lower appellate Court. Thus findings returned by the lower appellate Court cannot be said to be erroneous, perverse or not borne out from incomplete and incorrect appreciation of material placed on record.

13. For better appreciation, relevant clauses of statutory provisions are reproduced as under:

Hindu Widows Re-marriage Act, 1856:

"Section 2: Rights of widow in deceased husband's property to cease on her remarriage – All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall upon her remarriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same".

[Emphasis supplied]

Punjab Tenancy Act, 1887:

"Section 59. Succession to right of occupancy. –

(1) When a tenant having a right of occupancy in any land dies, the right shall devolve -

(a) on his male lineal descendants, if any, in the male line of descent; and

(b) failing such descendants, on his widow, if any, until she dies or remarries or abandons the land or is under the provisions of his Act ejected therefrom; and

(c) failing such descendants and widow, on his widowed mother, if any, until she dies or re-marries or abandons the land or is under the provisions of this Act ejected therefrom;

(d) failing such descendants and widow, or widowed mother, or, if the deceased tenant left a widow or widowed mother, then when her interest terminates under clause (b) or clause (c) of this sub-section on his male collateral relative in the male line of descent from the common ancestor of the deceased tenant and those relatives:

Provided with respect to clause (d) of this sub section, that the common ancestor occupied the land.

Explanation. – For the purposes of clause (d), land obtained in exchange by the deceased tenant or any of his predecessors –in-interest in pursuance of the provisions of sub-section (1) of section 58-A shall be deemed to have been occupied by the common ancestor if the land given for it in exchange was occupied by him.

(2) As among descents and collateral relatives claiming under sub-section (1) the right shall subject to the provisions of that sub-section, devolve as if it were land left by the deceased in the village in which the land subject to the right is situate.

(3) When the widow of a deceased tenant succeeds to a right of occupancy, she shall not transfer the right by sale, gift, or mortgage or by sub-lease for a term exceeding one year.

(4) If the deceased tenant has left no such persons as are mentioned in sub-section (1) on whom, his right of occupancy may devolve under that sub-section, the right shall be extinguished." [Emphasis supplied]

Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1952:

"Section 3: Vesting of proprietary rights in occupancy tenants and extinguishment of corresponding rights of landlords. - Notwithstanding anything to the contrary contained in any law, custom or usage for time being in force on and from the appointed day:

(a) All rights, title and interest (including the contingent interest, if any, recognized by any law, custom or usage for the time being in force and including the share in the Shamilat with respect to the land concerned) of the landlord in the land held under him by any occupancy tenant, shall be extinguished and such rights, title and interest shall be deemed to vest in the occupancy tenant free from all encumbrances, if any, created by the landlord:

Provided that the occupancy tenant shall have the option not to acquire the share in the Shamilat by giving a notice in writing to the Collector within six months of the publication of this Act or from the date of his obtaining occupancy rights whichever is later;

(b) the landlord shall cease to have any right to collect or receive any rent or any share of the land revenue in respect of such land and his liability to pay land revenue in respect of the land shall also cease;

(c) the occupancy tenant shall pay direct to the Government the land revenue accruing due in respect of the land;

(d) The occupancy tenant shall be liable to pay, and the landlord concerned shall be entitled to receive and be paid, such compensation as may be determined under this Act." [Emphasis supplied]

14. It is not in dispute that Hans Raj had no male lineal descendant and as such his right devolved upon his wife Shankari.To this effect, right from the year 1955 - 56 mutation of succession was also got recorded in the revenue record (Ext. D-1 to D-7). Significantly there is no challenge to earlier entries as the suit was filed only in the year 1994. The fact that initially she tilled the land as an occupancy tenant is not in dispute.

15. It is no doubt true that by virtue of provisions of the Re-marriage Act and the Tenancy Act, right devolved upon Shankari was restrictive in nature , but however by virtue of Section 3 of the Vestment Act, which is unambiguously clear, such restriction stood obliterated, conferring absolute right of ownership upon her. The provision starts with a non obstante clause. It not only extinguishes all rights of landlords but also confers right, title and interest in favour of an occupancy tenant. The vestment, automatic in nature, in favour of the occupancy tenant, free from all encumbrances, notwithstanding anything to the contrary contained in any law, custom or usage, is from the appointed day i.e. 15.6.1952 as stipulated under Section 2 (a)(i) of the Vestment Act.

16. The apex Court in *KSL and Industries Limited vs. Arihant Threads Limited & others,* (2015) 1 SCC 166, while dealing with the provisions of non obstante clause has held as under:

> "47. In a later case [*Solidaire India Ltd. Vs. Fairgrowth Financial Services Ltd.,* (2001) 3 SCC 71] the question arose in the context of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 and SICA. It was contended that in view of the special provisions contained in SICA no proceedings could have been initiated under the Special Court Act. The Court observed that though Section 32 of SICA contained a non obstante clause, there was a similar non obstante clause in Section 13 of the Special Court Act. The Court observed: (*Solidaire case,* SCC p.73, para 9)
>
> > "9. … This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail."
>
> This Court in *Solidaire case (supra)* approved the observations of the Special Court to the effect that if the legislature confers a non obstante clause on a later enactment, it means that the legislature intends that the later enactment should prevail. Further, it is a settled rule of interpretation that if one construction leads to a conflict, whereas on another construction two Acts can be harmoniously construed, then the latter must be adopted."
>
> [See: *State of West Bengal & others vs. Associated Contractors,* (2015) 1 SCC 32]

17. Also the apex Court in *State (NCT of Delhi) vs. Sanjay,* (2014) 9 SCC 772 has held as under:

> "63. It is well known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions."
>
> [See: *Hussein Ghadially @ M.H.G.A. Shaikh & others vs. State of Gujarat,* (2014) 8 SCC 425; *Animal Welfare Board of India vs. A. Nagaraja & others,* (2014) 7 SCC 547; *Municipal Corporation of Greater Mumbai & others vs. Kohinoor CTNL Infrastructure Company Private Ltd. & another,* (2014) 4 SCC 538; and *Bharat Sanchar Nigam Limited vs. Telecom Regulatory Authority of India & others,* (2014) 3 SCC 222.]

18. The Vestment Act does not merely regulate relationship of landlord and tenant but in fact deals with the alienation of agricultural land. It also includes transfer of the owner's interest in favour of an occupancy tenant.

19. There is nothing on record to establish the exact date of remarriage of Shankari. Equally it cannot be said that such remarriage did not take place prior to 15.6.1952. Her pre-existing jural relationship, in the demised premises, stood extinguished, conferring absolute right of ownership upon her by the provisions of the Vestment Act, being a special enactment, having an overriding effect over the provisions of both the Tenancy Act and the Re-marriage Act. The Court below has correctly and completely appreciated and interpreted the material so placed on record, including the provisions of the statutes.

20. The apex Court in *Bahadur Singh and others vs. Shangara Singh and others,* (1995) 1 SCC 232, while dealing with the provisions in hand has held existence of any pre-existing jural relationship of landlord and tenant by operation of law, to be extinguished and formation of a totally new relationship as owner.

21. While dealing with the provisions which were paramateria, the Division Bench of Punjab & Haryana High Court in *Partap Kaur* (Supra) has also taken a similar view.

22. Similar view has been taken by this Court in *Ratti Ram* (supra) as also Punjab & Haryana High Court in *Dipa* (supra), *Shrimati Pato* (supra); *Harbheji* (supra) and *Mst. Karmi* (supra).

23. The apex Court in *Ram Swaroop & another vs. Mahindru & others,* (2003) 12 SCC 436 has held as under:

> "24. The High Court, in our opinion, by misinterpreting the provisions of the Hindu Widows Remarriage Act came to a wrong conclusion that on remarriage Smt. Gangi lost all her rights and title in the estate of her deceased husband. The main question which was raised before the High Court was that after the marriage of Smt. Gangi with Bala Ram (father of the appellant) all rights of the properties inherited by Smt. Gangi from her husband devolved on Shri Bala Ram and Bala Ram has been enjoying all the properties exclusively with the consent and knowledge of the other brothers. This important fact has been overlooked by the High court. The High Court also wrongly observed that the document relating to the transfer of the estate of Kanshi Ram in favour of Bala Ram does not appear to have been given effect to. The further observation of the High Court that Smt. Gangi on her marriage loses all her rights in the properties as per the provisions of the Hindu Widows Remarriage Act is baseless and incorrect. It is seen from the records that the Hindu Widows Remarriage Act, 1856 came to be enforced in the area in question w.e.f. 1-1-1950 vide the Merged States (Laws) Act, 1949 whereas the document of compromise deed was executed in the year 1932 signed by Smt. Gangi and other panchas and the father of the plaintiff and the other witnesses. Therefore, the provisions of the Hindu Widows Remarriage Act, 1856 were not applicable to the area and the provisions of the Act cannot be made applicable retrospectively. In our opinion, the compromise deed does not debar her from losing all her rights in the properties and she was fully competent and entitled to inherit all the properties."

24. The apex Court in *Cherotte Sugathan (Dead) through LRs. & others, vs. Cherotte Bharathi & others,* (2008) 2 SCC 610 had the occasion to deal with the provisions of the Re-marriage Act and the Hindu Succession Act, 1956. The Court held as under:

> "11. The Act brought about a sea change in Shastric Hindu Law. Hindu widows were brought on equal footing in the matter of inheritance and succession along with the male heirs. Section 14(1) stipulates that any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, will be held by her as a full owner thereof. Section 24, as it then stood, reads as under:
>
> > "24. Certain widows remarrying may not inherit as widows. – Any heir who is related to an intestate as the widow of a predeceased son, the widow of a predeceased son of a predeceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has remarried."

12. Upon the death of Sukumaran, his share vested in the first respondent absolutely. Such absolute vesting of property in her could not be subjected to divestment, save and except by reason of a statute.

13. Succession had not opened in this case when the 1956 Act came into force. Section 2 of the 1856 Act speaks about a limited right but when succession opened on 2-8-1976, the first respondent became an absolute owner of the property by reason of inheritance from her husband in terms of sub-section (1) of Section 14 of the 1956 Act. Section 4 of the 1956 Act has an overriding effect. The provisions of the 1956 Act, thus, shall prevail over the text of any Hindu Law or the provisions of the 1856 Act. Section 2 of the 1856 Act would not prevail over the provisions of the 1956 Act having regard to Sections 4 and 24 thereof.

14. The question posed before us is no longer res integra. In *Chando Mahtain v. Khublal Mahto,* AIR 1983 Pat 33 the Patna High Court opined: (AIR p.34, para 6)

> "6. … … The Hindu Widows' Re-marriage Act, 1856 has not been repealed by the Hindu Succession Act, 1956 but Section 4 of the latter Act has an overriding erect and in effect abrogates the operation of the Hindu Widows' Re-marriage Act, 1856. According to Section 4 of the Hindu Succession Act all existing laws whether in the shape of enactments or otherwise shall cease to apply to Hindus insofar as they are inconsistent with any of the provisions contained in this Act."

15. In *Kasturi Devi vs. Dy. Director of Consolidation,* (1976) 4 SCC 674 this Court categorically held that a mother cannot be divested of her interest in the deceased son's property either on the ground of unchastity or remarriage.

16. The Kerala High court in *Thankam v. Rajan,* AIR 1999 Ker 62 held that remarriage of the wife cannot be a ground for her losing right to succeed to her deceased husband's property.

17. Yet again this Court in *Velamuri Venkata Sivaprasad v. Kothuri Venkateswarlu,* (2000) 2 SCC 139 held: (SCC p.165, para 52)

> "52. Incidentally, Section 24 of the Succession Act of 1956 placed certain restrictions on certain specified widows in the event of there being a remarriage; while it is true that the section speaks of a predeceased son or son of a predeceased son but this in our view is a reflection of the Shastric Law on to the statute. The Act of 1956 in terms of Section 8 permits the widow of a Hindu male to inherit simultaneously with the son, daughter and other heirs specified in Class I of the Schedule. As a matter of fact she takes her share absolutely and not the widow's estate only in terms of Section 14. Remarriage of a widow stands legalized by reason of the incorporation of the Act, of 1956 but on her remarriage she forfeits the right to obtain any benefit from out of her deceased husband's estate and Section 2 of the Act of 1856 as noticed above is very specific that the estate in that event would pass on to the next heir of her deceased husband as if she were dead. Incidentally, the Act of

> 1856 does not stand abrogated or repealed by the Succession Act of 1956 and it is only by Act 24 of 1983 that the Act stands repealed. As such the Act of 1856 had its fullest application in the contextual facts in 1956 when Section 14(1) of the Hindu Succession Act was relied upon by Defendant 1."
>
> We respectfully agree with the said view."

25. Principle laid down in *Chuhniya Devi* (supra) to the effect that Himachal Pradesh Tenancy and Land Reforms Act, 1972 is a complete Code in itself cannot be disputed. However, the Act specifically does not deal with the inter play between general and special enactment.

26. In *Commissioner of Income Tax, Lahore* (supra) Court was dealing with the definition of an owner in the context of the Income Tax Act. Where the corpus of the property was shown to belong to a Joint Hindu Family, an individual member of the family could not be held to be an owner only because by way of custom he was appropriating major portion of the income to himself.

27. In *Giano Devi* (supra), Court was dealing with a case where undisputedly marriage had taken place prior to the enactment of the Vestment Act and the widow upon her remarriage claimed title by way of adverse possession.

28. Hence, in my considered view, there is no merit in the present appeal and the same is accordingly dismissed. It cannot be said that the judgment passed by the lower appellate Court is based on incorrect and incomplete appreciation of facts and material placed on record by the parties or that the same is perverse which has resulted into miscarriage of justice. Points arising for consideration and substantial question of law are answered accordingly. Pending application(s), if any, also stand disposed of accordingly.

****

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

Manohar Lal son of late Sh Dila Ram. .....Petitioner.

Versus:

H.P.Vidhan Sabha through Secretary
HP Vidhan Sabha Shimla and others. .....Respondents.

CWP No. 8005 of 2011.
Order reserved on: 19.3.2015
Date of Order: April 2, 2015

Constitution of India, 1950- Article 226- Petitioner was appointed as a Clerk in Vidhan Sabha and was designated as Junior Assistant on placement- additional post of Senior Assistant was constituted- Departmental Promotion Committee recommended the name of 'M' – petitioner claimed that he was entitled to be promoted on the basis of reserved promotional vacancy for Scheduled Caste- respondent claimed that the post of Senior Assistant is a non-selection post and is to be filled up by way of promotion- held, that as per Rules, post of Senior Assistant is a non-selection post and the same should be filled by way of promotion from amongst the clerical cadre of Clerks/Junior Assistants having ten years of experience – there is no mention in the Rule that post will be reserved for Scheduled Caste only- State Government has taken a decision that provision of the Constitution (85th

Amendment) Act, 2001 are not required to be implemented in the State, therefore, the benefit of reservation in promotion cannot be granted to the petitioner. (Para-5 and 6)

For the petitioner: Mr.P.D.Nanda, Advocate.
For the respondents. Mr.Dushyant Dadwal, Advocate.

The following judgment of the Court was delivered:

P.S.Rana Judge.

Present Civil Writ is filed under Article 226 of the Constitution of India. It is pleaded that on dated 22.2.1995 petitioner was appointed as Clerk in Vidhan Sabha and on dated 6.5.2000 petitioner was designated as Junior Assistant on placement. It is pleaded that on dated 30.1.2006 seniority list of Junior Assistants/Clerks was circulated. It is pleaded that on dated 31.8.2007 on creation of additional post of Senior Assistant DPC was constituted. It is pleaded that promotional posts fell to the share of SC category but Departmental Promotion Committee recommended the name of Sh Mohar Singh from the general category. It is pleaded that on dated 1.9.2009 Sh Mohar Singh was promoted as Senior Assistant and thereafter petitioner filed present writ petition against the promotion of Sh Mohar Singh. It is pleaded that thereafter on dated 1.7.2009 the petitioner was promoted as Senior Assistant as a stop gap arrangement against leave vacancy. It is pleaded that on dated 1.10.2010 petitioner was promoted as Senior Assistant on notional basis w.e.f 1.9.2008. It is pleaded that thereafter on dated 1.10.2010 the notional promotion of the petitioner was regularized w.e.f. 1.9.2008. It is pleaded that petitioner was legally entitled for promotion on the basis of reserve promotional vacancy for Scheduled Caste w.e.f. 1.9.2007. Prayer for acceptance of petition sought.

2. Per contra reply filed on behalf of the respondents pleaded therein that HP Legislative Assembly has framed its own rules for recruitment and conditions of service. It is pleaded that as per rules the post of Senior Assistant is non selection post and method of recruitment is 100% by way of promotion. It is pleaded that promotion to the post of Senior Assistant is from the common clerical cadre of Clerks/Junior Assistants with ten years regular service. It is pleaded that those clerks who were promoted from Class-IV employee they would be promoted only after they fulfill essential qualifications with Matric 2nd division or 10+2 qualification. It is pleaded that as per rules promotion for the non selection post is laid down in Chaper-16 in para 16.34 of the Handbook on Personnel Matters Vol- I and as per rules 16.34 every person eligible for promotion was to be considered by the Departmental Promotion Committee. It is pleaded that seniority list is maintained in accordance with instructions and guidelines issued by the Government. It is pleaded that petitioner is not entitled for promotion w.e.f.1.9.2007 because post in question is non selection post and the same was to be filled as per rules 16.34 of the Handbook on Personnel Matters Vol.-I. It is pleaded that petitioner figured at serial No.9 in the seniority list and could not be considered for promotion. Prayer for dismissal of writ petition sought. Petitioner filed rejoinder and re-asserted the allegations mentioned in the writ petition.

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

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

(1) Whether petitioner is entitled for promotion to the post of Senior Assistant w.e.f. 1.9.2007 as alleged.?

(2) Relief.

Finding upon Point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioner that promotional post of Senior Assistant was reserved for Scheduled Caste category and petitioner is legally entitled for the promotion to the post of Senior Assistant w.e.f.1.9.2007 is rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that petitioner is an employee posted in HP Vidhan Sabha. It is also proved on record that petitioner is governed by the HP Vidhan Sabha Recruitment and Conditions of Service Rules 1974. As per HP Vidhan Sabha Recruitment and Conditions of Service Rules 1974 the post of Senior Assistant is non selection post and the same should be filled by way of promotion amongst common clerical cadre of clerks or Junior Assistants with having ten years regular service and from the clerks who have been promoted from Class-IV employee having the qualification of 2nd division in Matric or 10+2 pass or employee appointed on compassionate grounds. There is no mention in the rules that post will be reserved for the Scheduled Caste employee only. Even on dated 13.9.2013 the Hon'ble Supreme Court of India in Special Leave Petition (Civil) No. 30143/2009 titled HP Scheduled Tribes Employees Federation and another Vs. HP SVKK and others directed the State Government to take final decision within three months relating to implementation of Constitution 85th Amendment Act 2001 and assignment of seniority to SC/ST Government servants on promotion by virtue of rule of reservation/roster. After the direction of the Hon'ble Supreme Court of India the matter was considered by the State Government which is quoted in toto:

"No.PER(AP)-C-F(1)-2/2011-Vol.I
Government of Himachal Pradesh
Department of Personnel (AP-III)
Dated: 30.10.2013

From

The Chief Secretary to the
Government of Himachal Pradesh.

To

1.All the A.C.S./Principal Secretaries /Special Secretaries/Additional Secretaries /Joint Secretaries Deputy Secretaries and Under Secretaries to the Government of HP.

2. All the Divisional Commissioners in HP
3.All the Heads of the Departments in HP
4.All the Deputy Commissioners in HP
5.All the Chairmen/Managing Directors/ Secretaries & Registrars of all the Public Sector Undertakings/Corporations/Boards/Universities Etc. in Himachal Pradesh.

Sub: Implementation of the Constitution (85th Amendment) Act, 2001and assignment of seniority to SC/ST Government servants on promotion by virtue of rule of reservation/roster.

Sir,

I am directed to refer to the subject cited above and to say that the matter regarding implementation of the Constitution (85th Amendment) Act, 2001 in the State was under consideration of the Government for sometime past. In its judgment dated 13.9.2013 in I.A. No.6/2012 in Special Leave Petition (Civil) No. 30143/2009 titled as HP Scheduled Tribes Employees Federation and another Vs. HP SVKK and others the Hon'ble Supreme Court of India has directed the State Government to take final decision on the issue, within a period of three months from the date of pronouncement of this judgment.

2. As per directions of the Hon'ble Apex Court, the matter has been considered. Keeping in view the quantifiable data collected by the State, showing the overall representation of the Scheduled Castes and Scheduled Tribes in the services of the State and the Constitutional provisions thereof, the State is of the opinion that the enabling provisions of the Constitution (85th Amendment) Act, 2001 are not required to be implemented in the State.

3. In view of the above, reservation in promotion to the members of the Scheduled Castes and Scheduled Tribes categories as per the Constitution (85th Amendment) Act, 2001 may not be granted. These instructions will also supersede the instructions issued vide this department's letter No.PER(AP)-C-E(3)-2/2009-III, dated 11.1.2013 and No. PER(AP)-C-F(1)-2/2011, dated 31.1.2013 in this regard earlier.

4. These instructions may be followed in letter & spirit and brought to the notice of all concerned for strict compliance.

5. Kindly acknowledge the receipt.

Yours faithfully,

Sd/-
(S.K.B.S.Negi)
Principal Secretary (Personnel)
to the Government of Himachal
Pradesh. Tele:0177-2621897.

Endst. No.PER(AP)-C-F(1)-2/2011-Vol.I Dated 30.10.2013.

Copy forwarded for information and necessary action to:

1. The Secretary, HP Vidhan Sabha, Shimla-4.
2. The Registrar, HP High Court, Shimla-1.
3. The Secretary HP Public Service Commission, Shimla-2.
4. The Secretary, HP SSS Board, Hamirpur
5. The Additional Secretary (GAD) to the Govt. of HP
6. The Additional Advocate General, Himachal Bhawan,New Delhi.
7. The All Section Officers in HP Secretariat, Shimla-2.
8. Spare Copies (100).

Sd/-
(Prem Singh Thakur)
Under Secretary (Personnel) to the
Government of Himachal Pradesh
Tele: 0177-2624183."

6. In view of the above stated decision taken by the State Government and in view of supersede of earlier instructions it is held that at this stage benefit of reservation in promotion to the post of Senior Assistant in HP Vidhan Sabha could not be granted to the petitioner w.e.f. 1.9.2007. Hence point No.1 is answered in negative.

Relief.

7. In view of my finding upon point No.1 civil writ petition filed by petitioner under Article 226 of the Constitution of India is dismissed with no order as to costs. Writ petition is disposed of. All miscellaneous application(s) are also disposed of.

****

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

Mohamad Iqbal son of Sh Jamal Din Mir. .....Petitioner.
Versus
State of H.P. .....Respondent.

Cr.MP(M) No. 245 of 2015.
Order reserved on: 26.3.2015.
Date of Order: April 2,2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered for the commission of offences punishable under Sections 363, 366 and 376 of IPC read with Section 4 of Protection of Children from Sexual Offences Act 2012- allegation against the petitioner is that he had kidnapped the prosecutrix and had forcibly married her- prosecutrix was aged 16 years and one month on the date of incident- held, that as per Child Marriage Restraint Act, adult male below 21 years cannot marry a female below eighteen years – the age of the prosecutrix was not 18 years at the time of incident and the so called marriage was contrary to Child Marriage Restraint Act- therefore, the consent of the prosecutrix is not material- hence, bail application dismissed. (Para-7)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration) AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the petitioner: Mr. Manoj Pathak, Advocate.
For Respondent. Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 439 of the Code of Criminal Procedure 1973 for grant bail in connection with FIR No.49 of 2014 dated 27.10.2014 registered under Sections 363, 366, 376 IPC and under Section 4 of Protection of Children from Sexual Offences Act 2012 at Police Station Zhakari District Shimla HP.

2. It is pleaded that allegations against the petitioner are that petitioner had kidnapped the prosecutrix and thereafter forced the prosecutrix for marriage. It is pleaded that allegations against the petitioner are false and petitioner is innocent. It is pleaded that

petitioner will not tamper with the prosecution evidence. It is pleaded that the age of the petitioner is 20 years. Prayer for acceptance of bail petition filed under Section 439 Cr.P.C sought.

3. Per contra police report filed. There is recital in police report that FIR No. 49 of 2014 dated 27.10.2014 has been registered against the petitioner under Sections 363, 366 and 376 IPC and under Section 4 of POCSO Act 2012 at Police Station Zhakri District Shimla HP. There is recital in police report that on dated 27.10.2014 Kalam Singh came in Police Station along with his wife Sita Devi and filed criminal report. There is recital in police report that Kalam Singh has four daughters and one son. There is recital in police report that on dated 26.10.2014 at about 9 AM prosecutrix went to stitching centre Jeuri and thereafter prosecutrix did not come to her residential house. There is recital in police report that birth certificate of the prosecutrix obtained and as per birth certificate of the prosecutrix the age of the prosecutrix is 16 years and one month. There is recital in police report that site plan was prepared and petitioner was arrested. There is recital in police report that petitioner Mohamad Iqbal kidnapped the prosecutrix at Jammu on the pretext of marriage. There is recital in police report that prosecutrix and petitioner Mohamad Iqbal resided at Kathua for 5/7 days and thereafter petitioner took the prosecutrix to Indore in Madhya Pradesh through Delhi. There is recital in police report that thereafter prosecutrix and petitioner Mohamad Iqbal started residing in a rented room at Indore in Madhya Pradesh. There is recital in police report that petitioner Mohamad Iqbal has kept the prosecutrix as his wife and had committed sexual intercourse with her. There is recital in police report that bed sheet, shirt, salwar and underwear took into possession and sealed in a parcel. There is recital in police report that statement of the prosecutrix also recorded under Section 164 Cr PC. There is recital in police report that if the petitioner is released on bail then petitioner would create obstruction in the trial of the criminal case. Prayer for dismissal of bail petition sought.

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

(1) Whether petition filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of bail petition?.

(2) Final Order.

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

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the petitioner that petitioner is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that prosecutrix and petitioner Mohamad Iqbal have married and prosecutrix voluntarily joined the company of the petitioner and on this ground bail petition be allowed is rejected being devoid of any force for the reason hereinafter mentioned. It is prima facie proved on record that when prosecutrix voluntarily had gone with petitioner Mohamad Iqbal at that time the age of the prosecutrix was sixteen years and one month as per birth certificate

issued by the Panchayat. As per Child Marriage Restraint Act adult male below 21 years cannot marry and as per Child Marriage Restraint Act female below eighteen years cannot marry. It is prima facie proved on record that the age of the prosecutrix was not eighteen years at the time of alleged marriage. Hence it is prima facie proved on record that marriage between the petitioner and prosecutrix was performed contrary to Child Marriage Restraint Act. Even as per Section 2D of Protection of Children from Sexual Offences Act, 2012 word child has been defined as any person below the age of eighteen years. Even as per Section 361 IPC relating to criminal offence of kidnapping from lawful guardian the age of the female should be below eighteen years. Hence Court is of the opinion that criminal offence under Protection of Children from Sexual Offences Act 2012 and criminal offence punishable under Section 363 IPC are attracted against the petitioner in the present case and it is held that consent of prosecutrix is immaterial because the age of the prosecutrix was below eighteen years at the time of alleged incident. It is held that Protection of Children from Sexual Offences Act, 2012 and Child Marriage Restraint Act are special Acts. Even Section 375 IPC relating to criminal offence of rape was amended on 03.02.2013 and consent age has been enhanced to eighteen years. Present FIR No. 49 of 2014 was registered on dated 27.10.2014 after amendment in Section 375 IPC relating to consent age. Court is of the opinion that even offence under Section 376 IPC is also attracted against the petitioner and defence of consent is not available to petitioner hence it is prima facie proved on record that age of prosecutrix was below eighteen years at the time of alleged incident.

8. Another submission of learned Advocate appearing on behalf of the petitioner that any condition imposed by the Court will be binding upon the petitioner and on this ground bail petition filed by the petitioner be allowed is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors are to be considered (i) Nature and seriousness of offence (ii) Character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In view of grave allegations against petitioner qua criminal offences under Sections 363, 366 and 376 IPC and under Section 4 of the POCSO Act 2012 court is of the opinion that if the petitioner is released on bail at this stage then interest of State and general public will be adversely effected. Court is also of the opinion that if the petitioner is released on bail at this stage then trial of the case will be adversely effected.

9. Submission of learned Additional Advocate General appearing on behalf of the respondent that if the petitioner is released on bail then petitioner will induce and threat the prosecution witness and on this ground bail petition filed by petitioner be rejected is accepted for the reason hereinafter mentioned. There is apprehension in the mind of the Court that if the petitioner is released on bail at this stage then petitioner will induce and threat the prosecution witness. Court is of the opinion that it is not expedient in the ends of justice to release the petitioner on bail at this stage. Hence point No.1 is answered in negative.

Point No.2.

Final Order.

10. In view of the above stated facts bail petition filed under Section 439 of the Code of Criminal Procedure 1973 is rejected. Observation made hereinabove is strictly for the purpose of deciding the present bail petition and it shall not effect merits of the case in

any manner. Bail petition is disposed of. All pending application(s) if any are also disposed of.

****

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

Cr. Appeal Nos. 179 of 2011 & 180 of 2011.
Reserved on: March 26, 2015.
Decided on: April 02, 2015.

1. Cr. Appeal No. 179 of 2011.
Pardeep Kumar .....Appellant.
Versus
State of H.P. .....Respondent.

2. Cr. Appeal No. 180 of 2011.
Parshotam .....Appellant.
Versus
State of H.P. .....Respondent.

Cases referred:
State vrs. V. Jayapaul, (2004) 5 SCC 223
S. Jeevanantham vrs. State, (2004) 5 SCC 230,
State vrs. Rajangam, (2010) 15 SCC 369

N.D.P.S. Act, 1985- Section 20- Accused were found in possession of blue bag containing 18.850 kg. of charas – bag was found torn when it was produced in the Court- MHC deposed that the case property was intact when it was sent to the Court - he came to know from the Naib Court that one parcel was found in torn condition and the entry in the daily diary was made in the police Station- police officials who carried the case property from the Malkhana to the Court deposed that case property was put on an old bench and in the process of lifting the same one parcel was torn by nails on the bench- Case property was handed over to the Naib Court and was taken in the same condition to the police Station- the manner of producing the case property in torn condition casts doubt on the prosecution version- case property was required to be produced in the Court in intact condition- the version that the case property was torn in the police station cannot be believed as the matter was not reported to MHC immediately- FIR number was mentioned in the abstract of register No.19 as 35 which was changed to 37 of 2009- the figure of 25 was also changed to 27- the FIR number was initialed but the date was not initialed- only one seal impression of 'R' was legible and the others were not legible- it was not explained as to what happened to the remaining seals - similarly third seal was not legible in the second parcel- - date must be shown in Malkhana register- the fact that parcel was torn in the police Station was not brought in the notice of MHC- police had not associated independent witnesses, although, place of incident was a busy highway- complainant had conducted the investigation which is prejudicial to the accused- Held, that all these circumstances casts doubt on the prosecution version, hence, accused acquitted.(Para-24 to 32)

For the appellant(s): Mr. Anoop Chitkara, Advocate in both the appeals.
For the respondent: Mr. P.M.Negi, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these appeals, both these appeals were taken up together for disposal.

2. These appeals are directed against the judgment dated 30.4.2011/2.5.2011, rendered by the learned Special Judge, Kullu, H.P, in Sessions Trial No. 30 of 2009, whereby the appellants-accused (hereinafter referred to as the "accused", namely, Pardeep Kumar and Parshotam), who were charged with and tried for offences punishable under Sections 20 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), have been convicted and sentenced to undergo rigorous imprisonment for a period of 12 years each and to pay fine of Rs. 1,50,000/- each and in default of payment of fine, they were further ordered to undergo simple imprisonment for one year each. Accused Rajbir and Jeevan Lal were acquitted by the learned trial Court.

3. The case of the prosecution, in a nut shell, is that on 27.1.2009 at 6:30 PM, ASI Lal Chand alongwith other police officials were on patrolling duty and was present near Dohlu nallah on National Highway 21. The place was secluded. In the meanwhile, a white colour Indica car came there from Kullu side. It was on way to Manali. It was signaled to stop. The car driver stopped the vehicle at a distance of about 25 feet away from the police party. ASI Lal Chand developed a suspicion and he alongwith his fellow officials proceeded towards the car. They noticed that a person fled away towards river Beas after opening the rear door. Two persons were deputed to nab him and other police officials including the head of the police party surrounded the vehicle. The persons who were deputed to nab the person who fled away from the car returned back and disclosed to the I.O. that the person who fled away could not be nabbed due to the darkness. Thereafter, ASI Lal Chand deputed Constable Parveen Kumar to bring local witnesses towards Dohlu nalla side, who returned back and disclosed that due to cold, no one was available. Two persons out of the police party were associated as witnesses. ASI Lal Chand gave his personal search to the accused. The car was searched. During the search of the Car, I.O. found a rucksack of blue colour lying near the legs of accused Prdeep Kumar. Upon checking, it was found containing a gunny bag (*boru*) of white colour containing stick shaped and chapatti shaped cannabis mixture. It was found to be 18.850 kg. From the recovered contraband, two samples of 25-25 gms were separated and sealed with seal-R. Other codal formalities were completed on the spot and thereafter accused Pardeep Kumar and Parshotam were arrested. Accused Rajbir was arrested on 28.1.2009. Accused Pardeep Kumar, Parshotam and Rajbir told that they had purchased the recovered contraband from Jeewan Lal, resident of Dwara. On 29.1.2009, house of accused Jeewan Lal was searched. The *rukka* was sent to the Police Station. FIR was registered. Special report was also prepared and samples were sent to FSL, Junga. 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 20 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 the accused Pardeep Kumar and Parshotam, as noticed hereinabove.

Accused Rajbir and Jeewan Lal were acquitted. Hence, these appeals on behalf of the accused.

5. Mr. Anoop Chitkara, 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 30.4.2011/2.5.2011.

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

7. Sh. Anil Sharma, PW-1 has proved tickets Ext. PW-1/A and PW-1/B.

8. Sh. Deep Lal, PW-2 stated that he received telephonic message from ASI of Police, who informed him that the police was present at Village *Dawara*. He along with Vinod Kumar reached the house of Budh Ram, father of Jeewan Lal. When they reached, the search process was going on. The police found some plastic envelopes which were lying in the room. The police also found a machine. According to him, nothing was found in his presence. He denied that the incident has taken place on 29.1.2009. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that on 29.1.2009, he as well as Vinod Kumar were directed to be associated by the police during the search of the house of Budh Ram. He identified his signatures on Ext. PW-2/A. The articles were recovered vide memo Ext. PW-2/B.

9. Const. Mani Giri, PW-3 testified that on 5.2.2009, MHC Mahinder Singh handed over to him one cloth parcel sealed with three seal impressions of 'O' alongwith specimen seal impression of seal 'O', NCB forms in triplicate, docket, photocopy of FIR and other relevant papers to him vide RC No. 253/08-09 with a direction to deposit the same at FSL, Junga. The copy of RC is Ext. Ext. PW-3/A. He deposited the case property at FSL on 6.2.2009. The receipt is Ext. PW-3/B and on return he handed over the RC to MHC. So long the case property remained with him, the same remained intact.

10. Const. Om Parkash, PW-4 testified that on 29.1.2009 MHC Mahinder Singh handed over the case property i.e. one sealed parcel which was sealed with three seals of 'R', specimen seal impression of seal 'R', NCB forms in triplicate, copy of FIR, copy of recovery memo to him vide RC No. 244/09, vide RC Ext. PW-4/A with a direction to deposit the same at FSL. He deposited the case property with FSL, Junga on 30.1.2009 vide receipt Ext. PW-4/B. After depositing the case property in FSL, he deposited the receipt on the RC with MHC on his return.

11. HHC Sher Singh, PW-5 has proved copy of special report Ext. PW-5/A.

12. Sh. Rajiv Upadhyaye, PW-7 deposed that he was looking after the cottages as Manager. These cottages were owned by his mother. He has brought the visitors register according to which vide entry No. 130 dated 20.1.2009 one Parshotam son of Babu Lal Sharma alongwith Pardeep stayed in cottage No. 2. The entry in this regard is Ext. PW-7/A. They stayed up to 21.1.2009 and at about 7:55 AM, they checked out from the cottage. In his cross-examination, he admitted that Sr. No. 131 did not contain the name of the person who stayed in the hotel. He also admitted that in entry No. 131, there is no reference regarding the three persons. He also admitted that the column meant for mentioning the names of tourists/visitors did not contain the names of Parshotam, Rajvir and Pardeep. He also admitted that after Sr. No. 132, there was no entry.

13. ASI Daya Ram, PW-8 has registered the FIR on the basis of rukka mark A vide Ext. PW-8/A.

14. MHC Mahender Singh, PW-11 deposed that on 27.1.2009 at about 11:45 PM, ASI Lal Chand deposited three parcels, out of which one bulk parcel was stated to be containing 18 kg 800 gms charas which was sealed with ten seals of R, two sample parcels stating to be containing 25-25 grams charas sealed with 3 seals of R, specimen impression of seal R, NCB form in triplicate, photo copy of FIR, photo copy of seizure memo with him. He entered all these articles at Sr. No. 499 in register No. 19. He handed over one parcel to Const. Om Parkash No. 178 vide RC No. 244/09 alongwith docket, copy of FIR, NCB form in triplicate, photocopy of recovery memo, sample seal R which were deposited in FSL on 30.1.2009. He also filled in column No. 12 of NCB forms in triplicate. Const. Om Parkash deposited the RC and receipt with him. The copy of RC is Ext. PW-4/A. The abstract of register No. 19 is Ext. PW-11/A. Copy of NCB form is Ext. PW-11/B. On 29.1.2009 ASI Lal Chand deposited with him two parcels out of which bigger parcel was sealed with ten seals of 'O' and smaller parcel was sealed with three seals of 'O'. NCB forms, photo copy of FIR, photocopy of seizure memo, specimen impression of seal 'O' were also deposited with him. He entered all these articles at Sr. No. 502 in register No. 19. He handed over on 5.2.2009 one parcel sealed with three seals of 'O' alongwith papers and specimen seal impression of 'O' to Const. Mani Giri with a direction to deposit the same at FSL Junga vide RC No. 253 dated 5.2.2009 vide Ext. PW-3/A. He deposited the case property with FSL on 6.2.2009 vide receipt Ext. PW-3/B and on return deposited the RC with him. On 30.1.2009, ASI Lal Chand also deposited two parcels sealed with 3 seals of 'U'. These parcels were containing mobile phone. He entered these articles at Sr. No. 4 of register No. 19. The case property was produced vide DDR Ext. PK before the Court. Seals as mentioned in report Ext. PK were found intact but the cloth of parcel containing 18 kg. 800 gms charas produced was found in torn condition in "L" shape. The torn area was found to be stitched with 7 office pins. This fact was not mentioned in report Ext. PK. In his cross-examination, he admitted that in entry No. 499 of Ext. PW-11/A, there is cutting of date which is written as 27.1.2009. The date 27 has been corrected from 25. He also admitted that date 27.1.2009 did not bear any initials. He also admitted that there was cutting regarding FIR number but the same was initialed. Voluntarily stated that earlier the figure 36 was written which was corrected as 37 and the same was initialed by him.

15. HC Om Parkash, PW-12 has brought the relevant register No. 19 and the record of road certificates. According to him, vide RC No. 139/09 dated 10.9.2009 through HC Sher Singh a parcel sealed with ten seals of R, specimen impression of seal R and sample parcel sealed with three seals of R were deposited with him. He entered these articles at Sr. No. 834 in register No. 19. On the same day, another parcel sealed with seal 'O' and sample which was sealed with three seals impressions of seal "R" were deposited with him. On the same day, a parcel sealed with seal "O" and seals of FSL were deposited with him. He entered these parcels at Sr. No. 834 of register No. 19. On 23.7.2010, a parcel stated to be containing 18.800 kgs. charas sealed with ten seals of 'R' and one sealed parcel stated to be containing 25 gms charas sealed with three seals of 'R' alongwith the docket was sent to FSL Junga vide RC No. 6/10 through HC Anup Ram No. 65 and HHC Gautam Chand No 246. After depositing the case property with FSL Junga, they returned the receipt to him. The copy of RC is Ext. PW-12/A and abstract of register is Ext. PW-12/B.

16. HC Anup Ram, PW-13 has deposed that PW-12 Om Prakash has handed over to him as well as HHC Gautam Chand No. 246 one bulk parcel stated to be containing 18 kg. 800 gms charas sealed with ten seals of R and sample parcel stated to be containing 25 gms of charas sealed with three seals of R, specimen impression of seal R, docket from Suptd. of Police Kullu, addressed to Director, FSL, copy of FIR, copy of recovery memo, copy of earlier report vide RC No. 6/10 Ext. PW-12/A. He deposited the case property on

24.2.2010 in FSL Junga. It was received by the authorities at FSL Junga vide receipt Ext. PW-13/A.

17. Sh. C.L.Sharma, PW-15 has proved reports Ext. PW-15/A and Ext. PW-15/B.

18. Sh. Kapil Sharma, PW-16 has proved report Ext. PW-16/A.

19. Const. Parveen Kumar, PW-17 deposed the manner in which the vehicle was intercepted. ASI Lal Chand directed him to bring independent witnesses from Dohlu nalla side. Due to cold weather and night time, no one was found available. He returned back to the spot after about 10 minutes and apprised the I.O. about this fact. Upon this, ASI Lal Chand associated him and Const. Sumer Bahadur as witnesses in this case. The codal formalities were completed on the spot. Charas weighed 8.800 kgs. He handed over the rukka to ASI Daya Ram at PS Manali at about 10:05 PM on the basis of which, FIR Ext. PW-8/A was registered. The learned Public Prosecutor produced the case property vide report Ext. PX1. According to the report Ext. PX1, the parcel stated to be containing 18 kg. 800 gms cannabis mixture was stated to be sealed with ten seals of R, 8 seals of FSL2. When the case property was produced in the Court, only one seal of R was legible. However, there were six impressions of seal. In addition to this, seals of FSL2 were intact. Alongwith this parcel another sealed parcel was also tagged which has been marked 'B' and when it was produced in the Court it was found sealed with 3 seals of FSL2 and two seals of 'R' which were legible and third one not legible. When the bulk parcel was produced in the Court, the parcel was found stitched at one corner of the parcel. The cut was "L" shaped bearing no seal. Another cut found on it was on which cello tape was put. In his cross-examination, he admitted that he had gone towards Dholu nallah side in order to bring witnesses. He searched the witnesses on the road itself. Dholu nalla bazaar was situated at a distance of about 100 meter from the place where they had put the picketing. In one or two shops, the upper storey was being used for residential purposes. He did not know about the names of the owners of those shops. He did not knock the door of any of the shop or house.

20. ASI Lal Chand, PW-18 is the I.O. He also deposed the manner in which the accused were apprehended, codal formalities were completed on the spot, including filling up of NCB forms in triplicate. He associated Const. Sumer and Const. Parveen as witnesses. In his cross-examination, he admitted that Manali-Kullu road is a busy road where the vehicles remain plying on the road. Voluntarily stated that the rush of traffic is minimized during evening time. The buses use to ply after every half an hour. He also admitted that in the evening about more than 20 buses start from Manali to Delhi.

21. HC Sher Singh, PW-19 deposed that he was posted as MHC PS Manali since March, 2009. On 10.9.2009, he took the case property in case FIR No. 37 of 2009 from malkhana and deposited with Moharar of District malkhana, Kullu. He brought the case property from PS Manali vide RC No. 139 of 2009, the copy of which is Ext. PW-19/A. In his cross-examination, he admitted that no date is mentioned in Ext. PW-19/B i.e. details of the case property.

22. HC Om Parkash was recalled for further examination-in-chief. He deposed that on 15.9.2010, he sent the case property in this case to the Court through HHGs Revati Ram and Sanjeev Kumar vide DDR No. 11A, copy of which is Ext. PK. When he sent the case property from the district malkhana on that day to the Court, the same was intact. In the Court, he came to know about the fact from the Naib Court of the Court that one parcel produced was found to be in a torn condition. Then, he inquired this from the persons to whom he had handed over the case property with a direction to produce the same in the

Court. On his return from the Court to the malkhana, he got recorded DDR No. 27-A in this regard. Copy of the rapat No. 27-A is Ext. PW-12/X.

23. HHG Revati Ram, deposed that on 15.9.2010, he alongwith HHG Sanjeev Kumar were attached with Police Station Kullu. They were deputed to take the case property in this case from district malkhana Kullu to the Court. The case property was comprising of more than one parcel out of which, one was bulky parcel. They put the case property on an old bench lying in the police station Kullu. In the process of lifting the case property, one parcel was torn due to the nails on the bench. The said parcel was torn in L-shape. Thereafter, they produced the case property in the Court by handing it over to the Naib Court of the Court. After the Court proceedings, they again took the case property to District malknaha, Kullu. On return they apprised Moharar, Malkhana Kullu regarding this fact that the case property was torn while lifting.

24. Const. Mani Giri PW-3, Const. Om Parkash PW-4 and HC Anup Ram PW-13 have taken the case property to FSL, Junga vide RCs Ext. PW-3/A, PW-4/A and PW-12/A. The reports of FSL, Junga are Ext. PW-15/A, Ext. PW-15/B and Ext. PW-16/A. These samples were sent by HC Mahender Kumar PW-11 and HC Om Parkash PW-12 to FSL, Junga.

25. HC Om Parkash PW-12 deposed that HC Sher Singh has deposited with him a parcel sealed with ten seals of R, specimen impression of seal R and sample parcel sealed with three seals of R. He entered these articles in the register No. 19. On the same day, another parcel sealed with seal 'O' and sample which was sealed with three seals impressions of seal "R" were deposited with him. On the same day, a parcel sealed with seal "O" and seals of FSL were deposited with him. He entered these parcels at Sr. No. 834 of register No. 19. On 23.7.2010, a parcel stated to be containing 18.800 kgs. charas sealed with ten seals of 'R' and one sealed parcel stated to be containing 25 gms charas sealed with three seals of 'R' alongwith the docket was sent to FSL Junga vide RC No. 6/10 through HC Anup Ram No. 65 and HHC Gautam Chand No 246. HC Sher Singh PW-19 took the case property in case FIR No. 37 of 2009 from malkhana and deposited with Moharar of District malkhana, Kullu. He proved RC No. 139 of 2009, vide Ext. PW-19/A.

26. The case property was sent to the Court by HC Om Parkash PW-12 on 15.9.2010 through HHGs Revati Ram and Sanjeev Kumar vide DDR No. 11A, copy of which is Ext. PK. According to him, when the case property was sent from District malkhana, it was intact. He came to know about the fact from the Naib Court that one parcel produced was found to be in a torn condition. He made inquiries from the persons to whom he had handed over the case property. Thereafter, he recorded rapat Ext. PW-12/X. HHG Rewati Ram deposed that the case property was consisting of more than one parcel, out of which one was bulky. They put the case property on an old bench lying in the P.S. Kullu. In the process of lifting the case property, one parcel got torn due to the nails of the bench. The said parcel was torn in L-shape. Thereafter, they produced the case property in the Court by handing it over to the Naib Court of the Court. After the Court proceedings, they again took the case property to District malknaha, Kullu. On return they apprised Moharar, Malkhana Kullu regarding this fact. The trial Court has already noticed while recording the statement of HC Mahinder Singh PW-11 that the parcel containing 18 kgs. 800 gms charas was found to be in torn condition. It was stitched with seven office pins. However, this fact was not mentioned in Ext. PK. Mr. Anoop Chitkara, Advocate, for the accused has taken us through Ext. PK. According to Ext. PK, one parcel containing blue coloured rucksack containing another bag containing 18.800 kg. charas sealed with 10 seals of 'R' and 8 seals of FSL2 was sent to the Police Station. However, when the parcel was produced before the Court, it was torn. HHG Revati Ram deposed that they had put the case property on an old

bench lying in the P.S. Kullu. In the process of lifting the case property, one parcel got torn due to the nails of the bench. The said parcel was torn in L-shape. When the parcel was torn in the Police Station, it was the duty of HHG Revati Ram to bring this fact to the notice of HC Om Parkash PW-12. Though HC Om Parkash PW-12, in his examination-in-chief has deposed that he has made entry in Ext. PW-12/X but it is after the parcel in torn condition was produced in the Court.

27. Mr. Anoop Chitkara, Advocate, has drawn the attention of the Court to Ext. PW-11/A, the abstract of register No. 19. The FIR number was initially mentioned as 35 and the same later on was changed to 37/09. The figure of 25 was also changed to 27. The FIR number has been initialed but the date has not been initialed and this fact has been admitted by HC Mahender Kumar PW-11, in his cross-examination. The case property was also produced while recording the statement of Const. Parveen Kumar PW-17. The learned trial Court has noticed that in the case property produced in the Court for the second time, only one seal of impression 'R' was legible. There were only 6 impressions of seal. The prosecution has not explained as to what happened to the remaining seals of "R". There were 8 seals of FSL2. However, these were found intact. When parcel B was produced in the Court, it was found sealed with 3 seals of FSL2 and two seals of impression "R". The 3rd seal was not legible. The cut, as noticed by the trial Court, was L-shape bearing no seal. In one of the cuts, cello tape was put. The manner in which the parcel containing the bulk charas has been produced in the Court, it casts doubt in the prosecution version. The case property is required to be produced in the Court intact. The case property at the time when it is taken out from the malkhana must bear the date in the malkhana register. The prosecution has tried to show that the parcel got torn when it was lifted from the bench at Police Station, Kullu. It is not the case of the prosecution that the parcel was torn when it was taken from Police Station to the Court premises. The parcel itself according to HHG Revati Ram was torn at Police Station but this fact, as noticed above, was not brought to the notice of HC Om Parkash PW-12.

28. We have also gone through Ext. PX vide which the case property was produced second time before the trial Court on 31.12.2010. In daily station diary, it is stated that the contraband contained 18.800 kg charas sealed with 10 seals of "R" and 8 seals of FSL2 was sent to the Sessions Court, Kullu. The same was torn while being taken to the Sessions Court and it was stitched.

29. The accused were apprehended at 6:30 PM on 27.1.2009. The police has not associated any independent witnesses at the time of apprehending the accused, search and sealing process of the contraband. Constable Parveen Kumar, PW-17 has deposed that ASI Lal Chand PW-18 has directed him to bring the independent witnesses from Dohlu nalla side. However, according to him, due to cold weather and night, no one was found available. He returned back to the spot after about 10 minutes and apprised the I.O. about this fact. Upon this ASI Lal Chand associated him and Const. Sumer Bahadur as witnesses in this case. In his cross-examination, he has admitted that on the directions of the I.O., he had gone towards Dohlu nalla side in order to bring witnesses. He searched the witnesses on the road itself. Dohlu nalla bazaar was situated at a distance of about 100 meters from the place where they had put the picketing. In one or two shops, the upper storey was being used for residential purposes. ASI Lal Chand PW-18, has admitted in his cross-examination that Manali-Kullu road is a busy road where the vehicles remain plying on the road. Voluntarily stated that the rush of traffic is minimized during evening time. The buses use to ply after every half an hour. He also admitted that in the evening about more than 20 buses start from Manali to Delhi. The Naka was laid on National Highway. The police ought to have associated the independent witnesses from the vicinity. The explanation given by the

prosecution that the independent witnesses were not available, cannot be accepted. The police could stop the vehicles on the National highway and if the driver did not stop the vehicle action could be taken against him.

30. Mr. Anoop Chitkara, Advocate, has also argued that since the complainant himself has conducted the investigation, it has prejudiced the accused. Their lordships of the Hon'ble Supreme Court in the case of ***State vrs. V. Jayapaul,*** reported in ***(2004) 5 SCC 223,*** have held that there is nothing in the provisions of Criminal Procedure Code which precluded the appellant from taking up the investigation. Their lordships have further held that there is no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. It has been held as under:

> "4. We have no hesitation in holding that the approach of the High Court is erroneous and its conclusion legally unsustainable. There is nothing in the provisions of the Criminal Procedure Code which precluded the appellant (Inspector of Police, Vigilance) from taking up the investigation. The fact that the said police officer prepared the FIR on the basis of the information received by him and registered the suspected crime does not, in our view, disqualify him from taking up the investigation of the cognizable offence. A suo motu move on the part of the police officer to investigate a cognizable offence impelled by the information received from some sources is not outside the purview of the provisions contained in Sections 154 to 157 of the Code or any other provisions of the Code. The scheme of Sections 154,156 and 157 was clarified thus by Subba Rao, J. speaking for the Court in State of U.P. vs. Bhagwant Kishore [AIR 1964 SC 221].
>
> > "Section 154 of the Code prescribes the mode of recording the information received orally or in writing by an officer in charge of a police station in respect of the commission of a cognizable offence. Section 156 thereof authorizes such an officer to investigate any cognizable offence prescribed therein.
>
> 6. Though there is no such statutory bar, the premise on which the High Court quashed the proceedings was that the investigation by the same officer who 'lodged' the FIR would prejudice the accused inasmuch as the investigating officer cannot be expected to act fairly and objectively. We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased. In the present case, the police officer received certain discreet information, which, according to his assessment, warranted a probe and therefore made up his mind to investigate. The formality of preparing the FIR in which he records the factum of having received the information about the suspected commission of the offence and then taking up the investigation after registering the crime, does not, by any

> semblance of reasoning, vitiate the investigation on the ground of bias or the like factor. If the reason which weighed with the High Court could be a ground to quash the prosecution, the powers of investigation conferred on the police officers would be unduly hampered for no good reason. What is expected to be done by the police officers in the normal course of discharge of their official duties will then be vulnerable to attack.
>
> 13. Viewed from any angle, we see no illegality in the process of investigation set in motion by the Inspector of Police (appellant) and his action in submitting the final report to the Court of Special Judge."

31. Their lordships of the Hon'ble Supreme Court reiterating the same principles in the case of ***S. Jeevanantham vrs. State,*** reported in ***(2004) 5 SCC 230,*** have held that when nothing is pointed out to show that the investigation has caused prejudice or was biased against the accused in the case when the investigation was conducted by the complainant-police officer himself, it was found to be valid. It has been held as under:

> "3. In the instant case, PW-8 conducted the search and recovered the contraband article and registered the case and the article seized from the appellant was narcotic drug and the counsel for the appellant could not point out any circumstances by which the investigation caused prejudice or was biased against the appellant. PW-8 in his official capacity gave the information, registered the case as part of his official duty and later investigated the case and filed charge-sheet. He was not in any way personally interested in the case. We are unable to find any sort of bias in the process of investigation.
>
> 4. The appellants have been rightly convicted by the Special Judge and the High Court was also justified in confirming the conviction and sentence. These appeals are without any merit and are accordingly dismissed."

32. Mr. Anoop Chitkara, Advocate, for the accused has relied upon the judgment in the case of ***State vrs. Rajangam,*** reported in ***(2010) 15 SCC 369.*** However, in this case, judgments in the case of ***State vrs. V. Jayapaul*** and ***S. Jeevanantham vrs. State*** have not been considered.

33. The case property should have been produced intact with seals and in this case since the case property has been produced in a torn packet (*pulinda*), it casts serious doubt whether the same contraband was recovered from the accused and also sent to the FSL, Junga or it was the case property in some other case. The independent witnesses, though readily available, have not been associated by the prosecution.

34. Accordingly, in view of the analysis and discussion made hereinabove, both the appeals are allowed. Judgment of conviction and sentence dated 30.4.2011/2.5.2011, rendered by the learned Special Judge, Kullu, H.P., in Sessions trial No. 30 of 2009, is set aside. Accused are acquitted of the charges framed against them by giving them benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

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

36. However, before parting with the judgment, taking judicial notice of the fact, the manner in which the case property was handled in this case by the prosecution, the respondent-State is directed that henceforth, the case property shall never be sent to the Court through Homeguards. The case property, as per law, is required to be produced in the Court and it is the responsibility of the SHO concerned to ensure that the case property is always carried from the malkhana after completing the codal formalities to the concerned Court through Head Constable and is also carried back and re-deposited after completing the codal formalities in the malkhana by the Head Constable. The Registry is directed to send a copy of this judgment to the Secretary (Home), Government of Himachal Pradesh, for due compliance.

****

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

Promila Devi ..... Petitioner
Vs.
State of H.P. & ors. ..... Respondents

CWP No. 226 of 2010
Date of decision: 2.4.2015.

Constitution of India, 1950- Article 226- Petitioner was appointed as Drawing Teacher by Mother Teacher Association – her appointment was re-endorsed by Parent Teachers Association- Headmaster of the school recommended her case for release of the grant in aid – respondent submitted that appointment of the petitioner was made without conducting interviews and that the petitioner had given her written consent that she was not interested in receiving any emolument but she was only interested in gaining experience- record showed that petitioner was given the appointment in place of one 'A' who was not performing her duty diligently – held, that once appointment was given on substantive basis, it is difficult to believe that appointment was on honorary basis or without any remuneration – State being model employer cannot force a person to work on unreasonably low wages and should not take advantage of unequal bargaining power- act of the respondent amount to Begar which is specifically prohibited under Article 23 of the Constitution of India- State being a model employer is under an obligation to conduct itself with high probity and expected candour- a model employer should not exploit its employee and should not take advantage of helplessness and misery of employee –respondent directed to release grant-in-aid in favour of petitioner and to consider the case of the petitioner for regularization. (Para-5 to 14)

For the petitioner : Mr. Sanjeev Bhushan, Advocate.
For the respondents : Mr. Virender Kumar Verma and Mr. Rupinder Singh, Addl. Advocate Generals with Ms. Parul Negi, Dy. Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

By medium of this petition, the petitioner has claimed the following substantive reliefs:-

(i) That further writ in the nature of mandamus may be issued directing the respondents to release the grant in aid in favour of petitioner from the date the grant in aid Rules were notified and such grant in aid were released to the similarly situated persons along with interest as this Hon'ble Court deems fit and the arrears be paid within a reasonable period.

(ii) That further writ in the nature of mandamus may further kindly be issued directing the respondents to release the grant in aid regularly in future in favour of the petitioner.

2. In nutshell the case of the petitioner is that on 30.8.2005, she was appointed as Drawing Teacher by the Mother Teacher Association (MTA). Vide resolution No. 3 dated 5.5.2008 her appointment was re-endorsed by the Parent Teacher Association (PTA) and thereafter on 10.9.2009 the Headmaster of the concerned school recommended her case for releasing the grant in aid in her favour since the petitioner had been working prior to coming into force the grant in aid Rules.

3. In reply to the petitioner, it was averred that appointment of the petitioner made by the MTA was without conducting the interviews. It was further contended that after joining the petitioner on 1.9.2005 herself gave in writing that she was not interested to receive any payment and would be working only to gain experience. On 5.5.2008, P.T.A. was formed in the school and vide resolution No. 2 it decided to pay the petitioner a sum of Rs.1000/- out of PTA fund and school also gave its consent regarding engagement of the petitioner, which services are continuing till date.

4. During the course of hearing, the petitioner had pointed out that she had in fact been paid the grant in aid with effect from April 2010 to March 2013 and therefore, was entitled to the grant in aid for the period prior to April 2010 and subsequent to March 2013. The respondents sought time to verify these facts and thereafter placed on record the instructions dated 13.11.2014, which read thus:-

> "In this regard it is intimated that the petitioner was engaged as Drawing Master on honorary basis (without pay) by the MTA on 30.8.2005 of the concerned institution vide resolution No.3. On 5.5.2008 the PTA of the concerned school had started paying her Rs.1000/- per month out of PTA fund. It is pertinent to submit here that the petitioner was not engaged under GIA Rules, 2006 and was engaged much earlier than the commencement of these Rules i.e. in the year 2005. Hence the Grant in aid has not been released in her favour. But the same was released in her favour inadvertently by the Principal/DDO of the concerned institution for the period April, 2010 to March, 2013. When this mistake came in the notice, the Grant in aid to the petitioner has rightly been stopped."

5. The respondents were thereafter directed to produce on record the resolution No. 3 passed by the MTA on 30.8.2005 and further produce resolution No. 3 passed by the PTA on 5.5.2008. The respondents by way of supplementary affidavit have placed on record these two resolutions. A perusal of these resolutions would show that on 30.8.2005 the petitioner was offered the appointment of Drawing Teacher in place of one Smt. Asha Kumari wife of Satish Kumar, who allegedly had not been performing her job diligently. Therefore, once the petitioner was given a substituted appointment, it is difficult to comprehend that her appointment would be only on honorary basis or without remuneration.

6. At this stage, a wider issue arises for consideration as to whether the State as a model employer after having extracted nearly a decade of service from the petitioner can claim that she had not been regularly appointed. Further, can the State be permitted to argue that petitioner even in these days of high cost of living should remain content with the remuneration of Rs.1000/- more particularly when admittedly the petitioner has already been paid the salary out of PTA fund with effect from April 2010 to March 2013.

7. A learned Division Bench of this Court in **LPA No. 132 of 2014** titled **Dr. Lok Pal** vs. **State of Himachal Pradesh and other decided on 18.12.2014** was seized of a similar matter where the appointment of the person was though on a consolidated salary of Rs.43000/- per month but after his appointment he was actually paid Rs.21000/- per month and the learned Division Bench held this to be exploitation on the sheer strength of the unequal bargaining power and it was held as under:

> "7. This case reflects a sorry state of affairs where the respondents on the sheer strength of its bargaining power have taken advantage of their position and imposed wholly un-equitable and unreasonable condition of employment on their prospective employees, who did not have any other choice but to accept the employment on the terms and conditions offered by the respondents. This action of the respondents is violative of Article 14 of the Constitution. Here it is apt to reproduce relevant observations of the Hon'ble Supreme Court in the celebrated decision of **Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Ganguly and another, (1986) 3 SCC 156**, which reads as under:-
>
> > "88. As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognized, at least in certain areas of the law of contracts, that there can be unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, section 138(2) of the German Civil Code provides that a transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages.....which are obviously disproportionate to the performance given in return." The position according to the French law is very much the same.
> >
> > 89. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under-foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this

country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Art. 14. This principle is that, the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its, own facts and circumstances."

In terms of the aforesaid exposition of law, it is clear that this Court has the jurisdiction and power to strike or set aside the unfavourable term of contract of employment which purports to give effect to unreasonable bargain violating Article 14 of the Constitution.

8. The undertaking obtained from the appellant is so unfair and unreasonable that it shocks the conscious of this Court. It reflects the inequality of the bargaining power between the appellant and the respondents which emanates from the great disparity in the economic strength between the job seeker and job giver.

9. The appellant was compelled by circumstances to accept the offer made by the respondents, but then the mere acceptance of this offer would not give it a stamp of approval regarding its validity. It is an age old maxim that "*necessity knows no law*" and a person sometimes may have to succumb to pressure of the other party to bargain who is in stronger

position. Although, it may not be strictly in place, but the Court cannot shut its eyes to this ground reality.

10. At this stage, it shall be apt to quote the following observations of the Hon'ble Supreme Court in ***Chairman and MD NTPC Ltd. Vs. Rashmi Construction Builders and Contractors (2004) 2 SCC 663***:-

> "28. Further, necessitas non habet legem is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position."

11. Notably the respondents herein are none other than the functionaries of the State who are expected to function like a model employer. A model employer is under an obligation to conduct itself with high probity and expected candour and the employer, who is duty bound to act as a model employer has social obligation to treat an employee in an appropriate manner so that an employee is not condemned to feel totally subservient to the situation. A model employer should not exploit its employees and take advantage of their helplessness and misery. The conduct of the respondents falls short of expectation of a model employer.

12. The Hon'ble Supreme Court in its decision in ***Bhupendra Nath Hazarika and another Vs. State of Assam and others, (2013) 2 SCC 516*** has succinctly explained this position in the following terms:-

> "61. Before parting with the case, we are compelled to reiterate the oft stated principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules. Hence, the need for hammering the concept.
>
> 62. Almost a quarter century back, this Court in Balram Gupta V. Union of India 1987 Supp SCC 228 had observed thus: (SCC p. 236, para 13)
>
> > "13.... As a model employer the Government must conduct itself with high probity and candour with its employees."
>
> In State of Haryana V. Piara Singh (1992) 4 SCC 118 the Court had clearly stated: (SCC p. 134, para 21).
>
> > "21....The main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16."
>
> 63. In State of Karnataka V. Umadevi (3) (2006) 4 SCC 1 (SCC P. 18, para 6) the Constitution Bench, while discussing the role of State in recruitment procedure, stated that if rules have been made under Article 3089 of the Constitution, then the Government can make appointments only in accordance with the rules, for the State is meant to be a model employer.

> 64. In Mehar Chand Polytechnic V. Anu Lamba (2006) 7 SCC 161 (SCC p. 166, para 16) the Court observed that public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to al the citizens of India entitled for being considered for recruitment in the vacant posts.
>
> 65. We have stated the role of the State as a model employer with the fond hope that in future a deliberate disregard is not taken recourse to and deviancy of such magnitude is not adopted to frustrate the claims of the employees. It should always be borne in mind that legitimate aspirations of the employees are not guillotined and a situation is not created where hopes end in despair. Hope for everyone is gloriously precious and a model employer should not convert it to be deceitful and treacherous by playing a game of chess with their seniority. A sense of calm sensibility and concerned sincerity should be reflected in every step. An atmosphere of trust has to prevail and when the employees are absolutely sure that their trust shall not be betrayed and they shall be treated with dignified fairness then only the concept of good governance can be concretised. We say no more."

8. The respondents would however still contend that it was the petitioner who herself had agreed to work without remuneration and/ or was satisfied with Rs.1000/- remuneration as fixed by the PTA. Notably the same arguments were raised by the respondents in **Dr. Lok Pal's** case (supra), and the learned Division Bench observed as under:-

> "13. The respondents would still contend that it was the petitioner himself, who had agreed to the terms and conditions of his employment by accepting Rs.21,000/- per month as remuneration instead of Rs.43,000/- per month. Though, we have already held this contention of the respondents to be unsustainable yet the question, arises as to whether it is open to the State to disobey the Constitutional mandate merely because a person tells the State that it may do so? Complete answer to this question is found in the following observations of the Hon'ble Supreme Court in ***Basheshur Nath Vs. Commissioner of Income Tax, AIR 1959 SC 149:***:-
>
> > "14. Such being the true intent and effect of Art. 14 the question arises, can a breach of the obligation imposed on the State be waived by any person? In the face of such an unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because a person tells the State that it may do so? If the Constitution asks the State as to why the State did not carry out its behest, will it be any answer for the State to make that "true, you directed me not to deny any person equality before the law, but this person said that I could do so, for he had no, objection to my doing it." I do not think the state will be in any better position than the position in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as was that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It seems to us absolutely clear,' on the language of Art. 14 that it is a command issued by the Constitution to the State a matter of

> public policy with a view to implement its object of ensuring the equality of status and opportunity which every Welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State."
>
> 32. This, in my opinion, is the true position and it cannot therefore be urged that it is open to a citizen to waive his fundamental rights conferred by Part III of the Constitution. The Supreme Court is the bulwark of the fundamental rights which have been for the first time enacted in the Constitution and it would be a sacrilege to whittle down those rights in the manner attempted to be done.
>
> Therefore, once it is concluded by the aforesaid examination of law that it is not open to a citizen to waive off his fundamental right, then there is no gain saying that the appellant was in no manner estopped from filing the writ petition."

9. The matter can be looked from a different angle. Indisputably the petitioner had been appointed and assigned the duties to teach the students and such duties have been continuously performed by her. Then can the respondents, who are model employers, be permitted to act with total lack of sensitivity and indulge in "Begar", which is specifically prohibited under Article 23 of the Constitution of India.

10. The State government is expected to function like a model employer, who is under an obligation to conduct itself with high probity and expected candour and the employer, who is duty bound to act as a model employer has social obligation to treat an employee in an appropriate manner so that an employee is not condemned to feel totally subservient to the situation. A model employer should not exploit its employee and take advantage of their helplessness and misery. In the present case the conduct of the respondents falls short of expectation of a model employer.

11. It is not the case of the respondents that petitioner has not discharging her duties diligently, honestly and faithfully. Therefore, in such circumstances by claiming grant in aid on regular basis the petitioner has not asked for the moon. Not only is the petitioner entitled to regular grant in aid but having worked for nearly a decade, the petitioner can also not be denied her legitimate claim for regularization.

12. A similar question came up for consideration before learned Division Bench of this Court in Pritam Singh versus State of Himachal Pradesh and others, CWP No.4098 of 2012 decided on 13.09.2012 and it is apt to reproduce Paras 2 to 4 of this judgment which reads thus:

> "2. The admitted facts are that from 30th November, 1992 the petitioner was working as part time sweeper/water carrier at Govt. Senior Secondary School, Kalal, District Bilaspur. He was appointed by the Parents Teacher Association at Rs.200/- per month. In 2003 a certificate was issued by the Principal of the school that the petitioner has worked for more than 10 years. The salary of the petitioner in 2004 was increased from Rs.200/- to Rs.500/-. The petitioner had also applied for the post of water carrier but he was not selected.

3. We called for the record and we find that the selection of respondent No.4 cannot be said to be invalid. At the same time we cannot be oblivious to the fact that the petitioner has worked as part -time worker for more than 20 years. It may be true that he has worked on part time basis and was employed by the Parents Teacher Association but the fact remains that he has worked for 20 years. An employee who worked for 20 years has genuine expectation that over a period of time he would be regularized.

4. Without going into the merits of the case and without making this case a precedent, keeping in view the peculiar facts and circumstances of the case we direct that in case the work of sweeper or any other work of similar nature is available in the school then it is the petitioner alone who shall be offered appointment against the said post and such post shall not be given to any other person. The petition is disposed of accordingly. No costs."

13. Taking cue from the aforesaid judgement and bearing in mind the peculiar facts and circumstances of the case more particularly the fact that the petitioner has been working for nearly a decade, this court is of the view that the following directions would sub-serve the ends of justice:-

(i) The respondents are directed to release the grant in aid in favour of the petitioner from the date when the grant in aid Rules were notified; and

(ii) The respondents are further directed to consider the case of the petitioner for regularization in accordance with the policy.

14. The aforesaid directions be complied with within a period of three months. The petition is disposed of accordingly. No costs.

****

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

Ram Lal. ..... Petitioner.

Versus

Veena Dogra & others. ..... Respondents.

CMPMO No. 356 of 2014.
Date of order: April 2, 2015.

Constitution of India, 1950- Article 227- the Counsel for the petitioner submitted that Trial Court be directed to decide the suit on or before 15.5.2015- counsel for the respondent stated that he had no objection for the same- hence, direction issued to the Trial Court to dispose of the suit on or before 15.5.2015.

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

For the respondent : Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, J. (Oral)

CMPMO No. 356 of 2014 filed under Article 227 of the Constitution of India. Learned Advocate appearing on behalf of the petitioner submitted that the learned trial

Court be directed to dispose of the Civil Suit No. 180-1-13 of 2005 on or before 15.5.2015 in accordance with law. Learned Advocate appearing on behalf of the respondents submitted that he has no objection if the direction is issued to the learned trial Court to dispose of suit within stipulated period. With the consent of the parties direction is issued to the learned trial Court that learned trial Court will dispose of civil suit 180-1-13 of 2005 on or before ***15.5.2015***. It is clarify that option will lie with learned trial Court how to list the case proceedings in accordance with law. No order as to costs. Petition filed under Article 227 of Constitution of India disposed of. Pending applications if any also disposed of. Certify copy of order be transmitted to learned trial court forthwith for compliance. Copy Dasti.

****

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

Deepak Kumar & another .....Petitioners.
Versus
State of H.P & another ....Respondents.

Cr. Revision No. 291 of 2014
Decided on : 6.4.2015

Code of Criminal Procedure, 1973- Section 97 - Minor child 'K' was in the custody of her father- mother of the child moved an application under Section 97 of Cr.P.C on which search warrants were issued and the custody was handed over to the mother- held, that Magistrate is competent to issue search warrants for the production of minor child from the illegal confinement and to hand over the child to legal guardian- child was aged 1 ½ years who was being breast fed by her mother, therefore, the Court had rightly handed over the custody to the mother.

For the Petitioners: Mr. Pranay Pratap Singh, Advocate.
For the Respondents: Mr. Vivek Singh Attri, Deputy Advocate General for respondent No.1.
Mr. Parkash Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Minor child Komal @ Pooja is aged 1 ½ years. Her father, petitioner No.1 herein, had her in his custody. The mother of minor child, respondent No.2 herein, moved an application under Section 97 Cr.P.C before the competent Court. The competent Court while exercising jurisdiction vested in it under Section 97 Cr.P.C proceeded to issue search warrants for production of minor child Komal @ pooja, who is aged about 1 ½ years and is breast fed by the respondent No.2. On the minor child being produced before the Competent Court, the latter handed over the custody of the minor child to her mother being her natural guardian. The father, who is petitioner No.1 herein, is aggrieved by the said order. The learned counsel appearing for the petitioner herein has canvassed before this Court that the impugned order is jurisdictionally void, inasmuch, as, the Magistrate who had exercised the powers vested in it under Section 97 Cr.P.C for production, on issuance of search warrants , of the minor child, was, jurisdictionally incompetent to render an order as he did, for handing over the custody of the minor child to her mother. The learned counsel for the petitioner in making the aforesaid submission, appears to have lost sight of the fact that an incisive and close reading of the provisions of Section 97 of Cr.P.C unravels the fact

of it empowering the competent Magistrate to issue search warrants for the production of the minor child from the purported illegal confinement wherein she/he is kept, besides also jurisdictionally rendering him competent as well as investing him with a power to make a further order qua the person who is entitled to the custody of the minor child, on the latter being produced before him. The power vested in the competent Court, to, make any further order, on production of the minor child from the purported illegal confinement before it, encompasses also the power to hand over, as the competent court did, in the impugned order, the custody of the minor child to the person who in the facts and circumstances of the case is deemed fit, expedient and appropriate to have her/his custody. This Court while exercising jurisdiction under Section 397 Cr.P.C qua the custody of minor Pooja aged 1 ½ years, for whose custody, there is an acid contest inter-se her father (petitioner No.1 herein) and her mother (respondent No.2 herein), stands in the pedestal of *Parens Patricia*. Hence, this Court has to be mindful of the fact whether the order impugned before this court has taken into consideration the relevant, apt and germane factors necessarily to be borne in mind by the Competent Court for adjudging the legal tenacity of the rival claims made by the father and mother of the minor child Pooja for the latters custody. The preeminent fact which ought to weigh with this Court is whether the welfare of the nascent child aged 1 ½ years and who is brest fed by her mother would remain intact or would remain protected in case her custody is handed over to her father, who is petitioner No.1 herein. The minor aged 1 ½ years and who is breast fed by her mother, has to be bestowed with and showered upon the love and affection of her mother, who is the respondent No.2 herein. Though, it would be, not appropriate to say that petitioner No.1 who is the father of the minor child, would not shower or bestow love and affection upon his minor child. However, given the nascence of the minor child and the fact that she is breast fed by her mother, ultimately then, her nutritional needs necessitating hers partaking a natural diet would be met or satiated only by her mother, who is the respondent No.2 herein. Besides, given the infancy of the minor child, the necessary love and affection as is required at this stage by the minor child would in larger and natural measure be showered upon the minor child for ensuring her proper nourishment and growth, by the respondent No.2 herein. The learned counsel for the petitioners contends that respondent No.2 is not financially empowered to meet the needs of food and clothing of the minor child, yet, petitioner No.1, who is the father of the minor child, is under a pious as well as a legal obligation, to, even when the custody of the minor child has been ordered to be handed over to respondent No.2 herein, meet out the expenses as would be entailed for the upkeep and maintenance of the minor child. There is no infirmity in the impugned order and same is accordingly affirmed. Petition stands dismissed.

****

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

Karan Sharma .....Petitioner
Versus
State of H.P & another .....Respondents.

CWP No. 9554 of 2014
Reserved on: 26/03/2015
Decided on : 6/4/2015

Constitution of India, 1950- Article 226- Petitioner applied for the post of Assistant Manager and obtained the highest marks in the written test- he was interviewed but the Interview Committee did not find any person suitable for the appointment – no marks

were awarded to the petitioner in the interview- held, that it is difficult to believe that a person who had secured 80% marks in the written test did not possess the personality, awareness and subject knowledge or general knowledge compelling the Interview Board not to evaluate him, hence, proceedings of Interview Board set aside and respondent directed to conduct the interview afresh by constituting a new Interview Board. (Para-3)

For the Petitioner: Mr. Sandeep Sharma, Senior Advocate with Mr. Prashant Sharma, Advocate.

For the Respondents: Mr. M.A Khan, Additional Advocate General for respondent No.1.
Mr. Shivank Singh Panta, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The petitioner herein, in pursuance to an advertisement comprised in Annexure P-1, applied for the post of Assistant Manager (F.O). The respondent-Corporation held/conducted a test for disinterring the suitability of the petitioner for his being appointed against the post to which he had applied for. It remains un-controverted, as portrayed by Annexure P-2 and as evident from the record furnished by the respondent-Corporation, that the petitioner had obtained/secured 80 marks in the written test. He hence is the candidate who secured the highest marks, amongst all those, who alongwith him appeared in the written test for selection to the post of Asst. Manager (F&B) or Assistant Manager (FO). The presence of the petitioner alongwith other eligible candidates, considered suitable by the respondent-corporation within the ambit of the germane rules and guidelines, was elicited for participation in an interview to be held by a duly constituted committee/interviewing board and he alongwith other aspirants was interviewed by a duly constituted interviewing board. However, the petitioner avers that the committee constituted to conduct the personal interview did not find any of the interviewed candidates suitable. Hence, it was decided by the apposite committee not to recommend any candidate for the post of Assistant Manager(FO). The reasons as borne out in the writ petition, for the interviewing committee omitting, to recommend any of the interviewed candidates suitable for selection and appointment against the post to which they had applied and who though had been successful in the written-examination conducted by the respondent-Corporation are extracted hereinafter.

> *"..... During personal interview, the subject expert observed that the general knowledge, awareness and subject knowledge of all the candidates(including the petitioner) interviewed were not found suitable for appointment to either the post of Asst. Manager (F&B) or Assistant Manager (FO) (for which post the petitioner had applied), therefore the said interview committee decided not to recommend any candidate for the post of Asst. Manager)Food and Beverage) and Asst. Manager (FO) and a such the petitioner was not offered appointment."*

2. The said reason which heavily weighed upon the interviewing board constituted by the respondent-Corporation to not accord marks to the aspirants to the post of Asst. Manager (F&B) or Assistant Manager (FO) has remained un-controverted. For gauging and fathoming whether, as contended before this Court by the learned counsel for

the petitioner herein that, the interviewing board/committee constituted by the respondent-Corporation to evaluate and concomitantly accord marks to the candidates who appeared before them after theirs having successfully cleared the written examinations, had omitted to even accord a single mark to the petitioner herein rather had for the un-controverted reasons adverted to hereinabove rendered the entire exercise for recommending a suitable candidate to the post of Asst. Manager (F&B) or Assistant Manager (FO*)* nugatory, had elicited through a direction rendered against the respondent on 20.3.2015. Its perusal also discloses that the interviewing committee/interviewing board had not awarded a single mark to the petitioner despite his having secured the highest marks in the written test conducted by the respondent-Corporation.

3. The reasons as averred to by the respondent-corporation for omitting to award marks to the aspirants to the post of Asst. Manager (F&B) or Assistant Manager (FO) who appeared in the viva voce, though anvilled upon the factum of the subject expert opining that the general knowledge, awareness and subject knowledge of the candidates interviewed were all found unsuitable. However, the said reasoning as afforded by the Subject Expert for his omitting to award even a single mark to the petitioner herein despite his having secured the highest marks in the written test is perse dichotomous. The factum of his having secured the highest marks in the subject concerned is a strong repellent to the factum of his having not possessed the requisite awareness either in general knowledge or in the subject matter concerned. The score which was under the apposite regulations meted out for being awarded to the candidates standing for interview before the interviewing board/selection committee was 20. It is unfathomable that the candidate, as the petitioner, who secured 80 marks in the written test did not possess either the personality, awareness and subject knowledge or abysmally lacked even in general knowledge so as to necessitate or entail upon the interviewing committee/ interviewing board to not evaluate him and proceed to discard his candidature and to also proceed to not consider him suitable for selection and consequent appointment. Even though, it is un-sagacious for this Court to substitute its opinion for the opinion of the expert nonetheless given the dichotomy inter-se the highest marks obtained by the petitioner herein and his having been not evaluated by the interviewing board perse smacks of malafides. Obviously, the reasons as purportedly weighed upon the interviewing board/selection committee anvilled upon the opinion of the subject expert arise from a colorable exercise of power. Concomitantly, it stands to be deprecated by this Court. Besides, it also appears that the said purported specious and invented reason afforded by the subject expert concerned is a machination to in a most capricious manner untenably oust the petitioner for recommendation for selection and consequent appointment. Obviously it does not merit its being countenanced by this Court. The aura of illegality which hence the proceedings of the interviewing board/interviewing committee acquire as also when the lack of exercise of discretion by the interviewing committee/interviewing board comprised in its act of not evaluating the petitioner herein connoting arbitrariness actuated by malafides, renders tainted and vitiated the proceedings thereto. Consequently, this Court is constrained to set aside the proceedings of the interviewing board/interviewing committee. The respondent-Corporation is hence directed to conduct an interview afresh, for all the eligible candidates on a date to be intimated to them, by a newly constituted interviewing board/selection committee. The proceedings be returned in a sealed cover. The petition is allowed. All pending applications stand disposed of accordingly.

****

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

Nancy Bhatt and another ...Petitioners.
Versus
State of Himachal Pradesh and another ...Respondents.

Cr. MMO No. 183 of 2014
Judgment reserved on: 02.04.2015
Date of decision : April 6, 2015

Code of Criminal Procedure, 1973- Section 482- Petitioners sought quashing of FIR registered against them for the commission of offences punishable under Sections 498-A 506 read with Section 34 IPC- record showed that FIR has culminated in to charge-sheet- held, that once the charge-sheet was submitted before the Court, quashing of FIR is not permissible and the Court before which charge-sheet has been filed should be left to deal with the case on its own merit. (Para-4 to 9)

Cases referred:
State of Punjab vs. Dharam Vir Singh Jethi 1994 SCC (Cri.) 500
Vineet Narain and others vs. Union of India and another (1996) 2 SCC 199,
Anukul Chandra Pradhan vs. Union of India and others (1996) 6 SCC 354
Jakia Nasim Ahesan and another vs. State of Gujarat and others (2011) 12 SCC 302

For the Petitioners : Mr. Sanjeev Bhushan, Advocate.
For the Respondents : Mr. V.K.Verma, Mr. Rupinder Singh, Addl. A.Gs., with Ms. Parul Negi, Dy. A.G.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioners under Section 482 Cr.P.C.have invoked the jurisdiction of this Court for quashing of FIR No. 16 of 2014 registered at Police Station, Solan on 20.1.2014 under Sections 498-A 506 read with Section 34 IPC on the ground that the same is gross abuse of process of law and even if the contents are taken on the face value, the same do not disclose the commission of any offence much less the offence for which the petitioners have been charged.

2. A preliminary objection has been raised by the respondents that once the FIR has culminated in charge-sheet, the present petition has been rendered infructuous, because it is not the FIR but the chargesheet which forms the basis of criminal trial.

3. I have heard learned counsel for the parties and gone through the records of the case carefully.

4. In ***State of Punjab vs. Dharam Vir Singh Jethi 1994 SCC (Cri.) 500***, the Hon'ble Supreme Court held that when the chargesheet was submitted, quashing of FIR is not permissible since it would be open to the Court to refuse to frame charge. It was observed as under:

> *"2. Heard learned counsel for the State as well as the contesting respondent. We are afraid that the High Court was not right in quashing the First Information Report on the plea that the said respondent had no role to play and was never the custodian of the paddy in question. In fact it was averred in the counter-affidavit filed in the High Court that the said respondent had acted in collusion with Kashmira Singh resulting in the latter misappropriating the paddy in question. At the relevant point of time the respondent concerned, it is alleged, was in overall charge of the Government Seed Farm, Trehan. This allegation forms the basis of the involvement of the respondent concerned. The High Court was, therefore, wrong in saying that the respondent concerned had no role to play. A specific role is assigned to him, it may be proved or may fail. In any case, pursuant to the First Information Report the investigation was undertaken and a charge sheet or a police report under Section 173(2) of the Code of Criminal Procedure was filed in the court. If the investigation papers annexed to the charge sheet do not disclose the commission of any crime by the respondent concerned, it would be open to the court to refuse to frame a charge, but quashing of the First Information Report was not permissible.*

5. In ***Vineet Narain and others*** vs. ***Union of India and another (1996) 2 SCC 199,*** the Supreme Court after refusing to quash the FIR, held that when a chargesheet was filed in the competent Court, it is that Court alone which will then deal with the case on merits, in accordance with law.

6. This legal position has been reiterated in number of cases. (See: ***Anukul Chandra Pradhan vs. Union of India and others (1996) 6 SCC 354*** and ***Jakia Nasim Ahesan and another vs. State of Gujarat and others (2011) 12 SCC 302).***

7. Admittedly the FIR is not a substantive piece of evidence. It is information of a cognizable offence given under Section 154 of the Code of Criminal Procedure (for short 'Code'). The legislature in its wisdom under the provisions of the Code has given limited/restrictive power to the Court to intervene at the stage of investigation by the police. Investigation is the exclusive domain of the police. Ordinarily, it is only when the charge sheet is filed that the Court is empowered either to take cognizance and to frame charge or to refuse to do the same.

8. The FIR is the sheet anchor on the basis of which the investigation ensues. However, once the FIR on the basis of which the investigation was initiated has culminated into a chargesheet, the FIR does not remain the sheet anchor because the same alone then cannot be read and has to be read along with the material gathered by the investigating agency during the course of the investigation.

9. It would, therefore, not be permissible for this Court to quash the FIR or else that would amount to annihilating a still born prosecution by going into the merits on the plea of proof of the prima facie case. Further, adverting to those facts and giving findings on merits would otherwise result in the grossest error of law because this Court in exercise of its jurisdiction under Section 482 of the Code cannot undertake pre-trial of a criminal case.

10. The learned counsel for the petitioners would however argue that it was on account of misrepresentation made by respondent No.2 to the effect that the parties were working towards an amicable settlement that the matter was repeatedly adjourned and now the charge-sheet has been presented.

11. The submission made by learned counsel for the petitioners cannot be accepted because a perusal of the order-sheet discloses that it was on the joint

representation of the parties that the case was repeatedly adjourned on the pretext that there were chances of amicable settlement.

12. As a matter of fact, it was on the joint request of the parties that a learned Senior Advocate of this Court was appointed as a mediator vide order dated 17.10.2014. On 21.11.2014 the parties jointly requested for adjournment. On 28.11.2014, the petitioner sought adjournment. When the case was taken up thereafter on 5.12.2014, it was again at the joint request of the parties that the matter was adjourned and ordered to be listed on 2.1.2015 on which date the petitioner No.2 and respondent No.2 were directed to remain present. It was eventually on 2.1.2015 that the parties represented that no amicable settlement could be worked out and the case accordingly was then fixed for final hearing.

13. In view of the aforesaid discussion, the preliminary objection raised by the respondents is upheld and accordingly the present petition is dismissed. However, the petitioners are at liberty to avail of any other remedy which may be available to them under the law. Needless to add that any observation made hereinabove shall not be taken as an expression of opinion on the merits of the case and the learned trial Court shall decide the matter uninfluenced by any observation made hereinabove.

****

HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

Paras Ram .....Petitioner.
Versus
Jeet Singh and others .....Respondents.

CMPMO No. 266 of 2014
Date of decision: 6.4.2015

Code of Civil Procedure, 1908- Order 1 Rule 10- Plaintiffs and defendant claimed to be the legates under the Will executed by late 'S'- plaintiffs are minors and had filed a suit through their mother/natural guardian for declaration of their rights- suit was withdrawn by the mother- minor plaintiffs instituted an appeal through their grandmother- appeal was allowed and the suit was remanded for continuing the proceedings from the stage of termination- an application was filed for arraying the mother as a defendant on the ground that she being class -1 heir was a necessary party- defendant claimed that application was filed at a belated stage- held, that in case the Wills set up by the plaintiffs and defendant were not established, disposition of the property would be on the basis of natural succession, therefore, mother being natural heir was a necessary party and the order allowing the application under Order 1 Rule 10 CPC cannot be said to be bad. (Para-1 to 3)

For the petitioner: Mr. H.S.Rangra, Advocate.
For the respondents: Mr. Nimish Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The minor plaintiffs Jeet Singh and Tek Chand initially sued through their mother/natural guardian Smt. Chanchlo @ Hukami wd/o late Shri Chand. Their suit was for a declaration that they have under the testamentary disposition of one Saran become

owners of the suit land. The defendant-respondent No. 1, too claimed vestment of title in the suit property under a testamentary disposition executed in his favour by late Saran. The rival claims to the suit property as canvassed respectively on the strength of the respective testamentary dispositions of deceased testator Saran remain un-adjudicated. Initially, as stated above, the minors had instituted a suit against the defendants through their mother and natural guardian Chanchalo for a declaration of theirs having become owners of the suit property under the testamentary disposition executed qua it by their grand father Saran. The aforesaid Chanchalo withdrew the suit. However, the minor plaintiffs instituted an appeal through their maternal grand mother against the orders rendered by the learned trial Court dismissing their suit as withdrawn. The appeal was allowed and the suit was remanded to the learned trial Court for restarting the proceedings from the stage they stood terminated. During the pendency of the suit before the learned trial Court an application under Order 1 Rule 10 CPC was instituted before it by the plaintiffs/applicants seeking impleadment of Chanchalo @ Hukami as a party in the array of defendants. It was claimed that she is a necessary party being a class 1 heir. Obviously, in the eventuality of both the testamentary dispositions propounded by the plaintiffs as well as defendant-respondent No. 1 coming to be set-aside then the rights in the suit land would devolve upon a class -1 heir in consonance with the Indian Succession Act. Naturally then the aforesaid Chanchalo @ Hukami claimed by the plaintiffs to be class-1 heir would succeed to the estate of late Saran. In aftermath for facilitating hers to protect her interest in the suit property her impleadment was just and essential. The said fact is contested by the learned counsel for the petitioner herein. He also contests that the application necessitated dismissal as it is a clever contrivance on the part of the respondents to delay the proceedings.

2. Belated institution of the application on the part of the plaintiffs-respondents for the impleadment of Chanchalo in the array of defendants does not constitute a good and potent ground for the non impleadment of Chanchalo in the array of defendants, especially when it was claimed by the plaintiffs-respondents that she is a class 1 heir to whom the suit property would devolve in the eventuality of both the testamentary dispositions propounded by each of the parties at contest, falling apart. Consequently, leaving aside the fact that she at this stage ought not to be concluded to be having any invincible right as a class 1 heir to the suit property, which conclusion is to be formed and drawn on the basis of evidence on the apposite issue as is or may be struck by the learned trial Court on the pleadings, as exist before it, the necessary facet at this stage, is that when it is claimed by the plaintiffs-respondents that she is class 1 heir, she obviously has a tenable and sound right to prove the said fact. Besides, she has a right to also contest the respective testamentary dispositions. Moreso, when proof thereof would empower her to hence succeed to the estate of the deceased Saran in the event of both his testamentary dispositions coming to face discountenance by the learned trial Court. Obviously, then the mere contest on the part of the petitioner herein even in the absence of evidence to oust her claim ought not to constitute a good ground at this stage for this Court to construe her to be neither a proper party nor a necessary party.

3. The learned counsel for the petitioner herein has contended that since the earlier suit was instituted by the plaintiffs through their mother and natural guardian hence the respondents herein are estopped to claim when it is also averred in the relevant paragraphs that she has no interest adverse to the minors that she is a necessary and proper party. However, the said argument stand negatived in the face of the fact that now the suit which has recommenced before the learned trial Court after its remand to it by the first appellate Court depicts the factum of the minor plaintiffs now suing through their grand mother and natural guardian.

4. In sequel, the reasons as formed by the learned trial Court are anvilled upon a proper appreciation of the material on record, obviously then the findings do not necessitate interference by this Court while exercising jurisdiction under Article 227 of the Constitution of India. I find no merit in the petition which is accordingly dismissed. The impugned order is affirmed.

****

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

Pritam Singh .....Appellant.
Versus
Kishan Singh (deceased through LRs) & ors. .....Respondents.

RSA No. 176 of 2002.
Reserved on: 23.3.2015.
Decided on: 06.04.2015.

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 104- Predecessor-in-interest of the parties 'P' was a Gair Maurusi tenant- there was no order of relinquishment or abandonment of his tenancy in favour of land owners- 'S' used to help his father in the cultivation of the land- entries were recorded in favour of the predecessor-in-interest of the defendant No. 1 during the consolidation proceedings – 'S' cultivated the land on behalf of all the brothers and in absence of any relinquishment or abandonment, it is to be presumed that he remained tenant over the suit land – tenancy would not be affected by the death of the landlord or tenant except where the tenant does not leave some male lineal descendants, mother or widow - tenancy after the death of the original tenant devolved upon his son- the entries showing 'S' to be an exclusive owner and defendant No. 2 and predecessor-in-interest of the defendants No. 3 and 4 as tenant at will are wrong. (Para-17 and 18)

Code of Civil Procedure, 1908- Section 9- Jurisdiction of the Civil Court to hear the dispute regarding the landlord and tenant is barred but where the dispute is between the legal heirs of the tenant, Civil Court has jurisdiction to hear and entertain the suit. (Para-19)

For the appellant(s): Mr. T.S.Chauhan, Advocate.
For the respondent: Mr. N.K.Thakur, Sr. Advocate, with Mr. Rohit Bharoll, Advocate for respondent No. 1.
Mr. Ajay Sharma, Advocate, for respondents No. 2 & 3.

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, Una, H.P. dated 3.4.2002, passed in Civil Appeal No.90 of 1998.

2. Key facts, necessary for the adjudication of this regular second appeal are that the predecessor in interest of respondents No. 1((i) to 1(viii), namely, Sh. Kishan Singh has instituted suit for declaration against the appellant and proforma respondents No. 2 to 4 (hereinafter referred to as the defendants) to the effect that land measuring 3 kanals 1 marlas, comprised in khewat No.178, khatauni No. 229-230, bearing khasra Nos. 2236/369 min (2K-1M) and 2236/369 min (1K-0M), situated in village Rampur Tehsil and Distt. Una,

is jointly owned and possessed by the plaintiff and defendants. The alleged entries appearing in the revenue record in the column of ownership in the name of Santokh Singh son of Tulsa Singh, predecessor-in-interest of defendant Pritam Singh and in the column of cultivation showing kh. No. 2236/369 min (2K-1M) as Khud Kasht and Kh. No. 2236/369 min (1K-0M) under the tenancy of defendant No. 2, namely, Sh. Tarsem Singh, and his brother Harbans Singh, as per array of parties given in the original suit and mutation bearing No. 3282 transferring ownership rights of deceased Santokh Singh in the name of defendant No. 1 are incorrect, wrong and illegal. The suit land is jointly owned and possessed by the parties and the illegal entries appearing in the revenue record in the column of ownership in the name of Santokh Singh and in the column of cultivation as Khud Kasht under the tenancy of defendant No. 2 and his brother Harbans Singh predecessor-in-interest of defendants No. 3 & 4 and further mutation No. 3282 transferring ownership rights of deceased Santokh Singh in the name of defendant No. 1 are absolutely wrong, incorrect and void.

3. The suit was contested by defendants No. 1 & 4 by filing separate written statements whereas defendants No. 2 & 3 have filed joint written statement. Pritam Singh, defendant No. 1 has taken the preliminary objection that the Civil Court has no jurisdiction to go into any question connected with the conferment of proprietary rights under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972. He has denied the averments made by the plaintiff in his plaint and further submitted that Santokh Singh father of defendant No. 1 had been coming in physical cultivating possession of the suit land as tenant-at-will on payment of rent since long. The owners of the suit land filed LR-V application for resumption of the suit land which was allowed and suit land fell in the share of Santokh Singh, father of the replying defendant. Thus the suit land is owned and possessed by him. The replying defendant has admitted that his grandfather died on 3.7.1975. According to defendants No. 2 & 3, Tulsa Singh, the predecessor-in-interest of the parties abandoned his cultivation rights in the suit land before 1961 and after that Santokh Singh and Sunder Singh became joint tenant of the suit land under the original land owners. The plaintiff remained out of the village for his livelihood and never cultivated the suit land nor his father after the year 1961, have cultivated the same. The defendant No. 4 has filed written statement through her Court Guardian whereby she has denied the averments made by the plaintiff and taken the specific defence that Tulsa Singh, predecessor-in-interest of the parties has relinquished his tenancy in favour of Santokh Singh and Sunder Singh.

4. The replication was filed by the plaintiff. The learned Sub Judge, Una, framed the issues on 3.12.1993. The learned Sub Judge, Una, decreed the suit on 22.4.1998 for declaration to the effect that plaintiff, defendant No. 1 and defendants No. 2 to 4 were owners in possession qua 1/3rd share over suit land measuring 3 kanals 1 marlas which came to them after the decision of LR-V form. Defendant No. 1, Pritam Singh, as arrayed in the original suit, has filed an appeal against the judgment and decree dated 22.4.1998 before the learned District Judge, Una. The remaining defendants No. 2 to 4, as per the original suit, were arrayed as proforma respondents. The learned District Judge, Una, dismissed the appeal on 3.4.2002. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 22.8.2002:

> "1. Whether the Civil Court had jurisdiction in the matter in view of provisions of H.P. Tenancy and Land Reforms Act, and full bench judgment of this Hon'ble Court in Chuhniya Devi case 1991 Vol.-1 SLC 223, and in view of Section 57 of the H.P. Prevention of Fragmentation and Consolidation Act, 1971?"

6. Mr. T.S.Chauhan, Advocate, for the appellant has vehemently argued that both the Courts below have not correctly appreciated the oral as well as the documentary evidence on record. He also contended that the Civil Court had no jurisdiction in the matter in view of the provisions of H.P. Land Reforms Act, 1972. On the other hand, Mr. N.K.Thakur, learned Sr. Advocate, has supported the judgments and decrees passed by both the Courts below. Mr. Ajay Sharma, Advocate, has adopted the arguments of Mr. T.S.Chauhan, Advocate.

7. I have heard the learned Advocates for the parties and gone through the records of the case carefully.

8. Sh. Kishan Singh, plaintiff has appeared as PW-1. He testified that the suit land is owned and possessed by the parties and Sh. Santokh Singh father of Pritam Singh never remained *gair morusi* tenant over the suit land. The suit land was earlier cultivated by Tulsa Singh when the total area was 6 kanals 3 marlas before resumption. Tulsa Singh used to cultivate it on payment of *chakota* of Rs. 75/- per annum. Santokh Singh has got revenue entries made in his name in the absence of witnesses. In his cross-examination, he clarified that Chiranji Lal and Achhar Singh etc. were the earlier owners of the suit land.

9. Sh. Moti Ram, PW-2 has testified that he is familiar with the suit land and that Kishan Singh, Pritam Singh and Tarsem Singh cultivate it apart from the legal representatives of Harbans Singh and they are the owners of the same. He never saw any party cultivating the suit land exclusively at any time. In his cross-examination, he stated that the suit land is situated about 10-15 fields away for the suit land.

10. Sh. Wattan Chand, PW-3 has testified that the suit land was earlier cultivated by Tulsa Singh and now it is cultivated by the parties. According to him, Pritam Singh, Santokh Singh or Tarsem Singh never cultivated the suit land exclusively or individually. Tusla Singh had been paying Rs. 75/- as *Chakota*. In his cross-examination, he has denied that the suit land was earlier in joint possession of Santokh Singh and Sunder Singh.

11. The appellant-defendant Pritam Singh has appeared as DW-1. According to him, the disputed total land was earlier 6 kanals 3 marlas being cultivated by his father Santokh Singh on payment of *Chakota* per annum. His grandfather Tulsa Singh or the defendant/proforma respondents Tarsem Singh or deceased Harbans Singh or their children never cultivated the suit land. His father had been cultivating the total land prior to the year 1962. In his cross-examination, he has admitted that his father and grandfather used to live together.

12. Sh. Somi Ram DW-2, Patwari has proved copy of *Khasra Girdawari* Ext. D-1 for Kharif 1979 and Rabi 1980 showing that land measuring 1 kanal has been entered in the name of Tarsem Singh and Harbans Singh in a different ink and handwriting. He has also placed on file regular copy of *Khasra Girdawari* Ext. D-2 for the same period.

13. Sh. Tarsem Singh has appeared as DW-3. He testified that earlier his grandfather Tulsa Singh had been cultivating the suit land where after, it came in possession of Sunder Singh and Santokh Singh. He admitted in his cross-examination that Sunder Singh and Kishan Singh had been residing out of the village. He has also admitted categorically that Tulsa Singh used to cultivate the suit land earlier and he was never dispossessed from the same. He also admitted that Tulsa Singh was looked after and helped in his work by Santokh Singh and after the death of Tulsa Singh, his legal heirs have been cultivating the suit land. He has also admitted that the suit land was never given to Santokh Singh exclusively by the owners.

14. Sh. Bishan Dass, DW-4 testified that he remained Pradhan of village from the year 1972 to 1984. According to him, Harbans Singh, Santokh Singh and Tarsem Singh came to him about their land dispute and out of the said land 1 kanal was given to Tarsem Singh and Harbans Singh whereas remaining 2 kanals was retained by Santokh Singh. He has admitted in his cross-examination that Kishan Singh used to live outside the village and his family had been residing in the village only and they had been helping in the agricultural work. He also admitted that Santokh Singh used to cultivate the suit land on behalf of all brothers.

15. Ramesh Chand, Patwari, DW-6 has proved water bills Ext. DW-6/A to DW-6/C.

16. The plaintiff has produced jamabandi for the year 1954-55 Ext. P-1 and jamabandi for the year 1959-60 Ext. P-2. In these revenue entries, Tulsa has been shown to be in possession of the suit land as *Gair morusi* tenant. The name of Santokh Singh exclusively came in the revenue record for the first time in the year 1962-63. The same position was reflected in the jamabandi for the year 1968-69, 1973-74, Ext. P-4 and P-5, respectively. Santokh Singh was shown as owner in possession of the suit land comprised in Kh. No. 2236/369 and the owners were shown on other ½ of the suit land by conferment of proprietary rights by decision in LR-V form. The defendants have produced copy of *khasra girdawari* for the year 1979-80, copy of jamabandi for the year 1962-63, copy of jamabandi for the year 1968-69, copy of jamabandi for the year 1973-74, copy of jamabandi for the year 1978-79, copy of jamabandi for the year 1983-84, copy of *missal haquiat bandobast* for the year 1989-90, copy of *Bandobast Jadid Sani* for the year 1994-95 and copy of irrigation bills Ext. DW-6/A to DW-6/C.

17. It is apparent from the oral as well as documentary evidence placed on record by the parties that the predecessor-in-interest of the parties Tulsa Ram was *gair marusi* tenant over the suit land. There are no orders to show that he has relinquished or abandoned his tenancy in favour of land owners. Santokh Singh used to help his father in the cultivation of the land and they were residing in the same house. The change in the entries in favour of predecessor-in-interest of defendant No. 1 came for the first time during the consolidation proceedings in the year 1962. According to the jamabandi for the year 1954-55 Ext. P-1 and jamabandi for the year 1959-60 Ext. P-2, Tulsa was shown as *gair marusi* tenant on payment of *chakota*. Sh. Bishan Dass, DW-4 has admitted that Santokh Singh used to cultivate the suit land on behalf of all the brothers. In the absence of any order or any convincing evidence regarding abandonment or relinquishment of tenancy in favour of Tarsem Singh and Harbans Singh, presumption can be drawn that he remained tenant over the suit land till his death. Thus, the tenancy over the suit land was ancestral.

18. According to Section 8 of the Punjab Security of Land Tenures Act, 1953, the continuity of tenancy would not be affected by death of the land lord or the tenant except where the tenant does not leaves some male lineal descendants, mother or widow nor change made in the area of tenancy under the same landowner and for the purposes of section 17 & 18 of the Act. Even Section 45 of the H.P. Tenancy and Land Reforms Act, 1972 provides for succession to right of tenancy. Tulsa was the predecessor-in-interest of the parties. He was the original tenant. The tenancy after his death devolved upon Santokh Singh, Kishan Singh and Sunder Singh. Thus, the entries in record of rights, showing Santokh Singh predecessor-in-interest of the defendant No. 1 as owner of the suit land and in possession of part thereof comprised in Kh. No. 2236/369 min measuring 2 kanals 1 marlas and entries showing defendant No. 2 and Harbans Singh, predecessor in interest of defendants No. 3 & 4 as tenant-at-will, qua the remaining suit land measuring 1 kanal are

illegal, wrong and void. The plaintiff and defendants jointly owned and possessed the suit land as owners.

19. Mr. T.S.Chauhan, Advocate, has also vehemently argued that the Civil Court has no jurisdiction in the matter. There is no dispute regarding relationship of landlord and tenant. The dispute is *inter se* the legal heirs of the tenant. Hence, Civil Court had the jurisdiction to entertain the suit. The substantial question of law is answered accordingly.

20. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

****

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

Shankar Lal ...Petitioner.
Versus
The State of Himachal Pradesh & others ...Respondents.

CWP No. 1674 of 2013
Decided on: 06.04.2015

Constitution of India, 1950- Article 226- Petitioner claimed that he is entitled to seniority and other consequential benefits right from the date he was denied appointment- held, that this question was also determined in case titled as **Neetu versus State of H.P. & others,** reported in **2014 (2) Him. L.R. (DB) 1233,** and **Balak Ram versus State of Himachal Pradesh & others,** reported in **2015 (1) Him. L.R. (DB) 32-** respondent directed to examine the case of the petitioner in the light of the judgments delivered by the Court and to take the decision within six weeks. (Para-3 and 4)

Cases referred:
Neetu versus The State of H.P. & others, 2014 (2) Him. L.R. (DB) 1233
Balak Ram versus State of Himachal Pradesh & others, 2015 (1) Him. L.R. (DB) 32

For the petitioner: Mr. D.K. Khanna, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma, Additional Advocate General, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The writ petitioner was denied appointment illegally constraining him to file CWP (T) No. 8807 of 2008 challenging the appointment of private respondent No. 4, Smt. Anjana Sharma, to the post of Water Carrier, was allowed with a direction to the respondents to appoint the writ petitioner. The appeal filed by private respondent No. 4 was also dismissed by a Division Bench of this Court. It is contended that the writ petitioner could not reap the fruits of his legitimate rights and litigation because of the fault of the respondents.

2. The grievance projected by the writ petitioner is that he is entitled to seniority and other consequential benefits right from the date he was denied appointment due to the illegal appointment of one Smt. Anjana Sharma.

3. This Court has already determined this issue in the cases titled as **Neetu versus The State of H.P. & others,** reported in **2014 (2) Him. L.R. (DB) 1233,** and **Balak Ram versus State of Himachal Pradesh & others,** reported in **2015 (1) Him. L.R. (DB) 32.**

4. In the given circumstances, I deem it proper to dispose of this writ petition with a direction to the respondents to examine the case of the writ petitioner in light of the judgments (supra) and make a decision within six weeks.

5. The writ petition is disposed of accordingly alongwith all pending applications.

****

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

Varinder Verma & another .....Appellants.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 129 of 2011
Reserved on: April 01, 2015.
Decided on: April 06, 2015.

Indian Penal Code, 1860- Section 302 read with Section 34- Father of the complainant did not reach home - subsequently, complainant and his cousin found 'O' and 'G' lying dead- wooden pieces were lying scattered at the spot- cause of the death of 'G' was ante-mortem injuries on the head – cause of death of 'O' was gross head injury and ante-mortem manual strangulation- alcohol was found in the blood and urine of the deceased- motive projected by prosecution is a double edged weapon- while it can furnish a reason for commission of crime, it can also furnish a reason for false implication - recovery of the danda was effected in the presence of inimical witness- no independent witnesses were associated at the time of recovery- the possibility of brawl taking place between the persons in a state of intoxication could not be ruled out- mere presence of blood group AB of the deceased on the seized clothes does not lead to any inference that accused had murdered the deceased- held, that in these circumstances, prosecution version was not proved. (Para- 7 to 38)

Cases referred:

Balbir Vrs. Vazir and others and connected matters, (2014) 12 SCC 670,
Shyamal Saha and another vrs. State of West Bengal, (2014) 12 SCC 321
Parkash vrs. State of Karnataka, (2014) 12 SCC 133

For the appellants: Mr. Satyen Vaidya, Advocate.
For the respondent: Mr. Shrawan Dogra, AG with 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 28.12.2010/30.12.2010, rendered by the learned Addl. Sessions Judge, FTC, Shimla, H.P.

in Sessions Trial No. 20-S/7 of 2009, whereby the appellants-accused (hereinafter referred to as the accused), who were charged with and tried for offence punishable under Section 302 IPC read with Section 34 IPC, have been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 10,000/- each.

2. The case of the prosecution, in a nut shell, is that on 6.6.2009, Om Prakash came to Theog from the house of his sister Subhadra, situated in Chiundi, Tehsil Theog in connection with his work. Sh. Kuldeep Verma, the younger son of Om Prakash also came to Theog from Village Gadah on 6.6.2009 in connection with his own work. He met his father around 12 noon at bus stand Theog. The complainant Sh. Kuldeep Verma alias Dipia, came to Gadah Kufri around 3:00 PM earlier to his father. At about 6:30 PM, Shimla-Bhaj bus came and stopped there. His father alighted from the bus. He handed over a packet containing his belongings to the complainant and at that time, S/Sh. Vidya Sagar, a member of Panchayat Samiti, Nihal Singh and Sita Ram were with Sh. Om Prakash. The complainant came to his house at Gadah. At 9:22 PM, he made a call on the mobile phone of his father to know when he was about to come. Om Prakash told the complainant that he would be reaching within next 15-20 minutes and also informed that Sh. Ganga Ram was also with him. The complainant started watching TV. However, when they did not reach even by 10:30 PM, Sh. Kuldeep Verma, complainant again rang up his father on his cell phone, but it was not reachable. He tried on the cell phone of Sh. Ganga Ram. It went on ringing. The call was not replied by Sh. Ganga Ram. The complainant started going towards Gadah Kufri and on his way, he again made a call on the cell phone of Sh. Ganga Ram. He heard the phone ringing at a short distance but on account of darkness and being alone, he got frightened and returned back. He took his cousin Sh. Mukesh Verma with him and came to that place i.e. way leading towards Gadah Kufri. They found Sh. Om Prakash and Ganga Ram lying on the ground together. They were lying dead and on further checking, they found wooden pieces lying scattered on the spot. He immediately informed Police Post Matiyana. The statement of Kuldeep Verma was recorded under Section 154 Cr.P.C vide Ext. PA. FIR was registered at PS Theog. Inquest report was prepared. The dead bodies were initially taken to Civil Hospital, Theog and later sent to IGMC, Shimla for autopsy. A team of medical officers conducted autopsy upon the deceased and it was found that Ganga Ram had died on account of multiple ante-mortem injuries leading to head injury, whereas Om Prakash was found to have died because of gross head injury and ante-mortem manual strangulation. The accused were arrested on 7.6.2009. They made disclosure statements Ext. PW-6/A and Ext. PW-6/B under Section 27 of the Indian Evidence Act. They got the dandas and clothes recovered. 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 22 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution version. The accused have also examined DW-1 Madan Sharma. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Satyen Vaidya, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. P.M.Negi, learned Dy. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 28.12.2010/30.12.2010.

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

6. The entire case of the prosecution is based on circumstantial evidence. There is no eye witness of the incident.

7. Sh. Kuldeep Verma PW-1 deposed that at 6:00 PM, Shimla Bhaj bus came. His father alighted from that bus at Gadah Kufri and met him there. S/Sh. Vidya Sagar, Nihal Singh, Ganga Ram and Sita Ram were also seen with his father. His father handed over his belongings to him. He left Gadah Kufri with the belongings of his father for his native place Gadah. His father and Sh. Ganga Ram etc. remained in Gadah Kufri only. As his father did not return home, he rang up on his mobile phone at about 9:22 PM. His father replied that he will reach home within 10-15 minutes and Sh. Ganga Ram was with him. He started watching the T.V. As his father did not reach home, he again rang him up on his mobile phone at about 10:30/10:45 PM. The phone of his father was not reachable. Then, he made a call on the mobile phone of Sh. Ganga Ram. The phone kept on ringing. Sh. Ganga Ram was staying in their house for the last many years. When he failed to contact his father and Sh. Ganga Ram on their mobile phones, he left his house on foot for Gadah Kufri. At some distance from his house, he again made a phone call on the mobile phone of Sh. Ganga Ram. He heard the phone ringing. On account of the darkness and fear, he returned to his house. Thereafter, he alongwith his cousin Mukesh Kumar left the house during the night itself in search of his father and Ganga Ram. They spotted their dead bodies lying on the way. He telephonically informed the police at 11:30 PM. The police reached the spot on 7.6.2009 at about 1:30 AM. Sh. Amit Verma was also contacted by him. Sh. Ganga Ram used to stay in their house as he was turned out of his house by his brother Sh. Dhani Ram. Sh. Durga Singh is the other brother of late Sh. Ganga Ram. Sh. Ganga Ram had filed a case against Sh. Dhani Ram in the Court at Theog for property. In the year 2008, Kanungo etc. had visited the disputed property. In '*Jethanjui Mela*' hot exchanges had taken place between his father and accused Dev Raj. In his cross-examination, he admitted that he did not remember the telephone number of Sh. Anil Verma, the father of Amit Verma. It is stored in his mobile phone hand set. When he heard the mobile phone of Sh. Ganga Ram ringing, he had already walked for about 4-5 minutes after leaving his house. He returned home. Thereafter, he alongwith Mukesh Kumar left their house. It took about 7-8 minutes to reach the spot from their house.

8. Sh. Arun Kumar PW-2 deposed that S/Sh. Om Parkash, Sita Ram and others got down from the bus. S/Sh. Vidya Sagar and Nihal Singh were there in Gadah Kufri. Sh. Sita Ram left Gadah Kufri in the bus. Sh. Om Parkash remarked that they should enjoy. Then he, Vidya Sagar, Om Parkash, Ganga Ram and Nihal Singh started taking liquor outside the 'dhaba' of Kesu in Gadah Kufri. At about 7:00 PM, Sh. Vidya Sagar left. Around 8:30 PM, Sh. Nihal Singh also left. He alongwith Om Parkash and Ganga Ram kept on enjoying the liquor. It was a moon lit night. Both the accused came there. They spotted them and went away.

9. Sh. Amit Verma, PW-3 is the material witness. He deposed that Om Parkash deceased was his Mama. He stated that on 6.6.2009, at about 9:15 PM, he parked his vehicle in Gadah Kufri near the dhaba of Kesu. S/Sh. Om Parkash and Ganga Ram met him at the place where he parked the vehicle. They were going towards village Gadah. Spotting him, both of them stopped. He got down from the vehicle and wished them. Sh. Om Parkash asked him to accompany them to village Gadah. He replied that he has to go to village Chiundi. He alongwith Om Parkash and Ganga Ram then started moving together towards village Gadah. He saw the accused coming from Gadah Kufri side. He recognized both of them when they came near to him. He knew the accued earlier as they were locals. Both the accused inquired from him as to when Om Parkash and Ganga Ram left for Gadah. He replied that they had left just now for Gadah. Both the accused were armed with the

dandas. They went towards Gadah. Then, he left for his village Chiundi. At about 11-11:15 PM, his father received a phone call on his mobile phone from Sh. Kuldeep Verma. As the signal quality was poor, his father handed over the mobile to him. He talked with Sh. Kuldeep Verma. He told him that Om Parkash and Ganga Ram have been murdered by someone on the way to Gadah. They reached the spot on 6.6.2009 at 11:45 PM. The accused have taken the police to the spot on 10.6.2009. The accused Varinder led the police party to his house and got his clothes recovered. Accused Dev Raj also got his clothes recovered. In his cross-examination, he admitted that on 6.6.2009, he did not carry any goods in the vehicle. He came from Matiyana and parked the vehicle in Gadah Kufri. He did not remember as to whether the goods were transported by him in the vehicle on 5.6.2009 or not. He came alone in the vehicle from Matiyan to Gadah Kufri on 6.6.2009. His statement was recorded by the police at 11:30 AM on 7.6.2009. He further admitted that he did not tell or made any attempt to tell Kuldeep that accused were carrying dandas and were inquiring about the deceased. He had no talk with Kuldeep at the spot. From the spot, he went to Karana, Badyog, Bharana villages to bring the relatives of the deceased. He was asked by Gian Verma the brother of the deceased to go to these villages. He did not tell Gian Verma that the accused were carrying dandas and inquiring about the deceased. He brought Hira Singh and his wife from village Bharana to the spot in his vehicle. Even on return, he did not tell this fact that accused were carrying dandas and inquiring about the deceased to any person including Hira Singh and his wife.

10. Sh. Nasib Singh Patiyal, PW-4 has examined dandas Ext. P-12 and P-13.

11. HHC Ranjeet Singh PW-5 deposed that on 7.6.2009 at 2:45 AM, rukka Ext. PA was handed over to him by ASI Ajay Kalia.

12. Sh. Diwan Chandel, PW-6 deposed that on 10.6.2009, he and Ajay Verma were called by SHO Khazana Ram to Police Post Matiyana. Both the accused were present there. Accused Varinder made a disclosure statement in their presence to the effect that on 6.6.2009, the danda used by him in the commission of the offence has been kept concealed in a pool at Gadah Kufri. Accused Varinder also told the police that the clothes which he was wearing on 6.6.2009 have been kept by him in his house. Disclosure statement Ext. PW-6/A was recorded by the police in his presence. Similarly, accused Dev Raj made a disclosure statement in their presence to the effect that on 6.6.2009, the clothes which he was wearing have been kept concealed in a pool at Gadah Kufri. The disclosure statement is Ext. PW-6/B.

13. Sh. Budhi Ram, PW-8 deposed that at about 1-1:30 PM, the police vehicle came. SHO asked him and Kishan Verma to join the investigation. Accused Varinder got down from the vehicle. He led the police party to a place near the pond. The pond had some water. Accused Varinder Verma entered the water and took out a danda. The same is Ext. P-13. The danda was measured by the police. It was 27 inch long and 6 inch in diameter. It was taken into possession vide memo Ext. PW-8/A. Spot map was also prepared. Thereafter, accused Dev Raj got down from the vehicle. He led the police party to the same pond. Accused Dev Raj then entered the water and brought out a danda. It was measured. The same was 35 inch long and 8 ½ inch in diameter. The danda is Ext. P-12. It was recovered vide seizure memo Ext. PW-8/B.

14. Statements of PW-9 to PW-14 are formal in nature.

15. HC Het Ram, PW-15 has sent the case property to FSL, Junga on 16.6.2009.

16. Dr. Piyush Kapila, PW-17 has conducted the post mortem of both the dead bodies on 7.6.2009 alongwith Dr. H.S. Sekhon. According to them, Ganga Ram died as a

result of multiple ante mortem injuries leading to head injury. The probable time elapsed between injury and death was immediate and that between death and post mortem examination was between 18-24 hours. The cause of death of Om Parkash was head injury and ante mortem manual strangulation. He also proved report Ext. PW-17/G with regard to weapon of offence.

17. Dr. Shalini Bhardwaj, PW-18 has medically examined the accused and has issued MLCs Ext. PW-18/B and Ext. PW-18/C.

18. Dr. Kuldeep Kanwar, PW-19 has issued preliminary post mortem reports Ext. PW-19/B and PW-19/C. According to him, the duration between injury and death in both the cases was in between 30-120 minutes. The duration between the deaths and post mortem was 12 to 36 hours. He admitted in his cross-examination that he has conducted hundreds of post mortems.

19. ASI Liaq Ram, PW-20 has registered the FIR Ext. PW-20/A.

20. ASI Ajay Kalia, PW-21 testified that on 6.6.2009, Sh. Kuldeep Verma gave an information on his mobile phone to the effect that the dead bodies of his father and Sh. Ganga Ram were lying in the '*rasta*' between Gadah and Gadah Kufri. He alongwith Ranjeet Singh proceeded to the spot. On7.6.2009, at about 1:30 AM. The dead bodies of Ganga Ram and Om Parkash were lying on the spot. He checked the dead bodies. He noticed injuries on the face and head of the deceased. The blood had come out. Sh. Kuldeep Verma and other villagers were there at the spot. He recorded the statement of PW-1 Kuldeep Verma under Section 154 Cr.P.C. vide Ext. PA.

21. Insp. Khazana Ram, reached the spot on 7.6.2009 at about 2:45 AM. The blood stained soil was lifted from the spot by FSL team. The same was handed over to him. It was taken into possession vide memo Ext. PW-21/B. He recorded the statements of S/Sh. Kuldeep Verma, Laiq Ram, Kishan Verma and Amit Verma. He prepared the inquest reports Ext. PW-17/B and PW-17/C. He sent the dead bodies for post mortem examination to Civil Hospital, Theog. The accused were also got medically examined. The recoveries were made by the accused on the basis of the disclosure statements. In his cross-examination, he admitted that he did not record the statement of Sh. Keshu.

22. The trial Court has taken the following circumstances into consideration while convicting the accused:

> "a) On 6.6.2009 in between 8:30-9 PM when the deceased and Arun Verma PW-2, were taking liquor outside the Dhaba of Keshu at Gadah Kufri, the accused were found roaming about that place. Further, when Arun Verma went to Badyog, he did not meet any person in between Gadah Kufri and Gadah.
>
> b) In between 9:15-9:30 PM, the accused were seen by Sh. Amit Verma, PW-3, armed with Dandas at Gadah Kufri, they inquire about the deceased from Amit Verma and then followed them towards Gadah.
>
> c) The deceased were murdered, in between 9:30-10:30 PM.
>
> d) The accused made disclosure statements under Section 27 of the Evidence Act, on 10.6.2009, in PP Matiyana, before Inspector Khajana Ram and then led to the recoveries of Dandas, Ext. P-12 and Ext. P-13, used in assaulting the deceased, as well as the blood stained clothes. The clothes were smeared with blood and the blood group tallied with the blood groups of the deceased.

e) The pieces of wood, Ext. P-4, collected from the spot by the experts FSL, Junga were found as the fragmented parts of Dandas, Ext. P-12 and Ext. P-13.

f) There was strong motive for the accused to commit crime."

23. Sh. Kuldeep Verma, PW-1 has stated that he met his father at Gadah Kufri. He came back to his house. He contacted his father at about 9:22 PM. His father told him that he will reach home within 10-15 minutes alongwith Sh. Ganga Ram. He started watching the TV. As his father did not reach home, he again rang him up on his mobile phone at about 10:30/10:45 PM. The phone of his father was not reachable so he gave a call on the mobile phone of Sh. Ganga Ram. The phone kept on ringing. Sh. Ganga Ram was staying in their house for the last many years. When he failed to contact his father and Sh. Ganga Ram on their mobile phones, he left his house on foot for Gadah Kufri. At some distance from his house, he again made a phone call on the mobile phone of Sh. Ganga Ram. He heard the phone ringing. Because of the darkness and fear, he returned to his house. Thereafter, he alongwith his cousin Mukesh Kumar left the house during the night itself in search of his father and Ganga Ram. They spotted their dead bodies lying on the way. The prosecution has not examined Mukesh Kumar. He was a material witness. It is not believable that a son who was desperately looking for his father would come back and that too after hearing the mobile ring. His first reaction would have been to reach the spot and try to see whether everything was in order or not. In his cross-examination, Sh. Kuldeep Kumar, PW-1 has admitted that he did not remember the phone number of Ganga Ram. When he heard the mobile phone of Sh. Ganga Ram ringing, he had already walked for about 4-5 minutes after leaving his house. Then, he returned home. Thus, the incident has taken place near his house. He should have gone to the spot instead of coming back. He has also admitted that Dhani Ram and family members were inimical towards them as his father used to help Ganga Ram and in the Mela hot exchanges had taken place between his father and accused Dev Raj.

24. According to Sh. Kuldeep Verma, PW-1 he contacted Amit Verma on his telephone. PW-3 Amit Verma deposed that his father received telephone at 11-11:15 PM from Kuldeep Verma since the quality of signal was poor, his father handed over the cell phone to him. He had talked with Kuldeep Verma. He told that Om Parkash and Ganga Ram were murdered. In his cross-examination, PW-1 has admitted that he had called on the mobile of Anil Verma, the father of Sh. Amit Verma.

25. Sh. Arun Kumar, PW-2 deposed that Sita Ram and others got down from the bus. S/Sh. Vidya Sagar and Nihal Singh were there in Gadah Kufri. Sh. Sita Ram left Gadah Kufri in the bus. Sh. Om Parkash remarked that they should enjoy. Then he, Vidya Sagar, Om Parkash, Ganga Ram and Nihal Singh started taking liquor outside the 'dhaba' of Kesu in Gadah Kufri. At about 7:00 PM, Sh. Vidya Sagar left. Around 8:30 PM, Sh. Nihal Singh also left. He alongwith Om Parkash and Ganga Ram kept on enjoying the liquor. It was a moon lit night. Both the accused present in the Court came there. They spotted them and went away. In his cross-examination, he admitted that they had consumed two bottles of country liquor. Thus, the incident has taken place, as per the prosecution case, outside the shop of Kesu. Sh. Kesu has not been cited as a witness by the police. A suggestion was put to SI Khazana Ram PW-22 as to why he has not associated Kesu in the investigation. His only explanation was that Kesu has already closed the shop and left the place.

26. According to the prosecution case, Sh. Amit Verma, PW-3 has seen the accused near the spot carrying dandas on 6.6.2009 after 9:00 PM. He has seen the accused coming from Gadah Kufri side. His version is that accused inquired from him as to when

Ganga Ram and Om Parkash had left for Gadah. He told that they had just left and they left for village Gadah and he left for village Chiundi. However, in his cross-examination, he could not state whether the goods were transported by him in the vehicle on 5.6.2009 or not. He also admitted that on 6.6.2009 he did not carry any goods in the vehicle. He has reached the spot with his father on 6.6.2009 at 11:45 PM. He also went to bring the relations on the spot. He has categorically stated that he has seen the accused carrying the dandas in their hands. When he met them, they inquired about the deceased persons. However, surprisingly, he reached on the spot at 11:45 PM but did not disclose this fact to PW-1 Kuldeep Verma, as per his cross-examination. He was asked by Gian Verma, the brother of the deceased to go to villages Karana, Badyog, Bharana to bring the relatives of the deceased. He did not tell Gian Verma that the accused were carrying dandas and inquiring about the deceased. He brought Hira Singh and his wife from village Bharana to the spot in his vehicle. Even on return, he did not tell this fact that accused were carrying dandas and inquiring about the deceased to any person including Hira Singh and his wife. The conduct of PW-3 Amit Verma is very strange. He should have told PW-1 Kuldeep Verma or Gian Verma or Hira Singh and his wife that the accused were inquiring about the deceased and carrying dandas near the spot. Sh. Amit Verma, PW-3 is a chance witness. His version cannot be believed. Moreover, his statement was recorded belatedly by the police. The statements of the witnesses in cases like the one in hand should be recorded immediately.

27. The weapon of offence, as per the prosecution case, are two dandas Ext. P-12 and P-13. These were examined by Nasib Singh Patiyal PW-4. These dandas were recovered on the basis of the disclosure statements made vide Ext. PW-6/A and PW-6/B. The accused have got these dandas recovered from the Pond near Gadah Kufri. The dandas were brought by the accused from the mud of the pond. In case the accused have thrown the dandas, those should have been floating in the water. Budhi Ram, PW-8 has admitted in his cross-examination that the pond was 800-900 meters away from Gadah Kufri. The dandas were not floating in the water of the pond. Thus, the recovery of dandas is suspicious.

28. The cause of death of deceased Ganga Ram was due to ante mortem injuries received on head as per the opinion of PW-17 Dr. Piyush Kapila. The cause of death of deceased Om Parkash was due to gross head injury and ante mortem manual strangulation. However, surprisingly, Dr. Kuldeep Kanwar, PW-19 has also issued preliminary post mortem reports Ext. PW-19/B and PW-19/C. According to him, the cause of death was due to injuries of face and head leading to shock and death in the case of Ganga Ram and in the case of Om Parkash the deceased died of ante mortem facial injuries leading to shock and death. PW-19 Dr. Kuldeep Kanwar has proclaimed in his cross-examination that he conducted hundreds of post mortems. He was supposed to examine the dead body of Om Parkash closely. The cause of death of Om Parkash as per the statement of Dr. Piyush Kapila, PW-17 was manual strangulation. Dr. Kuldeep Kanwar, PW-19 could not miss such an important aspect of the matter as to how deceased Om Parkash has died.

29. The blood and urine samples of deceased were sent to FSL, Junga. The report of FSL, Junga is Ext. PW-22/L. The quantity of ethyl alcohol in the blood of Ganga Ram (deceased) was found to be 283.66 mg% and in urine it was found to be 285.50 mg%. The quantity of ethyl alcohol in the blood of Om Parkash (deceased) was found to be 264.22 mg% and in urine it was found to be 272.55 mg%. It, thus, proves that both of them were heavily drunk. It has come in the statement of PW-2 Sh. Arun Kumar that they had consumed two bottles of liquor and liquor was also brought by Om Parkash from Matiyana. PW-17 Dr. Piyush Kapila has also admitted in his cross-examination that if a person's blood alcohol concentration is more than 260 mg %, then he could be treated under the influence

of liquor. Thus, the possibility of the deceased receiving injuries by fall cannot be ruled out being heavily drunk.

30. In the case based entirely on circumstantial evidence, motive also plays an important role. According to Mr. P.M.Negi, learned Dy. Advocate General, the motive was the dispute between the families. It is settled law that motive is a double edged weapon. Since there was land dispute between the two families, as per the prosecution case, the possibility of the accused being falsely implicated can also not be ruled out. Sh. Kuldeep Verma, PW-1 has also deposed that there was land dispute and Sh. Ganga Ram (deceased) had filed case against Sh. Dhani Ram, father of the accused Varinder Verma. Sh. Dhani Ram has also filed suit against Sh. Ganga Ram. Om Parkash used to assist Ganga Ram in the Court. PW-3 Amit Verma, is closely related to Om Parkash (deceased). Sh. Kuldeep Verma, PW-1 has also deposed that Sh. Ganga Ram had filed a case against Sh. Dhani Ram in the Court at Theog for the property. Sh. Ganga Ram used to stay in their house as he was turned out of his house by his brother Sh. Dhani Ram. Sh. Durga Singh is the other brother of late Sh. Ganga Ram. Sh. Arun Kumar, PW-2 has also admitted in his cross-examination that Sh. Om Parkash helped Sh. Ganga Ram in the litigation. It is also borne from the statement of PW-8 Sh. Budhi Ram that case was got registered by Dhani Ram, father of Virender Verma against his son and the same was withdrawn. Sh. Budhi Ram, PW-8, is one of the witness before whom the dandas were got recovered by the accused from the pond. Sh. Budhi Ram, PW-8 in his cross-examination has admitted that the land dispute was going on between Ganga Ram and family members of accused Varinder Verma. He has also admitted in his cross-examination that Sh. Dhani Ram, father of the accused Varinder had filed a case against his son Rajesh alias Raju and his nephew Kishori Lal. He also admitted that there was water dispute going on in the village. He and Dhani Ram are from opposite factions. Thus, Amit Verma PW-3 is closely related to deceased Om Parkash. Sh. Budhi Ram, PW-8 has inimical relations with the father of accused Varinder Verma. Though, it is true that the statements of closely related witnesses can be taken into consideration but it has to be done with care and caution. Sh. Budhi Ram, PW-8 has also admitted that proceedings under Sections 107/150 Cr.P.C. were pending decision between him and Sh. Dhani Ram, father of accused Varinder Singh.

31. The statements of Sh. Amit Verma, PW-3 and Sh. Budhi Ram, PW-8 do not inspire any confidence. Sh. Amit Verma, PW-3 has stated to have seen the accused carrying dandas and inquiring about the deceased and PW-8 Budhi Ram was witness to recoveries of dandas from the pond by the accused. The statement of material witnesses Sh. Mukesh Kumar and Keshu Ram have not been recorded by the prosecution.

32. According to the prosecution case, the accused have got dandas recovered from the pond in the presence of PW-8 Budhi Ram and Krishan Verma vide seizure memos PW-8/A and PW-8/B. One of the witnesses PW-8 Budhi Ram, as we have already noticed, had inimical relations with the father of the accused Varinder Kumar. Krishan Verma is the brother of deceased Om Parkash. The police should have associated independent witnesses instead of associating the real brother of deceased Sh. Krishan Verma and PW-8 Budhi Ram who had strained relations with the father of one of the accused Sh. Varinder Verma.

33. According to PW-2 Arun Kumar, Sh. Om Parkash, Sita Ram and others got down from the bus. S/Sh. Vidya Sagar and Nihal Singh were there in Gadah Kufri. Sh. Sita Ram, Vidya Sagar and Nihal Singh have not been cited as witnesses by the prosecution.

34. The matter is required to be considered from another angle. The deceased have taken liquor at Gadah Kufri outside the dhaba of Kesu. They were heavily drunk. They were also in the company of PW-2 Arun Kumar. Vidya Sagar and Nihal Singh left.

They have taken liquor together. The possibility of the brawl taking place between these parsons can also not be ruled out after consuming liquor. The prosecution has failed to complete the chain. The prosecution has also failed to prove the case against the accused beyond the reasonable doubt.

35. Their lordships of the Hon'ble Supreme Court in the case of ***Balbir Vrs. Vazir and others and connected matters,*** reported in ***(2014) 12 SCC 670,*** have held that motive is a double edged weapon and just as there is a possibility of murders having been committed because of motive due to enmity, there is also a possibility of false implication of innocent people to settle past scores. It has been held as follows:

> "12. We are dealing with an appeal against acquittal. The acquittal is not recorded by the trial court but by the High Court. We shall therefore see whether there were sufficient reasons for the High Court to set aside the conviction. We must however bear in mind that if the view taken by the High Court is a reasonably possible view it should not be disturbed because the acquittal of the accused by the High Court has strengthened the presumption of their innocence. We must also mention that according to the prosecution this is a case of strong motive. Land disputes between the two sides and earlier attacks made on deceased Krishna Gir have been deposed to by the witnesses. The High Court has observed that no documentary evidence is produced by the prosecution in support of this case. However, we cannot dismiss the prosecution case of enmity between the two sides lightly because reference to it is made by several witnesses. But that by itself does not help the prosecution. Just as there is a possibility of murders having been committed because of motive due to enmity, there is also a possibility of false implication of innocent people to settle past scores. That is why it is said that motive is a double edged weapon. We shall keep this in mind and approach the case."

36. Their lordships of the Hon'ble Supreme Court in the case of ***Shyamal Saha and another vrs. State of West Bengal,*** reported in ***(2014) 12 SCC 321,*** have held that chain of events must be so complete as to leave no room for any other hypothesis except that accused was responsible for commission of offence. It has been held as follows:

> "26. The High Court believed the testimony of Dipak and Panchu and came to the conclusion that they had crossed the river along with Paritosh, Shyamal and Prosanta. However, the High Court did not take into consideration the view of the Trial Court, based on the evidence on record, that it was doubtful if the five persons mentioned above boarded the boat belonging to Asit Sarkar to cross the river as alleged by the prosecution. The High Court also did not consider the apparently incorrect testimony of Animesh who had stated that he had gone to the police station and given his version but despite this, he was not cited as a witness. The version of Animesh was specifically denied by the Investigating Officer.
>
> 27. When the basic fact of Paritosh having boarded a boat and crossing the river with Shyamal and Prosanta is in doubt, the substratum of the prosecution's case virtually falls flat and the truth of the subsequent events also becomes doubtful. Unfortunately, the High Court does not seem to have looked at the evidence from the point of view of the accused who had already secured an acquittal. This is an important perspective as noted in the fourth principle of Chandrappa. The High Court was Crl. Appeal No. 1490 of 2008

> Page 16 of 21 Page 17 also obliged to consider (which it did not) whether the view of the Trial Court is a reasonable and possible view (the fifth principle of Chandrappa) or not. Merely because the High Court disagreed (without giving reasons why it did so) with the reasonable and possible view of the Trial Court, on a completely independent analysis of the evidence on record, is not a sound basis to set aside the order of acquittal given by the Trial Court. This is not to say that every fact arrived at or every reason given by the Trial Court must be dealt with – all that it means is that the decision of the Trial Court cannot be ignored or treated as non-existent.
>
> 28. What is also important in this case is that it is one of circumstantial evidence. Following the principles laid down in several decisions of this Court beginning with Sharad Birdhi Chand Sarda v. State of Maharashtra13 it is clear that the chain of events must be so complete as to leave no room for any other hypothesis except that the accused were responsible for the death of the victim. This principle has been followed and reiterated in a large number of decisions over the last 30 years and one of the more recent decisions in this regard is 13 (1984) 4 SCC 116 Crl. Appeal No. 1490 of 2008 Page 17 of 21 Page 18 Majenderan Langeswaran v. State (NCT of Delhi) and Another. 14 The High Court did not take this into consideration and merely proceeded on the basis of the last seen theory.
>
> 29. The facts of this case demonstrate that the first link in the chain of circumstances is missing. It is only if this first link is established that the subsequent links may be formed on the basis of the last seen theory. But the High Court overlooked the missing link, as it were, and directly applied the last seen theory. In our opinion, this was a rather unsatisfactory way of dealing with the appeal."

37. Mr. P.M.Negi, learned Dy. Advocate General, has also drawn the attention of the Court to Ext. PX to prove that human blood was found on exhibits sent for chemical examination including wooden pieces and clothes of the deceased as well as the accused and hair. However, the fact of the matter is that the prosecution has not proved that the blood samples of the accused were also taken during the course of investigation. Their lordships of the Hon'ble Suprme Court in the case of ***Parkash vrs. State of Karnataka,*** reported in ***(2014) 12 SCC 133,*** have held that when the blood stained clothes are recovered, a serological comparison of blood of deceased and appellant and blood stains on his clothes was necessary and that was absent from evidence of prosecution. In this case, the prosecution has sought to prove that blood group of deceased was AB and blood stains on appellant's seized clothes also belong to blood group AB. This does not lead to any conclusion that bloodstains on appellant's clothes were those of deceased's blood. There are millions of people who have blood group AB and it is quite possible that even appellant had the blood group AB. Thus, merely since clothes of appellant were bloodstained and stains bore same blood group as that of deceased, circumstances could not be used against the appellant. Their lordships have further held that in a case of circumstantial evidence, there has to be some degree of trustworthiness and certainly about existence of circumstances. It has been held as follows:

> "40. The second discrepant statement was that Shivanna stated that the police had kept Prakash's clothes on the table. It was submitted, in other words, that the blood stained clothes were already seized by the police and kept on the table. We are not sure whether the actual statement made by Shivanna has been lost in translation.

41. In any event, the recovery of the blood stained clothes of Prakash do not advance the case of the prosecution. The reason is that all that the prosecution sought to prove thereby is that the blood group of Gangamma was AB and the blood stains on Prakash's seized clothes also belong to blood group AB. In our opinion, this does not lead to any conclusion that the blood stains on Prakash's clothes were those of Gangamma's blood. There are millions of people who have the blood group AB and it is quite possible that even Prakash had the blood group AB. In this context, it is important to mention that a blood sample was taken from Prakash and this was sent for examination. The report received from the Forensic Science Laboratory [Exh.P-27] was to the effect that the blood sample was decomposed and therefore its origin and grouping could not be determined. It is, therefore, quite possible that the blood stains on Prakash's clothes were his own blood stains and that his blood group was also AB.

45. We are not satisfied with the conclusion of the High Court that since the clothes of Prakash were blood stained and the stains bore the same blood group as that of Gangamma, the circumstance could be used Prakash. A serological comparison of the blood of Gangamma and Prakash and the blood stains on his clothes was necessary and that was absent from the evidence of the prosecution."

38. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 28.12.2010/30.12.2010, rendered by the learned Addl. Sessions Judge, FTC Shimla, H.P., in Sessions trial No. 20-S/7 of 2009 under Section 302/34 IPC is set aside. The accused are acquitted of the charge framed under Section 302/34 IPC, by giving them benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

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

****

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

Pawan Kumar ...Petitioner.

Versus

State of Himachal Pradesh & others ...Respondents.

CWP No. 2112 of 2015-B
Decided on: 07.04.2015

Constitution of India, 1950- Article 226- Petitioner had not recorded his qualification in the application form and he was found ineligible due to the same- Counsel for the respondent No. 3 stated that he had no objection in case, petitioner approaches the respondent for recording his qualification in the form and also produces the requisite certificate- in view of this, Writ Petition is disposed of with a direction to allow the petitioner to do the needful.

For the petitioner: Mr. Angrez Kapoor, 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. Kush Sharma, Deputy Advocate Generals, for respondents No. 1 and 2.
Mr. Raj Kumar Negi, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Mr. Raj Kumar Negi, learned counsel appearing on behalf of respondent No. 3, stated at the Bar that the writ petitioner has not recorded his qualification in the application form and that is why he was found ineligible. Further stated that he has no objection in case the writ petitioner approaches the respondents for recording the educational qualification in the form and also to produce the requisite certificates. His statement is taken on record.

2. In the given circumstances, we deem it proper to dispose of this writ petition with a direction to the respondents to allow the writ petitioner to do the needful.

3. The writ petition is disposed of accordingly alongwith all pending applications. Copy **dasti.**

****

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

Ayodhya Singh son of Sh. Charan Dass. ....Appellant.
Vs.
State of H.P. ...Respondent.

Cr.Appeal No. 29 of 2009.
Judgment reserved on: 4.3.2015.
Date of Decision: April 8, 2015

Indian Penal Code, 1860- Section 302- Marriage of the sister of the accused 'A' was fixed on 11.12.2005- deceased was called to make for lightning arrangement and decoration of the house - accused 'A' and PW-3 'T' were called to help 'R'- a telephonic call was received by 'T' and he went to attend the call- he found deceased 'R' with injuries on his body- blood was oozing out of his neck and he was found dead- prosecution alleged that deceased was talking to the sister of 'A' which led to the murder- accused 'A' had made a disclosure statement that he could get the weapon of offence recovered and three pieces of sword were recovered pursuant to the disclosure statement – Medical Officer also proved that injury on the neck could have been caused by means of sharp edged weapon- deceased had died in the residential houses of 'A'- he had sustained four injuries on his person- chain of circumstances clearly proved that accused had committed murder of the deceased.

(Para-10 to 14)

Indian Evidence Act, 1872- Section 27- it was contended that no independent person of the locality was present at the time of disclosure statement- held, that merely because

marginal witness of the disclosure statement was resident of another place was not sufficient to doubt the recovery. (Para-16)

Cases referred:
State of Madhya Pradesh Vs. Rumi 1999 (1) JLT 49
State of Uttar Pradesh Vs. Ram Sagar Yadav and others AIR 1985 S.C 416
Chahat Khan Vs. The State of Haryana AIR 1972 SC 2574
Jayaraj Vs. The State of Tamil Nadu AIR 1976 SC 1519
B.N.Srikantiah Vs. Mysore State AIR 1958 SC 672
Jose Vs. the State of Kerala AIR 1973 SC 944
State of HP Vs. Om Parkash Latest HLJ 2003 HP 541
State of U.P Vs. Krishan Pal 2008 (8) JT 650
Raja versus State of Delhi 1997 Cri.L.J 1873
Prakash Vs. State of Rajasthan 2013 Cri.L.J 2040
Rohtash Kumar Vs. State of Haryana 2013 (14) SCC 434

For the Appellant: Mr. Manoj Pathak, Advocate.
For the respondent: Mr.Ashok Chaudhary, Addl. AG, with Mr.V.S.Chauhan, Addl. AG and Mr. Vikram Thakur, Dy. A.G.

The following judgment of the Court was delivered:

P.S. Rana Judge

Present appeal is filed under Section 374 of the Code of Criminal Procedure 1973 against the judgment and sentence passed by learned Sessions Judge Kinnaur Sessions Division at Rampur HP in Sessions Trial No. 16 of 2006 titled State Vs. Ayodhya Singh and another decided on dated 2.12.2008.

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by prosecution that on dated 11.12.2005 at about 10.00 AM at village Gopalpur Police Station Jhakri Tehsil Rampur Bushahr District Shimla HP accused persons committed murder of Ramesh Chand son of Sh Sidhu Ram resident of village Dobi Tehsil Rampur intentionally. It is alleged by prosecution that house of co-accused Ayodhya Singh is situated at village Gopalpur and co-accused Ayodhya Singh has two sisters namely Rekha and Seema. It is alleged by prosecution that marriage of the sister of co-accused Ayodhya Singh namely Rekha was fixed on dated 11.12.2005 and deceased Ramesh Chand was called for lightning arrangement and decoration of the house of co-accused Ayodhya Singh and Sh Tek Singh was also called to help deceased Ramesh Chand. It is alleged by prosecution that PW3 Tek Singh was helping deceased Ramesh Chand for lightning arrangement and mother and sister of co-accused Ayodhya Singh were also present there. It is alleged by prosecution that thereafter telephone call was received by PW3 Tek Singh and he went to attend the telephone call and when he returned he found that deceased Ramesh Chand was having cut upon his body and blood was oozing out from his neck and he was dead. It is alleged by prosecution that thereafter information was delivered at Police Station Zhakri and ASI Jawahar Singh proceeded to the spot and noticed the dead body of deceased Ramesh Chand covered with a bed sheet lying in the compound of co-accused Ayodhya Singh. It is alleged by prosecution that statement Ext PW1/A of Sh Vinod Kumar brother-in-law of deceased under Section 154 Cr.PC recorded and thereafter same was sent to Police

Station through Sh Khem Chand for recording of FIR. It is alleged by prosecution that thereafter body of deceased was photographed through PW11 Krishan Lal and photographs are Ext PW11/A to Ext PW11/C and negatives are Ext PW11/D to Ext PW11/F. It is alleged by prosecution that thereafter PW12 Jawahar Singh prepared inquest reports Ext PW12/A and Ext PW12/B and preserved blood stains. It is alleged by prosecution that specimen seal was drawn on a separate piece of cloth Ext PW2/1 and memo regarding preserving of blood are Ext.PW4/A and Ext PW4/B. It is alleged by prosecution that sample of soil from the spot was also obtained and thereafter PW12 Jawahar Singh Investigating Officer also filed application Ext PW5/A to the medical officer for conducting post mortem of deceased Ramesh Chand. It is alleged by prosecution that spot map Ext PW12/C was also prepared. It is alleged by prosecution that statement of accused under Section 27 of the Evidence Act 1872 was recorded and sword i.e. weapon of attack was recovered as per disclosure statement made by co-accused Ayodhya Singh. It is further alleged by prosecution that trouser was kept by co-accused Ayodhya Singh in a heap of clothes in a kitchen and the same was recovered in pursuance of disclosure statement. It is further alleged by prosecution that sample seals Ext PW2/H and Ext PW2/1 also obtained. It is further alleged by prosecution that as per opinion of PW5 Dr.Vishal Bhandari deceased Ramesh Chand had died due to head injury leading to coma and death. It is further alleged by prosecution that co-accused Ayodhya Singh and his family belongs to Rajput caste and deceased Ramesh Chand belonged to Scheduled Caste. It is further alleged by prosecution that co-accused Ayodhya Singh noticed that deceased Ramesh Chand was chattering secretly with the sister of co-accused Ayodhya Singh which was the cause of murder of deceased Ramesh Chand. It is alleged by prosecution that on dated 11.12.2005 PW12 ASI Jawahar Singh deposited three parcels sealed with seal impression 'H' containing sample of soil, blood stained soil, grass and blood sample of the neck of deceased Ramesh Chand with PW7 MHC Krishan Lal. It is alleged by prosecution that thereafter on dated 13.12.2005 Inspector Suresh Kumar handed over two parcels sealed with seal 'M' and 'A' containing three pieces of sword and trouser of co-accused Ayodhya Singh to PW7 MHC Krishan Lal with direction to deposit the same in the office of FSL Junga vide RC No.126 of 2005. It is alleged by prosecution that copies of rapat No.7 dated 11.12.2005, rapat No.19 dated 14.12.2005 and rapat No.34 dated 14.12.2005 are Ext PW10/A to Ext PW10/C.

3. Learned trial Court convicted co-accused Ayodhya Singh under Section 302 IPC and acquitted co-accused Seema under Section 201 IPC.

4. Prosecution examined as many as thirteen witnesses in support of its case:

Sr.No.	Name of Witnesses
PW1	Vinod Kumar
PW2	Sabir Dass
PW3	Tek Singh
PW4	Lobu Ram
PW5	Dr. Vishal Bhandari
PW6	Kewal Ram
PW7	Krishan Lal
PW8	Om Prakash
PW9	Satpal
PW10	Golab Singh

PW11	Krishan Lal
PW12	Jawahar Singh
PW13	Suresh Kumar

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

Sr.No.	*Description.*
Ext PW1/A	*Statement of Vinod Kumar under Section 154 Cr PC*
Ext PW2/A & Ext PW2/B	*Statements of co-accused Ayodhya Singh U/S 27 of Indian Evidence Act 1872*
Ext PW2/C & Ext PW2/D	*-do-*
Ext PW2/E	*Sketch map of piece of sword.*
Ext PW2/F	*Seizure memo of pieces of sword Ext P1 to Ext P3*
Ext PW2/G	*Memo qua recovery of trouser.*
Ext PW4/A, Ext PW4/B & Ext PW4/C	*Memos qua taking blood in cotton from neck of deceased, memo qua recovery of blood stained soil, memo taking of sample of soil in match box.*
Ext PW2/H & Ext PW2/I	*Sample of seals A&M.*
Ext PW5/A	*Application filed for conducting post mortem..*
Ext PW5/B	*Post mortem report.*
Ext PW5/C	*Final opinion of Dr.Vishal Bhandari.*
Ext PW6/A	*Jamabandi copy*
Ext PW6/B	*Field book of spot.*
Ext PW6/C	*Receipt issued by Patwari*
Ext PW7/A	*Extract of malkhana register*
Ext PW7/B	*Register of malkhana*
Ext PW7/C	*Copy of road certificate*
Ext PW10/A & Ext PW10/B	*Copy of rapat rojnamcha No.7 and 19.*
Ext PW11/A to Ext PW11/C	*Photographs*
Ext PW11/D to Ext PW11/F	*Negatives of photos*
Ext PW12/A & Ext PW12/B	*Inquest reports*
Ext PW12/C	*Site plan*

Ext PW12/D	*Statement of Tek Singh*
Ext PW13/A	*Copy of FIR*
Ext PW13/B	*Spot map*
Ext PW13/C	*Application filed by M.O. PHC Gopalpur.*
Ext PW13/D, Ext PW13/E & Ext PW13/F	*Reports of Forensic Science Laboratory Junga (HP)*

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court convicted person filed present appeal.

7. We have heard learned Advocate appearing on behalf of the appellant and learned Additional Advocate General appearing on behalf of the State and also perused entire record carefully.

8. Points for determination in present appeal is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court caused miscarriage of justice to the appellant.

9. **ORAL EVIDENCE ADDUCED BY PROSECUTION**:

9.1 PW1 Vinod Kumar has stated that he was running chicken shop at village Dobi and his sister was married to deceased Ramesh Chand in that village. He has stated that on dated 11.12.2005 when he came to open his shop in the morning at about 9 AM he was informed by one Mangal Sain that his brother-in-law deceased Ramesh Chand was fell at village Gopalpur and was lying there. He has stated that village Gopalpur is situated at a distance of about half kilometer from village Dobi and thereafter he went to village Gopalpur on scooter. He has stated that deceased Ramesh Chand was lying in the court yard of co-accused Ayodhya Singh and a bed sheet was lying on his body. He has stated that when he removed bed sheet then he saw injuries on the head and neck of deceased Ramesh Chand. He has stated that blood was oozing out. He has stated that deceased Ramesh Chand had gone to the house of co-accused Ayodhya Singh for work of decoration of lightning and music system in marriage of sister of co-accused Ayodhya Singh. He has stated that 3/4 ladies were sitting near the dead body of deceased Ramesh Chand. He has stated that thereafter he came back to close his shop and then again went to the spot. He has stated that his statement Ext PW1/A was recorded under Section 154 Cr.PC.

9.2 PW2 Sh Sabir Dass has stated that on dated 13.12.2005 he remained associated in the investigation of the case. He has stated that co-accused Ayodhya Singh had given disclosure statement that pieces of sword through which he had killed deceased Ramesh Chand was kept by him and he could get the same recovered. He has stated that disclosure statement Ext PW2/A bears his signature. He has stated that co-accused Ayodhya Singh had also given disclosure statement about trouser which he was wearing on the day of incident. He has stated that disclosure statement Ext PW2/B bears his signature and the signatures of co-accused Ayodhya Singh and other witnesses. He has stated that thereafter co-accused Ayodhya Singh led police in the upper storey of his house where three pieces of sword were recovered. He has stated that sketch maps Ext.PW2/C, Ext PW2/D and Ext PW2/E were prepared which bears his signature and the signatures of the witnesses and the same were sealed in a parcel of cloth. He has stated that thereafter seizure memo Ext PW2/F was prepared which bears his signature and the signatures of the witnesses. He has stated that three pieces of sword are Ext P1 to Ext P3. He has stated that trouser was also recovered as per disclosure statement of co-accused Ayodhya Singh which was kept in

the heap of clothes. He has stated that trouser was stained with blood. He has stated that trouser was packed in a piece of cloth and thereafter the same was sealed in a parcel. He has stated that trouser Ext P4 is the same which was took into possession vide memo Ext PW2/G which bears his signature. He has stated that Investigating Officer has also took sample of seals Ext.PW2/H and Ext PW2/I which bears his signature. He has stated that he has no relation with deceased Ramesh Chand. He has stated that he is agriculturist. He has denied suggestion that he was called by police official at police station Jhakri from his shop. He denied suggestion that his signature obtained upon blank papers by police official. He denied suggestion that police had kept three pieces of sword and trouser on the table in police station when his signatures were obtained. He denied suggestion that he did not visit the spot. He denied suggestion that he used to drive van illegally for taxi purpose. He denied suggestion that he had linked with police official. He denied suggestion that co-accused Ayodhya Singh did not make any disclosure statement. He denied suggestion that no recovery was effected as per disclosure statement given by co-accused Ayodhya Singh.

9.3 PW3 Tek Singh has stated that co-accused Ayodhya Singh is his uncle. He has stated that his house is situated about 30 metres from his house. He has stated that co-accused Ayodhya Singh has two sisters namely Rekha and Seema. He has stated that marriage of Rekha was to be solemnized on dated 11.12.2005 and deceased Ramesh Chand was called to perform the work of decoration of lightning and music. He has stated that he was called by co-accused Ayodhya Singh to help deceased Ramesh Chand. He has stated that he was helping deceased Ramesh Chand to fix the gate and lightning work and mother and sisters of co-accused Ayodhya Singh were also present there. He has stated that in the meanwhile he received telephone call and thereafter he went to his house. He has stated that when he came back from his house he saw that there was cut on the neck of deceased Ramesh Chand and blood was oozing out from his neck and he was dead. He has denied suggestion that Seema had washed sword in order to remove the blood stains. He has stated that Rekha was also present there and she was weeping. He has denied suggestion that Rekha had slapped deceased Ramesh Chand in anger. He has stated that incident took place at about 9.45 AM.

9.4 PW4 Lobu Ram has stated that about two years back he had gone to Dobi in the house of his sister and thereafter he went to village Gopalpur and came to know that a person had fell down. He has stated that Investigating Officer took blood from the neck of deceased Ramesh Chand with cotton and sealed the same in match box vide memo Ext PW4/A. He has stated that police officials also took into possession blood stained grass and soil and same was also sealed in a parcel. He has stated that when he reached at the spot 40/50 persons were present. He has stated that police conducted proceedings for two hours.

9.5 PW5 Dr.Vishal Bhandari has stated that he was posted Medical Officer Incharge PHC Gopalpur. He has stated that there was mortuary house at MGMSC Khaneri. He has stated that a written request was received from Investigating Officer to conduct post mortem of dead body of deceased Ramesh Chand son of Sh Sidhu Ram. He has stated that he conducted post mortem on dated 12.12.2005 and after examination he observed incised wound on the back of neck spindle shape one in number, clotted blood was present around the wound of deceased Ramesh Chand. He has stated that size was 10x4 Cm.x muscle deep, margins were clean cut, well defined and beveling was present with tailing. He has stated that there was incised wound in left cheek one in number spindle shaped, 6cm. x 1 cm. x skin deep margins clean cut well defined and clotted blood were present around the wound. He has stated that in dorsum of right hand there was incised wound 4 cm skin deep clean cut well defined and there was clotted blood around the wound. He has stated that there was head injury and on opening the scalp he observed big hematoma at left temporal parietal region 4 inches x 8 inches extending up to sagittal suture and posterior was up to

occipit. He has stated that deceased Ramesh Chand had died due to head injury leading to coma and death. He has stated that articles viscera, blood sample, clothes and saline sample were handed over to the police. He has stated that injuries No. 1, 2 and 3 could be caused with sword pieces Ext P1 to Ext P3. He has stated that injury No.4 could be caused to a person if he falls while standing on a stool and if stool is suddenly removed by some other person. He has stated that post mortem report Ext PW5/B bears his signature. He has stated that injury mentioned in the neck could be caused only by giving a blow with sharp edged weapon. He has stated that injuries mentioned in the post mortem are possible with pieces of sword Ext P1 to Ext P3. He has denied suggestion that injury No.1 mentioned in the post mortem was received by deceased Ramesh Chand when he fell on the hard sharp edged object.

9.6. PW6 Kewal Ram Patwari has stated that on dated 9.1.2006 he prepared Jamabandi Ext PW6/A and tatima Ext PW6/B on the direction of Station House Officer and also issued receipt Ext PW6/C.

9.7 PW7 Krishan Lal has stated that he remained posted in Police Station Jhakri during the year 2005. He has stated that on dated 11.12.2005 ASI Jawahar Singh handed over to him three parcels sealed with seal 'H' in which parcel was containing sample of soil. He has stated that second parcel was containing blood stained soil and grass and third sample was containing blood sample of the neck of deceased Ramesh Chand. He has stated that thereafter on dated 13.12.2005 Inspector Suresh Kumar handed over to him two parcels sealed with seal 'M' and 'A'. He has started that one sample was having three pieces of sword and one parcel was having trouser of co-accused Ayodhya Singh. He has stated that on dated 13.12.2005 Constable Satpal deposited with him one sealed parcel with seal of MGH/RB and blood sample of deceased Ramesh Chand. He has stated that jar was also deposited containing viscera of deceased. He has stated that he sent parcels through Constable Om Parkash to FSL Junga vide RC No.126 of 2005. He has stated that he deposited receipts with him. He has stated that parcels remained intact when the same remained in his custody. He has stated that copy of RC is Ext PW7/C.

9.8 PW8 HHC Om Parkash has stated that he remained posted in Police Station Jhakri during the year 2005. He has stated that on dated 16.12.2005 he handed over 11 sealed parcels vide RC No. 126 of 2005 and thereafter he deposited the same in FSL Junga. He has stated that he handed over receipt to MHC Police Station Jhakari. He has stated that parcels remained intact in his custody.

9.9 PW9 Constable Satpal has stated that he remained posted in Police Station Jhakri during the year 2005. He has stated that on dated 13.12.2005 he handed over six parcels sealed with seal MGH/RB to MHC Police Station Jhakri. He has stated that sealed parcels remained intact during his custody.

9.10 PW10 Constable Gulab Singh has stated that during the year 2005 he remained posted in Police Station Jhakri. He has stated that he also brought the requisite record. He has stated that rapat No.7 dated 11.12.2005 Ext PW10/A, rapat No. 19 dated 14.12.2005 Ext PW10/B and rapat No.34 dated 14.12.2005 Ext PW10/C are correct as per original record.

9.11 PW11 Krishan Lal has stated that he was working as Photographer and running shop in the name of Krishna Studio at Dobi. He has stated that on dated 10.12.2005 at the instance of police he took photographs of the dead body of deceased Ramesh Chand Ext PW11/A to Ext PW11/C. He has stated that negatives of photographs are Ext PW11/D to Ext PW11/F.

9.12. PW12 ASI Jawahar Singh has stated that during the period 2002 to 2007 he remained posted in Police Station Jhakri. He has stated that on dated 11.12.2005 at about 12.20 PM he received a telephonic information from Tikkam Ram resident of Gopalpur that a decorator had died and report was recorded at Police Station and he proceeded to the spot and he noticed that a dead body of deceased Ramesh Chand was lying in the compound of co-accused Ayodhya Singh and was covered with a bed sheet. He has stated that Vinod Kumar brother-in-law of deceased Ramesh Chand was present at the spot and he recorded his statement Ext PW1/A under Section 154 Cr.PC. He has stated that statement was sent through Constable Khem Dass to Police Station and thereafter he obtained photographs of dead body of deceased Ramesh Chand. He has stated that he prepared inquest reports Ext PW12/A and Ext PW12/B which bears his signature. He has stated that he preserved blood stains which were lying on the grass and the soil in separate plastic boxes at the spot. He has stated that he took into possession blood which was on the neck of deceased in separate plastic boxes and thereafter boxes were sealed with seal impression 'H'. He has stated that specimen seal was also drawn on a separate piece of cloth Ext PW2/1 and the memos about preserving of blood also prepared. He has stated that he had given application Ext PW5/A to Medical Officer for conducting autopsy on the dead body of deceased Ramesh Chand. He has stated that he prepared site plan Ext PW12/C which bears his signature. He has stated that he recorded the statements of the witnesses. He has stated that he took into possession Jamabandi Ext PW6/A and Tatima Ext PW6/B from Patwari. He has stated that photographs are Ext PW11/A to Ext PW11/C and negatives of photographs are Ext PW11/D to Ext PW11/F. He has stated that thereafter investigation file was handed over to SHO Suresh Kumar. He has stated that samples were deposited with MHC. He has denied suggestion that shuttering was lying at the spot. He denied suggestion that deceased Ramesh Chand fell from the roof upon shuttering material and suffered injuries. He denied suggestion that he has recorded the statement according to his own convenience. He denied suggestion that he did not preserve blood sample from the grass and soil. He denied suggestion that signatures of witnesses have been obtained at Police Station. He denied suggestion that accused has been falsely implicated in the present case.

9.13 PW13 Inspector Suresh Kumar has stated that he was posted as Station House Officer Police Station Jhakri w.e.f. April 2003 to May 2006. He has stated that he received statement Ext PW1/A and thereafter he recorded FIR Ext. PW13/A. He has stated that preliminary investigation was conducted by ASI Jawahar Singh. He has stated that co-accused Ayodhya Singh has made disclosure statement under Section 27 of the Evidence Act that pieces of sword were kept by him and he could get the same recovered. He has stated that disclosure statement was reduced into writing. He has stated that thereafter co-accused Ayodhya Singh took him to the place where he had kept the sword pieces in the middle storey of the house. He has stated that he also prepared sketch map Ext PW2/C to Ext PW2/E. He has stated that sword pieces are Ext P1 to Ext P3. He has stated that trouser which was kept in the heap of clothes was also recovered as per disclosure statement given by co-accused Ayodhya Singh. He has stated that he also prepared spot map Ext PW13/B and recorded the statements of the witnesses. He has stated that he also obtained post mortem report Ext PW5/B. He has stated that co-accused Ayodhya Singh had noticed that deceased Ramesh Chand was chattering secretly with his sister. He has stated that thereafter completion of the investigation he filed challan. He has stated that dead body was lying in the compound of co-accused Ayodhya Singh. He has denied suggestion that broken pieces of sword were kept in the heap of garbage. He denied suggestion that sword was old. He denied suggestion that deceased Ramesh Chand had died due to fall from the roof of the house. He denied suggestion that dead body was lifted from the street and was kept in the compound by co-accused Ayodhya Singh. He denied suggestion that while lifting the dead body of deceased Ramesh Chand trouser of co-accused Ayodhya Singh was

smeared with blood. He denied suggestion that sword and trouser were not recovered as per disclosure statement given by co-accused Ayodhya Singh. He denied suggestion that memos were got signed from the witnesses at the later stage. He denied suggestion that deceased had sustained head injury when he fell from the roof of the building.

10. Statement of accused was recorded under Section 313 Cr.PC. Accused did not examine any defence witness. Accused stated that he has been falsely implicated in the present case.

11. Submission of learned Advocate appearing on behalf of the appellant that recovery of the sword pieces have not been connected with the appellant and on this ground appeal filed by appellant be allowed is rejected being devoid of any force for the reason hereinafter mentioned. Disclosure statement of co-accused Ayodhya Singh Ext PW2/A is proved on record as per testimony of PW2 Sabir Dass. PW2 Sabir Dass is the marginal witness of the disclosure statement given by co-accused Ayodhya Singh under Section 27 of the Evidence Act. PW2 has stated in positive, cogent and reliable manner that co-accused Ayodhya Singh had given disclosure statement in his presence that he could recover the pieces of sword which was weapon of attack upon deceased Ramesh Chand. In pursuance to disclosure statement given by co-accused Ayodhya Singh three pieces of sword Ext P1 to Ext P3 were recovered and recovery memo proved as per testimony of PW2 Sabir Dass. PW2 Sabir Dass has stated in positive manner that three pieces of sword were recovered in his presence as per disclosure statement given by co-accused Ayodhya Singh. Hence it is held that co-accused Ayodhya Singh was connected with three pieces of sword used for the murder of deceased Ramesh Chand. There is no evidence on record in order to prove that PW2 Sabir Dass has hostile animus against co-accused Ayodhya Singh at any point of time.

12. Another submission of learned Advocate appearing on behalf of the appellant that even as per medical evidence no offence of murder is proved against co-accused Ayodhya Singh is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully considered the testimony of medical officer PW5 Dr. Vishal Bhandari who has conducted post mortem of deceased Ramesh Chand. As per post mortem report deceased Ramesh Chand had sustained incised wound on the back of neck, incised wound on the left cheek, incised would on the right hand and had also sustained head injury. As per testimony of PW5 Dr. Vishal Bhandari deceased Ramesh Chand had died due to head injury leading to coma and death. PW5 Dr. Vishal Bhandari has stated in positive manner that injury upon the neck of deceased Ramesh Chand could be caused only by way of sharp edged weapon i.e. pieces of sword Ext P1 to Ext P3. PW5 Dr. Vishal Bhandari has denied suggestion that injury of neck sustained by deceased Ramesh Chand could be possible if deceased would have fallen from the storey of house while performing lightning work. Testimony of PW5 Dr. Vishal Bhandari is also trust worthy, reliable and inspires confidence of the Court. There is reason to disbelieve the testimony of PW5 Dr.Vishal Bhandari. There is no evidence on record in order to prove that PW5 has hostile animus against co-accused Ayodhya Singh at any point of time.

13. Another submission of learned Advocate appearing on behalf of the appellant that motive is not proved on record in the present case and no witness has stated that deceased Ramesh Chand was chattering with the sister of co-accused Ayodhya Singh and on this ground appeal filed by the appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that deceased Ramesh Chand had died in the four walls of residential house of co-accused Ayodhya Singh when he was performing decoration work of lightning. There is no evidence on record in order to prove that deceased Ramesh Chand had died due to lightning shock. There is no positive, cogent and reliable evidence on record in order to prove that deceased Ramesh Chand had

died due to fall fro m the storey of the building while performing lightning work. On the contrary it is proved on record that in the four walls of residential house of co-accused Ayodhya Singh when the deceased was performing lightning work in the marriage of the sister of co-accused Ayodhya Singh deceased Ramesh Chand had sustained three incised injuries upon his neck, upon his left cheek, upon his right hand and had also sustained head injury upon occipatal part. It is proved on record that thereafter immediately dead body of deceased Ramesh Chand was found in the residential house of co-accused Ayodhya Singh. It is also proved beyond reasonable doubt that deceased had sustained four injuries upon his body with pieces of sword Ext P1 to Ext P3. Hence chain of circumstantial evidence against co-accused Ayodhya Singh is proved beyond reasonable doubt in the present case. There is no evidence on record that some third person entered into the residential house of co-accused Ayodhya Singh and caused injuries upon deceased Ramesh Chand. It is held that in view of the fact that deceased had died in the four walls of residential house of co-accused Ayodhya Singh and in view of the fact that deceased had sustained four injuries in the four walls of residential house of co-accused Ayodhya Singh and in view of the fact that no third person entered into the residential house of co-accused Ayodhya Singh and in view of the fact that Investigating Officer has stated in positive manner that co-accused Ayodhya Singh has caused the murder of deceased Ramesh Chand because deceased was chattering with the sister of co-accused Ayodhya Singh in the residential house of co-accused Ayodhya Singh and in view of the fact that deceased was belonging to scheduled caste and in view of the fact that co-accused Ayodhya Singh is belonging to Rajput caste the above stated facts clearly proved beyond reasonable doubt that co-accused Ayodhya Singh had committed murder of deceased Ramesh Chand in four walls of his residential house. Chain of circumstantial evidence is completed in the present case beyond reasonable doubt against co-accused Ayodhya Singh.

14. Another submission of learned Advocate appearing on behalf of the appellant that sword pieces Ext P1 to Ext P3 is also not proved by the prosecution is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of PW2 Sabir Dass and recovery of pieces of sword Ext P1 to Ext P3 proved beyond reasonable doubt as per testimony of PW2 Sabir Dass. Testimony of PW2 Sabir Dass is trust worthy, reliable and inspires confidence of Court.

15. Another submission of learned Advocate appearing on behalf of the appellant that even recovery of blood clotted trouser belonging to co-accused Ayodhya Singh is not proved on record beyond reasonable doubt is also rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that disclosure statement of co-accused Ayodhya Singh relating to trouser worn by co-accused Ayodhya Singh at the time of incident is proved as per testimony of PW2 Sabir Dass. It is proved on record that blood clotted trouser was recovered in pursuance to disclosure statement given by co-accused Ayodhya Singh. Testimony of PW2 relating to disclosure statement and relating to recovery of trouser is trust worthy, reliable and inspires confidence of the Court.

16. Another submission of learned Advocate appearing on behalf of the appellant that no independent person of the locality was present at the time of disclosure statement given by co-accused Ayodhya Singh and on this ground appeal filed by the appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. In the present case it is proved on record that PW2 Sabir Dass has no relation with deceased Ramesh Chand. PW2 Sabir Dass is the resident of Jhakri and deceased Ramesh Chand was resident of Dobi. It was held in case reported in *1999 (1) JLT 49 titled State of Madhya Pradesh Vs. Rumi* that where marginal witness of disclosure statement was resident of another place even then his evidence regarding recovery of weapons and clothes could not be discarded.

17. Another submission of learned Advocate appearing on behalf of the appellant that the judgment and sentence passed by learned trial Court is based upon surmises and conjectures is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the judgment and sentence passed by learned trial Court. The judgment and sentence passed by learned trial Court is based upon positive, cogent and reliable testimony of oral witnesses i.e. PW1 Vinod Kumar, PW2 Sabir Dass, PW3 Tek Singh, PW4 Lobhu Ram, PW5 Dr. Vishal Bhandari, PW6 Kewal Ram, PW7 Krishan Lal, PW8 Om Parkash, PW9 Sat Pal, PW10 Gulab Singh, PW11 Krishan Lal, PW12 Jawahar Singh and PW13 Suresh Kumar and as per documentary evidence placed on record i.e. disclosure statement, sketch map, recovery of three pieces of sword, recovery of trouser and as per recovery of blood from the neck of deceased Ramesh Chand and as per recovery of blood clotted soil and grass and as per post mortem report placed on record and as per copy of jamabandi for the year 2002-03 placed on record and as per field book placed on record and as per extract of malkhana register placed on record and as per road certificate placed on record and as per inquest report placed on record and as per photographs placed on record and as per site plan placed on record and as per chemical analyst report placed on record.

18. Submission of learned Advocate appearing on behalf of the appellant that there is material contradiction in the testimony of prosecution witnesses and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of prosecution witnesses. There is no material contradiction in the testimony of prosecution witnesses which goes to the root of the case. In the present case the incident took place on 11.12.2005 and testimony of the prosecution witness was recorded on 14.2.2008, 15.2.2008, 11.1.2008, 15.2.2008, 15.3.2008, 22.5.2008 and 28.5.2008. It is held that minor contradictions are bound to come in the present case when testimonies of the witnesses are recorded after a gap of sufficient time.

19. Another submission of learned Advocate appearing on behalf of the appellant that deceased Ramesh Chand had died due to fall from upper storey of the building when he was performing the work of lightning and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. The plea of appellant that deceased Ramesh Chand had died when he was performing the lightning work in the upper storey of the building is defeated on the concept of ipse dixit (Assertion made without proof). Appellant did not examine any witness who were residing inside the four walls of the residential house at the time of incident in order to prove that deceased had died by way of fall from the upper storey of the residential house when he was performing lightning work in the marriage ceremony of the sister of appellant.

20. It was held in case reported *AIR 1985 S.C 416 titled State of Uttar Pradesh Vs. Ram Sagar Yadav and others* that except in cases covered by five exceptions mentioned in Section 300 culpable homicide is murder if the act by which the death is caused is done with the intention of causing death. In the present case co-accused Ayodhya Singh did not plead any defence of exceptions. In the present case it is proved on record that injuries were inflicted upon deceased Ramesh Chand by co-accused Ayodhya Singh upon vital part of body when deceased was working in the four walls of residential house of co-accused Ayodhya Singh. It was held in case reported in *AIR 1972 SC 2574 titled Chahat Khan Vs. The State of Haryana* that when the injury was inflicted on the vital part of the body by sharp edged weapon the inference would be drawn that intention was to kill deceased by the culprit. It was held in case reported in *AIR 1976 SC 1519 titled Jayaraj Vs. The State of Tamil Nadu* that intent and knowledge both postulate the existence of positive mental attitude. It was held in case reported in *AIR 1958 SC 672 titled B.N.Srikantiah Vs. Mysore State* that size and nature of the weapon and the manner in which weapon was used must be considered in

arriving at a finding on the guilt of the accused. In the present case the accused had given disclosure statement under Section 27 relating to pieces of sword and blood clotted trouser and same are proved on record beyond reasonable doubt. In the present case murder of the deceased was committed inside the four walls of residential house of co-accused Ayodhya Singh when deceased Ramesh Chand was performing decoration work of electricity and there was no possibility of any third person entering into the four walls of residential house of co-accused Ayodhya Singh at the time of commission of criminal offence. It was held in case reported in *AIR 1973 SC 944 Jose Vs. the State of Kerala* that conviction could be given on the testimony of single witness in criminal case if testimony of single witness is trust worthy, reliable and inspires confidence of the Court. Also see *Latest HLJ 2003 HP 541 titled State of HP Vs. Om Parkash*. Even as per Section 134 of the Indian Evidence Act 1872 no particular number of witnesses shall be required for the proof of any fact. It was held in case reported in *2008 (8) JT 650 titled State of U.P Vs. Krishan Pal* that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the Court. It was held in case reported in *1997 Cri.L.J 1873 titled Raja versus State of Delhi* that reliance could be based on solitary statement of a witness if the Court comes to the conclusion that the said statement is true and correct version of the case of the prosecution. It was held in case reported in AIR 2003 SC 854 titled Lalu Manjhi and another Vs. State of Jharkhand that court may classify the oral testimony into three categories (1) Wholly reliable (2) Wholly un-reliable (3) Neither wholly reliable nor wholly unreliable. It was held that in the first two categories there would be no difficulty in accepting or discarding the testimony of single witness.

21. It was held in case reported in *2013 Cri.L.J 2040 titled Prakash Vs. State of Rajasthan* Apex Court that there are five golden principles in case of circumstantial evidence.(1) That circumstances from which the conclusion of guilt is to be drawn should be fully established (2) That facts so established should be consistent only with the hypothesis of the guilt of the accused.(3) That circumstances should be of a conclusive nature.(4) That chain of circumstantial evidence should be completed. (5)That innocence of accused should be ruled out. It is was held in case reported in *2013 (14) SCC 434 titled Rohtash Kumar Vs. State of Haryana* Apex Court that time gap between last seen and death of deceased should be so small that possibility of any other person being author of the crime should become impossible. In the present case also the time gap when the deceased was last seen in the company of appellant alive and when deceased was found dead was so small that possibility of any other persons being author of the crime has become impossible.

22. In view of the above stated facts and case law cited supra 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 the appellant. Judgment and sentence passed by learned trial Court affirmed. Appeal filed by the appellant is dismissed. Pending application(s) if any also disposed of.

****

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

Balwinder Singh son of Sh.Gurcharan Singh ....Petitioner

Versus

State of H.P. ....Non-petitioner

Cr.MP(M) No. 301 of 2015
Order Reserved on 2nd April, 2015
Date of Order 8th April,2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the accused/applicant for the commission of offence punishable under Sections 457 and 380 of IPC- accused had broken into a ATM- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- In the present case, investigation was complete and the challan had been filed before the Court of Law- interest of the State would not be adversely affected by releasing the applicant/accused on bail- in these circumstances, bail granted. (Para-7 and 8)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

For the Petitioner: Mr. Naresh Verma, Advocate
For the Non-petitioner: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 180 of 2014 dated 27.9.2014 registered under Sections 457, 380 of Indian Penal Code at P.S. Jawalamukhi District Kangra (HP).

2. It is pleaded that petitioner is innocent and petitioner did not commit any criminal offence as alleged by prosecution. It is pleaded that there is no direct evidence against the petitioner and further pleaded that investigation of case is completed and nothing is required to be recovered from petitioner. It is pleaded that petitioner will cooperate with Investigating Agency and will not hamper the investigation of case. It is pleaded that petitioner undertakes that petitioner will not threat or promise to any witness acquainted with facts of case. It is pleaded that petitioner will abide by all conditions imposed by Court. It is further pleaded that petitioner is in the age of 19 years and is a student. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report FIR No. 180 of 2014 dated 27.9.2014 was registered under Sections 457 and 380 IPC in P.S. Jawalamukhi District Kangra (H.P.) against five accused. There is recital in police report that complainant Prem Chand Dhiman, Branch Manager PNB Kaloha Tehsil Rakkar P.S. Jawalamukhi District Kangra (H.P.) is posted in the bank since one month. There is recital in police report that on dated 26.9.2014 bank was closed and ATM was closed at 6.45 PM and on dated 27.9.2014 it was observed that ATM of Kaloha bank was broken. There is further recital in police report that there was cash to the tune of Rs.6,24,200/- (Rupees six lac twenty four thousand and two hundred only) in ATM machine. There is recital in police report that investigation was conducted and site plan was prepared and photographs also obtained. There is also recital in police report that there was spray upon CCTV cameras and during inquiry accused persons have given extra judicial confession of breaking the ATM of PNB bank and also confessed about stealing of cash amount. There is recital in police report that statement of

co-accused Jatinder Singh was recorded under Section 27 of Indian Evidence Act and broken locks of shutter were also recovered from bushes. There is recital in police report that one CD and statement of bank dated 26.9.2014 and transaction statement obtained. There is further recital in police report that cash statement kept in ATM also obtained and took into possession vide seizure memo. There is also recital in police report that spray found upon CCTV camera and bottle of spray recovered as per disclosure statement given by accused tallied with each other as per chemical analyst report. There is further recital in police report that criminal challan filed in Court of Judicial Magistrate 1st Class Court No. 2, Dehra District Kangra (H.P.) There is further recital in police report that all accused persons are quarrelsome persons and they would commit the similar offence if they are released on bail. Prayer for rejection of bail application sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether bail application filed under Section 439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?

2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that investigation is complete and challan already stood filed in the competent Court of law and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period.

8. In present case investigation is already completed and challan already stood filed in competent Court of law and no recovery is to be effected from the petitioner. It is well settled law that accused is presumed to be innocent till convicted by Court of law. Court is of the opinion that it would not be expedient in the ends of justice to keep the petitioner in judicial custody because trial of case will be concluded in due course of time. Court is also of the opinion that if petitioner is released on bail at this stage then interest of State and general public will not be adversely effected because investigation already stood completed in present case and challan also stood filed in the Court.

9. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to the petitioner and condition will be imposed in the bail order to the effect that petitioner will not induce and threat the prosecution witnesses. Court is of the opinion that if petitioner will flout the terms and conditions of bail order then non-petitioner will be at liberty to file application for cancellation of bail strictly in accordance with law. It is well settled law that accused is presumed to be innocent until convicted by competent Court of law. In view of above stated facts point No.1 is answered in affirmative.

Point No.2

Final Order

10. In view of findings on point No.1 bail application filed by petitioner under Section 439 Cr.P.C. is allowed and petitioner is ordered to be released on bail subject to furnishing personal bond to the tune of Rs. 1 lac with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the petitioner will attend the proceedings of trial Court regularly as and when called upon to do so. (ii) That petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the petitioner will not leave India without the prior permission of the Court. (iv) That petitioner will not commit similar offence qua which he is accused. (v) That petitioner will give his latest residential address in written manner to the Court at which address the petitioner would be available at short notice. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 439 of Code of Criminal Procedure stands disposed of.

****

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

Bhag Chand .....Appellant.
Versus
Virender Kumar & another .....Respondents.

RSA No. 506 of 2002.
Reserved on: 7.4.2015.
Decided on: 8.4.2015.

Indian Contract Act, 1872- Section 17- plaintiff claimed that sale deed was got executed from him by defendant No. 2 in favour of defendant No. 1 - he had litigation with one M- plaintiff had engaged defendant No. 2 as his counsel- defendant No. 2 had obtained his signatures on some blank judicial paper for moving application in the Court- defendant No. 2 got executed a sale deed in favour of defendant No. 1 by practicing fraud and taking advantage of his position- it was established from the statement of the witnesses that sale deed was scribed by 'T'- it was read over and explained by him to the plaintiff- plaintiff put his signature after understanding the same- witnesses also put their signatures- sale deed was produced before Sub Registrar – Sub Registrar again explained the contents of the deed

to the plaintiff and plaintiff put his signature after admitting the contents to be true- relation between the plaintiff and defendant No. 2 was terminated on 3.3.1994 when case was decided- the sale deed was executed on 8.3.1994- the sale deed was executed on non-judicial papers, which belies his version that his signatures were taken on blank judicial papers- plaintiff had also executed an affidavit - held, that in these circumstances, version of the plaintiff that sale deed was executed fraudulently cannot be accepted. (Para-16 to 20)

For the appellant(s): Mr. K.D.Sood, Sr. Advocate, with Mr. Rajnish K. Lall, Advocate.
For the respondent: Mr. Sanjeev Kuthiala, Advocate, for 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, Kullu, H.P. dated 11.10.2002, passed in Civil Appeal No.04 of 2002.

2. Key facts, necessary for the adjudication of this regular second appeal are that appellant-plaintiff (hereinafter referred to as the plaintiff), has filed a suit against the respondents-defendants (hereinafter referred to as the defendants) for declaration with consequential relief of permanent prohibitory injunction and in the alternative suit for possession. The plaintiff has challenged the sale deed dated 8.3.1994 to the extent of 9/62 shares measuring 0-5 biswas out of the land comprised in khata khatauni No. 645/962, khasra No. 3377, situated in Phati Bashishat, Kothi Jagatsukh, Tehsil Manali, Distt. Kullu, as per jamabandi for the year 1987-88 (hereinafter referred to as the suit land). According to the plaintiff, sale deed dated 8.3.1994 was got executed from him by defendant No. 2 in favour of defendant No. 1. He had litigation for about 15 years with one Manu, resident of Village Chajoga, Phati Bashishat, Kothi Jagatsukh in respect of land measuring 3-2 bighas, comprised in Kh. No. 3377 which was granted to him in nautor on 28.3.1977. The plaintiff engaged defendant No. 2 as his counsel. Defendant No. 2 procured his signatures on some blank judicial papers on the pretext that the judicial papers were required for the purpose of moving application in the Court. The plaintiff signed the same. He is an illiterate person. Defendant No. 2 having exercised sway, influence and pressure over the plaintiff by taking undue advantage, fraudulently got a sale deed dated 8.3.1994 executed and registered from him in favour of defendant No. 1, without his knowledge and consent. Neither the sale consideration was paid to him nor the possession of the suit land stood delivered to defendant No. 1. He was simply asked to say "Yes" to the questions put to him by the authorities including the Sub Registrar, Kullu. The defendants got executed mutation No. 2999 in respect of the suit land.

3. The suit was contested by the defendants. Defendant No. 2 has admitted that he was counsel of the plaintiff in a long drawn litigation with Manu. It has been denied that during the course of the litigation, defendant No. 2 had procured signatures of the plaintiff on blank judicial papers. It was also denied that defendant No. 2 being his counsel was having any sort of pressure or influence over the plaintiff and that by taking undue advantage of his position, had got executed and registered sale deed dated 8.3.1994 in favour of defendant No.1 by playing fraud. The plaintiff has executed the registered sale deed dated 8.3.1994 in favour of defendant No.1. It was scribed on the request of plaintiff in the presence of marginal witnesses and thereafter the contents were read over and explained to the plaintiff. The plaintiff after admitting the contents of the sale deed to be correct put

his signatures and thereafter the marginal witnesses and scribe put their signatures on the sale deed. The sale deed was presented before the Sub Registrar, Kullu. The Sub Registrar, Kullu again read over the contents of the sale deed to the plaintiff and plaintiff admitted them to be correct. Thereafter, the sale deed was registered. The plaintiff has also handed over a duly sworn affidavit to the patwari wherein he had stated his no objection in case mutation was attested on the basis of the sale deed in his absence.

4. The replication was filed by the plaintiff. The learned Sub Judge, Manali, framed the issues. The learned Sub Judge, Manali, dismissed the suit on 14.11.2000. The plaintiff, feeling aggrieved, preferred an appeal before the learned District Judge, Kullu. The learned District Judge, Kullu, dismissed the appeal on 11.10.2002. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on all the substantial question of law filed alongwith the grounds of appeal on 22.11.2002:

> "1. Whether in the facts and circumstances of the case the sale deed Ext. D-1 which was got executed by defendant No. 2 who was advocate of the appellant in favour of his father for a paltry consideration of Rs. 16,000/- was vitiated as a result of misrepresentation, fraud and the findings of the District Judge are based on mis-reading and misconstruction of the oral and documentary evidence, particularly Ext. D-1 and being perverse are liable to be set aside?
>
> 2. Whether in view of the relationship of lawyer and client between the defendant No. 2 and the appellant and the fiduciary relationship between the parties an inference of misrepresentation, fraud, was raised and the sale transaction Ext. D-1 is vitiated and liable to be set aside?
>
> 3. Whether the suit of the plaintiff was within limitation from the date of discovery of fraud and the evidence to the contrary are not sustainable?
>
> 4. Whether particulars of fraud, misrepresentation and undue influence had been pleaded and the said plea could be ignored for lack of particulars without calling upon the plaintiff to furnish full and better particulars if any, pleaded in view of the relationship between the parties?"

6. Since all the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

7. Mr. K.D.Sood, Sr. Advocate, for the appellant has vehemently argued that the sale deed Ext. D-1 was vitiated as a result of misrepresentation and fraud. According to him, defendant No. 2 has taken undue advantage of the fiduciary relationship between the parties. He then contended that both the courts below have come to the wrong conclusion that the suit was barred by limitation. He lastly contended that the courts below have not correctly appreciated the oral as well as the documentary evidence on record. On the other hand, Mr. Sanjeev Kuthiala, Advocate, has supported the judgments and decrees passed by both the Courts below.

8. I have heard the learned Advocates for the parties and gone through the records of the case carefully.

9. Sh. Jai Singh, PW-1 has brought the record of case No. 1/1985 alongwith the Power of Attorney. He has proved certified copy of the Power of Attorney Ext. PW-1/B

and plaint Ext. PW-1/C and also proved the POA filed in Civil Suit No. 181 of 1993 vide Ext. PW-1/D.

10. Plaintiff has appeared as PW-2. According to him, the disputed land was given to him by way of nautor measuring 3-2 bighas. It was situated in Phati Bashishat. He knew defendant No. 2. He was his advocate for 15-16 years. He has never sold the land to defendants. The sale deed was fraudulent. He came to know about it only last year when the notices of mutation were addressed to him. Earlier, the mutation was attested but was cancelled. He was in possession of the suit land. His litigation was pending before the Collector, Civil Court and Tehsildar. He presented himself before the Tehsildar at the instance of defendant No. 2. He has not read over the contents of any documents and he was under this impression that he was getting his work done. He has never received any consideration amount of sale deed. He did not know the marginal witnesses. He has never sold the land. He was never in need of money. The defendant No. 2 who was his counsel got his signatures on documents without reading the contents of the same. He is illiterate. He knew only how to put his signatures. In his cross-examination, he stated that he was working as tailor for the last 40-45 years. Jindu Ram was also working as tailor at Manali. He has entered into litigation with one Mr. Manu Ram. Initially, Sh. S.C.Sharma, was his Advocate. He was never involved in any litigation except Civil Suit No. 181 of 1993. In his cross-examination, he categorically admitted that he has got the revenue papers including average sale from the Patwari. Volunteered that he has got them at the instance of defendant No. 2. He has admitted his signatures in red circle. Volunteered that he has put the signatures at the instance of defendant No. 2.

11. Sh. Jindu Ram, PW-3 stated that he has seen the disputed land. It was in possession of the plaintiff. In his cross-examination, he admitted that he was working as tailor at Manali.

12. Sh. P.C.Thakur, DW-1 stated that the land was situated in Phatti Bashishat. He knew the plaintiff. He had come to him on 7.3.1994 at Court Complex, Kullu stating that he wanted to sell 5 biswas to Nanak Chand. He had brought the copy of jamabandi and average sale. However, Nanak Chand told him later on that he could only pay him Rs. 10,000/- and rest of the money would be paid later on. Plaintiff told him that he was in dire need of money. He made offer to the plaintiff to buy his 0-5-0 bighas of land for a consideration of Rs. 16,000/-. The defendant No. 2 was minor at that time. He paid a sum of Rs. 16,000/- to the plaintiff on 8.3.1994 and the possession of the suit land was also handed over to him. The sale deed was scribed by Tula Singh i.e. Ext. D-1, at the instance of plaintiff. It was scribed in the presence of Kaula Ram Nambardar and Jeet Ram. The contents were read over to him. He put his signatures on Ext. D-1 after admitting the same to be correct. Thereafter, it was signed by the marginal witnesses. Tula Ram also signed the same and put his seal. The sale deed was produced for registration before the Sub Registrar, Kullu. The contents of Ext. D-1 were read over in presence of marginal witnesses to the plaintiff. The plaintiff admitted the contents to be true and thereafter the same was registered. The plaintiff has also put his signatures before the Sub Registrar in the presence of marginal witnesses. The marginal witnesses also put the signatures after the plaintiff has put his signatures. The plaintiff has also sworn in an affidavit which was duly notarized by Ashok Marwah.

13. Sh. Jeet Ram, DW-2 has identified signatures on Ext. D-1 dated 8.3.1994. It was scribed by Tula Ram at the instance of the plaintiff. It was written in his presence and also in the presence of Kaula Ram. The contents were explained by Tula Ram to the plaintiff. Thereafter, the plaintiff has put his signatures. He and Kaula Ram put their signatures as marginal witnesses. Thereafter, it was produced before the Sub Registrar.

The contents of Ext. D-1 were read over by the Tehsildar to plaintiff and the plaintiff admitted the same to be correct and thereafter the Sub Registrar made the endorsement Ext. DW-1/A. On the endorsement also, plaintiff has put his signatures. He also put his signatures as marginal witnesses.

14. Sh. Tula Ram, DW-3 deposed that he at the instance of plaintiff and in the presence of Kaula Ram and Jeet Ram has scribed Ext. D-1. The contents of the same were read over and explained to the plaintiff. He put his signatures after understanding the contents to be true in the presence of Kaula Ram and Jeet Ram. Thereafter, the marginal witnesses put their signatures.

15. Sh. Ashok Marwah, DW-4 has notorized the affidavit dated 8.3.1994 and was registered at Sr. No. 1279 dated 8.3.1994. The copy of the register is Ext. DW-4/A.

16. Sh. Madan Singh, DW-5 deposed that he was working as Tehsildar w.e.f. 1987 to 1994. He retired in 1999. The sale deed Ext. D-1 was produced before him by the plaintiff on 8.3.1994. He has explained the contents of the sale deed to the plaintiff. He admitted the same to be correct. He made the endorsement on the sale deed vide Ext. DW-1/A. Thereafter, the plaintiff and the marginal witnesses have put their signatures on the same.

17. What emerges from the appraisal of the statements is that the sale deed Ext. D-1 was scribed by Tula Ram, the contents of the same were read over and explained by Tula Ram. The plainhtiff after understanding the same put his signatures. Thereafter, the marginal witnesses DW-2 Jeet Ram and Kaula Ram appended their signatures. Ext. D-1 was produced before DW-5 Sh. Madan Singh, Sub Registrar. He explained the contents of the sale deed to him. The plaintiff after admitting the contents to be true put his signatures. He made the endorsement Ext. DW-1/A. Thereafter, the plaintiff put his signatures followed by signatures of marginal witnesses.

18. Sh. K.D.Sood, learned Senior Advocate, has argued that defendant No. 2 was the counsel of plaintiff and he has taken advantage of the fiduciary relationship. The defendant No. 2 was the counsel of plaintiff in the litigation of plaintiff with one Sh. Manu. The litigation has come to an end on 3.3.1994 and the sale deed is dated 8.3.1994. The plaintiff has already obtained the revenue papers including the average sale price. These documents have been obtained by him only for the purpose of sale deed. The Court has already noticed that Ext. D-1 was scribed by Tula Ram. He has explained the contents of the same to plaintiff and thereafter, the plaintiff has put his signatures followed by the marginal witnesses. The sale deed was produced before the Sub Registrar, Kullu. He has also explained the contents of the same to him. DW-5 Madan Singh has made the endorsement and the plaintiff has signed the same followed by marginal witnesses.

19. According to the plaintiff, his signatures were obtained fraudulently by defendant No. 2 on blank judicial papers. However, the fact of the matter is that Ext. D-1 is on non-judicial papers. The plaintiff has also executed affidavit which was notorized by DW-4 Ashok Marwah and was registered at Sr. No. 1279 dated 8.3.1994 itself. The plaintiff was in litigation earlier also and he knew the difference between civil suit and the revenue court. He knew the purpose for which he had gone voluntarily to the Sub Registrar for the purpose of registration. His version cannot be believed that he only said “Yes” without understanding the implications of his admission. The plaintiff claimed himself to be illiterate but signed Ext. D-1 sale deed and identified his signatures on the same.

20. Sh. Tula Ram, DW-3 has also stated that the plaintiff has put his signatures on Ext. DW-3/A and Ext. DW-3/B, the copies of the extract register. The possibility of the documents being fraudulently prepared is also not ruled out in view of Ext. DW-3/A and DW-3/B.

21. It has come in the statement of Sh. P.C.Thakur, DW-1 that the possession of the suit land was also handed over by the plaintiff. The suit was to be filed within three years after the accrual of the cause of action. There is sufficient material on record to come to the conclusion that the plaintiff knew about the sale deed. Now, as far as the question of limitation is concerned, the plaintiff himself has produced Ext. P-2 copy of mutation No. 2999. According to it, the mutation proceedings were initially held on 13.6.1995 and thereafter on 31.7.1995 and when both the parties were absent and thereafter proceedings were adjourned to 25.8.1995, on which date, the plaintiff was present but defendants were not present. The suit has been filed on 21.12.1999. Moreover, the plaintiff has also stated in his examination-in-chief that he had raised objection before the revenue officials at the time of attestation of mutation and during his cross-examination, he testified that about 15-20 days prior to his making objection before the revenue officials, he had come to know that defendants have got executed from him a sale deed. Thus, he had the knowledge even from 8.3.1994. The substantial questions of law are answered accordingly.

22. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

****

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

Cr.Appeal No.252 of 2011 With
Cr.Appeal No.289 of 2011 and
Cr. Appeal No. 369 of 2011.
Reserved on: 02.04.2015.
Decided on: 8th April, 2015.

1. <u>Criminal Appeal No.252 of 2011</u>:
Kanwar Singh ...Appellant.
Versus
State of H.P. ...Respondent.
2. <u>Criminal Appeal No.289 of 2011</u>:
Dalbir Singh ...Appellant.
Versus
State of H.P. ...Respondent.
3. <u>Criminal Appeal No.369 of 2011</u>:
Rajesh Kumar and another ...Appellants.
Versus
State of H.P. ...Respondent.

N.D.P.S. Act, 1985- Sections 20 and 29 - 3.500 kg of charas was recovered from the car in which the accused were travelling- accused belonged to District Kaithal- they were travelling together in the vehicle from which contraband was recovered- driver also belonged to District Kaithal- an inference can be drawn that driver was aware of the fact that vehicle was transporting contraband in it- testimonies of the police officials corroborated each other- link

evidence was also established before the Court- mere failure to associate independent witness is not sufficient to discard the prosecution version- the order convicting the accused was sustainable. (Para-12 to 16)

For the Appellants:	Mr.Vivek Sharma, Advocate vice Mr. Satyen Vaidya, Advocate for the appellants in Cr.A. No.252 of 2011, Mr. G.R. Palsra, Advocate for the appellant in Cr. Appeal No. 289 of 2011 and Ms. Monika Sukla, Advocate vice Ms. Anita Dogra, Advocate for the appellants in Cr. Appeal No. 369 of 2011.
For the Respondent:	Mr. P.M. Negi, Dy. A.G. with Mr. Ramesh Thakur, Assistant A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

These appeals arise from a common judgment hence are being disposed of by a common judgment. The aforesaid appeals have been preferred by the appellants/accused against the judgment, rendered on 07.06.2011 by the learned Additional Sessions Judge, Kinnaur at Rampur, H.P. in Sessions Trial No. 26-AR/3 of 2010, whereby they have been convicted and sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs.1,00,000/- each for theirs having committed offence punishable under Section 20 (ii) (c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein-after referred to as 'NDPS Act'). In default of payment of fine, they have been sentenced to further undergo rigorous imprisonment for two years.

2. Brief facts of the case are that on 09.06.2009 at about 4.00 a.m, PW-9 ASI Lunder Singh along with H.C. Pune Ram, H.C. Pushap Dev, C. Bhoop Singh left police station Ani in official vehicle bearing No. HP-34-298 driven being driven by C. Hem Raj for laying Naka towards Chakapani side. An entry qua the departure of PW-9 ASI Luder Singh along with other police officials in a official vehicle was recorded in daily diary No.3, Ex.PW9/A. The police patrol arrived at Chakkapani near Thini at about 4.30 a.m., laid a Naka there. At about 5.45 A.M. Car No. HR-06-N-9706 appeared from Ani side. It was stopped for checking. Accused Kanwar Singh was in the driver's seat and accused Dalbir was sitting on the front seat. Accused Bablu and Rajesh were sitting on the back seat. On suspicion the search of the car was conducted. One polythene bag containing charas weighing 3.500 kg was found under the seat which was occupied by accused Dalbir. Two samples each weighing 25 grams were separated and put into parcels which were marked as S-1 and S-2 and sealed with seal impression X. The remaining charas weighing 3 kgs 450 grams was put back into the same polythene bag which was also put into a parcel which was marked as P-1 and sealed with seal impression X. NCB forms in triplicate were filled in. Case property was taken into possession vide seizure memo Ex.PW6/O. Rukka Ex.PW6/A was drawn and sent to police station Ani for registration of case. Parcels containing the bulk stuff and the samples were deposited with PW-4 MHC Anup Kumar, who affixed his own seal, which produced the impression of English letter 'H'. Sepcial Report Ex.PW3/B was sent to SDPO, Ani. Case property was sent to the chemical examiner, FSL Junga who opined its contents to be of charas.

3. After completion of the necessary investigation, into the offences, allegedly committed by the accused/appellants, challan was filed under Section 173 of the Code of Criminal Procedure.

4. The accused/appellants were charged for theirs having committed offences punishable under Sections 20 and 29 of the NDPS Act, by the learned trial Court, to which they pleaded not guilty and claimed trial.

5. In proof of the prosecution case, the prosecution examined as many as 9 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C., were recorded by the learned trial Court, in which they claimed false implication and pleaded innocence. In defence, the appellants/accused have examined one witness.

6. On appraisal of the evidence on record, the learned trial Court convicted the accused for theirs having committed offence punishable under Sections 20 (ii) (c) of the NDPS Act.

7. The appellants/accused are aggrieved by the judgment of conviction, recorded by the learned trial Court. The learned counsel for the accused, have 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, they contend that the findings of conviction be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

8. On the other hand, the learned Assistant Advocate General, appearing for the respondent-State, has, with considerable force and vigour, contended that the findings of conviction, recorded by the Court below, are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

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

10. The genesis of the prosecution version imputing an inculpatory role to all the accused, inasmuch as contraband weighing 3.500 kg having been recovered from the conscious and exclusive possession of the accused persons inasmuch as from a red colour car No. HR-06-N-9076 from underneath the seat occupied by accused Dalbir Singh, which at the apposite relevant time was being driven by accused Kanwar Singh, whereas, accused Dalbir Singh was occupying the front seat of the car besides accused Rajesh and Bablu were occupying the rear seat of the car, is unfolded in the depositions of the official witnesses, namely, PW-6 H.C. Pune Ram, PW-8 HHC Bhoop Singh and PW-9 ASI Luder Singh. All the official witnesses aforesaid have deposed in tandem and in harmony qua the factum of recovery of charas weighing 3.500 kg having been effected from a red colour car bearing No. HR-6N-9076 which was being occupied by all the accused in the manner aforesaid. They have also deposed in harmony qua the factum of each of the accused having been apprised by PW-9 of the legal right inhering in them of theirs being liable to be searched in the presence of a Magistrate or a gazetted officer. However, each of the accused under consent memos Ex. PW6/A to Ex.PW6/D opted to be searched by the police on the spot. Each of the aforesaid official witnesses have deposed in unison qua the further factum of each of them having given their search to each of the accused under search memos Ex.PW6/E to Ex.PW6/H. Thereafter, the personal search of each of the accused was carried out under search memos Ext.PW6/J to Ex.PW6/M by PW-9. However, no incriminating material was recovered from their possession. During the search of the vehicle, one polythene bag was found lying under/beneath the front seat occupied by accused Dalbir which contained charas in the shape of balls. On weighment, it was found to be weighing 3.500 kg. The official witnesses have deposed that two samples each weighing 25 grams were separated

which were packed and marked as S.1 and S.2 and sealed with seal bearing impression X. The residual charas weighing 3.450 kgs has been deposed by the officials witnesses to have been put back into the same polythene bag and sealed with seal impression X. NCB form Ex.PW4/D in triplicate was filled in by PW-9 on the spot. Specimens of seal impression have been deposed by the official witnesses to have been handed over by PW-9 to H.C. Pushap Dev. The case property has been deposed by the official witnesses to have been taken into possession vide seizure memo Ex.PW6/O. Rukka Ex.PW4/A has been deposed by the official witnesses to have been scribed by PW-9 and sent to Police Station Ani through C. Bhoop Singh. The site plan, Ex.PW9/B has been deposed by the prosecution witnesses to have been prepared by PW-9.

11. PW-1 Chande Ram had delivered special report to Sh. Bhan Singh, SDPO Ani on 10.06.2009 at 4.45 p.m. which was handed over to him by PW-9 ASI Luder Singh. ASI Prem Lal, PW-2 brought the case property along with the report of chemical examiner Ex.PW2/A from FSL Junga on 4.7.2009 and deposited the same with MHC Pune Ram in the Malkhana at Police Station Ani. PW-3 ASI Sohan Lal remained posted as Reader to SDPO, Ani during the year 2009. On 10.06.2009 Sh. Bhajan Singh, SDPO, Ani handed over Special Report Ex.PW3/B to him which was entered by him in the receipt register, abstract whereof is Ex.PW3/A. PW-4, H.C. Anoop Kumar remained posted as MHC in P.S. Ani during the year 2009. He has stated that on 9.6.2005, he registered FIR Ex.PW4/B on the basis of rukka Ex.PW4/A sent by PW-9, ASI Luder Singh from the spot through PW-8 HHC Bhoop Singh. On the same day at about 12.40 p.m., PW9 ASI Luder Singh deposited the case property consisting of two sample parcels and one parcel containing the bulk which were sealed with seal bearing impression of 'X'. He resealed the case property with seal bearing impression 'H' and made entries in the Malkhana Register, the extract of which is Ex.PW4/F. PW-5 SI Gurbachan Singh, on completion of the investigation, prepared the challan in this case.

12. 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, hence, portraying proof of unbroken and unsevered links, in the entire chain of the circumstances, therefore, it is argued that when the prosecution case stands established, it would be legally unwise for this Court to acquit the accused. Besides, it is canvassed that 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.

13. The accused persons as unraveled by their respective addresses belong to District Kaithal in the State of Haryana. Charas weighing 3.500 kg was recovered from underneath the front seat occupied by accused Dalbir Singh in vehicle bearing No. HR-6N-9076, whereas the other accused were too, occupying the said vehicle, obviously then criminal liability is to be fastened to each of the accused while traveling together in the vehicle from which the contraband was recovered. In other words, the factum of recovery of charas weighing 3.500 kg from beneath the front seat occupied by accused Dalbir Singh besides fastening criminal liability upon accused Dalbir Singh, also fastens conjoint and vicarious liability upon the other accused, who were also occupying and traveling in the vehicle from which the seizure was made. For each of the accused to be held to be not in exclusive and conscious possession thereof, there had to be on record overwhelming and potent evidence displaying the factum that their respective criminal liability stands exculpated especially, given the fact that the driver, named, Kanwar Singh was plying the vehicle for hire and reward, hence, given the capacity aforesaid in which he was plying it,

further hence, his being unaware of and his having remained un-awakened qua the fact of the other accused carrying with them contraband as seized from the vehicle, hence, the occupants therein alone remained consciously aware of the factum of its being carried in the vehicle driven by him on behalf of its owner for hire and reward, concomitantly, no vicarious criminal liability along with the occupants therein is to be fastened upon him. Nonetheless, the registration certificate of the vehicle firmly ousts the factum of the vehicle having been driven by accused Kanwar Singh for hire and reward. The factum of the registration certificate of the vehicle depicting the vehicle being registered as a private vehicle and not as a vehicle for carrying passengers for hire and reward underscores an inference especially when each of the occupants, who at the relevant time occupied it belong to District Kaithal in the State of Harayana to which State the accused Kanwar Singh also belongs, that hence, each of them knew the driver Kanwar Singh also. Consequently, if each of the occupants knew each other and the driver/accused Kanwar Singh also knew the occupants, the apt and natural inference which sprouts is that the contraband as found in the vehicle was being carried in it with each of the person occupying the vehicle as also the accused/driver being aware of the factum of its being carried by each of the accused as also each being aware of its being carried in it. Resultantly, then neither accused Kanwar Singh can contend that with his being unaware of the identities of the other persons occupying his vehicle, his having put them aboard the vehicle as passengers for hire and reward, no inculpatory vicarious role with other accused can be imputed to him nor also the contention advanced on behalf of each of other accused that they were unaware of their respective identities, hence, vicarious criminal liability for accused Dalbir Singh, while charas weighing 3.500 kg having been found beneath his seat, cannot be imputed to them, also necessitates its being discarded especially when the reasons advanced hereinabove efficaciously repulse it. Therefore, it has to be convincingly held that the prosecution has been able to prove that each of the accused were vicariously liable for theirs being found in exclusive and conscious possession of 3.500 kg of charas with it being carried in vehicle No. HR-6N-9076 in the manner as enunciated by the prosecution witnesses.

14. The learned counsel appearing for the accused/appellants have contended that the factum of non association of independent witnesses in the apposite proceedings relating to search, seizure and recovery of contraband in the manner as deposed by the prosecution witnesses cannot render them to hold sway besides, they do not enjoy probative tenacity in the absence of PW-9 ASI Luder Singh having not associated independent witnesses in the apposite proceedings. However, the factum of non association of independent witnesses would not outweigh the probative sinew of the testimonies of the official witnesses, who have deposed in unison and harmony qua the factum of the apposite proceedings having been carried out in the legally enjoined manner. Moreover, when the entire link in the chain of circumstances commencing from the commencement of the proceedings of search, seizure and recovery at the site of occurrence till the rendition of an opinion by the FSL, Junga on the sample sent to it for analysis has remained unbroken and unsevered besides, having been proved by cogent and unflinching evidence. Consequently, the effect, if any, of non-association of independent witnesses by the Investigating officer in the apposite proceeding wanes as well as fades. Even otherwise, assuming that the Investigating Officer had not associated independent witnesses in the apposite proceedings, such omission may eclipse the apposite proceedings, only when there was overwhelming and satisfactory evidence existing in the testimonies of the official witnesses portraying the factum that despite availability of independent witnesses, they were omitted to be joined in the apposite proceedings by the Investigating Officer. However, a close reading of the testimony of PW-6 unearths the factum of the apposite proceedings having commenced at an isolated place and at a time when the association of independent witnesses could not be solicited besides, with there being also an admission in the cross-examination of PW-6 of a

bus having crossed the naka point prior to theirs commencing the search of the vehicle occupied by the accused from which the recovery of charas was effected, firmly scores an apt inference that at a time contemporaneous to the holding or conducting of apposite proceedings qua the vehicle occupied by the accused from which the recovery of charas was effected neither any vehicle had crossed that place nor hence independent witnesses were available, for theirs being joined by the Investigating Officer in the apposite proceedings. Consequently, the Investigating Officer cannot be faulted for his having despite availability of independent witnesses omitted to join them in the apposite proceedings.

15. On a formation of the aforesaid conclusion, the concomitant deduction is that the prosecution has been able to prove the guilt of both the accused.

16. In view of above, we find that the findings of conviction, recorded by the learned trial Court below, are based on a mature and balanced appreciation of evidence on record. Hence, the findings do not necessitate irreverence. Accordingly, all the appeals are dismissed being devoid of any merit and the judgment rendered by the learned trial Court is affirmed and maintained. Records of the learned trial Court be sent down forthwith.

****

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

Master Ajeet and others Petitioners.

Versus

Rajiv Respondent.

Cr.MMO No. 238 of 2014.
Date of decision: 8.4.2015

Code of Criminal Procedure, 1973- Section 127- Petitioner filed an application for claiming enhancement of maintenance allowance- held, that an application for enhancement can only be filed if it is a averred that respondent has become financially empowered after the grant of maintenance or the needs of the children have increased- Petitioner had specifically pleaded that salary of the respondent had increased and the children were going to the school which increased the expenses for their maintenance- in these circumstances, enhancement of maintenance by Magistrate was justified.

For the petitioners: Mr. B.C.Verma, Advocate.
For the respondent: Mr. Davinder Chauhan Jaita, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The petitioners herein are the children and wife respectively of the respondent. The petitioners herein are aggrieved by the orders rendered by the learned Additional Sessions Judge-1, Shimla, Camp at Rohru, whereby he reversed the orders rendered by the Judicial Magistrate 1st Class, Court No.II, Rohru, District Shimla, on an application preferred before the latter Court by the petitioners herein under Section 127 Cr.P.C claiming therein enhancement of maintenance allowance over and above the one as previously ordered to be defrayed to the petitioners herein by the respondent by the Court of

competent jurisdiction on an application preferred before the latter under Section 125 Cr.P.C. Obviously, the application under Section 127 Cr.P.C. would stand duly constituted and be also maintainable before the Court it was preferred, only in the event of it having been pleaded therein by the petitioners herein that the respondent therein was subsequent to the rendition of the orders on the previous application before the competent Court under Section 125 Cr.P.C. was more financially empowered, hence it was justifiable to order for enhancement of maintenance allowance in favour of petitioners herein, over and above the one as previously ordered on an application filed under Section 125 Cr.P.C. by the petitioners herein before the competent Court. Besides there had to be a portrayal in the application under Section 127 Cr.P.C that given the escalated needs of the children of the respondent comprised in and arising out of their mother petitioner No. 3 being encumbered with the liability to pay their fees for theirs attending school as also for their concomitantly higher needs of food and clothing. Moreover, there had to be cogent and ample evidence on record to succor the pleadings or to give sinew to the pleadings portraying the facts aforesaid. Even though pleadings apposite to the factum of the respondent herein earning a salary higher than the one he was drawing at the time of rendition of orders on application under Section 125 Cr.P.C. exist in paragraph 3, so also pleadings exist in paragraph 3 of petitioners No. 1 and 2 portraying that the children of respondent herein now proceed to attend school necessitating or entailing a higher financial burden upon their mother concomitantly rendering the respondent amenable to pay a maintenance allowance to them higher than the one previously ordered by the competent Court. There is cogent proof of the petitioner drawing a salary of Rs. 25,591/- as evidenced by AW -1/2. The increased/escalated salary as now drawn by the respondent herein marks the factum of his being more financially empowered since the rendition of orders on an application under Section 125 Cr.P.C. by the Court of competent jurisdiction in favour of the petitioners herein. Consequently, with the uncontroverted fact of the respondent herein drawing salary of Rs.25,592/- at the time of preferment of application under Section 127 Cr.P.C. whereas previously at the time of rendition of orders on application under Section 125 Cr.P.C. he was drawing Rs.8,000/- as salary renders him now more financially empowered and capacitated to bear a higher burden of maintenance allowance to the petitioners herein. Besides the factum of petitioners No. 1 and 2 the off springs of respondent herein now attending school is marked by Ext.AW-1/4 and Ext.AW-1/3. Consequently, with the increase in the needs of petitioner No.3 for meeting the expenses towards their tuition fees for attending school, besides the concomitant natural incidental needs towards other expenses for their education as well as their up keep and maintenance, which needs now arise and which did not exist at the time of rendition of orders under Section 125 Cr.P.C. by the competent Court of jurisdiction, naturally then the good, tenable and a strong ground as manifested in application under Section 127 Cr.P.C. stood proved by cogent evidence as such necessitating enhancement of maintenance allowance in favour of the petitioners herein. The orders rendered by the Judicial Magistrate 1st Class, Court No.2, Rohru, were legally formidable and necessitated no interference. The learned Revisionist Court has discarded the tenable material on record portraying the proven fact of their being necessity of enhancement of maintenance allowance in favour of the petitioners herein. By excluding the said material the learned Additional Sessions Judge-1, Shimla has committed a grave illegality and impropriety. His order needs to be interfered with. Hence, the petition is allowed and the impugned order is set aside.

****

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

M/s Winsome Textile Industries Ltd. ...Petitioner.
Versus
State of Himachal Pradesh & others. ...Respondents.

CWP No.314 of 2014-B
Judgment reserved on: 25.03.2015
Date of Decision : April 8, 2015

Constitution of India, 1950- Article 226- State of H.P. decided to provide exemption of 5% on the electricity duty for all the new industrial unit coming up in the State of H.P.- petitioner established a large scale unit- petitioner claimed that an amount of Rs. 39 lacs was wrongly demanded as electricity duty- held, that State is bound by promise made by it- notification entitled all new industrial unit for exemption of 5%- rates were also clarified in the notification- petitioner had made large investment on the basis of incentives provided to it- there is no lapse on the part of the petitioner in either adhering to or complying with any of the Policies or statutory rules/regulations - Government sought increase in industrial development in the State – therefore, full effect must be given to the same- petition allowed and respondent directed to refund the amount @ 5% per annum. (Para- 3 to 48)

Cases referred:

Pratima Chowdhury Versus Kalpana Mukheerjee and another, (2014) 4 SCC 196

Collector of Bombay Versus Municipal Corporation of the City of Bombay and others, A.I.R. (38) 1951 SC 469

The Union of India and others Versus M/s Angelo Afghan Agencies etc., AIR 1968 SC 718

Century Spinning and Manufacturing Company Limited and another Versus The Ulhasnagar Municipal Council and another, (1970) 1 SCC 582

M/s Motilal Padampat Sugar Mills Co. Ltd. Versus State of Uttar Pradesh and others, (1979) 2 SCC 409

Central London Property Trust India Limited Versus High Trees House Limited, (1956) 1 All ER 256: 1947 KB 130

Combe Versus Combe, (1951) 2 KB 215: (1951) 1 All ER 767

Pournami Oil Mills and others Versus State of Kerala and another, 1986(Supp.) SCC 728

Kasinka Trading and another Versus Union of India and another, (1995) 1 SCC 274

Dr. Ashok Kumar Maheshwari Versus State of U.P. and another, (1998) 2 SCC 502

Sharma Transport represented by D.P. Sharma Versus Government of A.P. and others, (2002) 2 SCC 188

Pawan Alloys and Casting (P) Ltd. Versus U.P. SEB (1997) 7 SCC 251 and STO Versus Shree Durga Oil Mills, (1998) 1 SCC 572

Punjab Communications Ltd. Versus Union of India, (1999) 4 SCC 727

Bannari Amman Sugars Ltd. Versus Commercial Tax Officer and others, (2005) 1 SCC 625

Mahabir Vegetable Oils (P) Ltd. and another Versus State of Haryana and others, (2006) 3 SCC 620

Sadan Petrochemical Industries Co. Ltd. Versus Electricity Inspector and ETIO and others, (2007) 5 SCC 447

MRF Ltd. Versus Asstt. CST, (2006) 8 SCC 702

Pawan Alloys and Casting Private Ltd., Meerut Versus U.P. State Electricity Board and others, (1997) 7 SCC 251
A.P. Steel Re-Rolling Mills Ltd. Versus State of Kerala and others, (2007) 2 SCC 725
Transmission Corporation of Andhra Pradesh Ltd. and another Versus Sai Renewable Power Pvt. Ltd. and others, (2011) 11 SCC 34
Arunachal Pradesh Versus Nezone Law House Assam, (2008) 5 SCC 609
Cauveri Coffee Traders, Mangalore Versus Hornor Resources (International) Co. Ltd., (2011) 10 SCC 420;
State of Haryana and others Versus Mahabir Vegetable Oils Pvt. Ltd., 2011(3) SCC 778
LML Ltd. Versus State of Uttar Pradesh and others, (2008) 3 SCC 128
Express Newspapers Pvt. Ltd. and others Versus Union of India and others, (1986) 1 SCC 133)
U.P. Power Corporation Ltd. and another Versus Sant Steels and Alloys (P) Ltd. and others, (2008) 2 SCC 777
Pepsico India Holdings Pvt. Ltd. Versus State of Kerala and others, (2009) 13 SCC 55
Collector, District Gwalior and another Versus Cine Exhibitors Private Limited and another, (2012) 4 SCC 441
Monnet Ispat and Energy Ltd. Versus Union of India and others, (2012) 1 SCC 1
Commissioner of Income Tax (Central) – I, New Delhi Versus Vatika Township Pvt. Ltd., (2015) 1 SCC 1
Commissioner of Central Excise, Surat –I Versus Favourite Industries, (2012) 7 SCC 153
Vadilal Chemicals Ltd. v. State of A.P. and Others, (2005) 6 SCC 292

For the Petitioners	:	Mr. R.L. Sood, Sr. Advocate with M/s Arjun Lall and Sanjeev Kumar, Advocates, for the petitioner.
For the Respondent	:	Mr. Ashok Chaudhary and Mr. V.S. Chauhan, Additional Advocate Generals, and Mr. J.S. Guleria, Asstt. AG., for respondent No.1. Mr. Satyen Vaidya, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Sanjay Karol, J.

The points which arise for consideration in the present petition are: (i) (a) as to whether petitioner is entitled to the incentives of reduction in the rates of excess duty only in terms of vide notification dated 27.07.2012 (Annexure PB); (b) as to whether notifications dated 17.08.2012 and 04.03.2014 (Annexures PC and PC-1 respectively) are applicable only to large industrial units established prior to 01.04.2012; (ii) if not, then as to whether respondents, on facts and in law are estopped from charging the excisable duty in excess of notifications Annexures PC and PC-1; and (iii) as to whether petitioner is entitled to interest on the excess amounts so deposited under protest.

2. Answer to the same would lie in application of two fundamental principles of law: (a) doctrine of promissory estoppel and (b) interpretation of fiscal statute and subordinate legislation.

3. The Government of Himachal Pradesh, took a conscious decision of providing certain incentives to all new industrial units to be established in the State of Himachal Pradesh. As such, by virtue of and in exercise of its statutory powers under the Himachal Pradesh Electricity (Duty) Act, 2009 (hereinafter referred to as the Act), the

Government of Himachal Pradesh, issued notification dated 27.07.2012 (Annexure PB), which reads as under:-

"GOVERNMENT OF HIMACHAL PRADESH

DEPARTMENT OF MPP AND POWER

File No.MPP-F(10)-17/2012 Dated 27th July, 2012

NOTIFICATION

In exercise of the powers conferred by Section 11(1) of the Himachal Pradesh Electricity (Duty) Act, 2009 the Governor, Himachal Pradesh is pleased to give an exemption of 5% on the electricity duty for a period of 5 years to all new Industrial Units coming up in the State of Himachal Pradesh with effect from 01-04-2012. With this exemption the rates of electricity duty chargeable from the new Industrial units set up with effect from 01-04-2012 for 5 years will be as under:-

Sr.No.	Category	Rates of Electricity Duty for Industrial Consumers	Rates of Electricity Duty chargeable from new Industrial units setup w.e.f. 01-04-2012
1.	Small Industrial consumers.	9%	4%
2.	Medium Industrial consumers	15%	10%
3.	**Large Industrial consumers (above 100 KW) connected load)**	**20%**	**15%**

By order
Sd/-
(Deepak Sanan)
Addl.Chief Secretary (MPP & Power) to the
Government of Himachal Pradesh"
[emphasis supplied]

4. Subsequently Government issued another notification dated 17.08.2012 (Annexure PC) which reads as under:-

"GOVERNMENT OF HIMACHAL PRADESH

DEPARTMENT OF MPP AND POWER

File No.MPP-F(10)-17/2012 Dated 17th August, 2012

NOTIFICATION

In exercise of the powers conferred by Section 11 of the Himachal Pradesh Electricity (Duty) Act, 2009, the Governor, Himachal Pradesh in public interest, is pleased to reduce the rate of Electricity Duty in respect of Large Industrial Consumers

(above 100KW connected load) as levied under Section 2(c) of the Himachal Pradesh Electricity (Duty) Amendment Act, 2010 from 20% to 17% with immediate effect.

By order
Sd/-
(Deepak Sanan)
Addl.Chief Secretary (MPP & Power) to the
Government of Himachal Pradesh"
[emphasis supplied]

5. Yet vide another notification dated 04.03.2014 (Annexure PC-1), reproduced hereinbelow, Government reduced the rate of electricity duty, chargeable w.e.f. 01.04.2014:-

"MP AND POWER DEPARTMENT

NOTIFICATION

Shimla-2, the 4th March, 2014

No. MPP-F(10)-17/2012.—In exercise of the powers conferred by Section 11(1) of the Himachal Pradesh Electricity (Duty) Act, 2009, as amended from time to time and in partial modification of earlier notifications issued in this regard, the Governor, Himachal Pradesh, is pleased to order reduction in Electricity Duty in respect of industrial units in the State of Himachal Pradesh with effect from 1st April, 2014 in the following manner"-

Sr.No.	Category	Existing Rate of Electricity Duty for Industrial Consumers	Revised Rate of Electricity Duty chargeable w.e.f. 1-4-2014 for Industrial Consumers except Cement Industries.
1.	Extra High Tension (EHT) category consumers (Large Industrial consumers) (above 33 KV connected load).	17%	15%
2.	**Large Industrial Consumers above 100 KW connect load)**	**17%**	**13%**
3.	Medium Industrial Consumers except EHT	15%	13%
4.	New Medium and Large Industrial Unit consumers except EHT	13%	5% for 5 years
5.	Existing Small Industry consumers	9%	7% for 5 years
6.	New Small Industry	9%	2% for 5 years
7.	New Industry including EHT category which employ more than 300 Himachalis	As above	2% for 5 years.

By order
Sd/-
S.K.B.S., Negi,
Principal Secretary (Power).”
[emphasis supplied]

6. Duty on consumption of supply of energy, is chargeable under Section 3 of the Act. As per the amended provisions of the Act (w.e.f. 06.09.2010), the prescribed rate of duty for large industrial consumer (above 100 KW connected load) is 20%. By virtue of Section 4, first charge on such electricity duty is that of the State Government. Failure to pay the same entails penal consequences, as provided under Sections 7 and 10. Also all dues are recoverable as arrears of land revenue under Section 8. State Government, by virtue of provisions of Section 11, by issuing notification in the Official Gazette, has power to exempt any consumer from the payment of whole or part of the electricity duty for such period and upon such terms as may be specified in the notification.

7. Section 11 reads as under:-

> “11. Power to exempt from payment of electricity duty.- (1) The State Government may, in public interest, by notification in the Official Gazette, exempt any licensee, consumer or person from the payment of the whole or part of the electricity duty for such period and subject to such conditions as may be specified in such notification.
>
> (2) The State Government may, by notification, revise the rates of electricity duty not exceeding 50% at any one time, of the rates specified under section 3.” [emphasis supplied]

8. Petitioner is in the business of manufacturing of yarns etc. It is not in dispute that pursuant to the aforesaid notifications (Annexures PB and PC), petitioner herein established its large scale unit (Unit No.II) on 19.04.2013. That petitioner is a large industrial consumer, having more than 100 KW connectivity load, is also not in dispute.

9. Despite the aforesaid notifications, H.P. State Electricity Board (respondent No.2 herein) raised bills for the electricity, so consumed by the petitioner, also levying duty @ 15%. Undisputedly, petitioner has not only paid the electricity charges but also under protest, deposited the amount towards the duty. Petitioner contends that excess amount of Rs.39,00,000/- (rupees thirty nine lacs – approximately) stands deposited towards the component of duty.

10. It is not in dispute that respondent No.2 has raised bills, interpreting the aforesaid notifications, in the manner in which respondent No.1 wants it to be construed.

11. Respondent No.1 pleads that notifications dated 27.07.2012 and 17.08.2012 (Annexures PB & PC respectively) have *“distinct and different intent and applicability, as is evident from bare reading of them*”. Whereas, notification dated 27.07.2012 (Annexure PB) is applicable to *“new industrial units coming up in the State w.e.f. 01.04.2012*”, notification dated 17.08.2012 (Annexure PC) *“allows reduction in electricity duty to Large Industrial Consumer which were established prior to 01.04.2012.”* In effect, notifications (Annexures PC and PC-1), which according to the respondents are unambiguously clear, are applicable only to such of those large industrial units, which were established prior to 01.04.2012.

12. Acting upon notification dated 27.07.2012 (Annexure PB), after 01.04.2012, by making huge investments, petitioner has made operational a new industrial unit, in the State of Himachal Pradesh.

Principles of Promissory Estoppel

13. The question as to what is promissory estoppel is no longer res integra. Since the year 1951, Courts have enunciated and reiterated the principles with regard to the same. Recently Hon'ble the Supreme Court of India in *Pratima Chowdhury Versus Kalpana Mukheerjee and another,* (2014) 4 SCC 196, speaking through Hon'ble Mr. Justice J.K. Khehar, J., has held that:-

> "35. ....
>
> It needs to be understood, that the rule of estoppel is a doctrine based on fairness. It postulates, the exclusion of, the truth of the matter. All, for the sake of fairness. A perusal of the above provision reveals four salient pre conditions before invoking the rule of estoppel.
>
> (i) Firstly, one party should make a factual representation to the other party.
>
> (ii) Secondly, the other party should accept and rely upon the aforesaid factual representation.
>
> (iii) Thirdly, having relied on the aforesaid factual representation, the second party should alter his position.
>
> (iv) Fourthly, the instant altering of position, should be such, that it would be iniquitous to require him to revert back to the original position.
>
> Therefore, the doctrine of estoppel would apply only when, based on a representation by the first party, the second party alters his position, in such manner, that it would be unfair to restore the initial position."

14. That State is bound by its promise so meted out to a third party is a well known accepted principle. The Constitution Bench of Supreme Court of India in *Collector of Bombay Versus Municipal Corporation of the City of Bombay and others*, A.I.R. (38) 1951 SC 469, had an occasion to deal with a case where Government of Bombay, vide resolution dated 19.12.1865 had approved the site and made a grant in favour of the Municipality for setting up the famous "Crawford market". The condition of the grant being no charge of rent. However Collector of Bombay raised demands of rent in terms of statutory provisions which came up for consideration before the Court. Despite dissent of one Hon'ble Judge (Justice Pitanjali Shastri, J) the most illustrious decision of holding the Government, on the doctrine of equity and fair play, to be bound by its promise, so made out to a third party, still holds the field. Hon'ble Justice Chandra Sekhara Aiyar, J, who though concurred with the majority, vide his separate opinion observed as under:-

> "Can the Government be now allowed to go back on the representation, and, if we do so, would it not amount to our countenancing the perpetration of what can be compendiously described as legal fraud which a Court of equity must prevent being committed? If the resolution can be read as meaning that the grant was of rent free land, the case would come strictly within the doctrine of estoppel enunciated in S. 115, Evidence Act. But even

> otherwise, that is, if there was merely the holding out of a promise that no rent will be charged in the future, the Government must be deemed in the circumstances of this case to have bound themselves to fulfil it. Whether it is the equity recognized in *Ramsden's case,*[(1866) L.R.1 H.L.129] or it is some other form of equity, is not of much importance. Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power. As pointed out by Jenkins C.J. in *Dadoba Janardhan's case,* 25 Bom. 714, a different conclusion would be "opposed to what is reasonable, to what is probable, and to what is fair".

Action of the Government in collecting revenue, despite rent free grant so made to the Municipality was held to be illegal.

15. Refusal on the part of the authority to grant incentives to an assessee who acted upon the representations, so made in the Export Promotion Scheme was not found to be legal by the three Judges' Bench of Hon'ble Supreme Court of India in *The Union of India and others Versus M/s Angelo Afghan Agencies etc.,* AIR 1968 SC 718, wherein they observed as under:-

> "23. Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen. We agree with the High Court that the impugned order passed by the Textile Commissioner and confirmed by the Central Government imposing cut in the import entitlement by the respondents should be set aside and quashed and that the Textile Commissioner and the Joint Chief Controller of Imports and Exports be directed to issue to the respondents import certificates for the total amount equal to 100 per cent of the f. o. b value of the goods exported by them unless there is some decision which falls within Clause 10 of the Scheme in question." [emphasis supplied]

16. In *Century Spinning and Manufacturing Company Limited and another Versus The Ulhasnagar Municipal Council and another,* (1970) 1 SCC 582, Justice J.C. Shah, J. speaking for the Bench observed as under:-

> "10. There is undoubtedly a clear distinction between a representation of an existing fact and a representation that something will be done in future. The former may, if it amounts to a representation as to some fact alleged at the time to be actually in existence, raise an estoppel, if another person alters his position relying upon that representation. A representation that something will be done in the future may result in a contract, if another person to whom it is addressed acts upon it. A representation that something will be done in future is not a representation that it is true when made. But between a representation of a fact which is untrue and a representation express or implied - to do something in future, there is no clear antithesis. A representation that something will be done in future may involve an existing intention to act in future in the manner represented. If the representation is acted upon by another person it may, unless the statute governing the person making the representation provides otherwise, result in an agreement enforceable at law; if the statute requires that the

agreement shall be in a certain form, no contract may result from the representation and acting therefor but the law is not powerless to raise in appropriate cases an equity against him to compel performance of the obligation arising out of his representation.

11. Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. The obligation arising against an individual out of his representation amounting to a promise may be enforced ex contractu by a person who acts upon the promise: when the law requires that a contract enforceable at law against a public body shall be in certain form or be executed in the manner prescribed by statute, the obligation if the contract be not in that form may be enforced against it in appropriate cases in equity. In Union of India v. M/s. Indo-Afghan Agencies Ltd., (1968) 2 SCR 366 this Court held that the Government is not exempt from the equity arising out of the acts done by citizens to their prejudice, relying upon the representations as to its future conduct made by the Government. This Court held that the following observations made by Denning, J., in Robertson v. Minister of Pensions, (1949) 1 KB 227 applied in India.

> "The Crown cannot escape by saying that estoppels do not bind the Crown for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity, that is, the doctrine that the Crown cannot bind itself so as to better its future executive action".

We are in this case not concerned to deal with the question whether Denning, L. J., was right in extending the rule to a different class of cases as in Falmouth Boat Construction Co. Ltd., v. Howell, (1950) 1 All ER 538, where he observed at page 542:

> "Whenever Government officers in their dealings with a subject take on themselves to assume authority in a matter with which the subject is concerned, he is entitled to rely on their having the authority which they assume. He does not know, and cannot be expected to know, the limits of their authority, and he ought not to suffer, if they exceed it".

It may be sufficient to observe that in appeal from that judgment Howell v.Falmouth Boat Construction Co. Ltd, (1950) 1 All ER 538 Lord Simonds observed after referring to the observations of Denning, L J.:

> "The illegality of an act is the same whether the action has been misled by an assumption of authority on the part of a government officer however high or low in the hierarchy."* * *
>
> The question is whether the character of an act done in force of a statutory prohibition is affected by the fact that it had been induced by a misleading assumption of authority. In my opinion the answer is clearly: No".

12. If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public

> body is in our judgment, not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice." [emphasis supplied]

17. In *M/s Motilal Padampat Sugar Mills Co. Ltd. Versus State of Uttar Pradesh and others,* (1979) 2 SCC 409, the Supreme Court of India had an occasion to consider the development of such law in England and America. Relying upon various pronouncements, including so rendered in *Central London Property Trust India Limited Versus High Trees House Limited,* (1956) 1 All ER 256: 1947 KB 130 and *Combe Versus Combe,* (1951) 2 KB 215: (1951) 1 All ER 767, the Court jurisprudentially advanced the principle of promissory estoppel in India, holding that it would not be enough for the Government to just say that public interest so requires, hence be not compelled to carry out the promise. It further held that Government cannot be allowed to unilaterally repudiate the liability. Disclosure of circumstances, seeking exemption from such liability is must. Mere claim of change of Policy, *ipso facto*, would not be sufficient to exonerate the Government from its liability. If it makes a promise and the promissory acts, in relation thereupon and alters its position, like any other private individual, Government can be compelled to make good the promise. The Court further held that law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the Courts and the legislature must, therefore, be to close the gap between the law and morality and bring about as near an approximation between the two as possible. The Court specially repelled the defence of executive necessity. It further held that Government would not be relieved of its obligation to honour the promise, so made, upon being established that the citizen had altered its position. The position stands reiterated not only in *Pournami Oil Mills and others Versus State of Kerala and another,* 1986(Supp.) SCC 728 but other decisions so rendered till date.

18. It is also a settled position of law that where promise is contrary to law, rule of promissory estoppel cannot be invoked for enforcement of such promise. It is also settled that while invoking the doctrine of promissory estoppel it is not necessary for the promissory to show that he suffered actual detriment. [See: *M/s Motilal Padampat Sugar Mills Co. Ltd. Versus State of Uttar Pradesh and others,* (1979) 2 SCC 409; *Kasinka Trading and another Versus Union of India and another,* (1995) 1 SCC 274; *Dr. Ashok Kumar Maheshwari Versus State of U.P. and another,* (1998) 2 SCC 502; and *Sharma Transport represented by D.P. Sharma Versus Government of A.P. and others,* (2002) 2 SCC 188]

19. Legitimate expectation and promissory estoppel are two expressions having totally different connotations. It is also a settled principle of law that Government can, in the absence of manifest public interest, rescind from the promise, provided that no one is put in adversial position which cannot be rectified. [See: *Pawan Alloys and Casting (P) Ltd. Versus U.P. SEB* (1997) 7 SCC 251 and *STO Versus Shree Durga Oil Mills,* (1998) 1 SCC 572]

20. While dealing with the principle of legitimate expectation, reiterating its earlier view taken in *Punjab Communications Ltd. Versus Union of India,* (1999) 4 SCC 727, the apex Court in *Bannari Amman Sugars Ltd. Versus Commercial Tax Officer and others,* (2005) 1 SCC 625, held that:-

> "14 ..... the change in policy can defeat a substantive legitimate expectation if it can be justified on "Wednesbury reasonableness". The decision-maker has the choice in the balancing of the pros and cons relevant to the change in policy. It is, therefore, clear that the choice of policy is for the decision-maker and not the court. The legitimate substantive expectation merely permits the court to find out if the change of

policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made. A claim based on merely legitimate expectation without anything more cannot ipso facto give a right. Its uniqueness lies in the fact that it covers the entire span of time; present, past and future. How significant is the statement that today is tomorrow's yesterday. The present is as we experience it, the past is a present memory and future is a present expectation. For legal purposes, expectation is not same as anticipation. Legitimacy of an expectation can be inferred only if it is founded on the sanction of law."

[emphasis supplied]

22. In *State of Punjab Versus Nestle India Ltd. and another,* (2004) 6 SCC 465, the Court had an occasion to deal with a case where the Chief Minister, in a public rally, made an announcement abolishing purchase tax on milk products. Pursuant thereto memo was also issued by the Financial Commissioner. In the absence of any formal notification the Court held such promise to be binding and effective.

21. In *Mahabir Vegetable Oils (P) Ltd. and another Versus State of Haryana and others,* (2006) 3 SCC 620, Court reiterated the principle of the doctrine of promissory estoppel operating in the legislative field. The Court further observed that:-

"41. We may at this stage consider the effect of omission of said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule making power is a species of delegated legislation. A delegatee therefore can make rules only within the four corners thereof."

22. In *Sadan Petrochemical Industries Co. Ltd. Versus Electricity Inspector and ETIO and others,* (2007) 5 SCC 447, relying upon its earlier decisions in *MRF Ltd. Versus Asstt. CST,* (2006) 8 SCC 702 and *Kasinka Trading Versus Union of India,* (1995) 1 SCC 274, the Court held that :-

"….for instance, in a case where the right to exemption to tax for a fixed period accrues and the conditions for that exemption have also been fulfilled, the withdrawal of that exemption cannot affect the already accrued right".

23. The apex Court in *Pawan Alloys and Casting Private Ltd., Meerut Versus U.P. State Electricity Board and others,* (1997) 7 SCC 251, had an occasion to deal with a case where in order to promote industrial growth, incentive of 10% rebate on consumption of electricity charges, for a period of three years, was sought to be provided. Acting on statutory notifications various entrepreneurs established their units. However, arbitrarily and prematurely such incentives were withdrawn, which action came up for consideration before the Court. The Court observed that:-

"31. In the light of this settled legal position we, therefore, hold that even though the appellants have succeeded in convincing us that the earlier three notifications dated 29th October, 1982, 13th July, 1984 and 28th January, 1985 did contain a clear promise and representation by the Board to the prospective new industrialists that once they established their industries in the region within the territorial limits of the operation of the Board, they would be assured 10% rebate on the total bills regarding consumption of

> electricity by their industries for a period of three years from the initial supply of electric power to their concerns, the appellants will not be able to enforce the equity by way of promissory estoppel against the Board if it is shown by the Board that public interest required it to withdraw this incentive rebate even prior to the expiry of three years as available to the appellants concerned. It has also to be held that even if such withdrawal of development rebate prior to three years is not based on any overriding public interest, if it is shown that by such premature withdrawal the appellants-promisees would be restored to status quo ante and would be placed in the same position in which they were prior to the grant of such rebate by earlier notifications the appellants would not be entitled to succeed. We, therefore, now proceed to examine these twin aspects of the controversy".

Applying the ratio of law, to the factual matrix, the Court further held that:-

> "35. Under these circumstances when no public interest was sought to be pressed in service by the Board for withdrawal of this incentive rebate, as seen earlier, the equity which had arisen in favour of the appellants remained untouched and undisturbed by any overwhelming and superior equity in favour of the Board entitling it to withdraw this development rebate in a premature manner leaving these promises high and dry before the requisite period of three years earlier guaranteed to them by way of development rebate had got exhausted. This takes us to the consideration of the second aspect of the matter.
>
> 36. As observed by this Court in Shrijee Sales Corporation [(1997) 3 SCC 398)] , even where there is no such overriding public interest it might still be open to the promisor-State or its delegate to resile from the promise on giving reasonable notice which need not be a formal notice giving the promisee a reasonable opportunity of resuming his position, provided it is possible for the promisee to restore the status quo ante. Even on this aspect the respondent-Board has no case. It has not given any reasonable opportunity to the appellants to resume their earlier position. Nor is it shown by the Board that it is possible for the appellant-promisees to restore the status quo ante. The reason is obvious. Once the new industries were lured into establishing their factories in the region catered to by the Board on being assured three years guaranteed incentive of development rebate of 10% on their total bills of electricity charges and acting on the same once they had established their industries and spent large amounts for constructing the infrastructure and for employing necessary labour and for purchasing raw materials etc., it would be almost impossible for them to restore the status quo ante and to walk out midstream if the development rebate incentive was withdrawn for the unexpired period out of the three years' guaranteed period of currency of development rebate incentive. In fairness even it was not suggested by learned Senior Counsel for the respondents that on such withdrawal of development rebate the appellants would be able to restore the status quo ante and walk out. He simply relied upon the ratio of the decision of this Court in the case of Shrijee Sales Corporation [(1997) 3 SCC 398)]for contending that it is the power of the Board to grant the rebate and it is equally the power of the Board to withdraw the same in its own discretion".

[emphasis supplied]

Eventually action of the Board in prematurely withdrawing incentive development rebate so made available to the industries was quashed.

24. At this juncture, it be also observed that the said decision stands reiterated in *A.P. Steel Re-Rolling Mills Ltd. Versus State of Kerala and others,* (2007) 2 SCC 725 and on factual aspect, distinguished in *Transmission Corporation of Andhra Pradesh Ltd. and another Versus Sai Renewable Power Pvt. Ltd. and others,* (2011) 11 SCC 34, where the Court was dealing with an entrepreneur who had not fulfilled, within the prescribed time, requirements entitling him for such incentives and also contrary to the promises, parties had altered their position, by subsequently binding themselves with contractual agreements. *State of Arunachal Pradesh Versus Nezone Law House Assam,* (2008) 5 SCC 609; *Cauveri Coffee Traders, Mangalore Versus Hornor Resources (International) Co. Ltd.,* (2011) 10 SCC 420; and *State of Haryana and others Versus Mahabir Vegetable Oils Pvt. Ltd.,* 2011(3) SCC 778 also deal with similar fact situation.

25. In *LML Ltd. Versus State of Uttar Pradesh and others,* (2008) 3 SCC 128, relying upon its earlier decision in *Express Newspapers Pvt. Ltd. and others Versus Union of India and others,* (1986) 1 SCC 133), Court observed that:-

> "44. There can, however, be no doubt that ordinarily the doctrine of promissory estoppel would not be applied against statute. Sub-section 6 of Section 24 of 1999 Act inter alia empower the holder of a licence, to modify the tariff. If the implementation of tariff was dependent upon fulfillment of certain conditions precedent which in turn would be dependent upon the capacity of the producer of electrical energy to fulfil the same, in our opinion, no impropriety was caused by the Power Corporation to ask for the said option. The fact, that such an option had indeed been called for and pursuant thereto the consumers had altered their position is not in dispute. While dealing with a question as to whether an action on the part of the State to make a representation is contrary to a statute or not, in our opinion, a distinction should be borne in mind between an act which goes clearly contrary to the mandatory provisions thereof and a case where irregularities have been committed". [emphasis supplied]

26. In *U.P. Power Corporation Ltd. and another Versus Sant Steels and Alloys (P) Ltd. and others,* (2008) 2 SCC 777, Court had the occasion to deal with a case where such of those entrepreneurs who had set up new industrial units were made entitled to 33.33% hill development rebate on the electricity bill, for a period of five years. By way of subsequent notification it was reduced to 17%. Holding such action to be illegal, the Court held that:-

> "32. No person can be permitted to misuse the concession or benefit and invoke promissory estoppel. Promissory estoppel is not one sided affair, it is rather two sided affair. If one party abuses the concession then it is always open to the other party to revoke such concession but if one party avails the benefit and is acting on the same representation made by the other party then the other party who has granted the said benefit cannot revoke the same under the garb of public interest. Therefore the grounds that the revocation notification was issued in public interest and that same has the flavour of the statute, cannot persuade us to uphold it. sustained."
>
> ....

> "35. In this 21st century, when there is global economy, the question of faith is very important. Government offers certain benefits to attract the entrepreneurs and the entrepreneurs act on those beneficial offers. Thereafter, the Government withdraws those benefits. This will seriously affect the credibility of the Government and would show the shortsightedness of the governance. Therefore, in order to keep the faith of the people, the Government or its instrumentality should abide by their commitments. In this context, the action taken by the appellant-Corporation in revoking the benefits given to the entrepreneurs in the hill areas will sadly reflect their credibility and people will not take the word of the Government. That will shake the faith of the people in the governance. Therefore, in order to keep the faith and maintain good governance it is necessary that whatever representation is made by the Government or its instrumentality which induces the other party to act, the Government should not be permitted to withdraw from that. This is a matter of faith".
>
> [emphasis supplied]

27. This principles stand reiterated in *Pepsico India Holdings Pvt. Ltd. Versus State of Kerala and others,* (2009) 13 SCC 55.

28. Again in *Collector, District Gwalior and another Versus Cine Exhibitors Private Limited and another,* (2012) 4 SCC 441, the Court reiterated the principle that there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or the public authority be debarred by promissory estoppel from enforcing a statutory prohibition. Also promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make.

29. In *Monnet Ispat and Energy Ltd. Versus Union of India and others,* (2012) 1 SCC 1, the Court culled out the following principles for invoking the doctrine of promissory estoppel:-

> 1. Where one party has by his words or conduct made to the other clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is, in fact, so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not.
>
> 2. The doctrine of promissory estoppel may be applied against the Government where the interest of justice, morality and common fairness dictate such a course. The doctrine is applicable against the State even in its governmental, public or sovereign capacity where it is necessary to prevent fraud or manifest injustice. However, the Government or even a private party under the doctrine of promissory estoppel cannot be asked to do an act prohibited in law. The nature and function which the Government discharges is not very relevant. The Government is subject to the rule of promissory estoppel and if the essential ingredients of this doctrine are

satisfied, the Government can be compelled to carry out the promise made by it.

3. The doctrine of promissory estoppel is not limited in its application only to defence but it can also furnish a cause of action. In other words, the doctrine of promissory estoppel can by itself be the basis of action.

4. For invocation of the doctrine of promissory estoppel, it is necessary for the promisee to show that by acting on promise made by the other party, he altered his position. The alteration of position by the promisee is a sine qua non for the applicability of the doctrine. However, it is not necessary for him to prove any damage, detriment or prejudice because of alteration of such promise.

5. In no case, the doctrine of promissory estoppel can be pressed into aid to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. No promise can be enforced which is statutorily prohibited or is against public policy.

6. It is necessary for invocation of the doctrine of promissory estoppel that a clear, sound and positive foundation is laid in the petition. Bald assertions, averments or allegations without any supporting material are not sufficient to press into aid the doctrine of promissory estoppel.

7. The doctrine of promissory estoppel cannot be invoked in abstract. When it is sought to be invoked, the Court must consider all aspects including the result sought to be achieved and the public good at large. The fundamental principle of equity must forever be present to the mind of the court. Absence of it must not hold the Government or the public authority to its promise, assurance or representation.

Principles of Interpretation of Fiscal Legislation

30. It is a settled principle of law that notification of exemption is to be given literal meaning and interpreted as such. Recourse to the principles of interpretation of Statutes should be resorted to only in the event of any anomaly or absurdity. Such notification must be construed having regard to the purpose and object it seeks to achieve.

31. That tax laws and fiscal legislations need to be interpreted strictly and ambiguity, if any, must be resolved against imposition of tax, stands settled by the Constitution Bench of Supreme Court of India in *Commissioner of Income Tax (Central) – I, New Delhi Versus Vatika Township Pvt. Ltd.,* (2015) 1 SCC 1. The relevant extract of the opinion so authored by Hon'ble Mr. Justice A.K. Sikri, J., is as under:-

"41. We would like to embark on a discussion on some basic and fundamental concepts, which would shed further light on the subject matter:

41.1 No doubt, there is no scope for accepting the Libertarian theory which postulates among others, no taxation by the State as it amounts to violation of individual liberty and advocates minimal interference by the State. The Libertarianism propounded by the Australian-born economist philosopher Friedrich A. Hayek and American economist Milton Friedman

stands emphatically rejected by all civilised and democratically governed States, in favour of a strongly conceptualised "welfare state". To attain a welfare state is our constitutional goal as well, enshrined as one of its basic feature, which runs through our Constitution. It is for this reason, specific provisions are made in the Constitution, empowering the legislature to make laws for levy of taxes, including the income-tax. The rationale behind collection of taxes is that revenue generated therefrom shall be spent by the governments on various developmental and welfare schemes, among others.

41.2 At the same time, it is also mandated that there cannot be imposition of any tax without the authority of law. Such a law has to be unambiguous and should prescribe the liability to pay taxes in clear terms. If the provision concerned of the taxing statute is ambiguous and vague and is susceptible to two interpretations, the interpretation which favours the subjects, as against there the revenue, has to be preferred. This is a well established principle of statutory interpretation, to help finding out as to whether particular category of assessee is to pay a particular tax or not. No doubt, with the application of this principle, the Courts make endeavour to find out the intention of the legislature. At the same time, this very principle is based on "fairness" doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be levied to a particular class of persons or not, the subject should not be fastened with any liability to pay tax. This principle also acts as a balancing factor between the two jurisprudential theories of justice --- Libertarian theory on the one hand and Kantian theory along with Egalitarian theory propounded by John Rawls on the other hand.

41.3 Tax laws are clearly in derogation of personal rights and property interests and are, therefore, subject to strict construction, and any ambiguity must be resolved against imposition of the tax. In Billings v. United States, 232 US 261 (1914) the Supreme Court clearly acknowledged this basic and long- standing rule of statutory construction:

> "Tax Statutes . . . should be strictly construed, and, if any ambiguity be found to exist, it must be resolved in favor of the citizen.
>
> Eidman v. Martinez, 184 US 578 (1902); United States v. Wigglesworth, 2 Story, 369 (1842); and Mutual Benefit Life Ins. Co. v. Herold, 198 Fed 199 (1912), affirmed in Herold v. Mutual Benefit Life Insurance Co. 201 Fed 918; Parkview Bldg. and Loan Assn. v. Herold, 203 Fed 876; and Mutual Trust Co. v. Miller, 177 N.Y. 51."

41.4 Again, in United States v. Merriam, 263 US 179 the Supreme Court clearly stated at pp. 187-88:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. Gould v. Gould, 245 U.S. 151 (1917)."

41.5 As Lord Cairns said many years ago in Partington v. Attorney-General,1869 LR 4 HL 100:

> ".....as I understand the principle of all fiscal legislation it is this : If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.”" [emphasis supplied]

32. In *Commissioner of Central Excise, Surat –I Versus Favourite Industries,* (2012) 7 SCC 153, the apex Court held that:-

> “35. The notification requires to be interpreted in the light of the words employed by it and not on any other basis. There cannot be any addition or subtraction from the notification for the reason the exemption notification requires to be strictly construed by the Courts. The wordings of the exemption notification have to be given its natural meaning, when the wordings are simple, clear and unambiguous.
>
> 36. In Commissioner of Customs v. Rupa & Co. Ltd., (2004) 6 SCC 408, this Court has observed that the exemption notification has to be given strict interpretation by giving effect to the clear and unambiguous wordings used in the notification. This Court has held thus:
>
> > "7. ..... However, if the interpretation given by the Board and the Ministry is clearly erroneous then this Court cannot endorse that view. An exemption notification has to be construed strictly but that does not mean that the object and purpose of the notification is to be lost sight of and the wording used therein ignored. Where the wording of the: notification is clear and unambiguous, it has to be given effect to. Exemption cannot be denied by giving a construction not justified by the wording of the notification. "
> >
> > [Emphasis supplied]
>
> ....
>
> 41. In Commissioner of Customs (Preventive), Gujarat v. Reliance Petroleum Limited, (2008) 7 SCC 220, this Court has held:
>
> > "30. We are not oblivious of the proposition of law that an exemption notification should be construed directly but it is also well settled that interpretation of an exemption notification would depend upon the nature and extent thereof. The terminologies used in the notification would have an important role to play. Where the exemption notification ex facie applies, there is no reason as to why the purport thereof would be limited by giving a strict construction thereto.
> >
> > 31. The comparison made by the learned Solicitor General that mobility of a person would depend upon his personal fitness and not when he is placed on a wheelchair, in our opinion, is not apposite. The purpose of grant of exemption is different. The object for grant of notification shall be considered in a broad based manner. The wordings used therein have to be given their natural meaning. The

> purpose must be allowed to be achieved, The words "all types of materials" should be construed widely."[Emphasis supplied]
>
> 42. Moreover, a liberal construction requires to be given to a beneficial notification. This Court in Commissioner of Customs (Preventive), Mumbai v. M. Ambalal and Company, (2011) 2 SCC 74, (in which one of us was the party) has observed that the beneficial notification providing the levy of duty at a concessional rate should be given a liberal interpretation:
>
> > "16. It is settled law that the notification has to be read as a whole. If any of the conditions laid down in the notification is not fulfilled, the party is not entitled to the benefit of that notification. The rule regarding exemptions is that exemptions should generally be strictly interpreted but beneficial exemptions having their purpose as encouragement or promotion of certain activities should be liberally interpreted. This composite rule is not stated in any particular judgment in so many words. In fact, majority of judgments emphasise that exemptions are to be strictly interpreted while some of them insist that exemptions in fiscal statutes are to be liberally A interpreted giving an apparent impression that they are contradictory to each other. But this is only apparent. A close scrutiny will reveal that there is no real contradiction amongst the judgments at all. The synthesis of the views is quite clearly that the general rule is strict interpretation while special rule in the case of beneficial and promotional exemption is liberal interpretation. The two go very well with each other because they relate to two different sets of circumstances."
>
> 43. In Commissioner of Sales Tax v. Industrial Coal Enterprises, (1999) 2 SCC 607, this Court has observed thus:
>
> > "11. In CIT v. Straw Board Mfg. Co. Ltd. , 1989 Supp(2) SCC 523, this Court held that in taxing statutes, provision for concessional rate of tax should be liberally construed. So also in Bajaj Tempo Ltd. v. CIT, (1992) 3 SCC 78, it was held that provision granting incentive for promoting economic growth and development in taxing statutes should be liberally construed and restriction placed on it by way of exception should be construed in a reasonable and purposive manner so as to advance the objective of the provision."

33. An exemption notification should be given a literal meaning. Recourse to other principles or canons of interpretation of statute should be resorted to only in the event when it gives rise to anomaly or absurdity. The exemption notification must be construed having regard to the purpose and object it seeks to achieve. [Vadilal Chemicals Ltd. v. State of A.P. and Others, (2005) 6 SCC 292].

34. Applying the aforesaid principles to the given fact situation, we are not inclined to uphold the action of the respondents.

35. Language of Section 11 of the Act is clear. All exemptions are regulated by the Act and have to be only in terms of the notifications issued by the State.

36. In our considered view, notification dated 27.07.2012 (Annexure PB), so issued in public interest, is in two parts. (i) It entitles all new industrial units

established/coming up after 01.04.2012 for an exemption of 5% on the electricity duty for a period of 5 years. (ii) It clarifies the rates at which the assessees are required to pay the duty.

37. Notification dated 17.08.2012 (Annexure PC) only reduces the rate of electricity duty for industrial consumers, form 20% to 17%. Noticeably this notification only deals with the category of consumers to which the petitioner belongs, i.e. large industrial consumers having connected load of more than 100 KW. Hence necessarily applies to the petitioner.

38. Notification dated 04.03.2014 (Annexure PC-1) deals with all categories of consumers, including the category to which petitioner belongs, qua whom there is further reduction of duty from 17% to 13% w.e.f. 1.4.2014. Crucially this notification is in partial modification and not in supersession of all earlier notification(s).

39. Subsequent notifications only deal with the rate at which the duty is to be levied on the consumers. It certainly does not withdraw the exemption so provided in terms of earlier notification dated 27.07.2012 (Annexure PB). Language of the notifications is unambiguously clear. Also their applicability is nowhere confined to large scale units established in the State of Himachal Pradesh prior to 01.04.2012. To the contrary, it states that reduction in electricity duty is "in respect of all Industrial Units". Conjoint reading of these notifications, leaves no scope of any other interpretation. Language is clear, simple and understandable. The only irresistible conclusion being that petitioner shall be levied duty, on the rates so prescribed in the notifications, upon which he would be entitled to rebate @ 5%, being the component, falling under the exemption clause.

40. Insofar as petitioner is concerned, Annexures PC and PC-1 only reduces the duty levied on the electricity charges. In fact with respect to other category of consumers, so mentioned at Sr. No. 4 to 7, incentives are provided for a fixed term.

41. Applying the principles of Interpretation of Fiscal Legislation there can be no other interpretation.

42. Acceptance of the stand, so taken by the State would not only result into arbitrariness but also lead to invidious indiscrimination qua the petitioner. Benefit to be conferred only upon the likes of petitioner would not only be withdrawn but also conferred upon ineligible persons. The stand of the State cannot be accepted, more so, in the absence of any material to even *prima facie* show that notifications (Annexures PC and PC-1) were meant to be applied only to units established prior to 01.04.2012. Intent is to reduce the rate of duty from 20% to 13% qua all units established either prior or subsequent to 01.04.2012. But however, insofar as, rebate/incentive/exemption is concerned, neither it stands withdrawn nor has it been made applicable to old units.

43. It is not the pleaded case of the respondent that incentives, so granted in terms of notification (Annexure PB) stand withdrawn. Also there is no material placed on record to such effect. Notifications (Annexures PC and PC-1) do not supersede or make earlier notification redundant. Already accrued right of the petitioner cannot be prematurely and unilaterally withdrawn without any public interest and that too in utter disregard of principles of natural justice. It is violative of not only Article 14 but also Articles 19 and 21 of the Constitution of India. Any other construction would lead to absurdity, more so, in the absence of any material on record.

44. Acting on the representations of the State, providing incentives to new industrial units, petitioner made large investments and after establishing its unit, made it

fully functional and operational, within a time bound period. There is no lapse on the part of the petitioner in either adhering to or complying with any of the Policies or statutory rules/regulations. Any other interpretation would not only render the notification (Annexure PB) to be otiose but, in fact, do violence to the Industrial Policy, intended to encourage investment and augment industrial growth within the State.

45. Incentives specially conferred on new units with the avowed object of industrial growth cannot be withdrawn in the manner in which the respondent wants the Court to believe and agree with. Acceptance of submission of the respondent would lead to an odious position, rendering the Industrial Policy to be nugatory. The Government sought for increase in industrial development in the State. Such a benevolent act on the part of the State, unless there exists any statutory interdict, should be given full effect. There is nothing on record to show that old industrial units were required to be given a fillip. Also there is no change in the policy.

46. Principles laid down in *Collector of Bombay* (supra) and *M/s Motilal Padampat* (supra) are squarely applicable in the instant case. In fact, petitioner's case is squarely covered by the fact situation and law laid down in *Pawan Alloys* (supra); *Sant Steels* (supra); *Vatika Township* (supra); and *Favourite Industries* (supra).

47. The transaction in question being commercial in nature, we see no reason as to why petitioner be not awarded interest, more so, when respondents did not effectively deal with the grievance so made by the petitioner.

48. Thus, in our considered view, stand taken by the respondents cannot be said to be equitable, just, fair and legal. Points raised are answered accordingly. Consequently, writ petition is allowed holding the petitioner entitled to the following reliefs:-

(a) Petitioner is entitled to rebate @ 5% on the rates of electricity duty so prescribed by the respondent from time to time, more particularly in terms of notifications dated 27.07.2012, 17.08.2012 and 04.03.2014, Annexures PB, PC and PC-1, respectively;

(b) The amount of duty paid in excess by the petitioner shall be adjusted towards all future demands;

(c) Petitioner shall be entitled to interest @ 12% per annum (simple), on all such amounts, which shall also be adjusted towards future demands.

(d) Parties to reconcile the accounts within four weeks.

In the given facts and circumstances, no order as to costs.

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

****

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

Pawanbala wife of Prem Chand ....Petitioner

Versus

State of H.P. ....Non-petitioner

Cr.MP(M) No. 306 of 2015
Order Reserved on 2nd April, 2015
Date of Order 8th April, 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Section 498-A read with Section 306-A of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- petitioner being a female is entitled to special treatment- she has a minor children and parents- hence, it would be expedient to release her on anticipatory bail.

(Para- 7)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179

The State Vs. Captain Jagjit Singh AIR 1962 SC 253

Sanjay Chandra vs. Central Bureau of Investigation 2012 Cri. L.J. 702 Apex Court DB 702

For the Petitioner: Mr. Ajay Sharma, Advocate

For the Non-petitioner: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 32 of 2015 dated 24.3.2015 registered under Sections 498-A and 306 IPC at P.S. Gagret District Una (H.P.)

2. It is pleaded that petitioner has been falsely implicated in present case. It is further pleaded that petitioner will not influence the prosecution witnesses and will not tamper with prosecution evidence. It is pleaded that petitioner has two minor children, parents and family to support. It is pleaded that any condition imposed by the Court will be binding on the petitioner. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. As per police report, FIR No. 32 of 2015 dated 24.3.2015 registered under Sections 498-A and 306 of Indian Penal Code in Police Station Gagret District Una (H.P.) against the petitioner. There is recital in police report that on dated 23.3.2015 at about 8.40 PM I.O. received information that one woman with consumption of poison was admitted in FRU Gagret. There is further recital in police report that police officials went to FRU Gagret where deceased was brought dead. There is further recital in police report that statement of Anu Devi was recorded under Section 154 Cr.P.C. There is recital in police report that deceased Rekha Devi was married in the year 2009 at Amb District Una (H.P.). There is recital in police report that deceased Rekha Devi has one son namely Jagdeep Kumar and one daughter Taniya. There is further recital in police report that deceased Rekha was in strained relations with her husband Pardeep Kumar. There is also recital in police report that Pardeep Kumar used to beat Rekha Devi generally and also used to demand dowry. There is further recital in police report that there was physical and mental torture to deceased Rekha Devi in her matrimonial home. There is recital in police report that on dated 10.2.2015 deceased Rekha met Smt. Anu Devi and told her that deceased was very aggrieved. There is recital in police report that deceased also told that her husband Pardeep Kumar and her elder brother-in-law Prem and elder sister-in-law Pawna have harassed the deceased and have beaten the deceased when the deceased was alive. There is recital in police report that accused persons have also told the deceased to bring money and deceased also used to inform Smt. Anu Devi complainant that her

husband Pardeep Kumar, her elder brother-in-law and her elder sister-in-law Pawna used to beat the deceased. There is recital in police report that deceased Rekha Devi was pregnant. There is recital in police report that quarrel took place between co-accused Pardeep Kumar, co-accused Prem and co-accused Pawna and thereafter deceased had consumed poison. There is further recital in police report that after registration of case and during investigation post mortem of deceased was conducted and site plan was prepared. There is also recital in police report that statements of prosecution witnesses were recorded by way of videography. There is further recital in police report that co-accused Pardeep Kumar was arrested on dated 24.3.2015 and other co-accused namely Pawna and Prem have concealed themselves. There is recital in police report that since 27.3.2015 co-accused Pardeep Kumar is in judicial custody. There is further recital in police report that other co-accused namely Pawna and Prem Chand have not joined the investigation and recovery of bed sheet is still to be effected. There is also recital in police report that if petitioner is released on bail then petitioner would threat the prosecution witnesses. Prayer for rejection of anticipatory bail application sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the State and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether the anticipatory bail application filed under Section 438 Cr.P.C. by female petitioner is liable to be accepted in view of special provision of bail for women?
2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that petitioner is a female and she has special right to be released on bail on conditions imposed by Court is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period. Court is of the opinion that there is special provision to a female even in heinous criminal offence punishable with death or imprisonment for life. In view of the fact that petitioner has two minor children and parents to support Court is of the opinion that it is expedient in the ends of justice to release the petitioner on anticipatory bail as per special provision of bail relating to women. It is held that if petitioner is released on bail then interest of State and general public will not be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to petitioner and condition will be imposed in the bail order to the effect that petitioner will not induce and threat the prosecution witnesses. Court is of the opinion that if petitioner will flout the terms and conditions of bail order then non-petitioner will be at liberty to file application for cancellation of bail strictly in accordance with law. In view of above stated facts point No.1 is answered in affirmative.

Point No.2

Final Order

9. In view of my findings on point No.1 bail application filed by female petitioner under Section 438 Cr.P.C. is allowed and in the event of arrest female petitioner is ordered to be released on bail subject to furnishing personal bond to the tune of Rs. 1 lac with two sureties in the like amount to the satisfaction of Investigating Officer on following terms and conditions. (i) That the petitioner will join the investigation of case as and when required by Investigating Agency in accordance with law. (ii) That petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the petitioner will not leave India without the prior permission of the Court. (iv) That petitioner will give her residential address in written manner to the Investigating Officer and Court. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of.

****

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

Piare Lal son of Shri Hari Ram .....Appellant.

Vs.

State of Himachal Pradesh ...Respondent.

Cr. Appeal No. 4005 of 2013.
Judgment reserved on: 19th March, 2015
Date of Decision: April 08, 2015

N.D.P.S. Act, 1985- Sections 20 and 29- Accused 'P' and accused 'Y' were walking together- they started walking briskly on seeing the police- they were apprehended and their search was conducted during which 600 grams of charas was found from the possession of accused 'P' – testimonies of prosecution witnesses were reliable- they corroborated each other on material particulars- documents prepared by the police also corroborated the testimonies of eye-witnesses- mere non-association of independent witnesses, was not sufficient to doubt the prosecution case as it was not a case of prior information but was a case of chance recovery- minor contradictions in the testimonies of the witnesses are not sufficient to discard them as the witnesses were deposing after the lapse of more than three years from the date of recovery and the contradictions are bound to come with the passage of time- held, that in these circumstances, prosecution version is duly proved and accused 'P' was rightly convicted by the Trial Court. (Para-11 to 23)

Cases referred:
Jose vs. State of Kerala AIR 1973 SCC 944 (Full Bench)
Bhee Ram vs. State of Haryana AIR 1980 SC 957
Rai singh vs. State of Haryana AIR 1971 SC 2505
State of Haryana vs. Ranbir @ Rana, AIR 2006 SC 1796
Bharatbhai Bhagwanjibhai vs. State of Gujarat AIR 2003 SC 07
Lallu Manjhi and another vs. State of Jharkhand AIR 2003 SC 854
State of U.P. vs. Kishanpal and others JT 2008(8) SC 650

For the appellants: Mr.Chaman Negi, 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 Special Judge Bilaspur in Sessions Trial No. 3/3 of 2009 titled State of H.P. Vs. Piare Lal and another decided on 26.12.2012.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by the prosecution are that on dated 15.11.2008 PW12 ASI Lekh Ram along with ASI Krishan Chand, HC Hem Raj, LHC Pradeep Singh vide rapat Ext.PW3/A were on patrolling and detection work in Government vehicle No. HP-24-A-1114 driven by Pradeep Kumar. It is alleged by prosecution that when PW12 ASI Lekh Ram along with other officials were approaching near Goeli at about 5.30 PM accused persons were walking on foot towards Bharathu and when both accused persons saw the police officials both accused persons started walking in fast manner. It is alleged by prosecution that on suspicion police party stopped their vehicle and accused persons were apprehended by PW12 ASI Lekh Ram with the help of other police officials. It is alleged by prosecution that in the meantime PW2 Chandu Ram also reached at the spot and he was associated in investigation of case. It is alleged by prosecution that no other independent witness was available due to lonely place. It is alleged by prosecution that accused disclosed their names as Piare Lal and other co-accused disclosed his name as Yogesh Kumar. It is further alleged by prosecution that PW12 ASI Lekh Ram told the accused persons orally as well as in writing vide memo Ext.PW1/A that he had suspicion that both accused were possessing some narcotic contraband. It is alleged by prosecution that PW12 ASI Lekh Ram also informed the accused persons that they have legal right to be searched in presence of Magistrate or gazetted officer and memo Ext.PW1/A was prepared. It is alleged by prosecution that thereafter PW12 ASI Lekh Ram gave his personal search to accused persons vide memo Ext.PW1/F. It is alleged by prosecution that thereafter on personal search of accused two polythene packets Ext.P2 and Ext.P3 were recovered from front pockets of pant of co-accused Piare Lal in which black coloured substance was kept in the shape of sticks. It is alleged by prosecution that on opening the polythene packets charas in the shape of sticks was recovered and on weighing it was found 600 grams. It is also alleged by prosecution that two samples of 25 grams each obtained and sealed in parcel with three seals of seal 'D' and bulk of charas was also sealed in parcel with three seals of seal 'D'. It is alleged by prosecution that sample seal Ext.PW1/B was separately took on separate piece of cloth and NCB form Ext.PW10/E was prepared in triplicate and seal after use was handed over to PW2 Chandu Ram and memo Ext.PW1/C was prepared. It is alleged by prosecution

that PW12 ASI Lekh Ram prepared ruka Ext.PW12/A and sent it through LHC Pradeep Kumar to P.S. on the basis of which FIR Ext.PW10/F was registered. It is also alleged by prosecution that PW12 ASI Lekh Ram prepared site plan Ext.PW12/B and recorded statements of witnesses. It is also alleged by prosecution that thereafter PW12 ASI Lekh Ram produced accused persons along with three parcels Ext.P5 to Ext.P7, NCB forms in triplicate and sample seal to PW10 SHO/Inspector Taranjeet Singh who resealed all sealed parcels along with seal 'C' and filled relevant columns of NCB form and thereafter case property along with NCB form and sample seal were deposited with MHC Suresh Kumar who entered the same in malkhana register. It is alleged by prosecution that thereafter on dated 16.11.2008 PW6 Suresh Kumar handed over the case property to PW7 HC Neelam Kumar and handed over one sample parcel along with NCB forms and sample seal to PW8 HHC Jai Ram on dated 17.11.2008 vide RC No. 205/08 with direction to deposit the same in FSL Junga. It is alleged by prosecution that chemical analyst report was obtained and as per chemical analyst report entire mass was sample of charas. It is alleged by prosecution that thereafter on dated 17.11.2008 special report Ext.PW11/A was prepared and same was handed over to HHC Brij Lal with direction to further hand over the same to S.P. Bilaspur.

3. Learned Special Judge framed the charge against both the accused under Section 20 read with Section 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (Hereinafter referred to as the 'Act') on dated 29.3.2011. Both accused did not plead guilty and claimed trial.

4. The prosecution and accused examined following witnesses in support of their case:-

Sr.No.	Name of Witness
PW1	SI Krishan Chand
PW2	Chandu Ram
PW3	C. Rajesh Kumar
PW4	LHC Pardeep Singh
PW5	Dila Ram
PW6	HC Suresh Kumar
PW7	HC Neelam Kumar
PW8	HC Jai Chand
PW9	HHC Brij Lal
PW10	Taranjit Singh
PW11	SI Kishori Lal
PW12	Lekh Ram
DW1	Chavinder Kumar

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

Sr.No.	*Description:*
Ex.PW1/A.	*Search memo of co-accused Piare Lal.*
Ex.PW1/B.	*Sample of seal.*
Ex.PW1/C.	*Memo of recovered charas*
Ext.PW1/D.	*Arrest memo*
Ex.PW1/E	*Arrest memo.*

Ex.PW1/F	*Memo regarding personal search of accused*
Ext.PW3/A	*Copy of rapat No. 27-A*
Ex.PW6/A	*Attested copy of Malkhana register*
Ex.PW7/A.	*Attested copy of RC*
Ex.PW9/A.	*Copy of special report.*
Ex.PW10/A	*Sample of seal*
Ext.PW10/B	*Memo of re-seal*
Ext.PW10/C	*Receipt of deposit of articles*
Ext.PW10/D	*Receipt of Chemical Examiner report*
Ext.PW10/E	*NCB form*
Ext.PW10/F	*Copy of FIR No. 264/2008*
Ext.PW11/A	*Special report*
Ext.PW11/B	*Extract of register*
Ext.PW12/A	*Ruka*
Ext.PW12/B	*Site plan*
Ext.PW12/C	*Statement of Chandu Ram*
Ext.PW12/D	*Copy of report No. 38(A)*
Ext.PW12/E	*Copy of report of No. 39(A)*

5. Learned trial Court on dated 26.12.2012 convicted co-accused Piare Lal under Section 20 of the 'Act' and acquitted co-accused Yogesh Kumar. Learned trial Court sentenced the appellant to undergo rigorous imprisonment for two years and to pay fine of Rs. 20,000/- (Rupees twenty thousand only). Learned trial Court further directed that in default of payment of fine the convicted shall further undergo simple imprisonment for two months.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court appellant filed present appeal under Section 374 of the Code of Criminal Procedure.

7. Court heard learned Advocate appearing on behalf of the appellant and learned Additional Advocate General appearing on behalf of the State and also perused the entire record carefully.

8. Question that arises for determination before the Court in this appeal is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice to the appellant.

9. <u>ORAL EVIDENCE ADDUCED BY PROSECUTION & ACCUSED:</u>

9.1. PW1 Sub Inspector Krishan Chand has stated that he remained posted as ASI/IO in P.S. Barmana during the year 2008 to February 2009 and on dated 15.11.2008 he along with ASI Lekh Ram I.O. P.S. Barmana, HC Raj Kumar, LHC Pardeep Singh No. 369, along with departmental vehicle bearing registration No. HP-24A-1114 driven by driver Pardeep Kumar were on patrolling at Ghagas. He has stated that at about 5.30 PM when they reached Goeli on Kuddi Bharathu road two persons present in Court were walking on foot towards Bharathu and when they saw the police officials they started walking fast. He has stated that ASI Lekh Ram asked the driver to stop the vehicle and he with help of Raj Kumar apprehended one person and he with help of C. Pardeep also apprehended the other

person. He has stated that in the meanwhile one person Chandu Ram son of Dalel Singh reached at the spot and he was associated as a witness. He has stated that no other independent witness was present because of lonely place. He has stated that thereafter ASI Lekh Ram inquired the names of accused persons and accused persons disclosed their names as Piare Lal and Yogesh. He has stated that thereafter ASI Lekh Ram told the accused persons that there was suspicion of some contraband in possession of accused persons. He has stated that thereafter accused persons were informed about their legal right to be searched before the Magistrate or gazetted officer. He has stated that thereafter both accused persons opted to be searched by police party and consent memo Ext.PW1/A was prepared which was signed by accused persons and witness. He has stated that thereafter ASI Lekh Ram gave his personal search to accused persons but nothing was recovered from him. He has stated that thereafter ASI Lekh Ram searched accused Piare Lal and during search two polythene packets were recovered from front pockets of his pant. He has stated that both packets were found containing charas in the shape of sticks. He has further stated that thereafter ASI Lekh Ram conducted personal search of Yogesh Kumar and nothing was found from his possession. He has stated that thereafter recovered charas was weighed by ASI Lekh Ram with the help of weight and scale and same was found 600 grams. He has stated that thereafter two samples of 25 grams each were obtained and thereafter samples were wrapped in cloth parcel and sealed with three seals of seal 'D' and thereafter bulk charas was put into same two packets and wrapped in a cloth parcel and sealed with three seals of seal 'D'. He has stated that NCB form in triplicate was prepared and sample of seal was obtained on piece of cloth Ext.PW1/B. He has stated that memo Ext.PW1/C was also prepared. He has stated that grounds of arrests were informed to accused persons and memo was prepared. He has stated that thereafter ruka was sent through C.Pardeep Kumar to police station for registration of case. He has stated that sample of parcel and bulk parcel produced in Court are same which bear his signatures and signatures of accused persons and other witnesses. He has denied suggestion that independent witness Chandu Ram came after half an hour. He has denied suggestion that consent memo Ext.PW1/A was not explained and not handed over to accused persons. He has denied suggestion that signatures of accused were obtained on blank papers. He has denied suggestion that statements of Chandu Ram and Hem Raj were recorded in police station. He has denied suggestion that there was no provision of light at the spot and all proceedings were conducted in police station.

9.2 PW2 Chandu Ram has stated that he is running a vegetable shop at Ghagas. He has stated that on dated 15.11.2008 at about 5.30 PM after closing his shop he was going to his house on foot and when he reached near Goeli accused persons were present and police officials were also present. He has stated that he was associated by police and further stated that accused disclosed their names as Piare Lal and Yogesh Kumar. He has stated that on search of co-accused Piare Lal two polythene packets of envelope were recovered from front pockets of his pant. He has stated that in pockets charas in the shape of sticks was recovered. He has stated that recovered charas was found 600 grams. He has stated that thereafter two samples of 25 grams each were separated. He has stated that thereafter bulk of charas and sample of charas were sealed in separate parcels. He has also stated that thereafter memo Ext.PW1/C was prepared which was signed by him and other witnesses and accused persons and arrest memos Ext.PW1/D and Ext.PW1/E were also prepared which were signed by him and other witnesses. He has stated that bulk charas Ext.P1, polythene envelopes Ext.P2 and Ext.P3 are the same which were sealed in parcel Ext.P5. He has stated that parcels also bear his signatures. He has stated that he does not remember whether police has given any option to accused persons or not. Thereafter he has stated that police has given the option to accused persons whether they intended to be searched before gazetted officer or Magistrate. He has stated that thereafter accused persons

have given their consent to be searched by police officials as per memo Ext.PW1/A which was signed by accused and by him and police officials. He has stated that ASI Lekh Ram has also given his personal search but nothing incriminating was found. He has denied suggestion that seal 'D' was handed over to him after use. He has stated that police took out the packets from the pockets of co-accused Piare Lal. He has denied suggestion that memos were not read over and explained to him before obtaining his signatures. He has denied suggestion that there was dark at that time and there was no provision of light. Self stated that police has torch and vehicle light. He has denied suggestion that memos were not read over and explained to accused persons. He has denied suggestion that there were residential houses near the place of recovery of charas. He has stated that weight and scales were with police. He has denied suggestion that memos were not read over and explained to both accused persons in his presence.

9.3 PW3 C. Rajesh Kumar has stated that he worked on CIPA computer and on dated 15.11.2008 ASI Lekh Ram and other police officials left the police station at 4.05 PM regarding which rapat No. 27A was recorded which is Ext.PW3/A and same is true attested copy taken from computer.

9.4 PW4 LHC Pardeep Singh has stated that during the year 2008 he was posted in police station Barmana as LHC and on dated 15.11.2008 he along with ASI Lekh Ram, ASI Krishan Chand, HC Hem Raj were on patrolling in government vehicle which was driven by Pardeep Kumar. He has stated that when they reached at link road at Goeli at about 5.30 PM two persons present in Court were going on the road and they tried to run fast when they saw the police jeep. He has stated that on suspicion they stopped the vehicle and apprehended the accused persons. He has stated that in the meantime witness Chandu Ram also reached at the spot. He has stated that accused disclosed their names as Piare Lal and Yogesh Kumar and ASI Lekh Ram told the accused that he suspected that some contraband was possessed by them and thereafter option was given to them whether they intended to be searched before gazetted officer or before the Magistrate. He has stated that accused opted to be searched before police officials. He has further stated that ASI Lekh Ram had given his personal search to accused and memo was prepared. He has stated that thereafter search of accused persons was conducted and two polythene packets wrapped in polythene envelope recovered from pockets of Piare Lal. He has stated that nothing was recovered from possession of Yogesh Kumar. He has stated that after weighing the recovered charas was found to be 600 grams out of which two samples of 25 grams each were separated and sealed in parcels after putting them in polythene envelope. He has stated that remaining bulk of charas was also sealed in parcel. He has stated that thereafter parcels were sealed with seal 'D' and NCB forms in triplicate were filled up and thereafter ASI Lekh Ram prepared ruka and handed over to him which was brought to police station for registration of case. He has stated that after registration of case he handed over the file to ASI Lekh Ram. He has stated that charas Ext.P1 and polythene envelopes Ext.P2 and Ext.P3 are the same which were recovered from accused. He has denied suggestion that when witness Chandu Ram reached the spot search of accused persons was already conducted. He has stated that ruka was handed over to him at 7.15 PM and he took the lift in a private vehicle to take ruka to police station.

9.5 PW5 Dila Ram has stated that he has four sons and further stated that two sons are residing with him whereas two sons are residing separately in another house. He has stated that in his residential house there are eight rooms and out of these rooms one room and kitchen has been given by him to Piare Lal accused present in Court who is son-in-law of his brother Devu Ram. He has stated that accused is residing since 7/8 years along with his wife Kamla Devi. He has stated that accused Piare Lal has no issue and

accused Piare Lal sometimes used to lock the room and sometimes used to keep the room open. He has stated that he does not know about business of accused. He has stated that sometimes accused used to work in hotel and sometimes accused used to work in restaurant as servant.

9.6 PW6 HC Suresh Kumar has stated that since September 2007 to May 2009 he remained posted as MHC P.S. Barmana and on dated 15.11.2008 SHO Taranjit Singh handed over three parcels i.e. one parcel containing 550 grams of charas and two samples parcels containing 25 grams each of charas. He has stated that three parcels were sealed with three seals of 'D' and three seals of 'C' each, NCB forms in triplicate, samples seals and he entered the same in malkhana register. He has stated that attested copy of malkhana register is Ext.PW6/A. He has stated that on dated 17.11.2008 he had to attend the court of Sessions Judge Chandigarh for evidence therefore on dated 16.11.2008 he handed over all case property to HC Neelam Kumar. He has stated that case property remained intact during his custody. He has stated that parcels Ext.P5, Ext.P6 and Ext.P7 are same which were deposited with him and he handed over the same to HC Neelam Kumar along with sample seal and NCB form. He has stated that he does not remember the time when he handed over the case property to HC Neelam Kumar. He has stated that he does not remember when he took the charge of malkhana again.

9.7 PW7 HC Neelam Kumar has stated that since September 2007 to the year 2009 he remained posted as I.O. in P.S. Barmana and on dated 16.11.2008 MHC Suresh Kumar handed over the charge of malkhana to him as he had to go out of station for evidence. He has stated that on that day MHC Suresh Kumar handed over the case property to him of case FIR No. 264/08 containing three parcels duly sealed with seals D and C, NCB forms in triplicate and sample seals. He has stated that on dated 17.11.2008 he handed over one sample parcel of case property along with NCB forms in triplicate and sample seals, copy of FIR, copy of memo vide RC No. 205/08 to HHC Jai Ram for depositing the same in FSL Junga who after depositing the same he handed over the receipt to him. He has stated that attested copy of malkhana register is Ext.PW6/A and attested copy of RC is Ext.PW7/A. He has stated that parcels Ext.P5, Ext.P6 and Ext.P7 are same. He has stated that case property remained intact during his custody. He has stated that he does not remember the time when the charge of malkhana was given to him. He has stated that charge of all case property was given to him.

9.8 PW8 HC Jai Ram has stated that during the year 2008 he remained posted as HHC on general duty in P.S. Barmana and on dated 17.11.2008 MHC Neelam Kumar P.S. Barmana handed over one parcel containing 25 grams charas which was having three seals of seal 'D' and three seals of seal 'C', NCB forms in triplicate, sample seals and other documents vide RC No. 205/08 for depositing the same in FSL Junga which he deposited on dated 18.11.2008 in FSL Junga and obtained receipt on RC. He has stated that thereafter he handed over the receipt to MHC and further stated that sample parcels remained intact during his custody. He has denied suggestion that he has not deposited the articles in the office of FSL Junga.

9.9 PW9 HHC Brij Lal has stated that he is posted in P.S. Barmana for the last five years and on dated 17.11.2008 SHO/Inspector Taranjit handed over to him the special report of case FIR No. 264/08 which he handed over to ASI Kishori Lal Reader to S.P. Bilaspur at 2.15 PM on the same day. He has stated that photocopy of special report is Ext.PW9/A. He has stated that SHO Taranjit handed over the special report at 1PM.

9.10 PW10 Taranjit has stated that since December 2007 to February 2009 he remained posted as Inspector/SHO P.S. Barmana and on dated 15.11.2008 at 9.30 PM ASI

Lekh Ram produced one parcel sealed with three seals of seal 'D' containing 550 grams of charas and two other parcels sealed with three seals of seal 'D' each containing 25 grams charas each, NCB forms in triplicate which were filled upto column No. 8. He has stated that he resealed all three parcels with his own seal 'C' by affixing three seals impressions on each parcel and also filled up column No. 9 to 11 of NCB form. He has stated that sample seal Ext.PW10/A was separately took on piece of cloth and all case property along with NCB forms in triplicate and sample seals were deposited with MHC Suresh Kumar in proper condition. He has stated that he prepared resealed memo Ext.PW10/B. He has stated that he prepared special report and sent the same through HHC Brij Lal to S.P. Bilaspur with photocopy of special report is Ext.PW9/A and further stated that on receipt of chemical examiner report Ext.PW10/D and on completion of investigation he prepared challan and presented it in Court. He has stated that NCB form Ext.PW10/B also bears his signatures. He has stated that parcels Ext.P5 to Ext.P7 are same which were resealed by him. He has stated that he does not remember the date when report of FSL was received in police station. He has stated that after resealing he kept the seal with him. He has denied suggestion that false case has been planted against accused persons.

9.11 PW11 SI Kishori Lal has stated that during the year 2008 he was posted as Reader to S.P. Bilaspur and on dated 17.11.2008 HHC Brij Lal brought special report to office which he received at 2.15 PM which he entered in special report register at Sr. No. 12 and put up before S.P. Kuldeep Sharma at 2.20 PM who had seen the report and signed the same and thereafter handed over to him. He has stated that special report is Ext.PW11/A. he has stated that extract of register is Ext.PW11/B which is true as per original record. He has stated that S.P. handed over the special report back to him after writing the word 'seen' and after signing it.

9.12 PW12 SI Lekh Ram has stated that since August 2007 to September 2009 he remained posted as ASI/IO in P.S. Barmana and on dated 15.11.2008 he along with ASI Krishan Chand, HC Hem Raj, LHC Pardeep Singh were on patrolling and detection work in government vehicle No. HP-24A-1114. He has stated that when they reached near Goeli accused persons present in Court were walking on foot and were moving towards Bharatu. He has stated that when accused persons saw the vehicle they started walking in fast manner and on suspicion they stopped the vehicle and both accused were apprehended. He has stated that in the meanwhile Chandu Ram was also associated. He has stated that accused persons have disclosed their names as Piare Lal and Yogesh Kumar. He has stated that accused persons were told that police officials have suspicion upon them relating to possession of contraband. He has stated that option was given to accused persons whether they intended to be searched before the Magistrate or gazetted officer vide memo Ext.PW1/A. He has stated that thereafter police officials have given their personal search and nothing incriminating was found from possession of police officials. He has stated that thereafter accused persons were searched. He has further stated that two polythene packets were recovered from front pockets of pant of co-accused Piare Lal. He has stated that on search of co-accused Yogesh Kumar no contraband was found from his possession. He has stated that charas in the shape of sticks wrapped in polythene found. He has stated that charas was weighed with the help of scales which were in his kit after mixing both the packets. He has stated that bulk of charas was found 600 grams. He has stated that out of mixed substance two samples of 25 grams each were separated which were put in polythene separately and sealed in two parcels with three seals of seal 'D'. He has stated that parcels of charas and parcels of samples were separately prepared and NCB form in triplicate was filled up at the spot. He has stated that sample seal was also obtained on piece of cloth and seal after use was handed over to witness Chandu Ram. He has stated that he prepared ruka Ext.PW12/A and sent the same through LHC Pardeep Kumar for registration of case. He has stated that

he also prepared site plan Ext.PW12/B and further stated that marginal notes are in his hand and bears his signatures. He has stated that he also recorded statements of witnesses as per their versions. He has stated that rapat No. 38/A was also recorded and rapat No. 39/A was also recorded. He has stated that after completion the investigation he handed over the file to SHO Taranjit after receipt of chemical analyst report Ext.PW10/D. He has stated that bulk charas is Ext.P1 and polythene packets Ext.P2 and Ext.P3 are the same which were recovered from accused Piare Lal. He has stated that parcels Ext.P6 and Ext.P7 were prepared as samples at the spot. He has stated that one of samples was sent for chemical examination. He has denied suggestion that independent witness Chandu Ram reached at the spot after half an hour of apprehending the accused. He has stated that when accused was apprehended at that time Sun was set but it was not too dark. He has denied suggestion that he did not ask anything from accused persons. He has denied suggestion that contents of memo were not explained to accused persons and witness Chandu Ram. He has denied suggestion that during search and seizure proceedings some persons were passing through the way. He has denied suggestion that statements of witnesses were not recorded at the spot. He has denied suggestion that he has recorded the statement of witnesses according to his own versions. He has denied suggestion that he got the signatures of accused persons and witness Chandu Ram on blank papers. He has denied suggestion that he had not given any option to accused persons to be searched before the Magistrate or gazetted officer. He has denied suggestion that nothing was recovered from possession of accused.

10. Statements of accused persons were recorded under Section 313 Cr.P.C. Accused Piare Lal has stated that he is innocent and further stated that at the relevant time he was quarrelling with co-accused Yogesh Kumar at Ghagas and thereafter police took them to police station where their signatures were obtained on blank papers. He has stated that he thought that police has registered the case against him relating to quarrel with co-accused Yogesh Kumar but later on he came to know that police officials have implicated him in present case. Accused also examined defence witness.

10.1. DW1 Chavinder Kumar has stated that on dated 15.11.2008 at about 5 PM while he was returning back from Shimla he halted at Ghagas to change the bus to his village. He has stated that Ved Parkash was accompanying him and at Ghagas when they were taking tea they heard noise outside the restaurant and noticed that both accused persons namely Piare Lal and Yogesh were quarrelling with each other in front of shop of vegetables. He has stated that in the meantime police party came in vehicle Tata 207 and they took both accused persons along with vegetables vendor in vehicle and moved towards Barmana side. He has stated that vegetables vendor was Chandu Ram. He has stated that thereafter he left the spot to his native place and narrated the incident to parents of Yogesh Kumar and wife of Piare Lal. He has stated that Yogesh is residing in his village and further stated that villages are situated in the same Panchayat. He has stated that Yogesh is not related to him but he is his friend for the last 6/7 years. He has stated that he is not in visiting terms with him. He has stated that co-accused Yogesh is agriculturist and used to work at his home. He has stated that he is working as Munim in vegetables market Takoli with his brother-in-law Chandermani. He has stated that co-accused Piare Lal is known to him and he is residing in Takoli village. He has stated that he could not produce the bus tickets in order to prove that he came from Shimla on the alleged date. He has stated that he does not know that why Piare Lal and Yogesh were quarrelling with each other at Ghagas. He has denied suggestion that he did not come to Ghagas and also denied suggestion that accused persons were not quarrelling. He has denied suggestion that on dated 15.11.2008 at about 5.30 PM both accused persons were apprehended by police and he has denied suggestion that after search 600 grams charas was recovered from front pocket of Piare Lal.

He has stated that accused persons were took by police in his presence from Ghagas. He has stated that he did not intervene when both accused persons were took by police. He has stated that he did not think it proper to intervene in police work. He has denied suggestion that at the instance of accused he has concocted a false story without any basis in order to save the accused persons.

11. Submission of learned Advocate appearing on behalf of the appellant that learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and caused miscarriage of justice to appellant is rejected being devoid of any force for the reasons hereinafter mentioned. Court has perused seizure memo Ext.PW1/C placed on record. As per contents of seizure memo 600 grams charas was found from exclusive and conscious possession of accused Piare Lal on dated 15.11.2008 at 5.45 PM at place Goeli in presence of marginal witnesses namely PW1 Sub Inspector Krishan Chand and PW2 Chandu Ram. Court has carefully perused the testimony of PW1 Krishan Chand who has specifically stated that in his presence 600 grams charas was found from conscious and exclusive possession of co-accused Piare Lal. Contents of seizure memo Ext.PW1/A are proved on record in accordance with law as per testimony of PW1 Sub Inspector Krishan Chand. Hence it is held that testimony of Sub Inspector Krishan Chand is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW1 Sub Inspector Krishan Chand. There is no evidence on record in order to prove that PW1 Sub Inspector Krishan Chand has hostile animus against appellant Piare Lal prior to incident or at any point of time.

12. Court has carefully perused the testimony of marginal witness of seizure memo Ext.PW2 Chandu Ram. PW2 Chandu Ram has specifically stated in positive cogent and reliable manner that 600 grams charas was recovered from possession of co-accused Piare Lal in his presence. Testimony of PW2 Chandu Ram is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW2 Chandu Ram. There is no evidence on record in order to prove that PW2 Chandu Ram has hostile animus against appellant Piare Lal prior to recovery of contraband or at any point of time.

13. Court has also carefully perused the testimony of PW4 LHC Pardeep Singh who has stated in positive cogent and reliable manner that he was present at the time of recovery and further stated in positive manner that 600 grams charas was recovered from conscious and exclusive possession of co-accused Piare Lal in his presence. Testimony of PW4 LHC Pardeep Singh is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW4 LHC Pardeep Singh. There is no evidence on record in order to prove that PW4 LHC Pardeep Singh has hostile animus against appellant Piare Lal prior to incident or at any point of time.

14. Similarly Court has carefully perused the testimony of PW12 ASI Lekh Ram who has stated in positive cogent and reliable manner that 600 grams of charas was recovered from exclusive and conscious possession of co-accused Piare Lal. Hence it is held that testimony of PW12 ASI Lekh Ram is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW12 ASI Lekh Ram. There is no evidence on record in order to prove that PW12 ASI Lekh Ram has hostile animus against appellant Piare Lal prior to incident or at any point of time.

15. Court has carefully perused the testimony of corroborative witness PW3 C. Rajesh Kumar. It is proved on record that as per testimony of PW3 C. Rajesh Kumar rapat No. 27-A Ext.PW3/A was recorded. Court has also perused testimony of PW6 HC Suresh Kumar who has specifically stated that on dated 15.11.2008 SHO Taranjit Singh handed over to him three parcels i.e. one parcel containing 550 grams of charas and two parcels

containing 25 grams charas. He has further stated that NCB form in triplicate, sample of seal were deposited in malkhana register. He has proved the extract of malkhana register Ext.PW6/A placed on record. Hence it is held that testimony of PW6 HC Suresh Kumar is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW6 HC Suresh Kumar. Court has also perused testimony of PW7 HC Neelam Kumar. PW7 HC Neelam Kumar has specifically stated that he was officiating MHC and HC Suresh Kumar had handed over to him the case property vide FIR No. 264/08 containing three parcels duly sealed with seals 'D' and 'C' and NCB form in triplicate and sample of seal. PW7 HC Neelam Kumar has stated that on dated 17.11.2008 he handed over one sample parcel of case along with NCB forms in triplicate and sample seals, copy of FIR, copy of memo vide RC No. 205/08 to HHC Jai Ram to deposit the same in FSL Junga. He has stated in positive manner that receipt issued from office of FSL Junga was deposited with him and further stated in positive manner that testimony of PW7 HC Neelam Kumar is also trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of corroborative witness PW7 HC Neelam Kumar. Court has also perused testimony of corroborative witness PW8 HC Jai Ram who has specifically stated in positive manner that on dated 17.11.2008 MHC Neelam Kumar had handed over one parcel containing 25 grams charas having three seals of 'D' and three seals of seal 'C', NCB forms in triplicate, sample seals and other documents vide RC No. 205/08 for depositing the same in FSL Junga and he deposited the same in FSL Junga and obtained the receipt and thereafter he handed over the receipt to MHC. Testimony of PW8 HC Jai Ram is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW8 HC Jai Ram. Court has also perused the testimony of PW9 HHC Brij Lal who has stated that special report of FIR No. 264/08 was handed over by him to ASI Kishori Lal who was posted as Reader to S.P. Bilaspur on dated 17.11.2008 at 2.15 PM. Testimony of corroborative witness PW9 HHC Brij Lal is also trustworthy reliable and inspires confidence of Court and there is no reason to disbelieve the testimony of PW9 HHC Brij Lal. Court has also carefully perused the testimony of PW10 SHO Taranjit Singh who has specifically stated in positive manner that three parcels were produced before him along with NCB form in triplicate and he resealed all three parcels with his own seal 'C' and also filled up column Nos. 9 to 11 of NCB form. Testimony of PW10 SHO Taranjit relating to resealing is also trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW10 SHO Taranjit Singh. There is no evidence on record in order to prove that PW10 SHO Taranjit Singh has hostile animus against appellant at any point of time. Court has also carefully perused the testimony of another corroborative witness PW11 Kishori Lal who has stated in positive manner that in the year 2008 he was posted as Reader to S.P. Bilaspur. PW11 Kishori Lal has further stated that on dated 17.11.2008 HHC Brij Lal brought special report to the office which he received at 2.15 PM and entered in special report register at Sr. No. 12 and thereafter placed the special report before S.P. Kuldeep Sharma at 2.20 PM who had seen and signed the special report and handed over the same to him. PW11 SI Kishori Lal has produced special report Ext.PW11/A placed on record. Hence it is held that testimony of PW11 SI Kishori Lal is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW11 SI Kishori Lal. There is no evidence on record in order to prove that PW11 SI Kishori Lal has hostile animus against appellant Piare Lal prior to incident or at any point of time.

16. Court has carefully perused the documentary evidence placed on record. Consent memo Ext.PW1/A, seizure memo Ext.PW1/C, information of arrest memos Ext.PW1/D and Ext.PW1/E, personal search memo Ext.PW1/F, daily station diary Ext.PW3/A, extract of malkhana register Ext.PW6/A, road certificate Ext.PW7/A, special report under Section 57 of NDPS Act Ext.PW9/A, seal impression upon plain cloth Ext.PW10/A, resealing certificate issued under Section 55 of NDPS Act Ext.PW10/B, NCB

forms Ext.PW10/E, FIR Ext.PW10/F, extract of malkhana register Ext.PW11/B placed on record, site plan Ext.PW12/B corroborated the oral evidence produced by prosecution.

17. Court has also carefully perused the report of State Forensic Science Laboratory Junga Ext.PW10/D placed on record. Assistant Chemical Examiner, NDPS Division, State Forensic Science Laboratory Junga has specifically stated in his report Ext.PW10/D that various scientific tests such as physical, identification, chemical and chromatographic tests were carried out in Laboratory with exhibit under reference. He has further stated that tests performed above indicated cannabinols including the presence of tetrahydrocannabinol in the sample. He has further stated in his report that microscopic examination indicated the presence of cystolithic hair in the sample and charas is a resinous mass and resin is an active ingredient of charas which on testing was found present and quantity of resin as found in sample is 34.28% W/W. Assistant Chemical Examiner, NDPS Division, State Forensic Science Laboratory Junga has reported that entire mass of exhibit is a mixture of cannabis and sample of charas.

18. Submission of learned Advocate appearing on behalf of the appellant that prosecution did not associate respectable person of locality and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that present case was not a case of prior information but present case was a case of chance recovery. Even prosecution has associated independent witness PW2 Chandu Ram who has corroborated the version of prosecution story. It is held that in chance recovery association of two independent witnesses is not mandatory because search of accused was conducted on the basis of suspicion only.

19. Another submission of learned Advocate appearing on behalf of appellant that there are material contradictions in the statements of prosecution witnesses and on this ground appeal filed by appellant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the testimonies of all witnesses. There is no material contradiction in evidence adduced by prosecution which goes to the root of case. It is well settled law that minor contradictions are bound to come in criminal case when testimony of prosecution witness is recorded after a gape of sufficient time. In present case recovery of contraband was effected on dated 15.11.2008 at 5.45 PM at Goeli and statements of prosecution witnesses were recorded on dated 11.6.2012, 12.6.2012 and 13.6.2012. Hence it is held that when statement of prosecution witness is recorded after sufficient gape of time then minor contradictions are bound to come in prosecution case. Hence it is held that minor contradictions are not fatal to prosecution case.

20. Another submission of learned Advocate appearing on behalf of the appellant that link evidence is totally missing in present case and on this ground appeal filed by appellant be accepted is rejected being devoid of any force. Court has carefully perused the oral testimony of eye witness and oral testimonies of corroborative witnesses and Court has also perused the documentary evidence placed on record by prosecution. Link evidence in present case is not missing. Oral testimony of eye witness is corroborated by testimony of other corroborative witnesses and is also corroborated by documentary evidence placed on record. Hence it is held that link evidence is not missing in present case.

21. Another submission of learned Advocate appearing on behalf of the appellant that search was not conducted on the basis of search warrant or an authorization as mentioned in Section 41 of NDPS Act 1985 and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that search warrant or an authorization is required only when contraband is concealed in building, conveyance or enclosed place. In present case contraband was not concealed in

any building, conveyance or enclosed place but was kept in pocket of pant of appellant when he was moving upon public road. Hence it is held that search warrant or authorization under Section 41 of NDPS Act 1985 was not required in present case.

22. Another submission of learned Advocate appearing on behalf of appellant that Investigating Agency did not comply the provision of Section 42 of NDPS Act in present case and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that requirement of Section 42 of NDPS Act 1985 should be complied only when contraband is concealed in any building, conveyance or enclosed place. It is not the case of prosecution that contraband was concealed in any building, conveyance or enclosed place. On the contrary it is proved on record that contraband was kept by appellant in his pocket when he was moving on public road.

23. Another submission of learned Advocate appearing on behalf of appellant that even provision of Section 50 of NDPS Act was not complied is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that option was given to appellant whether he intended to be searched before gazetted officer or Magistrate and it is proved on record that appellant has given option that he should be searched before the police officials. Hence it is held that Investigating Agency had complied provision of Section 50 of NDPS Act 1985 in present case.

24. Another submission of learned Advocate appearing on behalf of appellant that police officials have no authority to conduct the search of a person and on this ground appeal be accepted is rejected being devoid of any force. As per Section 42 of NDPS Act 1985 the Central Government or State Government is legally competent to issue authorization to any office being an officer superior in rank to a peon, sepoy or constable to conduct search in NDPS Act, 1985. Hence it is held that search of appellant was conducted as per authorization given under Section 42 of NDPS Act 1985. In the present case search was conducted by ASI Lekh Ram who was legally competent to search.

25. Another submission of learned Advocate appearing on behalf of the appellant that specimen seal was not sent to laboratory and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has perused the chemical analyst report Ext.PW10/D placed on record. Assistant Chemical Examiner, NDPS Division, State Forensic Science Laboratory Junga namely C.L.Sharma has specifically stated that seal impression was sent by SHO in the form NCB-1 and he has specifically mentioned in his report that seals of parcels were tallied with seal impression sent by SHO in NCB form-1.

26. Another submission of learned Advocate appearing on behalf of appellant that scale on which alleged contraband was weighed was not produced in Court and scale was not approved by State of H.P. under Himachal Pradesh Weights and Measures (Enforcement) Act 1968 and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that PW12 ASI Lekh Ram has specifically stated that weight and scale were kept by him in his kit. There is no evidence on record in order to prove that weights and scales were not approved under H.P. Weights and Measures (Enforcement) Act 1968.

27. Another submission of learned Advocate appearing on behalf of the appellant that reports submitted by Assistant Chemical Examiner, NDPS Division, State Forensic Science Laboratory Junga Ext.PW10/D is inadmissible because laboratory which had tested the contraband is not eligible and is not fully equipped to test such contraband is also rejected being devoid of any force for the reasons hereinafter mentioned. It is held that

report of State Forensic Science Laboratory is per se admissible under Section 293 of Cr.P.C. 1973. Appellant did not file any application before learned trial Court for examination of Mr. C.L. Sharma Assistant Chemical Examiner who has submitted the report in order to prove that State Forensic Science Laboratory Junga was not legally competent to test the contraband and was not fully equipped to test the contraband.

28. Another submission of learned Advocate appearing on behalf of the appellant that two views have emerged in present case and on this ground appeal filed by appellant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. In the present case only one view has emerged and recovery of contraband is proved as per oral eye witnesses and is corroborated with link evidence and is also corroborated by documentary evidence placed on record.

29. Another submission of learned Advocate appearing on behalf of appellant that material incriminating questions have not been put to appellant when statement of appellant was recorded under Section 313 Cr.P.C. and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the statement recorded under Section 313 Cr.P.C. It is held that all incriminating questions have been put to accused when statement of accused was recorded by learned trial Court under Section 313 Cr.P.C.

30. Another submission of learned Advocate appearing on behalf of appellant that prosecution witnesses are interested witnesses and on this ground appeal filed by appellant be accepted is rejected being devoid of any force. It is well settled law that police officials are not *ipso facto* interested witnesses. There is no evidence on record in order to prove that police officials have hostile animus against appellant at any point of time.

31. Another submission of learned Advocate appearing on behalf of appellant that all recoveries and specimen signatures have been made in violation of Article 20(3) of Constitution of India and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that Narcotic Drugs and Psychotropic Substances Act 1985 is a special Act and special provisions have been made in Act relating to search and seizure proceedings. It is held that Investigating Officer had prepared the search and seizure memos strictly in accordance with Narcotic Drugs and Psychotropic Substances Act 1985. It is well settled law that when there is conflict between general and special law then special law always prevails over general law.

32. Another submission of learned Advocate appearing on behalf of appellant that substantive sentence imposed by learned trial Court is very harsh and on alternative ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that learned trial Court has awarded proper sentence keeping in view the quantity of contraband recovered from exclusive and conscious possession of appellant. It was held in case reported in ***AIR 1973 SCC 944 (Full Bench) titled Jose vs. State of Kerala*** that conviction could be based upon sole testimony of witness if it inspires confidence of Court and if testimony of witness is reliable and trustworthy. It is also well settled law that concept of *falsus in uno falsus in omnibus* is not applicable in criminal cases. ***(See AIR 1980 SC 957 titled Bhee Ram vs. State of Haryana. See AIR 1971 SC 2505 titled Rai singh vs. State of Haryana.)*** It was held in case reported in ***AIR 2006 SC 1796 titled State of Haryana vs. Ranbir @ Rana*** that Section 50 of NDPS Act shall be applicable only in case of personal search of accused and would not applicable in respect of bag, article, or container which accused at the relevant time was being carried. It was held in case reported in ***AIR 2003 SC 07 titled Bharatbhai Bhagwanjibhai vs. State of Gujarat*** that in chance recovery Section 50 would not be

attracted. It was held that when police officials were on patrolling duty and when accused started running, when he saw the police officials and thereafter suspicion created in the mind of police officials and thereafter search was conducted then compliance of Section 50 of NDPS Act 1985 would not apply. It is well settled law that as per Section 59 of Indian Evidence Act 1872 all facts except the contents of documents or electronic record can be proved by way of oral evidence. As per Section 134 of Indian Evidence Act 1872 no particular number of witness in any case is required for proof of any fact. It was held in case reported in ***AIR 2003 SC 854 titled Lallu Manjhi and another vs. State of Jharkhand*** that law of evidence does not require any particular number of witnesses to be examined and it was held that Court may classify the oral testimony into three categories (1) Wholly reliable (2) Wholly unreliable and (3) Neither wholly reliable nor wholly unreliable. It was held that in first two categories there would be no difficulty in accepting or discarding the testimony of a single witness. It was also held in case reported in ***JT 2008(8) SC 650 titled State of U.P. vs. Kishanpal and others*** that it is the quality of evidence and not quantity of evidence which requires to be judged by the Court to place credence to the testimony of witness.

33. In view of above stated facts it is held that learned trial Court has properly appreciated the oral as well as documentary evidence placed on record in present case. It is also held that learned trial Court did not commit any miscarriage of justice to appellant. However word mentioned as '205.68' grams of charas mentioned in para 27 of judgment is ordered to be deleted and word '600 grams' charas is ordered to be incorporated. Appeal filed by appellant is dismissed. File of learned trial Court along with certified copy of judgment be sent back forthwith. Pending miscellaneous application(s) if any also stands disposed of.

****

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

Cr. Appeal Nos. 52 of 2012 & 124 of 2012.
Reserved on: April 06, 2015.
Decided on: April 08, 2015.

1. Cr. Appeal No. 52 of 2012.
Pratap Singh .....Appellant.
Versus
State of H.P. .....Respondent.
2. Cr. Appeal No. 124 of 2012.
Partap Singh .....Appellant.
Versus
State of H.P. .....Respondent.

Prevention of Corruption Act, 1988- Section 13(2)- **Indian Penal Code, 1860-** Sections 420, 409, 467, 468, 471, 477 A IPC- Accused had additional charges of various offices- he was entrusted with cash amounting to Rs. 92,936/ - he misappropriated various amounts and forged the documents for misappropriation- amount of Rs. 27,000/- was drawn for purchase of fuel wood, however, no such supply was ever made – accused had drawn various amounts on different dates- some of the amount was shown to have been paid but no particulars of the payment were given - no receipt was obtained regarding the payment- it was the duty of the accused to make entries correctly duly supported by the documents – held, that in these circumstances, prosecution version was duly proved and he was rightly convicted. (Para-13 to 28)

Code of Criminal Procedure, 1973- Section 427- Accused was convicted of the commission of offences in two cases- it was pleaded that sentence in two cases should be ordered to be run concurrently- incident involved two financial years and Court has power to order that the sentence in the latter case should be run concurrently. (Para-29 to 33)

Cases referred:
V.K. Bansal vrs. State of Haryana and another, (2013) 7 SCC 211
A. S. Naidu vrs. The State of Madhya Pradesh, 1975 Cri.L.J. 498
Amar Nath vrs. Alfa, AIR 1969 Delhi 133
Sadashiv Chhokha Sable vrs. State of Maharashtra, 1993 Cri. L.J. 1469

For the appellant(s): M/S. Anoop Chitkara and Satyen Vaidya, Advocates.
For the respondent: Mr. Parmod Thakur, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these appeals, both these appeals were taken up together for hearing. However, in order to maintain clarity, the facts in each appeal are being taken into consideration separately.

2. These appeals are directed against the judgment dated 23.1.2012, rendered by the learned Special Judge (Forests), Shimla, H.P, in Corruption Case No. 11-S/7 of 2008 and also judgment dated 28.3.2012 in Corruption Case No. 12-S/7 of 2008.

Cr. Appeal No. 52 of 2012.

3. The appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 420, 409, 467, 468, 471, 477 A IPC and Section 13(2) of the Prevention of Corruption Act, 1988, has been convicted and sentenced to undergo imprisonment for two years and a fine of Rs. 10,000/- and in default of payment of fine, to further undergo imprisonment for six months under Section 409 IPC. The accused was further sentenced to imprisonment for one year and a fine of Rs. 10,000/- and in default of payment of fine to further undergo imprisonment for six months under Section 477-A IPC and under Section 13(2) of the P.C. Act to undergo imprisonment for one year and to pay a fine of Rs. 10,000/- and in default of payment of fine, to further undergo imprisonment for six months. The sentences were ordered to run concurrently.

4. The case of the prosecution, in a nut shell, is that the accused while functioning as Naib Tehsildar, Dodra Kawar, during the year 2000-01 held various additional charges of the offices, including Sub Treasury Office of Dodra Kawar, Block primary Education Office, Principal of Govt. Senior School, Kawar, Headmaster, Govt. High School Dodra and Jaskoon and Headmaster of Govt. Middle School Jakha and was entrusted with cash amounting to Rs. 92,936/- in respect of bills No. 17, 28, 73, 84, 95, 97, 98 and 100 concerning purchase of stationary and other articles and transportation thereof in respect of Block Primary Schools. The Vigilance Department received complaint and an inquiry was initiated. Thereafter, Inspector, Narata Ram conducted the enquiry. He gave the report that the accused while functioning as Naib Tehsildar and exercising powers of DDO in respect of Education Department, committed criminal breach of trust and embezzled Rs. 92,936/- (2000-01) and also forged documents and used them as genuine and made false entries of accounts. The entries of payments were made on the same date but there

was no voucher supporting the same. The entries were false and accounts were defalcated. An amount of Rs. 27,000/- was stated to be drawn for purchase of fuel wood, however, no such supply was ever made and amount was misappropriated. The investigation was completed and the challan was put up after completing all the codal formalities.

5. The prosecution, in order to prove its case, has examined as many as 28 witnesses. The accused was also examined under Section 313 Cr.P.C. He has denied the prosecution case. The learned trial Court convicted and sentenced the accused, as noticed hereinabove.

6. Mr. Anoop Chitkara, 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. Parmod Thakur, learned Addl. AG, for the State has supported the judgment of the learned trial Court dated 23.1.2012.

7. I have heard learned counsel for both the sides and gone through the records of the case carefully.

8. Sh. Hardyal Singh, PW-1 has testified that he remained posted in the office of BPEO, Dodra Kawar as JBT. He remained posted in that office from 2003. Accused was working as Niab Tehsildar and BPEO. He had produced the attendance register of Central Primary School Kawar from August, 2001 to September, 2004. According to him, the attested copy of challan dated 31.3.2004 for Rs. 4646/- in respect of Manoj Kumar and pay bill for December, 1990 which was unsigned were taken into possession vide memorandum Ext. PW-1/A. He proved copy of challan Ext. PW-1/B and bill Ext. PW-1/C.

9. Smt. Sunita, PW-2 testified that she remained in the office of BPEO Dodra Kawar, as Clerk in the year 1998. Accused was working as BPEO. She was working as daily wager. She was doing diary dispatch work. Sh. Ram Dutt, teacher used to prepare the bills. Authority was in her name for withdrawl of money from the treasury. She used to make the payment on the same day. She did not know BPEO could have made the authority in her name. In the treasury cash register, she used to sign. She was not conversant with the cash book. She used to disburse the payments.

10. Sh. Ram Dutt Sharma, PW-3, deposed that he remained posted as JBT in Govt. Primary School Kiterwari from 1999 to 2001. He was well conversant with the handwriting and signatures of the accused. He identified bill No. 31/2000 dated 8.8.2000 which was prepared by him vide Ext. PW-3/A. He also prepared bill No. 84 dated 6.1.2001 Ext. PW-3/B, Bill No. 95 dated 31.3.2001 Ext. PW-3/C, Bill No. 97 dated 31.3.2001 Ext PW-3/D, Bill No. 98 dated 31.3.2001 Ext. PW-3/D and Bill No. 100 dated 31.3.2001 Ext. PW-3/F. These bills were signed by the accused. He had also identified Bill No. 17 dated 23.6.2000 Ext. PW-3/G and bill No. 28 Ext. PW-3/H. He also identified cash book Ext. PW-3/J and also payment at page 7 and entries Ext. PW-3/K. He has also seen page Nos. 30 and 31 vide Ext. PW-3/M and Ext. PW-3/N. These have been attested by accused Partap Singh. The entry at page No. 34 was also attested by accused vide Ext. PW-3/O. Vouchers A-1 to A-13 were not attested by the DDO. In his cross-examination, he admitted that the payment was made, vouchers were annexed by accused himself. He was not aware that recipients used to sign the vouchers as well. In the school, stock register was maintained by the Center Head Teacher. He admitted that during his tenure whatever work was done, payment was received by the claimants. He also testified in his cross-examination that accused as D.D.O. was responsible for all departments in the Dodra Kawar.

11. Sh. Chandu Lal, PW-4 and Sh. Arun Kumar, PW-5 were declared hostile.

12. Sh. Som Nath, PW-6 testified that he is running Sharma General Store at Novbahar since 1989. He identified bill Ext. A-40. These articles were supplied by him. He denied the suggestion that Ext. A-40 was not issued by them. He also denied that writing on bill Ext. A-40 is in his hand writing or in the hand writing of his brother.

13. Sh. Dev Lal, PW-7 deposed that in the year 1997-98, he got the school white washed and also transported books etc. to the school and received the payment.

14. Sh. Thampi Singh, PW-8 deposed that he transported the material book etc. from Natwari to Kawar Jiskoon schools and executed receipts Ext. A-26 and A-27. Sh. Chaman Lal, PW-9 testified that he is running a Karyana shop for the last 20 years. He has not signed A-23. Sh. Bhagat Singh, PW-10 has sent record to Vigilance department through letter Ext. PW-10/A. Sh. Jagdish Chand, PW-11 has proved extract Ext. PW-11/A. Sh. Dharam Singh, PW-12 has proved memorandum Ext. PW-12/A and PW-12/B. Sh. Shri Lal, PW-13 has proved memorandum Ext. PW-13/A. Sh. Sarva Singh, PW-14 has proved abstract of register Ext. PW-14/B. Ms. Santosh Kumari, PW-15 has proved memorandum Ext. PW-15/A. Sh. Gian Chand, PW-16 has proved memorandum Ext. A-35. Sh. Ram Pal, PW-17 has proved memorandum Ext. PW-17/A. Sh. Rajinder Lal, PW-18 has proved original memorandum Ext. PW-18/A. Sh. Barji Ram, PW-19 was declared hostile. Sh. Ramesh Kumar, PW-20 has proved Ext. PW-20/A and PW-21/A. Sh. Susheel Kumar, PW-21 has proved memorandum Ext. PW-21/A. Sh. Kallu Ram, PW-22 stated that he had supplied fuel wood to various schools of Dodra Kawar. He had received payments and issued the receipts. He had signed receipt Ext. A-22. According to him, perhaps, he had received a sum of Rs. 27,000/-. Sh. Gian Chand, PW-23 deposed that he had received payment of Rs. 1385/-. He had signed bill Ext A-28 and receipt Ext. A-29. Sh. Serva Nand, PW-24 has proved the abstract Ext. PW-24/B. Sh. Sunil Kumar, PW-25 has proved memorandum Ext. PW-25/A and Ext. PW-8/B. Sh. Partap Singh, PW-26 has proved memorandum Ext. PW-26/A. Sh. Naratta Ram, PW-27 was the Investigating Officer. According to him, he has seized fuel registers produced by Hardyal Singh, Shiv Lal, Sarva Nand, Santosh Kumari, Ram Pal and Dharam Singh. He sent these documents alongwith the specimen writings and signatures to FSL, Junga for comparison. He recorded the statement of Rajinder Lal mark Z-1. He also recorded statements of Barji Ram, Sushil Kumar, Kallu Ram, Gian Chand and Sarva Nand. In his cross-examination, he deposed that the contractors had received the payments. Sh. Anant Ram, PW-28 has partly investigated the case. He has seized receipt Ext. A-27. He proved copy of FIR Ext. PW-28/A.

15. Bill Ext. PW-3/G for Rs. 14,750/- was drawn for office expenses and it was drawn in the name of P.S. Ranaut. The entries in the cash book Ext. PW-3/J at page 7 was made showing Rs. 14750/- as having been drawn against bill No. 17 on 23.6.2000 and payment was shown to have been made at page 7 of the cash book on 23.6.2000 itself. However, in the column of particulars, there is nothing to show that to which firm and to which person the payment was made. The accused had infact drawn payment vide bill No. 17 Ext. PW-3/G, however, the receipt was not obtained.

16. A sum of Rs. 3205/- was drawn by Sh. P.S. Ranaut as BPEO through bill Ext. PW-3/C i.e. bill NO. 95 dated 31.3.2001. In the cash book, at page No. 34, a sum of Rs. 3205/- was received and on the same day, payment was shown. However, in the column of particulars, there is no detail as to whom the payment was made. The entries are Ext. PW-3/O in cash book Ext. PW-3/J. The accused has not denied the withdrawal of money and also the payment in the cash book.

17. A sum of Rs. 6457/- was drawn through bill No. 97 dated 31.3.2001 Ext. PW-3/D. It was drawn in the name of P.S. Ranaut as BPEO and entry was made in the cash

book as receipt of the money at page No. 34 and amount was drawn for office expenses. The payment was shown to have been made on 31.3.2001 itself. The entries are Ext. PW-3/O and in the cash book Ext. PW-3/J. The accused has drawn Rs. 6457/- but could not account for the same.

18. A sum of Rs. 1000/- was drawn vide bill No. 100 dated 31.3.2001 vide Ext. PW-3/F and the amount was entered in the cash book on 31.3.2001. It was shown to have been paid on 31.3.2001 itself. The entry in the cash book did not show to whom the payment was made. There is no evidence to prove that the payment was infact made.

19. A sum of Rs. 63,380/- was drawn vide bill No. 98 dated 31.3.2001 Ext. PW-3/F as office expenses in the name of P.S. Ranaut, Naib Tehsildar and on the same day the payment was received and entered on receipt side of the cash book at page No. 34 as per the details in Ext. PW-3/O. The accused has admitted to have received the money but he did not know to whom the payment was made.

20. The explanation advanced by the accused cannot be accepted. The prosecution has proved the entrustment of money to the accused. The accused was also charged under Section 477-A IPC. Accused Partap Singh Ranaut, while functioning as BPEO, Dodra Kawar, has withdrawn a sum of Rs. 14750/- vide bill No. 17 dated 23.6.2000 and payment was shown to have been made in the cash book as per page No. 7 Ext. PW-3/O. However, there are no vouchers and receipts. Similarly, a sum of Rs. 100/- was drawn vide bill No. 100 Ext. PW-3/F and payment was shown at page 34 vide entries at Ext. PW-3/O. Similarly, he has withdrawn Rs. 63,380/- for office expenses vide bill no. 98 Ext. PW-3/E and payment was shown in the cash book. The entries are Ext. PW-3/O. There are no vouchers showing the payment. It was the duty of the accused, being DDO, to make entries correctly duly supported by the documents. The prosecution has fully proved the case against the accused and accused has rightly been convicted and sentenced, as noticed hereinabove, under Section 409, 477-A IPC and under Section 13(2) of the Prevention of Corruption Act, 1988.

Cr. Appeal No. 124 of 2012.

21. The appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 420, 409, 467, 468, 471, 477-A IPC and Section 13(2) of the Prevention of Corruption Act, 1988, has been convicted and sentenced to undergo imprisonment for one year and a fine of Rs. 10,000/- and in default of payment of fine to further undergo imprisonment for six months under Section 477-A IPC and under Section 13(2) of the P.C. Act to undergo imprisonment for one year and to pay a fine of Rs. 10,000/- and in default of payment of fine, to further undergo imprisonment for six months. The sentences were ordered to run concurrently.

22. The case of the prosecution, in a nut shell, is that the accused while functioning as Naib Tehsildar, Dodra Kawar, during the year 2001-02, held various additional charges of the offices, including Sub Treasury Office of Dodra Kawar, Block Primary Education Office, Principal of Govt. Sr. School, Kawar, Headmaster, Govt. High School Dodra and Jaskoon and Headmaster of Govt. Middle School Jakha and was entrusted with cash amounting to Rs. 2,27,473/- in respect of bills No. 26, 27, 28, 37, 38, 39, 40, 52, 53, 54, 55, 56, 57, 63 and one receipt amounting to Rs. 600/- concerning the purchases of stationary and other articles and transportation thereof in respect of Block Primary Schools. The Vigilance Department received complaint and an inquiry was initiated. Thereafter, Inspector, Narata Ram conducted the enquiry. The investigation was completed and the challan was put up after completing all the codal formalities.

23. The prosecution, in order to prove its case, has examined as many as 33 witnesses. The accused was also examined under Section 313 Cr.P.C. He has denied the prosecution case. The learned trial Court convicted and sentenced the accused, as noticed hereinabove.

24. Mr. Satyen Vaidya, 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. Parmod Thakur, Addl. AG, for the State has supported the judgment of the learned trial Court dated 28.3.2012.

25. I have heard learned counsel for both the sides and gone through the records of the case carefully.

26. Sh. Deep Ram, PW-1 has deposed that he never went to Natwarh for carrying the articles. Sh. Krishan Chand, PW-2 has proved proforma-invoice Ext. PW-2/A and PW-2/B. Sh. Atul Latwa, PW-3 deposed that he has issued bill Ext. PW-3/A and its receipt Ext. PW-3/B. Sh. Thampi Singh, PW-4 deposed that he has executed receipts Ext. PW-4/A and Ext. PW-4/B. Sh. Yashwani Kumar, PW-5 deposed that he has prepared bill No. 26 dated 20.10.2001. He identified the signatures of the accused. The same is Ext. PW-5/F. He also prepared bill No. 40 dated 20.10.2001 Ext. PW-5/G. He also identified signatures of accused Partap Singh on documents mentioned in his statement. He also identified signatures of the accused on cash book pages 199, 31 to 38 Ext. A-57 to A-72. Sh. Surinder Singh, PW-6 deposed that he has prepared bill No. 26, dated 20.10.2001 Ext. PW-6/A, PW-6/A-11, A-15, A-18, A-44, A-47 and A-55. He had written page No. 77 Ext. PW-6/C and made entry at page No. 38 of the cash book Ext PW-5/A. By the time the bill was drawn, bills had not been received and payment was shown to have been received in the name of Partap Singh accused. He has made these entries at the instance of accused. Sh. Hratap Singh Negi, PW-7 has proved extract of register Ext. PW-7/A. Sh. Gurmit Singh, PW-8 has proved receipts Ext. PW-8/B to PW-8/D. Sh. Uttam Lal, PW-9 deposed that whatever material was received in the School, it was entered in the register. Sh. Ramesh Chand, PW-10 has proved bill Ext. PW-10/A and receipt Ext. PW-10/B. Sh. Yogesh Arya, PW-11 identified bills supplied for stationary articles and payment received. Sh. Mehar Chand, PW-12 has proved memorandum Ext. PW-12/A. Sh. Jai Lal, PW-13 has proved memorandum Ext. PW-5/B. Sh. Sant Ram, PW-14 and Sh. Bhagat Singh, PW-15 are formal witnesses. Sh. Ram Dutt Sharma, PW-16, deposed that cash used to remain with the DDO. The contingency bills Ext. PW-16/A, PW-16/B, A-1, A-3, PW-5/F, PW-6/A and A-44 were prepared by him. Ms. Sunita, PW-17 stated that Ram Dutt was teacher. His services were being requisitioned for assistance. She used to draw money from the treasury. She used to disburse payment and she never maintained the cash book. Sh. Ram Lal, PW-18 has proved memo Ext. PW-18/A. Ms. Santosh Kumari, PW-19 has proved memo Ext. PW-19/A. Sh. Sarva Singh, PW-20 has proved memo Ext. PW-20/A. Sh. Jagdish, PW-21 deposed that he supplied books to BPO Dodra Kawar on 26.5.2001 valuing Rs. 54,051/-. The books were received by Ram Dutt, Teacher. Sh. Sri Lal, PW-22, has proved memo Ext. PW-22/A. Sh. Sunil Kumar, PW-23, has proved memo Ext. PW-23/A. Sh. Partap Singh, PW-24, has proved memo Ext. PW-24/A. Ms. Sulkshana Devi, PW-25, has proved Ext. PW-25/A. Sh. Ramesh Kumar, PW-26 has proved stock register Ext. PW-26/B. Sh. Sarva Nand, PW-27 has proved PW-27/A and PW-27/B. Sh. Sushil Kumar, PW-28 has proved stock register Ext. PW-28/A and PW-28/B. Sh. Rajinder Lal, PW-29, has proved memo Ext. PW-29/A. Sh. Vinod Kumar, PW-30 has proved copy of FIR Ext. PW-30/B. Sh. Lal Man, PW-31, has proved copy of FSL report Ext. PW-31/B. Sh. Anant Ram, PW-32, deposed that he had seized the record from Govt. School, Kawar through memo Ext. PW-12/A. He had also seized record and vouchers from Govt. School Jiskoon on 23.11.2006 through memo Ext. PW-5/B. Sh.

Naratta Ram, PW-33, testified that he seized records from GPS Lagnoo through memo Ext. PW-18/A and from GPS Chamdar through memo Ext. PW-19/A. He also seized record from GOPS Jakha through memo Ext. PW-20/A. The record from GPS Jiskoon was seized through memo Ext. PW-22/A. He also made the statement the manner in which the record was seized. In his cross-examination, he admitted that the accused was dealing with five departments.

27. Sh. Satyen Vaidya, Advocate, has vehemently argued that the items were received and payments were duly made. There is a detailed procedure, the manner in which the payment is to be made as per the H.P. Financial Rules, 1971. The payment is to be made after the receipt of the material and the receipt is to be obtained after the payment is made.

28. Now, as far as bill No. 26 dated 20.10.2001 is concerned, it was drawn in favour of Sharma General Store, Rahman, Deep Chand and Thampi Singh but payment was received as per the cash book by accused himself. There was no mention that the payment was made to these persons. Bill No. 27 Ext. A-11 was drawn in favour of M/S Himachal Emporium but payment in the cash book was shown to have been received by Pratap Singh Ranaut and cash book did not show that the payment was ever made to M/S Himachal Emporium but bills were obtained from M/S Latawa Furnishers. However, Latawa Furnishers were never claimant and no payment was shown to have been made to Latawa Furnishers in the cash book. The sanction order Ext. A-19 showed payment was drawn favouring Raj Pal Stationery and bills were that of Gian Bhandar (Ext. A-20 to A-43). The cash book did not show that either Raj Pal Stationers or Gian Bhandar were paid the money but the payment was received by Pratap Singh Ranaut himself. Bill No. 38 was drawn and claimant was M/S Himachal Emporium, sanction was Ext. A-46. However, payment was received by accused and bill was of M/S Latawa Furnishers in the cash book. As far as bill No. 39 Ext. A-47 is concerned, the material was received but account books were not maintained in conformity with the financial rules and did not reflect the true picture of the transactions. The appellant could not withdraw the amount in his name. The withdraw of the amount in his own name amounts to misconduct.

29. Mr. Satyen Vaidya, Advocate, submits that taking into consideration the peculiar facts and circumstances of the case, the sentence imposed in Corruption case No. 12-S/2008, may be ordered to run concurrently. There is sufficient force in his contention since the accused was involved in two financial years i.e. 2000-01 and 2001-02. He was admittedly looking after more than 5-6 departments.

30. Their lordships in the case of ***V.K. Bansal vrs. State of Haryana and another,*** reported in ***(2013) 7 SCC 211,*** have held that Court should exercise its discretion judicially and not mechanically in each case, having regard to nature of offence and particular fact situation while exercising discretion under Section 427(1) to direct sentences to run concurrently. It has been held as under:

> "10. We are in the case at hand concerned more with the nature of power available to the Court under Section 427(1) of the Code, which in our opinion stipulates a general rule to be followed except in three situations, one falling under the proviso to sub-section (1) to Section 427, the second falling under sub-section (2) thereof and the third where the Court directs that the sentences shall run concurrently. It is manifest from Section 427(1) that the Court has the power and the discretion to issue a direction but in the very nature of the power so conferred upon the Court the discretionary power shall have to be exercised along judicial lines and not in a mechanical,

wooden or pedantic manner. It is difficult to lay down any strait jacket approach in the matter of exercise of such discretion by the Courts. There is no cut and dried formula for the Court to follow in the matter of issue or refusal of a direction within the contemplation of Section Page 8 8 427(1). Whether or not a direction ought to be issued in a given case would depend upon the nature of the offence or offences committed, and the fact situation in which the question of concurrent running of the sentences arises."

31. In the case of ***A. S. Naidu vrs. The State of Madhya Pradesh,*** reported in ***1975 Cri.L.J. 498,*** the Division Bench has held that the High Court can exercise its discretion under sub-section (1) of Section 397 and direct the sentence awarded in a subsequent trial to run concurrently with the sentence awarded in a previous trial, even after the appeals or revisions preferred by the convict against his conviction in the said trials have been dismissed. It has been held as under:

"[9] Having come to the conclusion that Sub-section (1) of Section 397 of the Code confers an independent power on the Court to direct a subsequent sentence to run concurrently with the sentence in an earlier case, the question of exercising the power under its inherent jurisdiction does not arise. We may here mention that the learned counsel for the State invited our attention to the decision of a Division Bench of this Court in Dhyan-Singh v. The State of Madhya Pradesh Misc. Cri. C. No. 157 of 1970, D/- 20-3-1971 (Madh Pra), in which it has been held that the power to release an accused on probation of good conduct cannot be exercised after the delivery of judgment This decision cannot, however, be considered as an authority on the question whether the power under Sub-section (1) of Section 397 of the Code can be exercised after the delivery of judgment. An order releasing an offender after due admonition under Section 3 of the said Act or an order releasing an offender on probation of good conduct under Section 4 is passed in lieu of sentence, Section 9 of the Act provides that where the offender fails to observe the conditions of the bond, he may be awarded a sentence for the original offence. Thus, an order under the Act is in lieu of sentence and, being a matter pertaining to the award of sentence, must be passed when sentence is awarded and not at a later stage. The aforesaid decision has, therefore, no bearing on the question posed for consideration in this case.

[10] To sum up, we hold that subsection (1) of Section 397 of the Code confers an independent power on the Court to direct a subsequent sentence awarded in a case to run concurrently with the sentence awarded in an earlier case, which can be exercised even after the disposal of the case on merits since it does not involve any review of the judgment on merits."

32. In the case of ***Amar Nath vrs. Alfa,*** reported in ***AIR 1969 Delhi 133,*** the learned Single Judge has held that sentence in subsequent trial can be ordered to run concurrently with previous one. It has been held as under:

"4. It will be seen that section 397, as it now stands, gives power to a Court to direct that a subsequent sentence shall run concurrently with a previous sentence. Before the amendment of the Code in the year 1923, except where several sentences were passed at one trial or where in the case of a youthful offender, section 32 of the Reformatory Schools Act, 1897 (VIII of 1897) applied, there was no provision by which a subsequent sentence could be

made to run concurrently with a previous sentence. Section 397, prior to its amendment in that year, was in the following terms:

"When a person already undergoing a sentence of imprisonment, penal servitude or transportation is sentenced to imprisonment, penal servitude or trans portation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced.

Provided that if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in Its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced."

8. Under section 397 of the Code It was competent for the Magistrate, First Class, Chamba, to order that the subsequent sentence shall run concurrently with the previous sentence. Shri K. C. Pandit, learned counsel for State, also did not support the recommendation made by the learned Additional Sessions Judge."

33. In the case of ***Sadashiv Chhokha Sable vrs. State of Maharashtra,*** reported in ***1993 Cri. L.J. 1469,*** the Division Bench of the Bombay High Court has held that a person sentenced to imprisonment must, for the purpose of S. 427, be deemed to be undergoing that sentence from the very moment the sentence is passed. The accused may be on bail or in custody in the earlier case at the time of passing of the subsequent sentence. It has been held as under:

"6. We must notice that the learned Public Prosecutor for the State had contended that Section 427 Cr.P.C. is not attracted in the instant matter because the petitioner was not "undergoing a sentence of imprisonment" as contemplated under that provision, when subsequent sentence was awarded. According to him, unless the offender is physically in jail to suffer the sentence of imprisonment at the time of subsequent sentence, Section 427(1) cannot be pressed into service. In our view, such an approach to the provision would not be object oriented. Normal principle is that sentences should take effect immediately on conviction. Criminal Procedure Code provides that where several sentences are passed, such sentences should run one after the other i.e. consecutively unless the Court directs otherwise i.e. concurrently. A person sentenced to imprisonment must, for the purpose of Section 427, be deemed to be undergoing that sentence from the very moment the sentence is passed. The accused may be on bail or in custody in the earlier case at the time of passing of the subsequent sentence. There cannot be legislative intention to deny the benefit of the provision even in a deserving case by virtue of the only fact that the convict is on bail or in custody or could not be taken within the portals of prison for some genuine reason. Literal construction on the terminology "undergoing a sentence of imprisonment" as suggested on behalf of the State - would lead to absurd results specially where two separate sentences are awarded one after the other on one day in two different trials. Either the learned Judge would not exercise the discretion only

because in the earlier case he had not gone inside the jail by that time or he will have to actually send the convict inside the jail for some time, and call him back immediately to pronounce judgment in the second case. We do not think such a absurd and farcical situation was intended by the legislature."

34. In the instant case, the accused has been enlarged on bail for the previous conviction.

35. Mr. Anoop Chitkara, Advocate, has vehemently argued that since his client was to look after many departments as DDO, lenient view may be taken. There is merit in his contention. Mr. Satyen Vaidya, Advocate, has also argued that since his client has been convicted in Corruption case No. 12-S/7 of 2008 for the financial year 2001-02, the sentence imposed in Corruption Case No. 11-S/7 of 2008 may be ordered to run concurrently.

36. Accordingly, Cr. Appeal No. 52 of 2012 is partly allowed. The sentence imposed upon the appellant under Section 409 IPC is reduced to one year but the fine is increased to Rs. 50,000/- and in default of payment of fine, the accused shall suffer further imprisonment for three months. Cr. Appeal No. 124 of 2012 is dismissed. The sentence imposed upon the appellant in Corruption Case No. 12-S/7 of 2008 is ordered to run concurrently with the earlier sentence imposed in Corruption Case No. 11-S/7 of 2008.

****

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

Prem Chand son of Jagdish Chand ....Petitioner

Versus

State of H.P. ....Non-petitioner

Cr.MP(M) No. 305 of 2015
Order Reserved on 2nd April, 2015
Date of Order 8th April, 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for commission of offence punishable under Section 498-A read with Section 306 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- investigation is at initial stage and it would be adversely affected by releasing the petitioner on bail- specific allegations were made against the petitioner- offence punishable under Section 306 of IPC is against the society, therefore, it would not be expedient to release the petitioner on bail. (Para-7 and 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh AIR 1962 SC 253
Aruna Ramchandra Shanbaug vs. Union of India, AIR 2011 SC 1290

For the Petitioner: Mr. Ajay Sharma, Advocate

For the Non-petitioner: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 32 of 2015 dated 24.3.2015 registered under Sections 498-A and 306 IPC at P.S. Gagret District Una (H.P.)

2. It is pleaded that petitioner has been falsely implicated in present case. It is further pleaded that petitioner will not influence the prosecution witnesses and will not tamper with prosecution evidence. It is pleaded that petitioner has two minor children, parents and family to support. It is pleaded that any condition imposed by the Court will be binding on the petitioner. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. As per police report, FIR No. 32 of 2015 dated 24.3.2015 registered under Sections 498-A and 306 of Indian Penal Code in Police Station Gagret District Una (H.P.) against the petitioner. There is recital in police report that on dated 23.3.2015 at about 8.40 PM I.O. received information that one woman with consumption of poison was admitted in FRU Gagret. There is further recital in police report that police officials went to FRU Gagret where deceased was brought dead. There is further recital in police report that statement of Anu Devi was recorded under Section 154 Cr.P.C. There is recital in police report that deceased Rekha Devi was married in the year 2009 at Amb District Una (H.P.). There is recital in police report that deceased Rekha Devi has one son namely Jagdeep Kumar and one daughter Taniya. There is further recital in police report that deceased Rekha was in strained relations with her husband Pardeep Kumar. There is also recital in police report that Pardeep Kumar used to beat Rekha Devi generally and also used to demand dowry. There is further recital in police report that there was physical and mental torture to deceased Rekha Devi in her matrimonial home. There is recital in police report that on dated 10.2.2015 deceased Rekha met Smt. Anu Devi and told her that deceased was very aggrieved. There is recital in police report that deceased also told that her husband Pardeep Kumar and her elder brother-in-law Prem and elder sister-in-law Pawna have harassed the deceased and have beaten the deceased when the deceased was alive. There is recital in police report that accused persons have also told the deceased to bring money and deceased also used to inform Smt. Anu Devi complainant that her husband Pardeep Kumar, her elder brother-in-law and her elder sister-in-law Pawna used to beat the deceased. There is recital in police report that deceased Rekha Devi was pregnant. There is recital in police report that quarrel took place between co-accused Pardeep Kumar, co-accused Prem and co-accused Pawna and thereafter deceased had consumed poison. There is further recital in police report that after registration of case and during investigation post mortem of deceased was conducted and site plan was prepared. There is also recital in police report that statements of prosecution witnesses were recorded by way of videography. There is further recital in police report that co-accused Pardeep Kumar was arrested on dated 24.3.2015 and other co-accused namely Pawna and Prem have concealed themselves. There is recital in police report that since 27.3.2015 co-accused Pardeep Kumar is in judicial custody. There is further recital in police report that other co-accused namely Pawna and Prem Chand have not joined the investigation and recovery of bed sheet is still to be effected. There is also recital in police report that if petitioner is released on bail then petitioner would threat the prosecution witnesses. Prayer for rejection of anticipatory bail application sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the State and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether anticipatory bail application filed under Section 438 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that any condition imposed by the Court will be binding upon the petitioner and petitioner has minor children, parents and family to support and on this ground bail application filed by petitioner be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In present case it is prima facie proved on record that deceased Rekha had committed suicide on dated 23.3.2015. There is direct allegation against the petitioner namely Prem Chand who is elder brother-in-law of deceased that when deceased Rekha lastly met with complainant Anu Devi deceased told her that petitioner namely Prem Chand in collusion with other co-accused used to harass the deceased Rekha Devi in her matrimonial house and also used to beat her and also used to demand dowry from her. There are direct allegations of harassment, beatings and demand of dowry against the petitioner. Deceased had committed suicide in her matrimonial house and there is allegation of abetment of suicide against the petitioner. Investigation in this case is at the initial stage. It was held in case reported in ***AIR 2011 SC 1290 titled Aruna Ramchandra Shanbaug vs. Union of India*** that there are two types of abetments. (1) Active abetment. (2) Passive abetment. In active abetment something is abetted to end the life of deceased and in passive abetment something is not done which should have been done to save the life of deceased from suicide. Court is of the opinion that if petitioner is released on anticipatory bail at this stage then investigation of case which is at the initial stage will be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that investigation is in initial stage of case and custodial interrogation of petitioner is essential in present case in the ends of justice is accepted for the reasons mentioned hereinafter. Court is of the opinion that there are direct allegations against the petitioner relating to offence punishable under Section 498-A and 306 IPC. Court is of the opinion that offence under Section 306 IPC is offence against the society and against the married women. Court is of the opinion that every married woman has legal right to live in matrimonial house with dignity and honour. Court is of the opinion that no married woman will commit suicide in her matrimonial house leaving her two minor children at the mercy of other relatives without any reasonable cause. Keeping in view the above stated facts it is

held that it would not be expedient in the ends of justice to release the petitioner on anticipatory bail at the initial stage of investigation of case. Point No.1 is answered in negative.

Point No.2

Final Order

9. In view of my findings on point No.1 anticipatory bail application filed by petitioner under Section 438 Cr.P.C. is rejected. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 438 of Code of Criminal Procedure 1973. Pending application(s) if any also disposed of. Petition filed under Section 438 of Code of Criminal Procedure is disposed of.

****

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

Rakesh Kumar & another ...Appellants.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.103 of 2009
Reserved on : 30.3.2015
Date of Decision: April 8, 2015

Indian Penal Code, 1860- Sections 302, 109 and 498-A- Accused had married the deceased – marriage was not acceptable to the parents of the accused as the wife belonged to a different caste- complaint was lodged by the deceased against her husband and her in-laws- parties met at the police station for amicable settlement of the dispute but the matter could not be resolved and they agreed to meet again- deceased was brought to CHC, Palampur after having sustained serious burn injury- she made a statement in the presence of Naib Tehsildar and subsequently succumbed to her injury- police found on investigation that accused on instigation and abetment of his parents, had set the deceased on fire by pouring the kerosene oil – complaint filed by the deceased before the police clearly proved that there was a dispute between the accused 'R' and his parents- this corroborates the testimony of the prosecution witnesses that she was being maltreated by the accused- accused 'R' and his mother had subjected the deceased to harassment and cruelty- hence, accused were rightly convicted of the commission of offence punishable under Section 498-A IPC. (Para-13 to 18)

Indian Evidence Act, 1872- Section 32- Dying declaration- prosecution relied upon the dying declaration made by the deceased- there was no evidence that deceased was under fear, threat or was in any manner tutored – minor variation regarding the person who spoke to the deceased is not sufficient to make the dying declaration doubtful- deceased had specifically stated in the dying declaration that when she was put on fire, her husband was alone in the house, therefore, the involvement of the accused 'R' was ruled out – Dying declaration corroborated by the testimonies of the independent witnesses proves the guilty intent of the accused in murdering his wife – hence, husband was rightly convicted for the commission of offences punishable under Sections 302 read with Sections 109 and Section 498-A IPC - the accused 'R' was convicted of the commission of offence punishable under Section 498-A IPC and acquitted of the commission of offence punishable under Section 302 read with Section 109 of IPC. (Para-37 to 51)

Cases referred:

Jaishree Anant Khandekar vs. State of Maharashtra, (2009) 11 SCC 647
Khushal Rao vs. State of Bombay, AIR 1958 SC 22
Harbans Singh and another vs. The State of Punjab, AIR 1962 SC 439
Ram Nath vs. State of Madhya Pradesh, AIR 1953 SC 420
Paniben (Smt.) vs. State of Gujarat, (1992) 2 SCC 474
Jai Karan vs. State of Delhi (MCT), (1999) 8 SCC 161
Sham Shankar Kankaria vs. State of Maharashtra, (2006) 13 SCC 165
Mohammed Asif vs. State of Uttaranchal (2009) 11 SCC 497
Laxman vs. State of Maharashtra, (2002) 6 SCC 710
Paparambaka Rosamma vs. State of A.P. (1999) 7 SCC 695
Koli Chunilal Savji vs. State of Gujarat, (1999) 9 SCC 562
Ravi and another vs. State of T.N. (2004) 10 SCC 776
Kamalavva and another vs. State of Karnataka, (2009) 13 SCC 614
Shaik Nagoor vs. State of Andhra Pradesh represented by its Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2008) 15 SCC 471
Maiben D/o Danabhai Tulshibai Maheria vs. State of Gujarat, (2007) 10 SCC 362
Sohan Lal alias Sohan Singh and others vs. State of Punjab, (2003) 11 SCC 534
State of Karnataka vs. Shariff, (2003) 2 SCC 473
Dayal Singh vs. State of Maharashtra, (2007) 12 SCC 452
Kanti Lal vs. State of Rajasthan, (2009) 12 SCC 498
Gulam Hussain and another vs. State of Delhi, (2000) 7 SCC 254
Mohan Lal and others vs. State of Haryana (2007) 9 SCC 151
Java Beans vs. Union Territory of Pondicherry, (2010) 1 SCC 199
Sukanti Moharana vs. State of Orissa, (2009) 9 SCC 163
Nallapati Sivaiah vs. SDO, (2007) 15 SCC 465
Ongole Ravikanth vs. State of Andhra Pradesh, (2009) 13 SCC 647
Ram Bihari Yadav Vs. State of Bihar and others, (1998) 4 SCC 517
State of Karnataka vs. Shariff (2003) 2 SCC 473
K.Ramachandra Reddy and another vs. The Public prosecutor, (1976) 3 SCC 618
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 Appellants	:	Mr. N.S. Chandel, Advocate.
For the Respondent	:	Mr. Ashok Chaudhary and Mr. V.S. Chauhan, Additional Advocates General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellants-convicts Rakesh Kumar and Ram Piari, hereinafter referred to as the accused, have assailed the judgment dated 7.5.2009, passed by Additional Sessions Judge (2), Kangra at Dharamshala, Himachal Pradesh, in Sessions Trial No.23-P/VII/2008, titled as *State of Himachal Pradesh v. Rakesh Kumar and others*, whereby they stand convicted of the offence punishable under the provisions of Sections 109, 302 & 498A of the Indian Penal Code, and sentenced as under:

Accused Rakesh Kumar

Section	Sentence Imposed
302 read with Section 109 of Indian Penal Code	Imprisonment for life (rigorous) and fine of Rs.30,000/-, and in default of payment thereof, to further undergo imprisonment for a period of two years./
498A of the Indian Penal Code	Imprisonment for a period of three years and fine of Rs.5,000/-, and in default of payment thereof, to further undergo imprisonment for a period of six months.

Accused Ram Piari

Section	Sentence Imposed
302 read with Section 109 of Indian Penal Code	Imprisonment for life (rigorous) and fine of Rs.30,000/-, and in default of payment thereof, to further undergo imprisonment for a period of two years.
498A of the Indian Penal Code	Imprisonment for a period of three years and fine of Rs.5,000/-, and in default of payment thereof, to further undergo imprisonment for a period of six months.

2. It is the case of prosecution that on 22.3.2008, against the wishes of the parents, accused Rakesh Kumar married Reena (deceased). On account of caste factor, such marriage was not acceptable to the parents of Rakesh Kumar. On 4.7.2008, deceased lodged report against her husband and parents-in-law, alleging cruelty, maltreatment and atrocities. On 6.7.2008, parties met at the Police Station for an amicable resolution of the dispute. Since no conclusion could be arrived at, parties agreed to meet again, at the Police Station on 11.7.2008. However, same day (6.7.2008), deceased was brought, in an emergency to the Community Health Centre, Palampur, for having suffered serious burn injuries. Dr. Vinay Mahajan (PW-6), who first attended to her sent Ruka (Ex.PW-6/A) to Police Station, Palampur. ASI Nardev Singh (PW-14) immediately rushed to the hospital and in the presence of Naib Tehsildar Manoj Kumar (PW-4) and Dr. Vinay Mahajan, got recorded statement of Reena Devi (Ex.PW-4/A). Finding Reena Devi to have sustained severe and serious burn injuries, Dr. Mahajan, who issued MLC (Ex.PW-6/B), referred her for treatment

at the Medical College, Tanda. Eventually, Reena succumbed to her injuries on 14.7.2008. Postmortem of the dead body was got conducted and report (Ex.PW-14/J) taken on record.

3. Investigation revealed that accused Rakesh Kumar, on the instigation and abetment of his parents, had set the deceased on fire by pouring the kerosene oil. During investigation, a can containing kerosene oil, match stick, match box and other incriminating material were taken into possession by the Investigating Officer, in the presence of independent witness Punnu Ram (PW-3) and police official Ramesh Kumar (PW-9). Report of the Forensic Science Laboratory (Ex. PW-10/B) was obtained by the police. 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.

4. Accused Rajesh Kumar, Prem Chand and Ram Piari were charged for having committed offences punishable under the provisions of Sections 109, 302/34 & 498A/34 of the Indian Penal Code, to which they did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 14 witnesses and statements of the accused under the provisions of Section 313 of the Code of Criminal Procedure were also recorded, in which all the accused took defence of innocence and false implication. Accused Rakesh Kumar also took the following defence:

> "On 3/7/08 Reena went to Hospital and did not return. I on telephone went to Police Station where there were relatives of Reena."

6. Based on the testimonies of the witnesses and other evidence on record, trial Court found the prosecution to have proved its case, beyond reasonable doubt, only against accused Rakesh Kumar and Ram Piari, hence convicted and sentenced them as aforesaid. However, accused Prem Chand was acquitted on all counts. Hence, the present appeal by accused Rakesh Kumar and Ram Piari.

7. Court found the prosecution to have proved complaints (Ex. PW-10/E & PW-10/F) made by the deceased as also the dying declaration (Ex.PW-4/A). Significantly, Court found that there was no direct evidence against accused Prem Chand, in relation to any of the charged offences.

8. Having heard learned counsel for the parties as also perused the record, we are of the considered view that appeal needs to be allowed partly. We are of the considered view that insofar as charge of murder is concerned, there is no direct evidence against accused Ram Piari. We may also record that State has preferred not to file any appeal against the judgment of acquittal of Prem Chand.

9. In relation to an offence, punishable under the provisions of Section 498A of the Indian Penal Code, prosecution case primarily rests upon the testimonies of Ajudhiya Devi (PW-1), Prem Kumar (PW-2), Dy.S.P. Badri Singh (PW-10) and ASI Shyam Lal (PW-13). Conjoint reading of testimonies of these witnesses clearly reveals that accused Rakesh Kumar married the deceased in a temple on 22.3.2008. Evidently, parties had eloped and marriage was performed against the wishes of the parents. The matter was also reported to the police. However, they took a decision of living their own life.

10. Ajudhya Devi states that on 3.7.2008, Reena Devi (deceased) called her from the Police Station, disclosing that she had been beaten up by her husband and her parents-in-law. Her only fault being that she belonged to a lower caste. She states that the accused or his parents did not turn up at the Police Station either on 4th or 5th of July, 2008.

However, on 6.7.2008, when they visited the Police Station alongwith the Pradhan of Gram Panchayat, Latwala, Rakesh and his parents came, when it was agreed that endeavour shall be made to have the matter resolved amicably. It has come in her version that on 4.7.2008 and 5.7.2008, that Reena stayed with her parents but on 6.7.2008, accused Rakesh Kumar took her and made her stay with him in his rented accommodation. From the version of this witness, it is evident that marriage was not acceptable to the parents of accused Rakesh Kumar and as such they had expressed their desire of divesting him of all rights in the property. Apparently parents of Rakesh Kumar were not willing to take Reena to their house.

11. Dy. S.P. Badri Singh (PW-10) is the Police Officer before whom Reena Devi had lodged a written report, venting out her grievances against her husband and in-laws. He categorically states that on 4.7.2008, Reena Devi met him at Police Station, Palampur and by filing written applications (Ex. PW-10/E and Ex. PW-10/F) sought intervention for settlement of the issues with her in-laws. Accused did not come to the police station on 5.7.2008, but he came only the next day. He is clear that with the intervention of certain persons, though he tried to resolve the controversy, but the matter could not be settled. Reena wanted to go to her in-laws' place, which was categorically refused and resisted by her father-in-law and mother-in-law, who were of the view that the couple could reside anywhere, separately. The parties were bound down and asked to return on 11.7.2008. Document to such effect was also drawn.

12. Version of Badri Singh is corroborated by ASI Shyam Lal. He also clarifies that deceased had written two applications, which were marked to him by the SHO. Despite his calling, accused Rakesh Kumar did not come to the Police Station on 4.7.2008 and 5.7.2008 and it was only on 6.7.2008 that the parties came to the police station alongwith the Pradhan, when certain terms were reduced into writing (Ex.PW-13/A). Even he states that despite Reena desiring to go to the house of her in-laws, she was not allowed. However, her in-laws were of the view that the couple could reside anywhere else.

13. It is true that police did not register any FIR on the basis of complaints (Ex. PW-10/E and 10/F). But then, it stands explained by these police officials that they were kept in the complaint register. It is equally true that the register has not been produced in Court, but however, factum of the deceased and the accused having met in the Police Station where certain terms were reduced into writing (Ex.PW-13/A) cannot be disputed. The document is signed by all the accused persons, Pradhan, the deceased and her parents. All of the relevant prosecution witnesses have unrebuttedly disclosed and proved such fact. This document categorically records that (i) on 25.3.2008, accused Rakesh Kumar married the deceased; (ii) a dispute emerged between Rakesh Kumar and his parents; (iii) as a result of which deceased has lodged a complaint at the Police Station, Palampur; (iv) time was sought for getting the dispute amicably resolved; (v) both the parties undertook to remain present at the Police Station on 11.7.2008.

14. By comparing the signatures on Ex. PW-10/E and PW-10/F with that of compromise (Ex.PW-13/A), learned counsel for the appellant wants the Court to believe that the complaints placed on record by the police are not the ones, which were actually filed by the deceased. We are not inclined to except such submission. Reena Devi was a teacher. Documents (Ex. PW-10/E & PW-10/F) are written in Hindi, and at the place of her signatures, in English she has only put her initials. There are no signatures of hers in document (Ex. PW-13/A). She has simply written her full name in English. We see no reason to disbelieve the testimony of the police officials, more so in the light of the testimony of Ajudhya Devi, that the complainant was maltreated by her husband and more particularly by her mother-in-law.

15. Reena Devi who belonged to a lower caste was not acceptable as daughter-in-law in the house of accused Rakesh Kumar. In complaint (Ex. PW-10/F), she has highlighted the atrocities, cruelties and the maltreatment meted out by her husband. She is categorical that accused Rakesh Kumar not only subjected her to cruelty but also physical assaults. Accused Ram Piari (mother-in-law) asked the deceased to get `5 lacs from her parents, only whereafter would have been allowed to enter their house. Trial Court has also extracted a portion of complaint (Ex.PW-10/E), in his own words, which reads as "accused Rakesh had been beating her and had threatened to set her to fire and one day her foot was burnt. His mother visited their rental quarter everyday and she and Rakesh beat her and threated that she would be killed and her body would be hanged with a fan. They also coerced her to bring 5 lakhs from her parents otherwise they would say that she had committed suicide. His mother also takes Rakesh to her house and he has threatened that he would take students from Mainjha and Dharamshala Colelges and would get her brothers and family members killed. She apprehended that if anything occurred to her family members, Rakesh and his family members would be responsible". Grievance made out in the second complaint is against accused Rakesh Kumar, who calls her by her caste (Chamaar), to which she belonged to.

16. Certainly, accused Rakesh Kumar and Ram Piari, by their willful conduct have caused cruelty to the deceased, who was young and newly married and wanted to live her life with her husband, in the house of her in-laws, where her husband was residing prior to their marriage. Illegal demands and cruelty were persistent. She was beaten up, abused, assaulted and subjected to harassment and cruelty, in every aspect of the form. Coming from the lowest strata of the society, she wanted to live a happily married life with dignity. But however, her dreams got shattered with the cruel behaviour on the part of her husband and his family. Though she was educated and worked as a teacher, yet was unacceptable only on account of the curse, for which she cannot be held responsible, for having been born in the family of her parents. Only under compulsion, deceased reported the matter to the police. Initially, she never involved her parents. Only under extreme compulsion, on 4.7.2008 did she report the matter to the police and her parents.

17. Conduct of the accused evidently reflects their culpable mental state. On 4.7.2008 and 5.7.2008, they did not respond even to the calls of the police. On 6.7.2008, after admitting the factum of the deceased having lodged complaints with the police, under assurance, Rakesh Kumar took her and made her stay in the accommodation so taken on rent by him.

18. In the teeth of this evidence, in our considered view, prosecution has been able to establish, beyond reasonable doubt, the factum of both the appellants of having committed an offence, punishable under the provisions of Section 498A of the Indian Penal Code.

19. The question, which still needs to be considered, is as to whether prosecution has been able to establish, beyond reasonable doubt, the charge of murder against accused Ram Piari and Rakesh Kumar. To establish the same, prosecution seeks reliance upon dying declaration (Ex. PW-4/A) and corroborative evidence in the shape of recovery of tin containing kerosene oil, match box, etc.

20. Dying declaration (Ex. PW-4/A) was recorded by ASI Nardev Singh, in the presence of Dr. Vinay Mahajan, Naib Tehsildar Manoj Kumar and Prem Kumar (PW-2). According to the learned counsel, the dying declaration is shrouded by the following suspicious circumstances: (i) it was made in the presence of relatives; (ii) there is contradiction in the oral testimonies of the witnesses; (iii) deceased could not have signed

the dying declaration, as even according to the doctor, she was unable to do so, on account of burn injuries; (iv) even though at 8.20 p.m., deceased was referred for special treatment to Tanda Hospital, but her statement was recorded at 9.05 p.m.

21. Law with regard to dying declaration is now well settled. In *Jaishree Anant Khandekar vs. State of Maharashtra,* (2009) 11 SCC 647, a comparative study of laws of various countries on the point of dying declaration was done by the Apex Court. It was held that:

> "17. The law relating to dying declaration is an exception to the hearsay rule. The rationale behind admissibility of a dying declaration was best expressed, not in any judgment, but in one of the soliloquies in Shakespeare's King John, when fatally wounded Melun wails:
>
> 'Have I met hideous
> death within my view,
> Retaining but a quantity of life,
> Which bleeds away
> even as a form of wax,
> Resolveth from his figure
> 'gainst the fire?
> What in the world should
> make me now deceive,
> Since I must lose the use of all deceit?
> Why should I then be false
> since it is true
> That I must die here
> and live hence by truth?'
>
> (See King John, Act V, Scene IV.)
>
> 18. Both Taylor and Wigmore in their treatise on Evidence took refuge to the magic of Shakespeare to illustrate the principles behind admissibility of dying declaration by quoting the above passage.
>
> 19. Among the judicial fraternity this has been best expressed, possibly by Lord Chief Justice Baron Eyre (See. R. Vs. Woodcock, (1789) 1 Lea.502, and which I quote (ER p.353): -
>
> "...That such declarations are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation, equal to that which is imposed by a positive oath in a court of justice."
>
> 20. The test of admissibility of dying declaration is stricter in English Law than in Indian Law. Sir James Fitzjames Stephen in 1876 brought out a 'Digest of the Law of Evidence' and its introduction is of considerable interest even today. The author wrote that

English Code of Evidence is modelled on the Indian Evidence Act of 1872. In the words of the author:

> "In the autumn of 1872 Lord Coleridge (then Attorney General) employed me to draw a similar code for England. I did so in the course of the winter, and we settled it in frequent consultations. It was ready to be introduced early in the Session of 1873. Lord Coleridge made various attempts to bring it forward, but he could not succeed till the very last day of the Session. He said a few words on the subject on the 5th August, 1873, just before Parliament was prorogued. The Bill was thus never made public, though I believe it was ordered to be printed.
>
> It was drawn on the model of the Indian Evidence Act and contained a complete system of law upon the subject of evidence."

21. In that book, Article 26 sums up the English law relating to dying declaration as under:-

> "Article 26. Dying Declaration as to Cause of Death . - A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is deemed to be relevant only in trials for the murder or manslaughter of the declarant; and only *when the declarant is shown, to the satisfaction of the judge, to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made.*
>
> Such a declaration is not irrelevant merely because it was intended to be made as a deposition before a magistrate, but is irregular." (emphasis supplied)

22. In Section 32(1) of the Indian Evidence Act the underlined portion is not there. Instead Section 32 (1) is worded differently and which is set out:

> "32. Cases in which statement of relevant fact *by person who is dead or cannot be found, etc., is relevant - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:-*
>
> *(1) When it relates to cause of death - When the statement is made by a person as to the cause of his death, or to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.*
>
> *Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be he nature of the proceeding in which the cause of his death comes into question." (emphasis supplied)*

23. The Privy Council in the case of Nembhard Vs. The Queen, 1982 (1) The All England Law Reports 183 (Privy Council), while hearing an appeal from the Court of Appeal of Jamaica, made a comparison of the English Law and Indian Law by referring to the underlined portions of Section 32(1) of the Indian Evidence Act at page 187 of the report. Sir Owen Woodhouse, speaking for the Privy Council, pointed out the different statutory dispensation in Indian Law prescribing a test of admissibility of dying declaration which is distinct from a common law test in English Law.

24. Apart from an implicit faith in the intrinsic truthfulness of human character at the dying moments of one's life, admissibility of dying declaration is also based on the doctrine of necessity. In many cases victim is the only eye witness to a crime on him/her and in such situations exclusion of the dying declaration, on hearsay principle, would tend to defeat the ends of justice. American Law on dying declaration also proceeds on the twin postulates of certainty of death leading to an intrinsic faith in truthfulness of human character and the necessity principle.

25. On certainty of death, the same strict test of English Law has been applied in American Jurisprudence. The test has been variously expressed as 'no hope of recovery', 'a settled expectation of death'. The core concept is that the expectation of death must be absolute and not susceptible to doubts and there should be no chance of operation of worldly motives. (See Wigmore on Evidence page 233-234).

26. This Court in Kishan Lal Vs. State of Rajasthan, AIR 1999 SC 3062, held that under English Law the credence and the relevance of the dying declaration is admissible only when the person making such statement is in hopeless condition and expecting imminent death. Justice Willes coined it as a "settled hopeless expectation of death" (R Vs. Peel, (1860) 2 F. & F. 21, which was approved by the Court of Criminal Appeal in R Vs. Perry, (1909) 2 KB 697). Under our Law, the declaration is relevant even if it is made by a person, who may or may not be under expectation of death, at the time of declaration. (See para 18, page 3066). However, the declaration must relate to any of the circumstances of the transaction which resulted in his death."

22. In *Khushal Rao vs. State of Bombay,* AIR 1958 SC 22, the Apex Court has further held that:-

"Sometimes, attempts have been made to equate a dying declaration with the evidence of an accomplice or the evidence furnished by a confession as against the maker, if it is retracted, and as against others, even though not retracted. But in our opinion, it is not right in principle to do so. Though under S. 133 of the Evidence Act, it is not illegal to convict a person on the uncorroborated testimony of an accomplice, illustration (b) to S. 114 of the Act, lays down as a rule of produce based on experience, that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars and this has now been accepted as a rule of law. The same cannot be said of a dying declaration because a dying declaration may not, unlike a confession, or the testimony of an approver, come from a tainted source. If a dying declaration has *been made by a person whose antecedents*

are as doubtful as in the other cases that may be a ground for looking upon it with suspicion, but generally speaking, the maker of a dying declaration cannot be tarnished with the same brush as the maker of a confession or an approver."

"*It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made*; it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence that other pieces of evidence; a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as for as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the lying man for observation, for example, whether there was sufficient light if the crime was committed at night; *whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.*"

"In order to pass the test of reliability, a dying declaration has to be *subjected to a very close scrutiny*, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. *If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then without corroboration it cannot form the basis of a conviction.* Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court, in a given case, has come to the conclusion that particular dying declaration was not free from the infirmities." (Emphasis supplied)

23. The aforesaid decision came up for consideration before the Constitution Bench of the Apex Court in *Harbans Singh and another vs. The State of Punjab,* AIR 1962 SC 439 and after taking into account its earlier decision in *Ram Nath vs. State of Madhya Pradesh,* AIR 1953 SC 420**,** affirmed the aforesaid view.

24. In *Paniben (Smt.) vs. State of Gujarat,* (1992) 2 SCC 474, the Court has further reiterated and laid down the following principles:-

"A dying declaration is entitled to great weight. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring-corroboration is merely a rule of prudence."

> "However, since the accused has no power of cross-examination, which is essential for eliciting the truth, the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail".
>
> "Merely because a dying declaration does not contain the details as to occurrence, it is not to be rejected. Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. But a dying declaration which suffers from infirmity cannot form the basis of conviction. Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon."
>
> "(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Mannu Raja v. State of U.P. (1976) 2 SCR 764) (AIR 1976 SC 2199).
>
> (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration (State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 416; Ramavati Devi v. State of Bihar, AIR 1983 SC 164).
>
> (iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (Rama Chandra Reddy v. Public Prosecutor, AIR 1976 SC 1994).
>
> (iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of Madhya Pradesh, (1974) 4 SCC 264 : (AIR 1974 SC 332).
>
> (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M.P., AIR 1982 SC 1021).

> (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P., 1981 SCC (Crl) 581).
>
> (vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).
>
> (viii) Equally, merely because it is a brief statement it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505).
>
> (ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State, AIR 1988 SC 912).
>
> (x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan, AIR 1989 SC 1519).
>
> 19. In the light of the above principles, we will consider the three dying declarations in the instant case and we will ascertain the truth with reference to all dying declarations made by the deceased Bai Kanta. This Court in Mohan Lal v. State of Maharashtra, AIR 1982 SC 839 held:
>
> "where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred."
>
> Of course, if the plurality of dying declarations could be held to be trust-worthy and reliable, they have to be accepted."

25. However, where the prosecution version differs from the statement of deceased, dying declaration cannot be used for convicting the accused [Paniben (supra)].

26. The aforesaid view has been reiterated in Jai Karan vs. State of Delhi (MCT), (1999) 8 SCC 161, Sham Shankar Kankaria vs. State of Maharashtra, (2006) 13 SCC 165 and Mohammed Asif vs. State of Uttaranchal (2009) 11 SCC 497.

27. The Constitutional Bench of the Apex Court in *Laxman vs. State of Maharashtra,* (2002) 6 SCC 710, while considering the conflict in *Paparambaka Rosamma vs. State of A.P.* (1999) 7 SCC 695 and *Koli Chunilal Savji vs. State of Gujarat,* (1999) 9 SCC 562, came to the conclusion that law laid down in the latter was the correct law and simply because the Doctor has not recorded/made endorsement that the deceased was in a fit state of mind to make the statement in question, other material on record to indicate that the deceased was fully conscious and capable of making statement cannot be ignored. This view has been reiterated in *Ravi and another vs. State of T.N.* (2004) 10 SCC 776 and *Kamalavva and another vs. State of Karnataka,* (2009) 13 SCC 614.

28. In *Shaik Nagoor vs. State of Andhra Pradesh represented by its Public Prosecutor, High Court of Andhra Pradesh, Hyderabad,* (2008) 15 SCC 471, the Apex Court

held that where the Judicial Magistrate and the Police officer had given detailed description and witnesses were not cross-examined on the point of fitness of the deceased to give dying declaration plea taken by the accused that the deceased was not fit to make the statement, under the circumstances of that case, was untenable.

29. In *Maiben D/o Danabhai Tulshibai Maheria vs. State of Gujarat,* (2007) 10 SCC 362, the Court was dealing with a case where death had taken place 25 days after recording of the statement of the deceased and the same was taken to be a dying declaration.

30. Further in *Sohan Lal alias Sohan Singh and others vs. State of Punjab,* (2003) 11 SCC 534, *State of Karnataka vs. Shariff,* (2003) 2 SCC 473, Dayal *Singh vs. State of Maharashtra,* (2007) 12 SCC 452 and *Kanti Lal vs. State of Rajasthan,* (2009) 12 SCC 498, it has been held that it is not necessary that dying declaration is to be recorded before the Magistrate. The same can be recorded even before or by the police official. This view stands reiterated in *Gulam Hussain and another vs. State of Delhi,* (2000) 7 SCC 254.

31. In *Mohan Lal and others vs. State of Haryana* (2007) 9 SCC 151, the Court disbelieved the statement made by the wife of the accused on the ground that not only it was vague but also there was no contemporaneous documentary or other material on record to prove dowry demands prior to the incident.

32. In *Java Beans vs. Union Territory of Pondicherry,* (2010) 1 SCC 199, the Apex Court was dealing with the case of an accused who was charged of having poured kerosene oil on his wife and then set her on fire. The accused husband was charged for having committed an offence punishable under Section 302, IPC. The accused assailed the findings of conviction on the ground that prosecution had examined only interested witnesses and also dying declaration was tutored, promoted and product of the imagination of deceased. In the proven facts of that case repelling the contention, it was held as under:-

> "We are of the considered view that in case where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court *must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency.* The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."
>
> (Emphasis supplied)

33. In *Sukanti Moharana vs. State of Orissa,* (2009) 9 SCC 163, the Court was dealing with a case where the dying declaration was challenged on the ground that it did not contain thumb impression or signatures of the deceased. The challenge was repelled on the ground that medical evidence proved that the deceased was having 90% burn injuries on the thumb and therefore was in no position to sign the dying declaration. The Apex Court further reiterated its decision in Nallapati Sivaiah vs. SDO, (2007) 15 SCC 465, in the following terms:-

> "18. …This Court in more than one decision cautioned that the courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental

condition to make the dying declaration, the courts have to look for the medical opinion."

34. This view stands reiterated in *Ongole Ravikanth vs. State of Andhra Pradesh,* (2009) 13 SCC 647.

35. Dying declaration need not be in the form of question and answer. Principles required to be adopted for recording the statement of deceased stand reiterated in *Ram Bihari Yadav Vs. State of Bihar and others,* (1998) 4 SCC 517**,** *State of Karnataka vs. Shariff* (2003) 2 SCC 473 and *K.Ramachandra Reddy and another vs. The Public prosecutor,* (1976) 3 SCC 618.

36. Prosecution evidence has to be appreciated in the backdrop of the above stated legal position.

37. It has nowhere come in the testimony of the witnesses, before whom or who recorded the dying declaration, that the deceased was either under any fear, threat or was in any manner tutored. There was no pre determination or due deliberation of mind.

38. It has come on record that at the time when statement was recorded, Ajudhya Devi and Punnu Ram were present, but then there is no evidence of tutoring. We find dying declaration to have been scribed by ASI Nardev. However, there is a minor contradiction with regard to the person who spoke with the deceased. The variation is in the statement of Prem Kumar, Naib Tehsildar Manoj Kumar and Dr. Vinay Mahajan. We find that insofar as involvement of accused Rakesh Kumar is concerned, there is no contradiction at all in the content of the statement. Accused Rakesh Kumar specifically named in the dying declaration. He set the deceased on fire, at the time when none else was present in the house, as is so stated by the victim herself.

39. We are not inclined to accept the version of Ajudhya Devi and Prem Kumar that accused Rakesh Kumar and his parents had set the deceased on fire, in view of the categorical statement of Manoj Kumar, according to whom deceased had disclosed that “she was set ablaze by her husband and asking that she be rescued and that she did not want to die”. Only after refreshing memory, the doctor could state the deceased to have disclosed that her in-laws had poured kerosene and she was set ablaze by her husband with a match stick. But, in the dying declaration, deceased clarified that at the time when she was burnt, her husband was alone at home. Dying declaration simply states that her in-laws had poured kerosene, but then was it the father-in-law or the mother-in-law. There is no certainty about the same. She qualified and clarified her previous statement. She stated that at the time when she was set ablaze, only her husband was in the house.

40. In this view of the matter, we express our doubt about the culpable state of accused Ram Piari, in relation to the charge of murder, in furtherance of her common intention.

41. It is true that dying declaration contains signatures of the deceased. The doctor opined, when he first examined the deceased, that she was suffering from 80% superficial deep burns. MLC (Ex.PW-6/B) itself records that the deceased could not sign as her hands were burnt. We notice that the doctor has categorically deposed the deceased to have signed document (Ex. PW-4/A) in his presence. Initially there was no complaint of burning/ murder against anyone. Only when ruka was sent from the hospital and statement, under the provisions of Section 154 of the Code of Criminal Procedure (Ex. PW-14/A), was recorded, the Investigating Officer, after taking all precautions by associating a gazetted officer, got statement of the deceased recorded. Apparently, deceased appended her

signatures in a broken form. She appears to have only written her name as 'Reena'. Prior to recording of the statement, doctor had certified her to be fit. Even Naib Tehsildar Manoj Kumar has clarified that statement was signed by the deceased. It has come on record that after 7.7.2008, deceased was not fit to make any statement.

42. It is true that document (Ex. PW-6/A), whereby deceased was referred for treatment to the hospital at Tanda, records the timing to be 8.20 p.m., but then one cannot ignore the fact that it takes time for the formalities to be completed before the patient is discharged from the hospital for being transported to the referral hospital. It has come on record that the Investigating Officer moved an application (Ex.PW-6/C) for getting the statement of the deceased recorded and only after the doctor certified the deceased to be fit, her statement was recorded at the earliest opportune time. Record reveals that the deceased was admitted to the hospital at 8.15 p.m. All formalities had to be completed, which took less than an hour. It is not even suggested to the doctor that the statement was not recorded in the hospital or that at the time of recording of said statement, deceased stood discharged from the hospital. Thus, time cannot be said to be a relevant factor for discarding the document.

43. 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. [See: *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.].

44. Also, apex Court in *Padala Veera Reddy v. State of Andhra Pradesh and others,* 1989 Supp (2) SCC 706, Court 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."

(Also 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).

45. 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.

46. 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 guilty of the accused.

47. Both Punu Ram and ASI Ramesh Kumar, in their unrebutted testimonies, have corroborated the version of the Investigating Officer of having effected recoveries of steel glass (Ex.P-2), can (Ex. P-1), match box (Ex. P-3) and two match sticks (one live and one burnt)(Ex.P-4 and P-5, respectively) alongwith clothes of the deceased. It has come on record that the sealed articles were kept in the Malkhana by MHC Ranjit Singh (PW-8). Malkhana register (Ex.PW-8/B) is on record to this effect. Articles were sent for chemical analysis to the Forensic Science Laboratory, Junga, vide Road Certificate (Ex. PW-8/A) and deposited by there Karam Chand (PW-7). Report of the Chemical Analyst (Ex. PW-10/B) proves that kerosene oil was found in the plastic can (Ex.P-1) and packet containing burnt clothes of deceased (Ex.P-4).

48. We are not inclined to accept the submission of the learned counsel. We are of the considered view that in the instant case no ground for interference is made out. The dying declaration, corroborated by independent witnesses, proves the guilty intent of the accused in murdering his wife. This fact stands established on record, beyond reasonable doubt.

49. Thus, from the conjoint reading of testimonies of all the witnesses and the documentary evidence placed on record, it is evident that on 6.7.2008, accused Rakesh Kumar, with criminal intent, set his wife (deceased) on fire in his house. It has nowhere come that the deceased was deranged or had suicidal tendency. She was newly married and had no reason to set herself on fire. She wanted to live a dignified life in the house of her husband, but on account of social stigma and resistance from the parents of her husband, she was not allowed to do so. She had already approached the police, disclosing and expressing apprehension to her life. Accused himself had sought time from the police to resolve the issue. He took the deceased alongwith himself to his rented accommodation. He alone was at home at that point in time. Simply because he brought the deceased to the hospital, would not render the prosecution case to be false or doubtful. It would not negate his criminal intent.

50. In our considered view, prosecution has been able to establish guilt of accused Rakesh Kumar, in relation to offences, punishable under Sections 302 read with Section 109 and 498A of the Indian Penal Code, and that of accused Ram Piari, in relation to offence punishable under the provisions of Section 498A of the Indian Penal Code, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, not only ocular but also corroborative in the shape of recovery of weapon of offence.

51. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court, with regard to accused Rakesh Kumar. 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. However, with regard to accused Ram Piari, in our considered view, the prosecution has been able to prove the charge only under the provisions of Section 498A of the Indian Penal Code and not the charge of murder. Hence, the appeal qua accused Rakesh Kumar is dismissed and qua accused Ram Piari is partly allowed, as aforesaid. She is acquitted of the offence punishable under the provisions of Section 302 read with Section 109 of the Indian Penal Code. Appeal stands disposed of, so also pending application(s), if any.

****

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

Smt. Rama Devi wife of Sh. Kewal Krishan and others. ....Appellants/Defendants.

Vs.

Sh. Sushil Kumar Handa and others. .....Respondents/Plaintiffs.

RSA No. 80 of 2014.
Judgment reserved on: 19.3.2015
Date of Decision: April 8, 2015.

H.P. Urban Rent Control Act, 1987- Section 13- It is the duty of landlord to keep the building in good repair and if the landlord neglects to keep the building in good repair then tenant may make the repair himself after giving prior notice to the landlord in writing - tenant can deduct the expenses of repair from the rent not exceeding one-twelfth of the rent payable by him to the landlord- landlord filed a Civil suit against the tenant for restraining him from raising construction or changing the existing structure of the building- tenant admitted that the repairs were carried out in the building – no permission was obtained from M.C or Town and Country Planning Department- held, that tenant is not entitled to carry out the repairs without obtaining prior permission of the M.C and Town and Country Planning Department- further, permission of Rent Controller is required for carrying out any construction or repairing the premises within the municipal area- however, the tenant is entitled to take the benefit of H.P. Urban Rent Control Act in accordance with law.

(Para-12 to 15)

For the appellants: Mr.Satyen Vaidya, Advocate.
For respondents: Mr.Harish Behl, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree passed by learned Additional District Judge (2) Mandi in Civil Appeal No. 58 of 2011 titled Smt.Rama Devi and others Vs. Susheel Kumar Handa and others.

2. Brief facts of the case as pleaded are that plaintiffs filed a suit for permanent prohibitory and mandatory injunction pleaded therein that three storeyed building comprising in khata khatauni No. 326/371 khasra No.8 measuring 47-25 Sq. metre is situated in Mohalla Thanehra Mauza Magwain Tehsil Sadar District Mandi HP owned by

one Sh Geeta Nand son of Sh. Todar who expired. It is pleaded that out of three storey building first and second story was rented out to Sh Mela Ram in the year 1964 and third storey is in the occupation and possession of the plaintiffs as owners. It is pleaded that Sh Mela Ram original tenant expired and he was succeeded by defendants who are in occupation of the first and second storey of the building as tenants. It is pleaded that defendants without any consent and permission of the owners have removed wooden planks of the roof of second storey and have raised the height of existing second storey to three feets above and have laid down slab and are adamant to raise further construction. It is pleaded that construction on the part of defendants is without any approval of construction plan. It is pleaded that defendants also threatened that they would occupy the third storey also. It is pleaded that defendants are tenants under the plaintiffs and they have no right to change the existing structure of the building. Prayer for decree of the suit as mentioned in relief clause of plaint sought.

3. Per contra defendants filed written statement pleaded therein that plaintiffs have no cause of action and locus standi to file present suit. It is pleaded that plaintiffs did not approach the Court with clean hands. It is pleaded that two stories building were rented by late Sh Geeta Nand to late Sh Mela Ram in the year 1960. It is pleaded that third storey of the building was also rented out by Sh Geeta Nand to Mela Ram on dated 1.1.1971. It is pleaded that entire premises is under the possession of defendants on rent. It is admitted that Mela Ram was succeeded by defendants. It is denied that defendants without any consent and permission of the owners have removed the wooden planks. It is pleaded that entire work was done in the presence of land owners with their consent. Prayer for dismissal of suit sought. Plaintiffs also filed replication. As per pleadings of the parties the following issues were framed by learned trial Court on dated 15.9.2008:

1. Whether plaintiffs are entitled for the relief of permanent prohibitory injunction as prayed for? ...OPP

2. Whether plaintiffs are also entitled for the relief of mandatory injunction as claimed? ...OPP

3. Whether plaintiffs have concealed true facts and are not entitled for discretionary relief of injunction as alleged? ...OPD.

4. Whether defendants are also in occupation the third floor of the premises in the capacity of tenant as alleged? ...OPD.

5. Relief.

4. Findings of the learned trial Court upon issue No.1 are in affirmative and findings of learned trial Court upon issues No. 2,3 and 4 are in negative. Learned trial Court passed decree of permanent prohibitory injunction in favour of plaintiffs and against defendants restraining defendants from removing wooden planks and karia (wooden articles) from the roof of second storey or making any addition or alteration in the building in dispute comprised in khata khatoni No. 326/371 khasra No.8 measuring 47-25 Sq. Metres situated in Mohalla Thanehra Mauja Magwain Tehsil Sadar District Mandi HP.

5. Feeling aggrieved against the judgment and decree passed by learned trial Court appellants filed Civil Appeal No. 58 of 2011 titled Smt. Rama Devi and others Vs. Susheel Kumar and others before learned Additional District Judge (II) Mandi. Learned first appellate Court dismissed the appeal filed by the appellants.

6. Feeling aggrieved against the judgment and decree passed by learned first appellate Court in Civil Appeal No. 58 of 2011 appellants filed present appeal under Section

100 of the Code of Civil Procedure. Hon'ble High Court of HP on dated 9.9.2014 admitted the appeal on the following substantial questions of law:

1.Whether judgment and decree passed by learned first appellate Court is sustainable without adjudication upon serious and disputed questions of law?.

2. Whether learned First Appellate Court has misconstrued the provisions of HP Urban Rent Control Act 1987 and eclipsed civil rights of the parties under the general law of the land?.

3. Whether learned Courts below are justified in issuing blanket injunction order in favour of the land lord especially when the land lord himself failed to fulfill his obligation under the HP Urban Rent Control Act 1987?

4. Whether learned Courts below have ignored the material evidence and have based findings on material which was not proved on record by legal evidence?.

7. Court heard learned Advocate appearing on behalf of the parties at length and also perused the entire record carefully.

8 Parties produced following witnesses in support of their case.

PW1	Sh.Mahinder Kumar
PW2	Sh. Pawan Kumar
DW1	Sh. Vijay Kumar
DW2	Sh R.S.Rana

9. Parties also produced following pieces of documentary evidence in support of their case.

Sr.No.	Ext.No.& Date	Description
1.	Ext.PA	Death certificate of Geeta Nand.
2.	Ext.PB	Jamabandi for the year 1999-2000.
3.	Mark-A	Copy of structure stability certificate.
4.	Mark-B	Copy of site plan.
5.	Mark-C	Copy of site plan.
6.	Ext.DW-2/A	Affidavit in evidence on behalf of the defendant
7.	Ext.DA	Affidavit in evidence on behalf of the defendant
8.	Ext.DX & DY	Photographs.

10. Oral evidence adduced by the parties.

10.1 PW1 Mohinder Kumar has stated that disputed property is three stories building and plaintiffs are owners of the suit property. He has stated that his father died on dated 19.1.1968. He has stated that death certificate is Ext PA placed on record. He has

stated that building is seventy years old and condition of the building is not proper. He has stated that his father inducted Mela Ram as tenant in the building in the year 1964 and third storey remains in the possession of owners. He has stated that defendants are running Punjabi restaurant in the suit property. He has stated that defendants are raising construction in the suit property. He has stated that defendants are intending to raise slab over the suit property without consent of the owners. He has stated that defendants did not obtain any prior permission from Town and Country Planning and Municipal Corporation for construction. He has tendered in evidence Jamabandi Ext PB for the year 1999-2000. He has admitted that suit property is situated in the middle of Mandi market. He has denied suggestion that defendants are tenants of entire building.

10.2 DW1 Vijay Kumar has tendered affidavit Ext DA in examination-in-chief. There is recital in the affidavit that two stories of building was rented out by late Sh Geeta Nand to late Sh Mela Ram in the year 1960. There is recital in the affidavit that subsequently third storey of the building was also rented out by late Sh Geeta Nand to late Sh. Mela Ram. There is recital in the affidavit that repair of the premises was conducted in the year 1994 with the consent of owners. There is further recital in the affidavit that slab was laid on half portion of the premises. There is recital in the affidavit that no further construction or repair of the premises was conducted after 1994. There is recital in the affidavit that building did not require any further repair. DW1 has admitted in cross examination that plaintiffs are owners and defendants are tenants. DW1 has admitted that height of third storey had diminished due to construction of slab. DW1 has stated that no permission from Municipal Committee or Town and Country Planning was obtained for repair. DW1 has denied suggestion that tenant intends to possess third storey of the building. Self stated that tenants are already in possession of third storey of the building.

10.3 DW2 Sh R.S.Rana has tendered an affidavit Ext.DW2/A in examination-in-chief. There is recital in the affidavit that deponent was knowing late Sh Geeta Nand and late Sh Mela Ram and deponent has also seen the suit property. There is recital in the affidavit that premises is three stories building. There is recital in the affidavit that third storey was also rented out by late Sh Geeta Nand to late Sh Mela Ram in the year 1966. There is recital in the affidavit that defendants are running a hotel in the building. There is recital in the affidavit that repair of the premises was conducted in the year 1994 and same continued for about two months and thereafter no repairs was conducted. There is recital in the affidavit that building did not require any repair. DW2 has denied suggestion that defendants have uprooted the planks of the roof without consent of the land owners. DW2 has stated that the age of the building is seventy years old. DW2 has denied suggestion that condition of the building is in very bad condition.

10.4. Plaintiffs also examined PW2 Pawan Kumar in rebutal. He has stated that Sh Geeta Nand was his father and two stories building was given to late Sh Mela Ram. He has stated that no permission to change the premises was given by land owners. He has stated that residential premises of the land owners is situated at the distance of half kilometre from the suit property.

Finding upon point No.1 of substantial question of law .

11. Submission of learned Advocate appearing on behalf of the appellants that learned trial Court and learned first appellate Court have not adjudicated serious and disputed questions of fact in the present case is rejected being devoid of any force for the reason hereinafter mentioned. On dated 15.9.2008 issues were framed by learned trial Court and there is recital in the order sheet that issues were read over and explained to the parties and no other issues arise or claimed. It is proved on record that thereafter learned trial court

had given opportunity to both parties to lead evidence in support of their issues. It is proved on record that plaintiffs are owners of the suit property and defendants are the tenants of suit property. It is also proved on record that defendants are running restaurant in the suit property. Learned trial Court has given reasons upon issue No.1 in para No.16 to 25 in positive, cogent and reliable manner. Learned trial Court has also given reasons upon issues No. 2,3 and 4 in paras No. 26 27 and 28 with positive, cogent and reliable manner. It is held that learned trial Court and learned first appellate Court have adjudicated all disputed questions of fact involved in the present case in a legal manner. Hence point No.1 of substantial question of law is answered against the appellants.

Finding upon point No.2 of substantial question of law.

12. Submission of learned Advocate appearing on behalf of the appellants that learned first appellate Court had misconstrued the provisions of HP Urban Rent Control Act 1987 and eclipsed civil rights of appellants is also rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that HP Urban Rent Control Act 1987 is applicable in the present case because suit property is situated in Municipal area in the middle of Mandi market. As per Section 13 of the HP Urban Rent Control Act 1987 it is the duty of the landlord to keep the building in good repair and if the landlord neglects to keep the building in good repair then tenants may make the repair himself after giving prior notice to the landlord in writing and could deduct the expenses of repair from the rent not exceeding one-twelfth of the rent payable by the tenant for the year. In the present case there is no evidence on record in order to prove that written notice was given by the tenants to repair the building. It is held that learned first appellate Court has not misconstrued the provisions of HP Urban Rent Control Act 1987 to eclipse the civil rights of appellants. It is well settled law that when there is conflict between special law and general law then special act always prevails over the general law. In the present case tenants have specifically admitted that repair of the building was done in the year 1994 with the consent of owners. DW1 Vijay Kumar has admitted that repair of the building was continued for two months. DW1 Vijay Kumar has admitted that slab was laid on half portion of the premises in the year 1994. DW1 Vijay Kumar has also admitted that plaintiffs are the owners of the suit property and defendants are tenants. DW1 Vijay Kumar has also admitted that no prior permission of the Municipal Committee and Town and Country Planning was obtained for repair work of the building. It is well settled law that repair work within municipality area can only be conducted after obtaining prior permission of Municipal Committee and Town and Country Planning. Even DW2 R.S.Rana has corroborated the version that repair work was conducted in the year 1994 by the defendants. It is held that learned first appellate Court has not eclipse the civil rights of the appellants because it is well settled law that no tenants can raise construction over the suit property without the permission of Rent Controller within the municipality area. It is held that permission of Rent Controller is required for raising any construction or for repairing the premises within municipality area as per HP Urban Rent Control Act 1987. Hence point No.2 of substantial question of law is decided against the appellants.

Finding upon point No.3 of substantial question of law.

13. Submission of learned Advocate appearing on behalf of the appellants that learned courts below have issued blanket injunction in favour of the plaintiffs and against the defendants contrary to law is partly accepted for the reason hereinafter mentioned. Court has perused the judgment and decree passed by learned trial Court and affirmed by learned first appellate Court carefully. Learned trial Court in para No.31 has granted decree of permanent prohibitory injunction in favour of the plaintiffs and against the defendants restraining the defendants from removing the wooden planks from the roof of the second

storey or making any addition or alteration in the building in dispute. It is held that perpetual injunction could not be granted to the tenants contrary to HP Urban Rent Control Act 1987 because under Section 13 of the HP Urban Rent Control Act 1987 tenant is legally entitled to repair the premises himself after giving notice to the landlord and tenant also legally entitled to deduct the expenses of repair from the rent not exceeding one-twelfth payable by the tenant for the year. As per Limitation Act 1963 the limitation for execution of decree of mandatory injunction is three years from the date of decree or from date fixed for performance and limitation for execution of any decree other then the decree of mandatory injunction is twelve years. As per Limitation Act 1963 there would be no limitation for execution of decree of perpetual injunction. Court is of the opinion that decree of permanent prohibitory injunction is a perpetual prohibitory injunction. It is held that by way of granting perpetual prohibitory injunction in favour of landlord learned trial Court and learned first appellate Court have barred the tenants to seek relief under Section 13 of the HP Urban Rent Control Act 1987. It is held that perpetual prohibitory injunction granted by learned trial Court and affirmed by learned first appellate Court are contrary to law and contrary to Section 13 of the HP Urban Rent Control Act 1987. Hence point No.3 of substantial question of law is answered partly in favour of the appellants.

Finding upon point No.4 of substantial question of law.

14. Submission of learned Advocate appearing on behalf of the appellants that learned trial Court have ignored material evidence and based its finding on material not proved on record is rejected being devoid of any force for the reason hereinafter mentioned. Court is of the opinion that landlord can seek the injunction against the tenant that tenant should not repair or should not raise any construction in the tenanted premises contrary to HP Urban Rent Control Act 1987. Admittedly it is proved on record that appellants are tenants of the premises and respondents are landlords of the premises. Even court has also perused jamabandi Ext PB placed on record. As per jamabandi Ext PB Geeta Nand has been recorded as owners of the premises and Mela Ram has been recorded as tenant of the premises. There is recital in the remarks column that third storey of the building is in the possession of owners. Jamabandi Ext PB has been prepared by the public servant in discharge of his official duty and is a relevant fact under Section 35 of Indian Evidence Act 1872. Tenants did not rebut jamabandi Ext PB placed on record and appellants did not examine any revenue official who has prepared jamabandi Ext PB in order to rebut the contents of the jamabandi. Hence point No.4 of substantial question of law is decided against the appellants.

Relief:

15. In view of the above stated facts appeal is partly allowed and judgment and decree passed by learned trial Court and affirmed by learned first appellate Court are modified to the extent that both parties will be at liberty to take the benefit of HP Urban Rent Control Act 1987 in accordance with law. Judgment and decree of learned trial Court and learned first appellate Court are modified to this extent only. Decree sheet be drawn accordingly. File of the learned trial Court and learned first appellate Court along with certified copy of judgment be sent back forthwith. Parties are left to bear their own costs. Pending applications if any also disposed of. Appeal is disposed of.

****

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

Shamshed Ali ...Appellant.
Versus
State of H.P. ...Respondent.

Criminal Appeal No.119 of 2012
Reserved on : 23.3.2015
Date of Decision : April 8, 2015

Indian Evidence Act, 1872- Section 155- hostile witness- merely because a witness had turned hostile, his testimony cannot be termed to be untrustworthy of credence- it is for the Court to decide, whether as a result of contradiction, witness stands fully discredited or part of his testimony can still be believed- independent witness had turned hostile, however, he admitted that accused was riding the motorcycle which was stopped by the police for checking- he admitted that he was associated by the police during investigation and had signed his previous statement recorded by the police regarding the recovery of contraband substance in his presence - statement was also proved by the Investigating Officer - held, that these circumstances proved that independent witness had supported prosecution version. (Para 8 to 14)

Indian Evidence Act, 1872- Section 3- Sole testimony of a police official if found to be reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of his case – it will depend on the fact of the case- when evidence of the police official inspires confidence and is found to be trustworthy and reliable, it can form the basis for conviction - absence of independent witness of the locality does not affect the creditworthiness of the prosecution case. (Para- 15 to 18)

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 4.5 k.g of charas- testimonies of the police officials corroborated each other- minor contradictions regarding the number of vehicle and time spent by the police officials at the spot are not sufficient to discard the prosecution version. (Para- 20 to 26)

N.D.P.S. Act, 1985- Sections 42 and 52- Police had effected a chance recovery- it had no prior information of the accused carrying any contraband- accused was informed of his ground of arrest- contraband was deposited in the safe custody – superior officers were informed, there is no question of violation of mandatory provision of Sections 42 and 52 of N.D.P.S. Act. (Para-27)

Cases referred:

Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh, (2011) 5 SCC 123
Yomeshbhai Pranshankar Bhatt vs. State of Gujarat, (2011) 6 SCC 312
Bhajju alias Karan Singh vs. State of Madhya Pradesh, (2012) 4 SCC 327
Ramesh Harijan vs. State of Uttar Pradesh, (2012) 5 SCC 777
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625
Aher Raja Khima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338
Dharampal Singh v. State of Punjab, (2010) 9 SCC 608

State of Punjab v. Lakhwinder Singh and another, (2010) 4 SCC 402
P.K. Arjunan v. State of Kerala, (2007) 8 SCC 516
Gopaldas Udhavdas Ahuja and another v. Union of India and others, (2004) 7 SCC 33

For the Appellant	:	Mr. Manoj Pathak, Advocate.
For the Respondent	:	Mr. Ashok Chaudhary & Mr. V.S. Chauhan, Additional Advocates General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Shamshed Ali, hereinafter referred to as the accused, has assailed the judgment dated 19.3.2012, passed by Special Judge, Fast Track Court, Shimla, Himachal Pradesh, in Sessions Trial No.13-S/7 of 2011, titled as *State of Himachal Pradesh v. Shamshed Ali*, whereby he stands convicted of the offence punishable under the provisions of Section 20(b)(ii)(C) 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 ten years and pay fine of Rs.1,00,000/-, and in default of payment thereof, to further undergo simple imprisonment for a period of two years.

2. It is the case of prosecution that on 26.1.2011, SI Chaman Bhatia (PW-9), alongwith police party comprising of Constable Surat Singh (PW-2), Constable Virender Sharma (PW-3) and ASI Kishore (PW-7), amongst others, was present at a place known as Fediz Bridge. They were on patrol duty and before departure had recorded such entry (Ex.PW-9/D) at the Police Station. At about 4.30 p.m., police party stopped a motorcycle bearing No.UA-07N-9701 driven by the accused, which was checked and from the dickey, contraband substance wrapped in a polythene packet (Ex. P-2) was recovered. After associating independent witnesses, including Beni Ram (PW-1) a local shopkeeper, the contraband substance, which was weighed and found to be 4.5 kgs, was sealed with seal impression 'M'. Also, photographs (Ex. PW-7/A1 PW-7/A8) were taken of the proceedings conducted on the spot. Ruka (Ex. PW-9/B) was sent through Constable Surat Singh, on the basis of which FIR No.4, dated 26.1.2011 (Ex. PW-9/C), under the provisions of Section 20 of the Act, was registered at Police Station, Nerwa, District Shimla, Himachal Pradesh. File was taken back to the spot. Whereafter, further proceedings were completed. Accused was arrested and informed of the grounds of his arrest. Contraband substance alongwith the NCB forms, so filled up in triplicate, was entrusted to MHC Kartar Singh (PW-6), who after entering the same in the Malkhana Register (Ex. PW-6/A), kept it in safe custody. The seized contraband substance was sent, through Constable Naresh Kumar (PW-8), to the Forensic Science Laboratory, Junga. Report of the Chemical Examiner (Ex. PW-9/G) was obtained and taken on record. Special Report (Ex. PW-4/A), so prepared by SI Chaman Bhatia, was sent to the Deputy Superintendent of Police, through Constable Ashok Kumar (PW-4), which was received by ASI Parkash Chand (PW-5). 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 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 nine 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 the following defence:

> "I was coming to Tieuni. My vehicle was stopped. I was not having pollution control certificate. A police officer bearing one star one SI, demanded money. When I refused, I was taken to P.S. and false case was filed."

Though accused expressed his desire of leading evidence, but eventually decided not to do so.

5. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused and sentenced him as aforesaid. Hence, the present appeal by the accused.

6. Before us, Mr. Manoj Pathak, learned counsel for the accused, has made the following submissions: (i) non-compliance of Sections 42 and 52 of the Act has rendered the prosecution case to be fatal; (ii) testimonies of the prosecution witnesses, uninspiring in confidence, stand mutually contradicted and belied through the testimony of independent witness; (iii) statements of the witnesses were recorded after 4-5 days of the incident, which renders the prosecution case to be doubtful; (iv) also there is doubt with regard to the genuineness of the papers so prepared by the police; (v) non-production of the original seal has rendered the prosecution case to be fatal; and (vi) failure on the part of the prosecution in establishing where the case property was kept, after it was brought back from the laboratory, has further rendered the prosecution case to be doubtful.

7. It is no doubt true that independent witness Beni Ram (PW-1) was declared hostile and cross-examined by the Public Prosecutor. However, his statement makes a very interesting reading.

8. It is a settled proposition of law that merely because a witness has turned hostile, his entire evidence cannot be termed to be unworthy of credence. It is for the Court to consider, whether as a result of contradiction, witness stands fully discredited or part of his testimony can still be believed. If the credit of a witness is not fully shaken, Court can rely upon that part of the testimony which appears to be creditworthy.

9. Their Lordships of the Hon'ble Supreme Court in *Ashok alias Dangra Jaiswal vs. State of Madhya Pradesh,* (2011) 5 SCC 123 have held that seizure witnesses turning hostile may not be very significant by itself, as it is not an uncommon phenomenon in criminal trials, particularly in cases relating to NDPS Act.

10. Their Lordships of the Hon'ble Supreme Court in *Yomeshbhai Pranshankar Bhatt vs. State of Gujarat,* (2011) 6 SCC 312 have held that evidence of hostile witness may contain elements of truth and should not be entirely discarded. Their Lordships have held as under:

> "22. The learned counsel for the appellant further submitted the doctor had not given his written opinion that the deceased was fit enough to give her statement. Though orally, the doctor said so. Relying on this part of the evidence especially the evidence of the husband of the deceased, the learned counsel for the appellant submitted that even though the husband may have been declared hostile, the law relating to appreciation of evidence of hostile witnesses is not to completely discard the evidence given by them. This Court has held that even the evidence given by hostile witness may contain elements of truth.
>
> 23. This Court has held in State of U.P. vs. Chetram and others, AIR 1989 SC 1543, that merely because the witnesses have been declared hostile

the entire evidence should not be brushed aside. [See para 13 at page 1548]. Similar view has been expressed by three-judge Bench of this Court in Khujji alias Surendra Tiwari vs. State of Madhya Pradesh, [AIR 1991 SC 1853]. At para 6, page 1857 of the report this Court speaking through Justice Ahmadi, as His Lordship then was, after referring to various judgments of this Court laid down that just because the witness turned hostile his entire evidence should not be washed out."

11. Their Lordships of the Hon'ble Supreme Court in *Bhajju alias Karan Singh vs. State of Madhya Pradesh,* (2012) 4 SCC 327 have held that evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. Their Lordships have held as under:

> "36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.
>
> 37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases:
>
> (a) Koli Lakhmanbhai Chanabhai v. State of Gujarat (1999) 8 SCC 624
>
> (b) Prithi v. State of Haryana (2010) 8 SCC 536
>
> (c) Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1
>
> (d) Ramkrushna v. State of Maharashtra (2007) 13 SCC 525"

12. Their Lordships of the Hon'ble Supreme Court in *Ramesh Harijan vs. State of Uttar Pradesh,* (2012) 5 SCC 777 have again reiterated that any portion of evidence consistent with case of prosecution or defence can be relied upon. Their Lordships have further held that seizure/recovery witnesses though turning hostile, but admitting their signatures/thumb impressions on recovery memo, they could be relied on by prosecution. Their Lordships have held as under:

> "23. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same

can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide: Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).

a. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla v. Daroga Singh & Ors., AIR 2008 SC 320; and Subbu Singh v. State by Public Prosecutor, (2009) 6 SCC 462. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. (See also: C. Muniappan & Ors. v. State of Tamil Nadu, AIR 2010 SC 3718; and Himanshu @ Chintu v. State (NCT of Delhi), (2011) 2 SCC 36)"

13. Applying the aforesaid provisions of law, we proceed to examine his testimony.

14. This witness was extensively cross-examined by the Public Prosecutor and surprisingly we find the witness to have corroborated the testimony of police officials. Witness admits the accused to be present on the spot. He admits that accused was driving the motorcycle, which was stopped by the police for checking. Though he initially did feign ignorance with regard to recovery of the contraband substance from the motorcycle, but later clarified that "it is wrong that this motorcycle was never stopped by the police at Fediz bridge on that day and no recovery was effected from it". Witness admits to have been associated by the police during investigation and signed his previous statement so recorded by the police. Such statement so proved by the Investigating Officer does record recovery of the contraband substance in his presence. He admits the police party to have taken weights from his shop and the contraband substance, which was weighed in instalments, to be of 4.5 kgs. Incident is of 26.1.2011 and the witness admits that his statement was recorded on the very same day. Thus, in our considered view, this independent witness has fully supported the prosecution case.

15. It is also a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

16. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

17. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction. [See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

18. Apex Court in *Tahir v. State (Delhi)*, (1996) 3 SCC 338, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

19. In view of the aforesaid statement of law, we shall now examine the testimonies of police officials present on the spot.

20. Conjoint reading of testimonies of such police officials, clearly establishes recovery of the contraband substance, from the conscious possession of the accused.

21. SI Chaman Bhatia (PW-9) categorically states that on 26.1.2011 at 4.30 p.m., he stopped vehicle No. UA-07N-9701, driven by the accused, for checking. From the dickey, contraband substance, which smelt like Charas was recovered. It was in the shape of sticks. Two independent witnesses, namely Ashwani and Beni Ram were called and joined for further investigation. Scales and weights were brought from the shop of Beni Ram and upon weighment, the contraband substance was found to be 4.5 kgs. ASI Kishore took photographs (Ex.PS-7/A1 to Ex. PW-7/A8 - negatives Ex.PW-7/B1 to PW-7/B7) of the proceedings on the spot. Recovered stuff was wrapped in a cloth parcel and sealed with nine seals of seal impression 'M'. Sample of the seal was also taken on a piece of cloth, which is Ex. P-5. Thereafter, contraband substance was seized vide Memo (Ex.PW-3/A). He himself filled up NCB form (Ex.PW-9/A) and sent Ruka (Ex. PW-9/B) to the Police Station for

registration of the case. Whereafter, accused was arrested and informed of the grounds of arrest. He entrusted the case property to the MHC.

22. Accused could not, through cross-examination, impeach the credit of this witness. Veracity of his testimony cannot be said to be doubtful or shaky in any manner. Witness has explained the signatures on the piece of cloth (Ex.P-5), on which specimen seal impressions were taken, to be in different ink. He clarifies that the accused was informed of all the grounds of arrest, as mentioned in the arrest memo (Ex.PW-2/A).

23. Testimony of this witness stands materially corroborated by Surat Singh (PW-2), Virender Sharma (PW-3) and Kishore Kumar (PW-7).

24. Surat Singh is categorical that after recovery was effected, he carried Ruka to the Police Station. Virender Sharma is a witness to recovery and has deposed in the manner in which the prosecution wants the Court to believe. Witness categorically denies false implication of the accused or that Charas was actually recovered from some other person. Kishore Kumar has deposed that he took photographs of the proceedings on the spot.

25. Now, in their cross-examination part, limited contradiction we find is with regard to the number of vehicles, which were checked by the police party. But then, this does not render the prosecution witnesses to be doubtful or fatal for the reason that accused himself admits his presence on the spot and his vehicle being stopped by the police for checking. It is not his case that he was stopped at another place or some other police officials. Kishore Kumar admits not to have signed any memo of recovery, but then it is not the case of Chaman Bhatia that it was so done. The contradiction, minor in nature, is also with regard to exact time which took place on the spot, but then, in the given facts and circumstances, even this does not render the prosecution case to be doubtful. FIR clearly records that the vehicle was searched at 4.30 p.m. On the material aspect of recovery of Charas from the conscious possession accused, there is no contradiction.

26. Thus, it cannot be said that the prosecution witnesses are unreliable and their testimonies are uninspiring in confidence. We find testimonies of the witnesses to be clear, cogent and consistent. Prosecution has been able to prove its case, beyond reasonable doubt. Contraband substance in question was recovered from the conscious possession of the accused.

27. It is a case of chance recovery. Police party had no prior information or intimation of the accused carrying any contraband substance. Also, accused was informed of his grounds of arrest; seized contraband substance was deposited in safe custody and superior officers were informed. As such there is no question of violation of mandatory provisions of Sections 42 and 52 of the Act.

28. Chaman Bhatia is silent as to whom he handed over original seal, but then he has proved the sample of the seal, so taken by him on a piece of cloth (Ex. P-5), which we find to be the very same seal, which was found by the experts at the Forensic Science Laboratory, Junga. Nine seals of seal impression 'M' were found intact and tallied with the specimen seal impression. Even the NCB form bears the very same seal impression, reference whereof is also there in the Malkhana Register.

29. Non production of the original seal itself would not render the prosecution case to be doubtful or fatal.

30. Even if statements of the witnesses were recorded 4-5 days after the incident, in the teeth of other overwhelming evidence on record, it would not render the prosecution case to be doubtful.

31. We find the police to have taken all precautions in informing the superior Officers of having effected recovery of the contraband substance from the conscious possession of the accused, which fact is evident through the testimonies of Ashok Kumar (PW-4) and Parkash Chand (PW-5).

32. It is a settled position of law that where prosecution has been able to establish the accused to be in conscious possession of the contraband substance, Court can presume his mental culpable state and the onus to rebut the presumption is on the accused. (See: *Dharampal Singh v. State of Punjab*, (2010) 9 SCC 608; *State of Punjab v. Lakhwinder Singh and another,* (2010) 4 SCC 402; *P.K. Arjunan v. State of Kerala,* (2007) 8 SCC 516; and *Gopaldas Udhavdas Ahuja and another v. Union of India and others,* (2004) 7 SCC 33.

33. It is true that prosecution has failed to explain where the contraband substance remained for a period of two months (approximately), after it was brought back from the Forensic Science Laboratory. Significantly by then the entire seized parcel stood chemically analyzed. But then, does this fact render the prosecution case to be doubtful or fatal? In our considered opinion, no. MHC Naresh Kumar and Kartar Singh have deposed that so long as the sample remained in their possession it was not tampered with. Report of the Chemical Expert (Ex.PW-9/G) clearly exhibits that nine seals of seal impression 'M' were found intact, only whereafter the parcel was opened up. Its weight was found to be 4.55 kgs. The sealed parcel was analyzed, which was found to be extract of cannabis and sample of Charas. Thus, in this backdrop, where the property remained, till the time of its production before the Court, would be inconsequential. The very sample sealed at the laboratory stands produced before the Court. Non-explanation is for the period after receipt of the contraband substance from the laboratory. Significantly, by that time, property stood chemically analyzed and as such this fact would, in no manner render the prosecution case to be doubtful or fatal. Yes, police officials have been negligent to this extent. It may be a case of tardy investigation. But certainly does not render the prosecution case, on material aspect to be false or doubtful.

34. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

35. 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/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

****

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

Sonu ...Appellant.

Versus

State of H.P. ...Respondent.

Criminal Appeal No.150 of 2010
Reserved on : 23.3.2015
Date of Decision: April 8, 2015

N.D.P.S. Act, 1985- Section 18- Accused was running a shop of Tudi- search of the shop was conducted during which two packets, one containing 1.6 kg and another containing 1.2 kg of opium, were recovered- Police Officials and independent witnesses duly supported the prosecution version- link evidence was also established- building was owned by one 'S' and no evidence was collected by prosecution to prove that accused was a tenant- however, this fact would not make the prosecution case doubtful as the witness categorically deposed that accused was alone in the shop- he had not protested that someone else was owner of the goods- witnesses had no animosity with the accused and Court can infer culpable mental state after the possession of the accused is proved- onus is upon the accused to rebut the presumption- no evidence was led by the accused to rebut the presumption – held, that in these circumstances, accused was rightly convicted. (Para-10 to 37)

N.D.P.S. Act, 1985- Section 42- Police had not obtained any search warrant or authorization prior the conducting search but Dy. S.P. a Superior and Gazetted Officer was associated, hence, in these circumstances; there was no requirement of complying with Section 42 of N.D.P.S. Act. (Para-12 and 13)

Cases referred:

Om Prakash alias Baba v. State of Rajasthan, (2009) 10 SCC 632
Avtar Singh and others v. State of Punjab, (2002) 7 SCC 419
Ismailkhan Aiyubkhan Pathan v. State of Gujarat, (2000) 10 SCC 257
Mohd. Aslam Khan v. Narcotics Control Bureau and another, (1996) 9 SCC 462
Inder Sain v. State of Punjab, (1973) 2 SCC 372
State v. Raju @ Mohammad and others, Latest HLJ 2010 (HP) 913
Shivaji Sahabrao Bobade & another vs. State of Maharashtra, (1973) 2 SCC 793
Yasihey Yobin and another v. Department of Customs, Shillong, (2014) 13 SCC 344
State of Haryana v. Jarnail Singh and others, (2004) 5 SCC 188
M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449
Dharampal Singh v. State of Punjab, (2010) 9 SCC 608
State of Punjab v. Lakhwinder Singh and another, (2010) 4 SCC 402
P.K. Arjunan v. State of Kerala, (2007) 8 SCC 516
Gopaldas Udhavdas Ahuja and another v. Union of India and others, (2004) 7 SCC 33

For the Appellant	:	Mr. Vinay Thakur, Advocate.
For the Respondent	:	Mr. Ashok Chaudhary & Mr. V.S. Chauhan, Additional Advocates General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Sonu, hereinafter referred to as the accused, has assailed the judgment dated 24.3.2009, passed by Special Judge (II) (Additional Sessions Judge-I), Kangra at Dharamshala, Himachal Pradesh, in Sessions Trial No.9-I/2008, titled as *State v. Sonu*, whereby he stands convicted of the offence punishable under the provisions of Section 18 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 ten years and pay fine of Rs.1,00,000/-, and in default of payment thereof to further undergo rigorous imprisonment for a period of two years.

2. It is the case of prosecution that on 4.3.2008, ASI Ajit Kumar (PW-17) received secret information that accused, who was running a *Tudi* (fodder) shop near Hanuman Temple Mohtali, Himachal Pradesh, was dealing with and had concealed the contraband substance (opium) in his shop. Information of such fact was sent by ASI Ajit Kumar, through Constable Joginder Singh (PW-10), to the Superintendent of Police, Kangra. Ajit Kumar also associated Excise Inspector Narinder Singh (PW-4) and Rasal Singh (PW-1), Pradhan of the concerned Gram Panchayat, for carrying out search and seizure operations. Thereafter, Ajit Kumar formed a raiding party. Also, Dy.S.P. Kishan Chand (PW-3) was requested to remain present on the spot. On reaching the spot, raiding party apprised the accused of his statutory right. He offered to be searched by the police officials vide Memo (Ex. PW-1/A). During the search, hidden inside the *Tudi*, police recovered a scooter tyre (Ex. P-1), in which two packets (Ex. P-2 & P-3), containing opium, were kept. Weights and scales were brought from the shop of Tilak Raj (PW-8) and the contraband substance weighed. Weight of one packet (Ex. P-1) was found to be 1.6 kgs and another packet (Ex. P-3) was found to be 1.2 kgs. Two samples, each weighing 25 grams, from each of the packets, were drawn and sealed with two seals of seal impression 'M'. Photographs (Ex.PW-2/A to 2/E) (negatives are Ex.PW2/A1 to 2/E1) of recovery were taken on the spot. NCB form (Ex.PW-17/B) was filled up. Ruka (Ex.PW-17/A) was sent through Constable Ashok Kumar (PW-12), on the basis of which FIR No.47/08, dated 4.3.2008 (Ex.PW-6/A), under the provisions of Section 18 of the Act, was registered at Police Station, Indora. Accused was also arrested on the spot. NCB form and the case property was produced before SHO Shakti Prashad (PW-16), who resealed the same with his own seal of impression 'T' and deposited it in the Malkhana. MHC Rajinder Singh (PW-6) handed over the sealed samples to Dev Raj (PW-13), who deposited the same at the Forensic Science Laboratory (FSL), Junga. Report (Ex.PW-16/D), which confirmed the sample to be opium, was obtained and 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 an offence punishable under the provisions of Section 18 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 17 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 the following defence:

> "I am innocent and have been falsely implicated in the present case. I was not in occupation of any shop of Mohtli ramp. I was not doing any work of selling fodder. No opium was recovered from my possessing or from any shop in my occupation. The entire story of the police raid and recovery of opium from a shop in my possession is false. I was taken by the police from my home at village Saili Kulian, Tehsil Pathankot on 5.3.2008 and a false case was planted on me and the police officials took the photographs under their pressure and duress. I am just a auto-rickshaw driver."

Accused chose not to lead any evidence in defence.

5. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused and sentenced him as aforesaid. Hence, the present appeal by the accused.

6. While relying upon the decisions rendered in *Om Prakash alias Baba v. State of Rajasthan,* (2009) 10 SCC 632; *Avtar Singh and others v. State of Punjab*, (2002) 7 SCC 419; *Ismailkhan Aiyubkhan Pathan v. State of Gujarat,* (2000) 10 SCC 257; *Mohd. Aslam*

Khan v. Narcotics Control Bureau and another, (1996) 9 SCC 462; *Inder Sain v. State of Punjab,* (1973) 2 SCC 372; and *State v. Raju @ Mohammad and others,* Latest HLJ 2010 (HP) 913, learned counsel for the accused-appellant, contends that prosecution failed to establish recovery of the contraband substance from the conscious possession of the accused. The principles of law stand misinterpreted and mis-appreciated. Only argument being that there is nothing on record to establish relationship of landlord and tenant between witness Sunita (PW-9) or that accused was in the exclusive possession of the shop in question.

7. Learned Additional Advocate General has supported the judgment of the trial Court, for the reasons assigned therein.

8. Having heard learned counsel for the parties as also perused the record, we are of the considered view that no case for interference is made out. Trial Court has correctly and completely appreciated the evidence on record. There is no error in either appreciation or application of law. The accused led no evidence to probablize his defence. Even from his cross-examination of the prosecution witnesses, it remains improbablized. Prosecution has been able to establish, beyond reasonable doubt, recovery of the contraband substance from the conscious possession of the accused.

9. Hon'ble Supreme Court of India in *Shivaji Sahabrao Bobade & another vs. State of Maharashtra,* (1973) 2 SCC 793 has held that:-

> "6. Even at this stage we may remind ourselves of a necessary social perspectives in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary contest of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles of golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then breaks down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned author [*Glanville Williams in 'Proof of Guilt'*] has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that " a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent ... ..." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analysing the evidence and appraising the soundness of the contrary conclusions reached

by the Courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant. In India the law has been laid down on these times long ago." [Emphasis supplied]

10. In the instant case, we find that not only the police officials but also independent witnesses to have supported the prosecution case, on the issue of with regard to recovery of the contraband substance from the conscious possession of the accused.

11. ASI Ajit Kumar categorically states that on 4.3.2008, when he was on patrol duty at Ranchi Mor Damtal, alongwith police officials HC Raj Kumar, HHC Surjit Singh, Constables Purshotam, Kamlesh, Ashok Kumar and Jatinder Singh, at 4 p.m., he received a secret information that one Sonu alias Nitu son of Bahadur Chand, resident of Selly Pulian Pathankot, who was running a *Tudi* shop near Hanuman Temple, Mohtli, was dealing in psychotropic/narcotic substance. The information was definite to the effect that if premises were raided, opium would be detected and recovered. Accordingly, he telephonically informed the Deputy Superintendent of Police and requested him to reach the spot. Ruka (Ex. PW-17/A) was also sent though Constable Ashok Kumar for registration of the FIR. In compliance of provisions of Section 42 of the Act, he also sent information through Constable Joginder Singh to the superior officer. From the testimony of Dy.S.P. Kishan Chand (PW-3), Joginder Singh (PW-10) and Praveen Kumar (PW-15), we find such fact to have been duly corroborated. Praveen Kumar, who was posted in the Office of Superintendent of Police, Kangra at Dharamshala, has produced extract of the Register (Ex.PW-15/A), evidencing the fact of receipt of such information. Thus, in our considered view, there is total compliance of provisions of Section 42 of the Act.

12. It is true that no search warrant or authorization was obtained before conducting the search and seizure operations, but then it remains explained that secret information was authentic. ASI Ajit Singh did involve Dy.S.P., a Superior and gazetted Officer, for carrying out the search and seizure operations.

13. Where the Gazetted Officer himself, after acting under Section 41 of the Act, has conducted search and seizure operations, it is not mandatory requirement of law to comply with the provisions of Section 42 of the Act. (See: *Yasihey Yobin and another v. Department of Customs, Shillong,* (2014) 13 SCC 344; *State of Haryana v. Jarnail Singh and others,* (2004) 5 SCC 188; and *M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence,* (2003) 8 SCC 449).

14. ASI Ajit Kumar states that he formed a raiding party, comprising of the police officials and other independent witnesses, and upon reaching the spot, in the presence of Dy.S.P. Kishan Chand, as also the raiding party, informed the accused of his statutory rights. Accused offered to be searched by the police party, vide Memo (Ex.PW-1/A). Prior to the search being conducted, accused, who was present on the spot, also searched the members of the raiding party, vide Memo (Ex.PW-1/D). Witness states that accused was running a shop of *Tudi*. From the *Tudi*, so kept in the shop, a scooter tyre (Ex. P-1), which contained two polythene packets, was recovered. Kamlesh Kumar (PW-5) was sent to fetch weights and scales and also call a photographer. The packets (Ex. P-2 & P-3) contained opium, which when weighed were found to be 1.6 kgs and 1.2 kgs, respectively. Two samples (Ex. P-4 & P-5), each weighing 25 grams, were drawn from each of the packets and sealed with seal impression 'M'. Specimen impression of the seal was taken on a piece of cloth (Ex. PW-1/D). NCB form (Ex. PW-17/B), in triplicate, was filled up on the spot. Also, entire proceedings were got photographed. Accused, who was arrested, desired information of his arrest be furnished to Sunita (PW-9), which was so done accordingly, vide memo (Ex. PW-17/D). Both, Judicial Magistrate 1st Class and Superintendent of Police,

Kangra, were informed, through wireless message (Ex.PW-17/E), of recovery of opium, effected from the conscious possession of the accused. With the completion of proceedings on the spot, police party returned to the Police Station and handed over the case property to Inspector Shakti Prashad, who resealed the sealed parcels with his separate seal.

15. In cross-examination, we find the testimony of this witness not to have been impeached in any manner. His deposition is clear and unambiguous. Significantly, accused has not cross-examined the witness on material points. Grievance made out is only with regard to non-association of independent witnesses present on the spot or the owner of the building to establish the factum of tenancy.

16. Independent witnesses of credence were associated and the question of tenancy we shall discuss hereinafter.

17. We find testimony ASI Ajit Kumar to have been materially corroborated not only by Dy. S.P. Kishan Chand but also by independent witnesses. Kishan Chand categorically states that upon receiving telephonic information, he reached the spot and in his presence, premises occupied by the accused were searched and from the tyre found in the *Tudi*, contraband substance was recovered. There are no contradictions, embellishments, improvements in his testimony. His testimony is absolutely inspiring in confidence.

18. We find that police party had also associated independent witnesses of credence and credibility. Rasal Singh is the Pradhan of the area and Narinder Kumar is an Excise Inspector. Both have proved their presence on the spot and recovery of the contraband substance from the conscious possession of the accused. No contradiction, material in nature, could be pointed out from their testimonies.

19. It is true that Rasal Singh had earlier witnessed such like operations, but then it has not come on record that Rasal Singh is not a witness of credence, is a stock witness, or that he was trying to shield the real culprit or had any animosity with the accused. They fully corroborate the version of other two police officials.

20. Kamlesh Kumar (PW-5) does state that on the asking of Ajit Kumar, he brought the scales/weights and also requested the photographer to come to the spot.

21. Tilak Raj does state that on the date of occurrence of the incident, police Constable took weights and scales from his shop. Though the witness was declared hostile, but when examined by the Public Prosecutor, admitted himself to be one of the persons standing on the spot, in the photograph (Ex. PW-2/B). In fact, weighment was done in his presence, as he clarifies by stating that he went to the spot lateron. We find defence of the accused not to have been probablized at all, even from his testimony.

22. Sandeep (PW-2) has proved photographs (Ex. PW-2/A to PW-2/E) and negatives (Ex. PW-2/A1 to Ex. PW-2/E1). The witness categorically states that the shop belonged to accused, who was carrying on business of fodder/*Tudi*.

23. We find Ajit Kumar to have materially complied with the provisions of the statute. Joginder Singh, as is evident from his testimony, took the Special Report (Ex. PW-12/A) and delivered it in the Office of Superintendent of Police, Kangra at Dharamshala, which fact also stands corroborated by Ashok Kumar (PW-12), who was posted as Reader of the Superintendent of Police. Not only that Constable Sugreev (PW-11) promptly took copy of the FIR to the Additional Chief Judicial Magistrate, Nurpur; SDPO, Nurpur; and SSP, Kangra.

24. We find that even by way of link evidence, prosecution has been able to establish its case beyond reasonable doubt. Shakti Prashad (PW-16), who was, at the relevant time, posted as the SHO of the concerned Police Station, does state that on 4.3.2008, Ajit Singh produced before him parcels bearing seal impression 'M', which he resealed with his seal of impression 'T' and handed it to the MHC.

25. MHC Rajinder Singh (PW-6) states that Inspector Shakti Prashad handed over the case property to him, which he deposited in the Malkhana. Entry (Ex.PW-6/D) was made in the Register. Two sealed parcels alongwith Road Certificate; NCB forms, were entrusted to Dev Raj (PW-13) for being deposited at the Forensic Science Laboratory. Dev Raj does corroborate such fact. From the conjoint reading of testimonies of these witness, it is apparent that so long as the parcels remained with them, they were kept in save custody and not tampered with.

26. Prosecution witnesses do state that the building having the shop in question, is owned by Sunita Devi (PW-9). It is also true that prosecution has not led any evidence to establish relationship between the accused and Sunita Devi. Whether accused was a tenant or not, remains un-established on record. But then, would this fact render the prosecution case to be fatal? In our considered view - No. This we say for the reason that relationship of landlord and tenant or existence of tenancy is not an issue in the present case. All that the prosecution was required to establish was exclusive possession of the accused and his presence in the shop, where *Tudi* was kept, wherefrom contraband substance was recovered. Corroborative in nature, photographs clearly establish accused to be present on the spot. Primarily independent witnesses have deposed that when raid was conducted for carrying out search and seizure operations, accused alone was present in the shop. When the contraband substance was recovered, neither did he raise any hue and cry nor protest about someone else being owner of the goods. His presence on the spot had to be explained. After all a senior level Police Officer was present on the spot. His defence that he was picked up from his residence at Pathankot (Punjab-a neighbouring State), cannot be said to have been probablized. Neither he nor his family raised any protest at any point in time, with regard to alleged kidnapping or false implication, both by the police officials or any other individual. Also none of the police officials harboured any animosity against the accused. Evidently, accused himself had desired information of his arrest be supplied to Sunita. Thus, he was familiar with her, who undisputedly owned the premises in question. No doubt, Sunita has her residence immediately behind the shop in question, but it is not her case that she is in possession of the shop in question or owner of *Tudi,* but she does admit of having let out the shops to third parties. Certainly she does not state that the shop in question was let out to the accused, but then the shop being in exclusive possession of the accused stands duly established on record, through the testimonies of the members of the raiding party.

27. Trial Court, in para-16 of the judgment, has dealt with the testimonies of the tenants of the adjoining shops. We affirm the reasoning. Police had neither any intimation nor information of relationship of the accused with Sunita Devi. But definite information was of the accused carrying business of *Tudi* from the premises in question, where she had hidden the contraband substance. The capacity in which the accused was occupying the shop is immaterial and irrelevant to the fact in issue. "Possession" has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together. What is required is custody or control.

28. In *Inder Sain (supra),* the Court, while dealing with the expression "possession", held as under:

"11. .....So, in the context it is permissible to look into the object of the legislature and find out whether, as a matter of fact, the legislature intended anything to be proved except the possession of the article as constituting the element of the offence. Even if it be assumed that the offence is absolute, the word 'possess' in Section 9 connotes some sort of knowledge about the thing possessed. So we have to determine what is meant by the word 'possess' in the section. The question is whether the possessor of a parcel is necessarily in possession of everything found in it. The word 'possess' is not crystal clear. There is no clear rule as to the mental element required.

.....

14. We think that the only question for consideration here is whether the appellant was in possession of opium. It was held in a number of rulings of the various High Courts that if possession of an article is made an offence, then there must be proof that the accused was knowingly in possession of the article. See the decisions in Emperor v. Santa Singh, AIR 1944 Lah339; Sabendra Singh v. Emperor, AIR 1948 Pat 222, Abdul Ali v. The State, AIR 1950 Assam 152, Pritam Singh v The State, 68 Pun LR 200=(AIR 1961 Punj 50) and Sub-Divisional Officer and Collector, Shivasagar v. Gopal Chandra Khaund, AIR 1971 SC 1190.

15. It is true that prosecution has not adduced any evidence to show that the appellant was knowingly in possession of opium The appellant took the endorsement of the Railway Receipt from the consignee, and presented it before the parcel clerk and obtained the parcel. There is, strictly speaking, no evidence that the appellant was aware that the parcel contained any contraband substance, much less opium.

16. But it is said on behalf of the prosecution that in most cases of unauthorised possession of opium the prosecution will never be able to prove that the accused was knowingly in possession of the article and that the burden to prove that he was not in conscious possession is upon the accused by virtue of Section 10 of the Act. That section seems to proceed on the assumption, if it Is proved that the accused had something to do with opium, then the burden of proof that he has not committed an offence will be upon the accused. In other words, when once it is proved in a prosecution under Section 9 of the Act that the accused was in physical custody of opium, it is for the accused to prove satisfactorily that he has not committed an offence by showing that he was not knowingly in possession of opium. It would, therefore, appear that the prosecution need only show that the accused was directly concerned in dealing with opium. If the prosecution shows that the accused had physical custody of opium, then, unless the accused proves by preponderance of probability that he was not in conscious possession of the article the presumption under S. 10 would arise. We do not think that the language of S. 10 would warrant the proposition that for the presumption mentioned in the section to arise it is necessary for the prosecution to establish conscious possession.

17. In our opinion S. 10 would become otiose if it were held that prosecution must prove conscious possession before it can resort to the presumption envisaged in the section As we said Section 10 proceeds on the assumption that a person who is in any way concerned with opium or has dealt with it in any manner, must be presumed to have committed an offence under S. 9 of

the Act, unless the person can satisfactorily prove by preponderance of probability either at he was not knowingly in possession or other circumstances which will exonerate him. The burden to account will arise only when the accused is in some manner found to be concerned with opium or has otherwise dealt with it.

18. In State v. Sham Singh, ILR (1971) 1 Punj & Har 130, Gurdev Singh, J. speaking about S. 10 observed:

> "Section 10 of the Opium Act, in my opinion, implies that a person who is in any way concerned with opium that forms the subject matter of prosecution or has otherwise dealt with it in any manner so as to render him accountable for it will be presumed to have committed an offence under S. 9 of the Opium Act unless he can 'account satisfactorily' for it."

In Sheo Raj Singh v. Emperor, AIR 1944 Oudh 297, it was held:

> "Section 10 expressly throws upon the accused the burden to account for opium in respect of which he is alleged to have committed an offence". Practically the same view was taken in Syed Meheboob Ali v. State, 1967 Cri LJ 1727 (Orissa).

19. In the last analysis, therefore, it is only necessary for the prosecution to establish that the accused has some direct relationship with the article or has otherwise dealt with it. If the prosecution proves detention of the article or physical custody of it, then the burden of proving that the accused was not knowingly in possession of the article is upon him. The practical difficulty of the prosecution to prove something within the exclusive knowledge of the accused must have made the legislature think that if the onus is placed on the prosecution, the object of the Act would be frustrated.

20. It does not follow from this that the word 'possess' in S. 9 does not connote conscious possession. Knowledge is an essential ingredient of the offence as the word 'possess' connotes, in the context of S. 9, possession with knowledge. The legislature could not have intended to make mere physical custody without knowledge an offence. A conviction under S. 9 (a) would involve some stigma and it is only proper then to presume that the legislature intended that possession must be conscious possession.

21. But it is a different thing to say that the prosecution should prove that the accused was knowingly in possession. It seems to us that by virtue of S. 10, the onus of proof is placed on the accused when the prosecution has shown by evidence that the accused has dealt with the article or has physical custody of the same, or is directly concerned with it, to prove by preponderance of probability that he did not knowingly possess the article.

22. In his statement under Section 342, the appellant totally denied having anything to do with the parcel. He had no case that to his knowledge the parcel contained anything other than apples. He never put forward the case that he bona fide believed that the parcel

> contained only apples. He was in physical custody of opium. He had no plea that he did not know about it."
>
> (Emphasis supplied)

29. In *Om Prakash alias Baba (supra),* the Court was dealing with the case where there was positive evidence to the effect that the premises in question belonged to a third party, where several persons, other than the accused, were residing. Hence, decision is inapplicable.

30. In *Avtar Singh (supra),* the Court was dealing with a case where the alleged contraband substance was being transported and it had come on record that persons other than the accused were also found travelling in the vehicle at the relevant time. Hence, decision is inapplicable.

31. In *Ismailkhan Aiyubkhan Pathan (supra)*, the Court was dealing with a case where the prosecution could not establish exclusive, actual or constructive possession of the room.

32. In *Mohd. Aslam Khan (supra),* Court was dealing with a case where the accused was not found to be in the premises and police had to break upon the lock, for carrying out the search and seizure operations. In the absence of proof of ownership or exclusive possession of the premises, the Court acquitted the accused, which is not the case in hand.

33. In *Raju @ Mohammad (supra),* the Court was dealing with the case where, in the given facts and circumstances, Court found the accused not to be in exclusive possession of the premises, from where the contraband substance was recovered.

34. It is a settled position of law that where prosecution has been able to establish the accused to be in conscious possession of the contraband substance, Court can presume his mental culpable state and the onus to rebut the presumption is on the accused. (See: *Dharampal Singh v. State of Punjab,* (2010) 9 SCC 608; *State of Punjab v. Lakhwinder Singh and another,* (2010) 4 SCC 402; *P.K. Arjunan v. State of Kerala,* (2007) 8 SCC 516; and *Gopaldas Udhavdas Ahuja and another v. Union of India and others,* (2004) 7 SCC 33.

35. In the instant case, even remotely, accused has not rebutted such presumption.

36. In our considered view, prosecution has been able to establish guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

37. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

****

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

Sunil Kumar Bansal & another .....Petitioners

Versus

K.T.S Educational and Charitable Trust ...& others.

....Respondents.

CMPMO No. 227 of 2014
Date of Decision: 08/04/2015

Code of Civil Procedure, 1908- Order 6 Rule 17- Defendant sought amendment in the Written Statement to assert that ostensible nature of the trust was charitable but in reality, it was a partnership firm to run a school - plaintiff contended that this amendment would change the nature and character of the defence- application was filed when issues had not been framed- held, that the proposed amendment was necessary for passing an effective decree - proposed amendment would not change the nature of the suit and would not affect the rights of the plaintiff- application was rightly allowed.(Para-3)

For the petitioners: Mr. S.D Gill, Advocate.
For the Respondents: Mr. Neeraj Gupta, Advocate, for respondents No. 1 and 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The plaintiffs/petitioners herein are aggrieved by the order rendered by the learned Additional District Judge, Solan, on an application preferred by the defendants/ respondents No. 3 and 4, herein before him under Order 6 Rule 17 C.P.C, claiming leave of the learned Additional District Judge, Solan, to incorporate certain amendments in the written-statements of defendants No. 3 and 4. Alongwith the application, the amended written statement was also filed. The leave, as prayed for, was granted. The proposed amendments to the written-statement of the defendants concerned exist in paragraph 5 of the application filed under Order 6 Rule 17 CPC. Since an inference and conclusion is to be drawn by this Court whether the amendments as proposed to be incorporated in the written-statement of the defendants concerned and as exist in paragraph 5 of the application alter its structure and character from the one as initially projected in the written-statement of the defendants concerned, or, whether the proposed amendments are merely an endeavor to clarify certain ambiguities occurring in the written-statement previously instituted by the defendants concerned, it is deemed apt to extract in verbatim paragraph 5 of the application under Order 6 Rule 17 C.P.C:-

> 5. *That the applicants intend to amend the written statement in para-1 there is mention. " it is correct that ostensibly the nature of so called trust is charitable but in act it is a partnership firm to run a school", such legal position has taken by the then counsel is not correct, a such the applicants intend to replace these lines/words as under:-*
>
> *" The trust has been constituted vide deed dated 21.6.1997 registered with sub Registrar, Solan on 19.7.1997, the nature of the trust is matter of*

conclusion to be drawn on the basis of trust deed. It will not be out of place to submit humbly that no contribution from the general public has been obtained.

In para 4 on merits of the written statement in 10th line after word Prem Goyal word sold has been used, the applicants intend to substitute word sold by transferred". in the end of this para, the applicants intend to add:

"on account of resign by Mrs. Santosh Garg, Parmod Singla and Shri Prem Goyal new trustees i.e defendant No. 3 to 5 were inducted as trustee".

In para-5 of the written statement in 3rd line after 1st word 3 word purchased interest has been used, the applicants intend to substitute word purchased by the following:-

"Made it possible and met with the conditions of resign and leaving of trust by Smt. Santosh Garg, Sh. Parmod Singla and Shri Prem Goyal and due to this reason got right and choice to have 3 trustees on the Board."

In para-5, after words accordingly a written agreement was created it is mentioned, "Rs. 3.70 crore was fixed consideration to be paid by defendant No. 3", these words are intended to be substituted:-

"Rs. 3.70 crore was advanced by the defendant No.3 to the Trust to bail out the trust out of the crises."

During pendency of suit Shr. T.R Bansal has transferred his rights in favour of smt. Balninder Kaur and has submitted resignation from the Board of Trustee, this fact is intended to be pleaded by adding following in end of para-9:-

"However, Sh. T.R Bansal has transferred his rights and resigned from the post of trustee and smt Balninder Kaur has been included as a Trustee in Board of Trustees. It is humbly submitted that the financial health of the trust could not improve due to acts of the plaintiffs due to which various trustees have been leaving their post after taking away their membership contribution and other monies advanced to the trust".

In para-12 in the first line words" amount of their share in the trust" have been used, these words are intended to be replaced by:

"that after receiving amount of their share/membership contribution and further amounts advanced"

In the end of para-26 the applicants intend to add:-

"The defendants No. 3 to 5 have been spending much time in India to look after the affairs of the trust. Moreover, on account of new scientific and technological advancement the meeting of board of trustees can be held even by way of circulation video conference/meeting."

The applicants further intend to bring the acts and conduct of the non-applicants/plaintiff, after dismissal of the suit vide order 19.5.2008, when the management of the trust and school was taken over by the 2/3rd majority of the trustee and affairs were checked, the following misdeeds of the non-applicants/plaintiffs transpired subsequently the suit has been restored. The following facts have come to knowledge of the applicants during pendency of suit, as such the applicants intend to add the following in the end of para-30:-

"The plaintiffs have not been pumping their money in the school and on the contrary have been causing loss and injury to the trust by their acts, conduct , deeds and omissions etc. etc. some of them are detailed as under:-

(i) *The main work which the trust had been executing is running of KTS Public School, year-wise strength of the student in the school tells a lot about the mismanagement of the affairs of the trust afater dismissal of the suit, when the 2/3rd majority of the trustees checked the affairs of the trust and further in accordance with the terms of MOU authorized Sh. Jitender Singh to manage and look after the management, only 6 students were found on the rolls of the school and only 2 teachers were working in the school.*

(ii) *Despite of memorandum of understanding which has been reduced into writing after consent of all the trustees and is binding upon all the trustees, the plaintiff No.1 has failed to hand over the records to the defendant No.3, so as to hide the wrong and illegal deeds of the plaintiffs. Otherwise, also, after dismissal of the suit all the trustees are entitled to check the records at any time and such records is to be kept in the office of the trust. The plaintiff No.1 has removed the record or detained the same in his personal custody without any right to do so.*

(iii) *After taking over management defendant No.3 found that heavy losses and damage has been caused to building of the school and allied structures like that of retaining wall, removal of fixtures and fittings from the school premises. Neglect to keep and maintain the trust property in a proper manner by the plaintiffs has caused heavy loss of the trust property. The loss and damage to the buildings was got assessed from authorized civil engineer Mr Rakesh Thakur, Proprietor, Thakur construction Co.. who has assessed such losses at Rs. 53,00,000/- (Rupees Fifty Three Lacs). The detail of losses is more specifically detailed in report of Mr. Thakur, Annexed as Annexure R-1.*

(iv) *The plaintiffs had rented out 2 domes/building of the school and mess along with kitchen to Art of living Association and have been receiving heavy rent from them, at no point of time the trustees agreed to rent out the building to any association and moreover, rent received from Art of Living Association has been misappropriated and misused by the plaintiffs, running of camps by Art of Living Association in the school complex has caused great loss and prejudice not only to the buildings but the running of the school by the trust, the premises rented to Art of Living Association had to be got vacated after having negotiations under stress and strains, even police had to intervene in the said matter.*

(v) *The plaintiffs have cut and removed 7 big chil/pine tress the logs and wood after cutting the tress, the timber has been misappropriated, only small portion of the timber was found in dome No.3, the matter was reported by the defendant No.3 to the Divisional Forest Officer, Solan. On receipt of information Divisional Forest Officer, Solan, summoned plaintiff No.1, the plaintiff No.1 made false statement to said official, stating that these trees were damaged by termite and fell down of their own. With regard to same tress, the plaintiffs filed affidavit in the Hon'ble High Court of HP wherein plaintiffs stated that these tress have*

been cut by them after obtaining permission from concerned officials during the construction of the school in the year 2005. The building of the school has been constructed in the year 1998-99. The DFO solan has informed the replying defendants that no permission has ever been obtained by the plaintiff for cutting and removing trees. The plaintiffs have been causing damage to the trust property and misappropriating the same.

(vi) *Besides causing loss of Rs. 53,00,000/- the plaintiffs have removed major portion of metal fence of the school alongwith metal postures (Angle irons), approximately 100 door/window frames ventilator frames, furniture, chairs gas cylinder, science equipment kept in the school and tour iron bars/saria has also been found to have been removed, the plaintiffs have misused the same so as to have undue benefit.*

(vii) *Four tv Sets have also been removed from the school premises. In earlier 2002, a contract was granted for metaling of parking in front of school gate. Amount of Rs. 60000/- (Rupees Sixty thousand) was paid in advance to the contractor. After bringing some material, equipment and road roller, the contractor fled away without performing his part of contract and the plaintiffs sold coal Tar Drums. Tar Melting Machine and road roller and pocketed the money, the persons who are witness to such wrong acts can be produced by the replying defendants in the Hon'ble Court.*

(viii) *The plaintiffs failed to make payment of electricity bills of the school, electricity supply has been disconnected w.e.f 23.9.2008, the plaintiffs paid only amount of Rs. 10,000/- (Rupees Ten Thousand) against one bill out of Rs. 47,890/- further the plaintiffs failed to pay electricity bill with regard to dome and mess building and as such failed to make total payment of Rs. 63,060/- said amount at present had to be paid by defendant No.3 and this liability has been fastened on the trust by the plaintiffs. Payment of the electricity bills was necessary so as to make effort to run the school and meet other objectives of the trust.*

(ix) *The plaintiffs have employed staff at lesser amount of salary what was being shown in the record of the trust. After making payment to the staff, the plaintiffs have been taking back portion of the amount paid, the witnesses to said effect can be produced by the replying defendants. A letter dated 7.4.2005 signed by the plaintiff Sunil Kumar Bansal and Principal as a salary of staff for the month of 2005 shows crediting of Rs. 61,200/- in the account of the employees of the school, but on the reverse of the letter plaintiff No.1 has with his own hand writing shown that actual pay of the staff for the said month as paid is Rs. 48, 900/-.*

(x) *5 students Sh. Gurusaran Singh, Ujjawal Kapoor and Rohil Sharma students of +1of Daya Nand Adarsh Vidyalya, Solan, Jatin Sehran and Shivangi verma who were not students of KTS Public School were allowed to reside in the school premises, these students have informed replying defendant No.3 that they have been making payment for boarding and lodging @Rs. 25,000/-p.a.*

(xi) *Some ex-employees of the KTS school were allowed to occupy the school premises/buildings of the trust in a wrong manner. From these employees charges must have been received by the plaintiffs. The plaintiffs have no authority to permit ex-employees to use the property of the trust in any manner.*

(xii) *The employees provident fund of the school employees has not been deposited in their PF accounts during the pendency of the suit, the concerned department has issued letter dated 11.12.2008 and notice No. 1(3)HP-1868/888 and 89 dated 27.3.2008, despite of receipt of notice requisite information was not supplied by the plaintiffs.*

(xiii) *New School bus was purchased in the year 1999, the bus has not been maintained and even the taxes qua the same have not been paid due to neglect the bus has become unusable and approximately scrap. The same requires Rs. 1,50,000/- so as to make the same in road worthy condition. RLA Solan has issued letter of demand of Rs. 37,500/- as tax for 2007-08, besides this it has been informed vide letter dated 2.1.2009 that the permit of the bus has not been renewed for last two years and Rs. 2,800/- is payable towards the permit fee.*

(xiv) *Amount of Rs. 8,50,000/- has been found to have been embezzled by the plaintiff No.1 FIR No. 53 dated 14.3.2007 in the matter has been lodged with P.S Solan. According to information available with the defendant No.3 a case has been put in the court of law against plaintiff No.1. The plaintiff No.1 has also misappropriated amount of Rs. 4,00,000/- by showing such payment to his wife. Besides this, plaintiff No.1 and his wife have connived with Sh. T.R Bansal, Ex Trustee so as to charge Rs. 3,000/- from each student of the KTS School under the pretext of providing internet information.*

(xv) *The plaintiffs have been extracting money from various persons after alluring them to have benefits from the trust. The plaintiffs received amount of Rs. 30,00,000/- (Rupees thirty lacs) from Sh. Rakesh Bansal and Smt. Balbir Kaur after representing that they are the only trustees and if amount is paid to them, the above mentioned person would be made trustees and in future various types of benefits will be available to the trustees from the trust as the school is likely to run in very good manner and generate heavy income, after finding that they have been cheated sh. Rakesh Bansal and Smt. Balbir Kaur have lodged FIR No. 242 dated 18.9.2007 with P.S Solan. According to information of replying defendant a case has been put in against the plaintiffs in the Court of law.*

(xvi) *In the year 2002, the trust was to make payment of Rupees one Crore so as to clear the liabilities/debts. At that time it was decided that all the six trustees should make arrangement of money payment of approximately Rs. 16,66,666/- each so as to clear the liability. As defendant No.3 and 3 other trustees were having one line of thought and plaintiffs were having other line of thought finally agreed that replying defendant No.3 will advance amount of Rs. 65,00,000/- as loan to the trust and the plaintiffs will pay Rs. 35,00,000/- so as t clear the liability of Rupees one crore/ The defendant N.3 made payment of*

Rs. 65,00,000/- approximately to the trust by depositing the same in the loan account of the trust kept and maintain with Indus Bank, Chandigarh. Despite of time and again request, the plaintiff failed to make payment of Rs. 35,00,000/- and on account of this amount having remained standing. The interest continued to increase the liability of the trust. This conduct of the plaintiffs caused great loss and injury to the trust. The amount of Rs. 35,00,000/- increased to amount more than Rupees one crore.

(xvii) *On account of above mentioned liability of more than Rupees one crore, the Indus Bank filed a case before Debt recovery Tribunal, Chandigarh the matter was decided in favour of the Bank, an appeal was preferred by the plaintiffs before Debt Recovery Appellate Authority Tribunal, Delhi, when replying defendants came to know about said proceedings, moved an application for become party to the appeal. The plaintiffs acted with culpable negligence and did not pursue the mater property, due to which the appeal was dismissed and the Bank became entitled to take over possession of the trust property on 21.1.2008 After dismissal of the appeal, the plaintiffs contacted defendant No.3 to bail out the trust, after negotiations etc. all the trustees arrived at an understanding and MOU and agreement came into existence. In pursuance of the MOU the defendant No.3 took initiative to save the trust property and succeeded in getting one time settlement for Rs. 1,01,00,000/- (Rs.One crore & one Lac). Out of this amount the defendant has paid amount of Rs. 91,00,000/- (Rupees Ninety one Lacs) and plaintiffs got amount of Rs. 10.00.000/- (Rupees ten lacs) adjusted from the account of their sisters kept and maintained with the Indus Bank. Had the plaintiffs made payment of Rs. 35,00,000/- earlier, the liability of Rs. 1,01,00,000/- would not have been fastened on the trust, the plaintiffs have never acted in the interest of trust but on the contrary have always been trying to take undue advantage and gain. The amount has been paid on above mentioned dates and the same was to be returned alognwith interest, but till today not even a single penny has been returned on the contrary the trust property has been damaged in such a manner that in order to run the school and other projects of the trust heavy amount would be required.*

(xviii) *in the year 2002, replying defendant was made trustee of the trust. Thereafter the plaintiffs and other three trustees i.e. all remaining trustees requested the replying defendant to advance amount of Rs. 50,00,000/- (one Lac US Dollars) to the trust, this amount was also returnable by the trust alongwith interest. Till today no amount against said head has been returned to the replying defendant No.3 there has been gross financial mismanagement on the part of the plaintiffs, had replying defendant No.3 not advanced money from time to time, the property of the trust would have been sold and the trust would have come to an end. Now the plaintiffs are again trying to have undue advantage and gain.*

(xix) *Payments to various employees has not been made and they have got legal notices issued to the trust and defendant No.3 this act has brought bad name of the trust.*

(xx) Payment to various local shop keepers has not been made and they have also issued notices to the trust and defendant No3.

All these facts have caused loss, injury and prejudice to the trust. The applicants further intends to change 3rd and 4th lines of para 32 by substituting the same as under:-

"Trustees, There exist no situation where under the Hon'ble Court may have to exercise the discretion to appoint trustees. The trust is being managed on the basis of decisions taken by majority of the trustees, the replying defendants assure the Hon'ble Court that the trust will be run as per trust deed and after taking decisions in board of trustees."

2. The learned counsel for the petitioners/plaintiffs herein has with force, contended that the proposed factual amendments enunciated by the defendants concerned in replacement of the facts, as originally projected in their written-statement, qua the constitution of defendant No.1 being therein mis-averred to be in the nature of a trust whereas it is a partnership firm, renders the substitution in the character of and the nature of defendant No.1 from the hitherto pleaded fact of it being a charitable trust to its proposed replaced status of a partnership firm, to constitute a dire/stark alteration in its structure and character. Consequently, it is urged that when its structure and character stands grossly altered, from the one as initially projected in the written-statement of the defendant concerned to its proposed replaced character, the amendment aforesaid in its character and structure is hence impermissible. It is also argued that the reasons as attributed by the defendants concerned in their written-statement as initially instituted before this Court for arraying of defendants No. 3 and 4, are anchored upon the fact of " Induction of defendants No. 3 to 5 as trustees is for the reason that trustees and founders of the Trust, namely, Santosh Garg, Parmod Singla and Prem Goel had sold their rights in the Trust to defendant No. 3", however by way of the proposed amendment the defendants No. 3 and 4 desire to in dire contradiction thereto plead/contend in the written-statement that " on account of resign by Ms. Santosh Garg, Parmod Singla and Prem Goel (defendants No. 3 to 5) were inducted as trustee". Further more it is also contended that in the original written-statement of the defendants No. 3 and 4, they had projected the contention "that defendant No. 3 purchased the interest of trustees Santosh Garg, Parmod Singla and Prem Goel and in their place nominated defendants No. 3,4 and 5 as trustees and Rs. 3.70 crores was fixed consideration to be paid by defendant No.3" whereas now by way of the proposed amendment defendants No. 3 and 4 want to contend that "with the condition of resign and leaving of Trust by Ms. Santosh Garg, Parmod Singla and Prem Goel, defendant No.3 got right and choice to have three trustees of the Board and Rs. 3.70 crore was advanced by defendant No.3 to the Trust to bail out the Trust out of the crises."

3. Significantly, the suit of the plaintiffs against the defendants is for injunction. The suit has not reached the stage of striking of issues. It was at a stage, prior to the striking of issues when the application at hand had come to be instituted before the Court concerned. The substitution in the status, character of defendant No.1, as, proposed in application under Order 6 Rule 17 in as much as it having been contended therein that the learned Additional District Judge, Solan permit the defendants concerned to alter its status and character from the one contended in the previous written/statement to be its being a Charitable trust to its rather being a partnership firm would not in any way preclude, prejudice or affect the rights of the plaintiffs to claim injunction in case relief of injunction is proven to be affordable by

apposite evidence as may come to be adduced by the plaintiff on the relevant issue as would be struck by the court where the suit is pending. Further more, the appropriate and the apt nomenclature of or the apt status and character of defendant No.1 would facilitate the plaintiffs to claim relief of injunction in case evidence on record as adduced before the learned trial Court permits rendition of a decree for injunction in their favour, besides, it would preclude any objection qua mis-nomenclature of necessary parties. Consequently, way for facilitating rendition of an executable decree, would hence be opened by an appropriate status and character of defendant No.1 being permitted to be reflected. Obviously, any substitution of the status / character of defendant No.1 by replacement of the hitherto status and character though may be diverse inter-se the one projected in the original written-statement, and as now proposed it would also facilitate the plaintiffs/petitioners herein to establish their right for claiming injunction, against the appropriate reflected defendants, especially when the suit is at a pre-issue stage as also when it would facilitate the plaintiffs to on the apposite issue as would be struck hereinafter obtain relief. Consequently, in face thereof, the argument as projected by the learned counsel for the plaintiffs/petitioners herein that the dire alteration or substitution in the status and character of the defendant No.1 is impermissible stands to be discountenanced. Further more, even if, in the original written-statement, it has been contended therein that the induction of defendants No.3 to 5 as trustees is for the reason that the trustees and founders of the trust, namely, Santosh Garg, Parmod Singla and Prem Goel had sold their rights in the trust to defendant No.3, however by way of the proposed amendment, it has been contended that on account of resignation of Santosh Garg, new trustees defendants No. 3 to 5 were inducted as trustees. Even the aforesaid alteration or substitution in the extantly instituted application under Order 6 Rule 17 C.P.C qua the manner of acquisition of rights by defendants No. 3 & 4 in defendant No.1 would not in any way affect or impinge upon the rights of the plaintiffs/petitioners herein to claim the relief of injunction against the defendants No.3 and 4, especially when their appropriate capacities have been unfolded in the application under Order 6 Rule 17 CPC. Consequently, when the appropriate capacities of defendants No. 3 and 4 would come to be reflected in the appropriate paragraph of the written-statement, therefore, such reflection would facilitate the rendition of a tenable and executable decree against them. Furthermore the reasons as attributed hereinabove by this Court for concluding that the proposed amendment would facilitate the rendition of a tenable and executable decree against the defendants especially when their appropriate and apt capacities as proposed to be reflected in the proposed amendment comes to be reflected in the appropriate paragraph of the written-statement. In sequel, for reiteration, it forestalls the submission of the learned counsel for the petitioners herein, that the amendments are uncalled for as they would erode the character and grossly alter the substratum of the capacities of the defendants concerned. Rather the amendments are apt and germane besides relevant for enabling the learned court concerned to frame appropriate issue on which the party defendants in their appropriate capacities, would be, subject to the onus as cast on them adduce their respective evidence. Besides, the amendments being rather of a clarificatory nature besides erasing ambiguity qua the capacities of the defendants were tenably permitted to be incorporated in the written-statement. This court does not find any error in the reasonings formed by the learned court below in permitting the defendants concerned to carry out amendments in the written-statement previously instituted. Consequently, there is no merit in the petition, same is accordingly dismissed.

****

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

Yashpal ..... Petitioner

Versus

Dr. Y.S. Parmar University of Horticulture and Forestry, Nauni .....Respondent

CWP No. 5748/2013
Decided on: 8.4.2015

Constitution of India, 1950- Article 226- Petitioner was appointed on ad-hoc basis with the University- he sought regularization – his case was placed before the Board of Management of University who forwarded it to the State Government- State Government turned down the case- held, that University had already regularized the services of four incumbents and it cannot discriminate the petitioner by not regularizing his services- the case of the petitioner was denied only on the ground that he was appointed on ad hoc basis and not on daily wages- petitioner is superior to the daily waged workmen and should have been regularized on the analogy of daily waged workmen- State Government should have taken into consideration various regularization policies framed by it for its employees and the employees of State Government undertaking - it was open to the University to adopt the notifications governing the regularization or in the alternative to frame its own policy – petition allowed and the petitioner deemed to have been regularized after completion of seven years uninterrupted service.

For the petitioner : Mr. B.S. Chauhan, Advocate.
For the respondent : Ms. Ranjana Parmar, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

Petitioner was appointed on ad hoc basis with the respondent-University on 30.12.1999 in the pay scale of Rs. 2520-4140. Petitioner made several representations seeking regularization. Matter was placed before the Board of Management in its 83rd Meeting held on 12.11.2010 for consideration. Respondent-University referred the matter of four ad hoc employees for regularisation including the case of the petitioner to the Government. It was rejected on 19.4.2011. The matter was again placed before the Board of Management of the University, in its 89th meeting held on 13.9.2012 for consideration of the case of petitioner and other similarly situate persons. State Government turned down the plea of the respondent-University on 15.12.2012.

2. Respondent-University has already regularised services of four incumbents on the basis of Instructions dated 30.11.1996. Respondent-University can not discriminate the petitioner by not regularizing services of the petitioner and other similarly situate persons, who have worked for more than 14 years. Action of the respondent-University in not regularising services of the petitioner amounts to unfair labour practice. Respondent-University is a 'State' within the meaning of Article 12 of the Constitution of India. Its action can not be arbitrary. Petitioner has already attained the age of 51 years. His future is still uncertain. Respondent-State has already taken decision to regularise services of workmen, who have completed 7 years service with 240 days in each calendar year. In the instant case, petitioner has worked for more than 14 years. Despite that petitioner has been denied regularisation only on the ground that he was appointed on ad hoc basis and not on daily

wage basis. Petitioner is superior to the daily waged workmen. He should have also been regularised on the analogy of daily waged workmen.

3. State Government while dealing with the case sent by the Board of Management should have taken into consideration various regularisation policies framed by it for its employees as well as for the employees of the Government undertakings. It was always open to the respondent-University to adopt notification (s) governing the regularisation, or, in the alternative, to frame its own policy at par with the policy framed by the State Government to redress the grievances of the petitioner and other similarly situate persons.

4. Accordingly, the present petition is allowed. Petitioner shall be deemed to have been regularised after completion of 7 years uninterrupted service with all consequential benefits. Pending applications, if any, are also disposed of.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Himachal Pradesh State Electricity Board ...Appellant.
Versus
Mahesh Dahiya ...Respondent.

LPA No. 340 of 2012
Reserved on: 19.03.2015
Decided on: 09.04.2015

Constitution of India, 1950- Article 226- Petitioner fell ill and was taken to IGMC for check up on 04.06.2005- his disease was detected as tuberculosis- he was admitted on 4.6.2005 and was discharged on 16.6.2005– his fitness certificate was issued on 23.07.2005 and he joined duties on 25.07.2005 – he developed chest pain on 30.07.2005 and was taken to IGMC where Doctor advised him to take bed rest – respondent asked the petitioner to appear before Medical Board vide letters dated 25.08.2005 and 21.10.2005- he was placed under suspension on 21.01.2006 when he failed to appear before the Medical Board- he submitted joining report on 20.02.2006 and sought revocation of his suspension order- he was charge-sheeted on the ground of disobedience of the order of superior willfully and absence from the duties- held, that absence of the petitioner was not deliberate or willful but due to the circumstances beyond his control- he was suffering from contagious disease and it was his duty to take precautions to prevent the spread of infection to the others- respondent had sanctioned the leave and had granted medical reimbursement, therefore, it could not be said that petitioner was not suffering from any disease or had willfully absented from the duties- Inquiry Officer had made up his mind to remove the petitioner from the services and to throw him out, without hearing him- hence, order passed by Disciplinary Authority was set aside. (Para-3 to 36)

Cases referred:

Krushnakant B. Parmar versus Union of India and another (2012) 3 SCC 178
Chhel Singh versus MGB Gramin Bank, Pali and others, (2014) 13 SCC 166
Kuldeep Singh versus The Commissioner of Police and others, AIR 1999 Supreme Court 67

Anant R. Kulkarni versus Y.P. Education Society and others, (2013) 6 SCC 515
Roop Singh Negi versus Punjab National Bank and others, (2009) 2 SCC 570
Union of India and others versus R.P. Singh, 2014 AIR SCW 3475

For the appellant: Mr. Satyen Vaidya, Advocate.
For the respondent: Mr. Hamender Chandel, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Challenge in this Letters Patent Appeal is to the judgment and order, dated 9th April, 2012, passed by the learned Single Judge in CWP No. 522 of 2010-A, titled as Mahesh Dahiya versus Himachal Pradesh State Electricity Board, whereby the inquiry proceedings and the order of compulsory retirement were quashed with a command to the writ respondent to reinstate the writ petitioner-respondent herein forthwith and to grant all consequential benefits with a further direction to open the sealed cover and promote him to the post of Superintending Engineer, if found suitable by the Departmental Promotion Committee (for short "the impugned judgment").

2. Writ petitioner-respondent herein, a senior officer of the Himachal Pradesh State Electricity Board (for short "Board") was diagnosed as *"Loculated Fluid Collections (Exudative) (Rt) Pleural cavity echo Tubocular" (Pleural Effusion T.B.)* and was made to suffer because of the said disease.

3. Admittedly, perusal of the pleadings of the parties does disclose that the writ petitioner-respondent herein was Senior Executive Engineer (Commercial) at the relevant point of time, suddenly fell ill, was constrained to go to Indira Gandhi Medical College and Hospital, Shimla (for short "IGMC") for his check up on 04.06.2005. After detecting the disease as tuberculosis, he was admitted in IGMC on 04.06.2005 and was discharged on 16.06.2005, vide discharge slip Annexure RJ-1to the writ petition, was advised bed rest and after examination, he was found fit to discharge duties and accordingly, fitness certificate was issued on 23.07.2005 and he joined on 25.07.2005 and resumed his duties.

4. Admittedly, the writ petitioner-respondent herein had applied for leave for the said period and had also claimed medical reimbursement. The leave as well as the medical reimbursement was granted without any objection, rather, without any whisper.

5. It is pleaded in the writ petition and also taken as a defence before the Inquiry Officer during the inquiry proceedings that the writ petitioner-respondent herein developed chest pain suddenly on 30.07.2005 while he was in office, constraining him to rush to IGMC and the doctor, after noticing his deteriorating condition, advised him complete bed rest, proper medication, good diet and proper care. He applied for leave on medical grounds alongwith station leave to the Director (Commercial) on 30.07.2005. Thereafter, vide letters dated 25.08.2005 and 21.10.2005, the writ petitioner-respondent herein was asked to appear before the Medical Board to be constituted by the Chief Medical Officer, Shimla. Telegrams were also sent to him to appear before the Medical Board. It is averred that he had sent telegrams in response to the letters/telegrams that he was not in a position to appear before the Medical Board or to join his duties because of the serious ailment from which he was suffering and was under treatment from Pt. B.D. Sharma Post Graduate Institute of Medical Sciences, Rohtak (for short "Pt. B.D. Sharma PGIMS").

6. When he failed to report, he was placed under suspension on 21.01.2006 (Annexure P-4 to the writ petition). He obtained medical certificates from IGMC and Dr. B.D. Sharma PGIMS (Annexure P-5 to the writ petition) to the effect that the period of his absence from duty was necessary in order to recover from the ailment from which he was suffering. He submitted his joining report on 20.02.2006 (Annexure P-6 to the writ petition) alongwith representation (Annexure P-7 to the writ petition) seeking revocation of his suspension order, was not reviewed but was made applicable till further orders and a charge sheet was framed against him in terms of the mandate of Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (for short "CCS (CCA) Rules"), which reads as under:

> *"That the said Er. Mahesh Dahiya while functioning as Sr. Executive Engineer (Elect.) in the office of the Chief Engineer (Comm.), HPSEB, Shimla-4 during the period from 2005-06 proceeded on leave on 30-7-05 on medical ground. Er. Dahiya was repeatedly directed vide Chief Engineer (Comm.), HPSEB, Shimla-4 letter dated 25.8.05, 7.9.05, 26.10.05 and 2.12.05 to appear before the Medical Board but he failed to do so. Thus Er. Dahiya has wilfully absented himself from official duties and has disobeyed the directions of his superiors. He has therefore acted in a manner which is unbecoming of an officer of his status. The said Er. Mahesh Dahiya, Sr. Executive Engineer (Elect.) has thus violated the provisions of Rule-3(I) (i) (ii) (iii) of CCS Conduct Rules 1964 and which made him liable for disciplinary action under Rule-14 of CCS (CCA) Rules-1965."*

7. Precisely, there are two charges against the writ petitioner-respondent herein - (i) that he has disobeyed the orders of his superiors, and (ii) that he has willfully remained absent from his duties.

8. The disciplinary authority appointed Inquiry Officer. The inquiry was conducted. The Presenting officer examined two witnesses, i.e. Shri S.D. Rattan, Director (Commercial) as PW-1 and Shri Brij Lal Kaishta, Section Officer, as PW-2 in support of the charge. The writ petitioner-respondent herein examined one witness, namely Er. P.C. Sardana, whose statement is at Page-96 of the paper book of the writ petition. The Inquiry Officer concluded and returned finding that the charge stands proved and, accordingly, submitted his findings to the disciplinary authority.

9. The Whole Time Members of the Board (for short "WTM") examined the inquiry report and came to the conclusion, vide its decision, dated 25.02.2008, that the writ petitioner-respondent herein is to be removed from service. Memorandum, dated 02.04.2008 (Annexure P-19 to the writ petition) alongwith copy of inquiry report and decision of WTM was served upon him, was removed from service vide order, dated 06.07.2009 (Annexure P-23 to the writ petition).

10. He was asked to make representation on quantum of penalty, constraining him to make a representation on 21.07.2009 (Annexure P-24 to the writ petition), which was considered and the penalty of removal from service was converted into compulsory retirement vide order, dated 25.08.2009 (Annexure P-25 to the writ petition).

11. The writ petitioner-respondent invoked the procedural remedy by the medium of the appeal (Annexure P-26 to the writ petition), which was dismissed on 10.12.2009 (Annexure P-1 to the writ petition).

12. In view of the above, the writ petitioner-respondent herein was left with no other option, but to approach this Court by the medium of CWP No. 522 of 2010, which was admitted on 05.01.2011 and was posted for final hearing.

13. During the pendency of the writ petition, learned Single Judge, vide orders, dated 10.05.2011 and 19.07.2011, issued a show cause notice to Dr. B.M. Sharma, who had issued the certificate on 18.02.2006 (Annexure P-5 to the writ petition) whereby he had certified that the writ petitioner-respondent herein was unable to attend the duty from 01.08.2005 to 11.11.2005, appeared and explained the circumstances and the reasons for issuance of the said certificate. The show cause notice was dropped vide order, dated 03.11.2011. It is apt to reproduce the relevant portion of order, dated 03.11.2011, passed by the learned Single Judge, herein:

> *"Notice was issued to Dr. B.M. Sharma. Dr. Brij Sharma present in person and states that in fact the certificate has been issued by him and his name is Dr. Brij Sharma and not Dr. B.M. Sharma. He has explained in what circumstances the certificate was issued by him. Therefore, notice issued to him is discharged. List on 24th November, 2011."*

14. The order, quoted hereinabove, has not been questioned by the Board, is suggestive of the fact that the said certificate was genuine, which lends credence to the defence of the writ petitioner-respondent herein.

15. The writ petitioner has specifically pleaded in the writ petition, as discussed hereinabove, what were the reasons for his admission in IGMC Shimla at the first instance and after joining, why he rushed from office to IGMC Shimla on 30.07.2005. He has given all details in paras 5 to 10 of the writ petition.

16. The writ respondent has not replied the said averments specifically, but evasively. The averments contained in paras 19 to 25 have also not been denied by the writ respondent, thus, stand admitted in view of the mandate of the Civil Procedure Code (for short "CPC").

17. The writ petitioner has sought writ of certiorari and writ of mandamus on the grounds taken in para 28 (A) to 28 (R). The core of the entire litigation is contained in grounds (C) to (F), which are virtually admitted by the writ respondent-appellant. The writ respondent has not denied grounds (C) to (F) and (H) of the writ petition, but virtually have admitted that inquiry report was not supplied to the writ petitioner and WTM decided to pass order of removal from service without hearing him.

18. The facts do disclose that WTM had made up a mind to pass removal order without hearing the writ petitioner. The grounds (G) and (H) contained in the writ petition have not been denied by the writ respondent-appellant herein specifically, thus, admitted. It stands corroborated and proved by the statement of Dr. Brij Sharma. Abovesaid facts read with order, dated 03.11.2011, passed by the learned Single Judge are factors leading to the conclusion that the absence of the writ petitioner was not deliberate or willful, but was beyond his control.

19. The writ petitioner has filed rejoinder and has explained all circumstances which have been taken as grounds by the appellant-writ respondent in the reply for conducting the inquiry and imposing the penalty upon the writ petitioner-respondent.

20. All officers have lost sight of the fact that the writ petitioner was suffering from such a disease, which is contagious and it is the duty of the person suffering from the said disease to take all such measures/precautions so that the persons, who are around him would not get infected. It is the duty of a Doctor also to advise such patient to take all preventive steps which are required as per medical jurisprudence.

21. Having said so, the core question is - whether the inquiry is to be quashed from the stage where the Inquiry Officer/disciplinary authority has committed fault, i.e. from the stage of Rule 15 of the CCS (CCA) Rules, i.e. non-supply of inquiry report, findings and other material relied upon by the Inquiry Officer/disciplinary authority to the writ petitioner-respondent herein to explain the circumstances, which were made basis for making foundation of inquiry report or is it a case for closure of the inquiry in view of the fact that there is not

even a single iota of evidence, *prima facie,* not to speak of proving by preponderance of probabilities, that the writ petitioner has absented himself willfully and he has disobeyed the directions?

22. Keeping in view the discussions made hereinabove, findings are to be returned after applying the ratio of the Apex Court judgments.

23. The Apex Court in a case titled as **Krushnakant B. Parmar versus Union of India and another,** reported in **(2012) 3 Supreme Court Cases 178,** discussed all the aspects and held that in case an employee explains that his absence was beyond his control and due to compelling circumstances, it was not possible for him to attend the duties, it cannot be said to be willful absence. It is apt to reproduce paras 16 to 24 of the judgment herein:

> *"16. In the case of appellant referring to unauthorised absence the disciplinary authority alleged that he failed to maintain devotion of duty and his behaviour was unbecoming of a government servant. The question whether "unauthorised absence from duty" amounts to failure of devotion to duty or behaviour unbecoming of a government servant cannot be decided without deciding the question whether absence is wilful or because of compelling circumstances.*
>
> *17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.*

18. In a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in the absence of such finding, the absence will not amount to misconduct.

19. In the present case the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is wilful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty.

20. The question relating to jurisdiction of the Court in judicial review in a departmental proceeding fell for consideration before this Court in M.V. Bijlani v. Union of India and others, (2006) 5 SCC 88, wherein this Court held: (SCC p. 95, para 25)

> *"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi- criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."*

21. In the present case, the disciplinary authority failed to prove that the absence from duty was wilful, no such finding has been given by the inquiry officer or the appellate authority. Though the appellant had taken a specific defence that he was prevented from attending duty by Shri P. Venkateswarlu, DCIO, Palanpur who prevented him to sign the attendance register and also brought on record 11 defence exhibits in support of his defence that he was prevented to sign the attendance register, this includes his letter dated 3rd October, 1995 addressed to Shri K.P. Jain, JD, SIB, Ahmedabad, receipts from STD/PCO office of Telephone calls dated 29th September, 1995, etc. but such defence and evidence were ignored and on the basis of

irrelevant fact and surmises the Inquiry Officer held the appellant guilty.

22. Mr. P. Venkateswarlu, DCIO, Palanpur, who was the complainant and against whom appellant alleged bias refused to appear before the Inquiry Officer in spite of service of summons. Two other witnesses, Shri Jivrani and Shri L.N. Thakkar made no statement against the appellant, and one of them stated that he had no knowledge about absence of the appellant. Ignoring the aforesaid evidence, on the basis of surmises and conjectures, the Inquiry Officer held the charge proved.

23. Though the aforesaid facts noticed by the appellate authority but ignoring such facts giving reference of extraneous allegations which were not the part of the charge, dismissed the appeal with following uncalled for observation:

> *"The appellant even avoided the basic training required for the job and asked JAD Ahmedabad to send all the training papers for his training at IB Training School, Shivpuri (Madhya Pradesh) to his residence at Ahmedabad. 'An untrained officer is of no worth to the department'."*

24. In the result, the appeal is allowed. The impugned orders of dismissal passed by disciplinary authority, affirmed by the Appellate

Authority; Central Administrative Tribunal and High Court are set aside. The appellant stands reinstated."

24. While applying the test to the instant case, admittedly, the writ petitioner was suffering from tuberculosis disease, admitted in hospital, discharged from hospital, was advised to take bed rest and was issued a certificate by the concerned Doctor that he was fit to discharge his duties, is sufficient to hold that his absence was not willful. It is also worthwhile to record herein that the writ respondent has sanctioned the leave in favour of the writ petitioner after his joining on 25.07.2005 and also medical reimbursement was made in his favour. Then, how can it lie in the mouth of the employer-writ respondent-appellant that the writ petitioner was not suffering from any disease or has willfully absented himself.

25. The writ petitioner has specifically taken a defence that on 30.07.2005, he suffered chest pain, which made him to rush to IGMC, was asked by the Doctor for bed rest, as discussed hereinabove. All these facts are supported by the medical certificate issued by Dr. Sharma, who appeared before the learned Single Judge and explained how the certificate was issued and what was the reason for the same.

26. Not only this, the Engineer of a higher rank, who reached the age of superannuation on 30.07.2005, appeared as defence witness and admitted that on that day, the writ petitioner made a request to him that he was not in a position to attend his farewell party and also admitted that the writ petitioner was suffering from tuberculosis and had gone to IGMC on that day.

27. Thus, it was for the writ respondent-appellant to plead and prove that all these documents, including medical certificates, were false or forged. It is not the case of the writ respondent that documents (Annexures P-5 and RJ-1 to the writ petition) were forged or managed by the writ petitioner-respondent herein.

28. The Apex Court in its latest judgment in a case titled as **Chhel Singh versus MGB Gramin Bank, Pali and others,** reported in **(2014) 13 Supreme Court Cases 166,** held that the unauthorized absence due to genuine medical reasons cannot be termed as willful absence. It is apt to reproduce paras 10 and 12 of the judgment herein:

> *"10. After giving our careful consideration to the facts and circumstances of the case and the submission made by the learned counsel for the parties, we are of the view that the Division Bench was wrong in setting aside the order of reinstatement. The Division Bench has accepted that the inquiry stood vitiated by disallowing the request of the appellant to summon the rest of the five witnesses. For the said reason, the Division Bench has not interfered with such part of the finding and order passed by the learned Single Judge whereby the impugned order of termination dated 17-10-1994 and the Appellate Authority order dated 26-12-1994 were quashed. The order of termination being quashed by the High Court, in absence of any observation and grounds to refuse the reinstatement, the appellant automatically stood reinstated. Without reinstatement in service, the question of further inquiry does not arise. There was no occasion for the Division Bench of the High Court to direct further inquiry, without reinstatement of appellant.*
>
> *11. .....*
>
> *12. From a plain reading of the charges we find that the main allegation is absence from duty from 11-12-1989 to 11-12-1989 (approximately 10½ months), for which no prior permission was obtained from the competent authority. In his reply, the appellant has taken the plea that he was seriously ill between 11-12-1989 and 11-12-1989, which was beyond his control; he never intended to contravene any of the provisions of the service regulations. He submitted the copies of medical certificates issued by Doctors in support of his claim after rejoining the post. The medical reports were submitted after about 24 days. There was no allegation that the appellant's unauthorized absence from duty was willful and deliberate. The Inquiry Officer has also not held that appellant's absence from duty was willful and deliberate. It is neither case of the Disciplinary Authority nor the Inquiry Officer that the medical reports submitted by the appellant were forged or fabricated or obtained for any consideration though he was not ill during the said period. In absence of such evidence and finding, it was not open to the Inquiry Officer or the Disciplinary Authority to disbelieve the medical certificates*

issued by the Doctors without any valid reason and on the ground of 24 days delay."

29. The Apex Court in the case titled as **Kuldeep Singh versus The Commissioner of Police and others,** reported in **AIR 1999 Supreme Court 677,** held that in case the inquiry proceedings are perverse and foundation is not as per the true facts, said inquiry cannot stand and would be amenable to judicial scrutiny.

30. In the case titled as **Anant R. Kulkarni versus Y.P. Education Society and others,** reported in **(2013) 6 Supreme Court Cases 515,** the Apex Court has held as to under what circumstances fresh/de novo inquiry/second inquiry/re-inquiry is permissible. It is apt to reproduce paras 17, 28, 31 and 34 to 37 herein:

"17. The purpose of holding an enquiry against any person is not only with a view to establish the charges levelled against him or to impose a penalty, but is also conducted with the object of such an enquiry recording the truth of the matter, and in that sense, the outcome of an enquiry may either result in establishing or vindicating his stand, and hence result in his exoneration. Therefore, fair action on the part of the authority concerned is a paramount necessity.

18 to 27. .....

28. The Tribunal, as well as the learned Single Judge of the High Court have recorded a categorical finding of fact to the effect that initiation of departmental enquiry against the appellant had been done with malafide intention to harass him. The charges were not specific and precise; in fact, they were vague and unspecific. Furthermore, the Management committee had failed to observe the procedure prescribed in Rules 36 & 37 of Rules, 1981. The said Rules 36 & 37, prescribe a complete procedure for the purpose of holding an inquiry, wherein it is clearly stated that an inquiry committee should have minimum three members, one representative from the Management committee, one to be nominated by the employees from amongst themselves, and one to be chosen by the Chief Executive Officer, from amongst a panel of teachers who have been awarded National/State awards. In the instant case, there was only a two member committee. The procedure prescribed under the Rules is based on the Principles of Natural Justice and fair play, to ensure that an employee of a private school, may not be condemned unheard. It is pertinent to note that the Management committee failed to prove even a single charge against the appellant.

29. .....

30. .....

31. The conclusion reached by the Division Bench that the Tribunal and the learned Single Judge had found that there was a defect in the manner in which the enquiry was held,

and therefore there was no question of it recording a finding on merit to the effect that charges levelled against the appellant were not proved, is also not sustainable in law. It is always open for the Court in such a case, to examine the case on merits as well, and in case the Court comes to the conclusion that there was in fact, no substance in the allegations, it may not permit the employer to hold a fresh enquiry. Such a course may be necessary to save the employee from harassment and humiliation.

32. .....

33. .....

34. We may add that the court has not been apprised of any rule that may confer any statutory power on the management to hold a fresh enquiry after the retirement of an employee. In the absence of any such authority, the Division Bench has erred in creating a post-retirement forum that may not be permissible under law.

35. In light of the facts and circumstances of the case, none of the charges are specific and precise. The charges have not been accompanied by any statement of allegations, or any details thereof. It is not therefore permissible, for the respondents to hold an enquiry on such charges. Moreover, it is a settled legal proposition that a departmental enquiry can be quashed on the ground of delay provided the charges are not very grave.

36. In the facts and circumstances of the case, as the Tribunal as well as the learned Single Judge have examined all the charges on merit and also found that the enquiry has not been conducted as per the Rules 1981, it was not the cause of the Management Committee which had been prejudiced, rather it had been the other way around. In such a fact-situation, it was not necessary for the Division Bench to permit the respondents to hold a fresh enquiry on the said charges and that too, after more than a decade of the retirement of the appellant."

31. The Inquiry Officer has not discussed the statement of defence witness, who has specifically supported the case of the writ petitioner-respondent herein, though, being the employee of the appellant-writ respondent.

32. The Apex Court in a case titled as **Roop Singh Negi versus Punjab National Bank and others,** reported in **(2009) 2 Supreme Court Cases 570,** held that it is a duty of the Inquiry Officer to scan the entire evidence in order to arrive at a finding after judging the case of all the parties, adhering to the principles of natural justice, otherwise, the inquiry is vitiated and the finding recorded is also not in accordance with law. It is apt to reproduce para 23 of the judgment herein:

"23. Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any

> *reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the Criminal Court on the basis of self-same evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the Enquiry Officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the Enquiry Officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof."*

33. Applying the test to the instant case, admittedly, the Inquiry Officer has not discussed the evidence of the defence witness, who, though was a senior officer of the writ respondent-appellant.

34. The specific case of the writ petitioner is that the Inquiry Officer/WTM and the disciplinary authority have violated the principles of natural justice and had made up a mind to remove the writ petitioner-respondent herein from service and to throw him out, even without hearing him. Meaning thereby prejudice has been caused to the writ petitioner-respondent herein.

35. The Apex Court in the case titled as **Union of India and others versus R.P. Singh,** reported in **2014 AIR SCW 3475,** held that non-supply of copy of the inquiry report to the delinquent at pre-decisional stage amounts to violation of principles of natural justice. It is apt to reproduce paras 25 to 28 of the judgment herein:

> *"24. We will be failing in our duty if we do not refer to another passage which deals with the effect of non-supply of the enquiry report on the punishment. It reads as follows:-*
>
> > *"[v] The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to*

> *reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the [pic]concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice".*

25. After so stating, the larger Bench proceeded to state that the court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished. The courts/tribunals would apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment. It is only if the court/tribunal finds that the furnishing of report could have made a difference to the result in the case then it should set aside the order of punishment. Where after following the said procedure the court/tribunal sets aside the order of punishment, the proper relief that should be granted to direct reinstatement of the employee with liberty to the authority/ management to proceed with the enquiry, by placing the employee under suspension and continuing the enquiry from that stage of furnishing with the report. The question whether the employee would be entitled to the back wages and other benefits from the date of dismissal to the date of reinstatement, if ultimately ordered, should invariably left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome.

26. We have referred to the aforesaid decision in extenso as we find that in the said case it has been opined by the Constitution Bench that non-supply of the enquiry report is a breach of the principle of natural justice. Advice from the UPSC, needless to say, when utilized as a material against the delinquent officer, it should be supplied in advance. As it seems to us, Rule 32 provides for supply of copy of advice to the government servant at the time of making an

order. The said stage was in prevalence before the decision of the Constitution Bench. After the said decision, in our considered opinion, the authority should have clarified the Rule regarding development in the service jurisprudence. We have been apprised by Mr. Raghavan, learned counsel for the respondent, that after the decision in S.K. Kapoor's case (2011 AIR SCW 1814), the Government of India, Ministry of Personnel, PG & Pensions, Department of Personnel & Training vide Office Memorandum dated 06.01.2014 has issued the following directions:

> *"4. Accordingly, it has been decided that in all disciplinary cases where the Commission is to be consulted, the following procedure may be adopted :-*
>
> *(i) On receipt of the Inquiry Report, the DA may examine the same and forward it to the Commission with his observations;*
>
> *(ii) On receipt of the Commission's report, the DA will examine the same and forward the same to the Charged Officer along with the Inquiry Report and his tentative reasons for disagreement with the Inquiry Report and/or the advice of the UPSC;*
>
> *(iii) The Charged Officer shall be required to submit, if he so desires, his written representation or submission to the Disciplinary Authority within fifteen days, irrespective of whether the Inquiry report/advice of UPSC is in his favour or not.*
>
> *(iv) The Disciplinary Authority shall consider the representation of the Charged Officer and take further action as prescribed in sub-rules 2(A) to (4) of Rule 15 of CCS (CCA) Rules, 1965.*

27. After the said Office Memorandum, a further Office Memorandum has been issued on 5.3.2014, which pertains to supply of copy of UPSC advice to the Charged Officer. We think it appropriate to reproduce the same:

> *"The undersigned is directed to refer to this Department's O.M. of even number dated 6.1.2014 and to say that it has been decided, in partial modification of the above O.M. that a copy of the inquiry report may be given to the Government servant as provided in Rule 15(2) of Central Secretariat Services (Classification, Control and Appeal) Rules, 1965. The inquiry report together with the representation, if any, of the Government servant may be forwarded to the Commission for advice. On receipt of the Commission's advice, a copy of the advice may be provided to the*

Government servant who may be allowed to submit his representation, if any, on the Commission's advice within fifteen days. The Disciplinary Authority will consider the inquiry report, advice of the Commission and the representation(s) of the Government servant before arriving at a final decision".

28. In our considered opinion, both the Office Memoranda are not only in consonance with the S.K. Kapoor's case (2011 AIR SCW 1814) but also in accordance with the principles of natural justice which has been stated in B. Karunakar's case (AIR 1994 SC 1074)."

36. Applying the test to the instant case, one comes to an inescapable conclusion that the Inquiry Officer and the disciplinary authority have violated the principle of natural justice.

37. In view of the discussions made hereinabove, no case for interference is made out. Accordingly, the appeal is dismissed and the impugned judgment is upheld for the reasons recorded hereinabove. Pending applications, if any, are also disposed of.

****

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

Jitender Kumar @ Nardu ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Appeal No. 468 of 2010
Judgment Reserved on : 1.4.2015
Date of Decision : April 9, 2015

N.D.P.S. Act, 1985- Section 29- Accused 'R' was carrying a knapsack from which 4.3 k.g. of charas was recovered - accused 'J' was with accused 'R'- accused 'J' shouted on seeing the police "there is police run away"- both the accused turned and started running away- however, they were apprehended after a distance of about 30 meters – held, that both the accused were found together – nakka was set up in a jungle- it was not explained as to why both the accused should be together in a jungle and why accused 'J' should have asked his co-accused to run on seeing the police- the conduct of the accused was to facilitate the crime as otherwise he would not have reacted in the manner in which he did – all these circumstances proved that he was a conspirator. (Para-8 to 23)

Cases referred:

Abdul Rashid Ibrahim Mansuri vs. State of Gujarat, (2000) 2 SCC 513
Narcotics Control Bureau, Jodhpur vs. Murlidhar Soni & others, (2004) 5 SCC 151
Amarsingh Ramjibhai Barot vs. State of Gujarat, (2005) 7 SCC 550
Sorabkhan Gandhkhan Pathan & another vs. State of Gujarat, (2004) 13 SCC 608
Sat Pal vs. State of Himachal Pradesh, 2012 (3) Sim. L.C. 1673
Virabhai Kalabhai Aayar vs. State of Gujarat, 2008 (3) Crimes 234

Shri Ram vs. The State of U.P., (1975) 3 SCC 495
Bachchan Lal vs. State, AIR 1957 (Allahabad) 184
Dehal Singh vs. State of Himachal Pradesh, (2010) 9 SCC 85
Madan Lal & another vs. State of Himachal Pradesh, (2003) 7 SCC 465
Dharampal Singh vs. State of Punjab, (2010) 9 SCC 608
Goura Venkata Reddy vs. State of A.P., (2003) 12 SCC 469
Kishore Lal vs. State of H.P., (2007) 10 SCC 797

For the appellant : Mr. Anoop Chitkara, Advocate for the appellant.
For the respondent : Mr. Ashok Chaudhary, Addl. Advocate General with Mr. Vikram Thakur, Dy. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Convict Jitender Kumar (appellant herein), has assailed the judgment dated 23.9.2010, passed by Special Judge (Fast Track Court), Kullu, District Kullu, Himachal Pradesh, in Sessions Trial No. 12 of 2010, titled as *State v. Ravi Thakur & another,* whereby he stands convicted and sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs.1,00,000/- and in default thereof, to further undergo simple imprisonment for a period of two years.

2. In relation to an F.I.R. No. 464 of 2009 dated 24.12.2009 (Ext. PW-6/A), registered at Police Station Sadar, Kullu, District Kullu, H.P., co-accused Ravi Thakur was charged for having committed an offence punishable under the provisions of Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act), whereas, accused Jitender Kumar (appellant herein) was charged for having committed an offence punishable under the provisions of Section 29 read with Section 20(b)(ii)(C) of the Act.

3. Trial Court, appreciating the testimonies of the witnesses of recovery, namely Const. Kuldip Kumar (PW-1), HHC-Tek Singh (PW-2) and Inspector Prem Dass (PW-7) convicted the accused for the charged offences. Prosecution was able to establish that co-accused Ravi Thakur was carrying the knapsack from which 4.3 k.g. of charas was recovered and that accused Jitender abetted/conspired such crime. Hence both were found guilty of the respective charges so framed against them and sentenced as aforesaid.

4. Convict Jitender Kumar (appellant herein) as also co-accused Ravi Thakur (appellant in Cr. Appeal No. 467 of 2010) assailed the judgment by filing separate appeals, which were clubbed and heard together. However on 8.7.2014 Cr. Appeal No. 467 of 2010 so filed by co-accused Ravi Thakur was disposed of vide separate judgment of that date. Without laying challenge to the findings returned by the trial Court, Ravi Thakur confined the challenge only on the question of sentence i.e. the period of imprisonment, which he was required to undergo in the event of default of payment of fine by him, which, taking into account the overall attending circumstances, was so done and reduced to a period of six months instead of two years.

5. In the instant appeal, convict Jitender Kumar lays challenge to the findings returned by the trial Court on a limited ground. It is alleged that since recovery was effected from the knapsack carried by co-accused Ravi Thakur, appellant cannot be held guilty for he was not even aware of any contraband substance so carried by him. Thus recovery of

conscious possession of the narcotic substance, by no stretch of imagination, can be attributed to the appellant. In support of such limited challenge, Mr. Anoop Chitkara, learned counsel, invites our attention to the testimonies of Const. Kuldeep Kumar, HHC-Tek Singh and Inspector Prem Dass and also seeks reliance upon the following decisions rendered by various courts: *Abdul Rashid Ibrahim Mansuri vs. State of Gujarat,* (2000) 2 SCC 513; *Narcotics Control Bureau, Jodhpur vs. Murlidhar Soni & others*, (2004) 5 SCC 151; *Amarsingh Ramjibhai Barot vs. State of Gujarat,* (2005) 7 SCC 550; *Sorabkhan Gandhkhan Pathan & another vs. State of Gujarat,* (2004) 13 SCC 608; *Sat Pal vs. State of Himachal Pradesh, 2012 (3) Sim. L.C. 1673; Virabhai Kalabhai Aayar vs. State of Gujarat,* 2008 (3) Crimes 234; *Shri Ram vs. The State of U.P.,* (1975) 3 SCC 495; *Bachchan Lal vs. State,* AIR 1957 (Allahabad) 184.

6. Before dealing with the same, it would be only appropriate to first set out the prosecution case.

7. On 24.12.2009, after completing investigation of F.I.R. No. 107 of 2009, Inspector Prem Dass, ASI Hem Raj, Const. Kuldeep Kumar and HHC Tek Singh had set up a naaka at Baladhi. At about 6.30 p.m., accused persons came from the side of Parbati river. Co-accused Ravi Thakur was carrying a knapsack and appellant Jitender was walking behind him. Seeing the police party, appellant shouted "there is police run away". Resultantly both the accused turned back and started running away. However they were apprehended after a distance of about 30 meters. The person carrying the knapsack revealed his name as Ravi Thakur and the other person revealed his name as Jitender Kumar, appellant herein. Inspector Prem Dass, on suspicion made inquiries from both the accused and after completing the statutory formalities, accused were searched by associating ASI Hem Raj (not examined) and Const. Kuldeep as witnesses. The knapsack (Ext. P-4) was checked. Nylon bag (Ext. P-3) was kept inside, from which charas like substance was recovered. The contraband substance was weighed and found to be 4.3 k.g. which was sealed with seal impression-T. NCB form (Ext.PW-4/C), in triplicate, was filled up on the spot and contraband substance seized vide memo (Ext. PW-1/E). Ruka (Ext. PW-7/A) was sent for registration of the case through HHC-Tek Singh. Resultantly F.I.R. No. 464/2009, dated 24.12.2009 (Ext. PW-6/A) was registered against both the accused under the provisions of Section 20/29 of the Act at Police Station Sadar, Kullu, Distt. Kullu, H.P. who were arrested on the spot. Necessary investigation was also conducted and completed on the spot. Case property along with the NCB forms was handed over to the MHC- Jawala Singh (PW-4) who sent the parcel for chemical analysis to the State Forensic Science Laboratory, Junga through Constable Pritam Singh (PW-5) and report (Ext. PA) received and taken on record. As per the report, contraband substance was charas. With the completion of investigation, challan was presented in the Court for trial.

8. Since the challenge to the findings returned by the trial Court is on a limited ground, we deem it appropriate to reproduce the relevant portion of the testimonies of the prosecution witnesses, who have established recovery of the contraband substance from the conscious possession of both the accused:

Constable Kuldeep Kumar (PW.1)

> "..... ...When we were present on the foot-path at Baladhi at about 6.30 P.M two persons were coming from Parbati River towards us. One was having a backpack. When they were at a distance of 40 meters from us, they returned and ran away. We ran after them and apprehended them. they appeared to be frightened. When we inquired about their names, the person carrying the backpack, revealed has

name as Ravi and the other person revealed his name as Jitender, who are present in the Court (identified correctly)." … …

HHC Tek Singh (PW.2)

"… …We had set up a nakka at Baladhi on a foot path. Two persons came from Parbati river side. When they were at a distance of 40 mtrs. from police party, the person at the rear shouted run-run. Those persons started running away. We followed them and apprehended them after some distance. One was carrying a backpack. The person carrying backpack revealed his name as Ravi Thakur and the other person revealed his name as Jitender, who are present in the Court (identified correctly)." … …

Xxx xxx by Sh. B. R. Rana, Advocate, for accused Ravi.

"… …They ran backwards on the foot path. One accused was apprehended by Kuldeep, but I cannot tell the name of the accused who was apprehended by him. One accused was apprehended by me. I cannot tell who was apprehended by me, because, it was dark. The investigation was carried out at the place where accused were apprehended." … …

Xxx xxx by Sh. Chuneshwar Thakur, Advocate.

"… …We heard the voice I cannot tell which of the accused had said those words. It is correct that there is bazaar at Jari and Jari is also a village." … …

Prem Dass (PW.7)

"… …Two persons were found coming from the side of Parbati river at about 6.30 PM. They got frightened on seeing the police. The person who was going ahead was carrying backpack and other was not carrying anything. The persons who was walking on the rear said on seeing us that there is police run away. They returned and started running and were apprehended after a distance of about 30 mtrs. The person carrying the backpack revealed his name as Ravi Kumar and the other revealed his name as Jitender Kumar (identified correctly). I got suspicious and made inquiry from the accused whether they wanted to be searched in the presence of Magistrate or a competent Gazetted Officer and this was their legal right." … ….

Xxx xxx by Sh. Chuneshwar Thakur, Advocate. "We were not having any prior information. I came to know about the fact that Jitender had seen us while I made inquiries about their names and address. I came to know about the fact who was going ahead and who was behind after the investigation. The person who shouted run away was behind the other person. I was not conversant with his voice prior to said shout." … … [Emphasis supplied]

9. A careful perusal of the testimonies so extracted hereinabove would reveal that both the accused were found together by the police party. Otherwise it stands proved that police party had set up a naaka in the jungle. Now why would both the accused be

together in the jungle at the same time and place remains unexplained by them. That recovery was effected from the bag carried by co-accused is not in dispute.

10. At this juncture, we may also observe that in his statement under Section 313 Cr.P.C. appellant-accused has taken the following defence:

> "I was present in my shop at Jari on 24.12.2009 at 4 p.m. I was called out of the shop and was told that enquiry was to be made from me. Taxi of Pyare Lal, Pradhan Taxi Union was called. I was taken to police station where my signatures were obtained on blank papers. I was put in the jail."

We do not find the same to have been probablized, even remotely by Pyare Lal (DW-1), a taxi driver, who has not placed on record either the logbook or the receipt of payment for hiring the taxi, as is so alleged by the appellant.

11. Version so disclosed by the prosecution witnesses is clear, consistent, cogent and unambiguous. The veracity of their statements cannot be said to have been shattered in any manner. They are police officers/officials and have no reason to falsely implicate the accused. Categorically they have deposed that the person who was at the rear shouted "run run". Const. Kuldeep Kumar in his unrebutted testimony does state that both were frightened. Witnesses do state that after seeing the police party when the accused tried to flee away, they were apprehended on the spot. In fact, Inspector Prem Dass has clarified that the person walking ahead was carrying the knapsack and the other person was not carrying anything. He is certain that the person walking behind, after seeing the police party, said "there is police run away". He has identified appellant Jitender Kumar to be the said person. Yes it was 6.30 p.m. and slightly dark. But then he has uncontrovertedly identified the said person.

12. At the time of recovery of the contraband substance three police officials were present on the spot. Both the accused were found together. Conduct of appellant Jitender Kumar is quite apparent, establishing his criminal intent of commission of crime. There was no need for him to have (i) either got frightened; (ii) shouted "run away"; and then (iii) ran away from the spot.

13. In *Dehal Singh vs. State of Himachal Pradesh,* (2010) 9 SCC 85 and *Madan Lal & another vs. State of Himachal Pradesh,* (2003) 7 SCC 465, under similar circumstances, Court has held accused to be in constructive possession of the contraband substance. In *Madan Lal* (supra) Court held as under:

> "22. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supdt. & Remembrancer of Legal Affairs, W.B. vs. Anil Kumar Ghunja* (1979) 4 SCC 274 to work out a completely logical and precise definition of "possession" uniformally applicable to all situations in the context of all statutes.
>
> 23. The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.
>
> 24. As noted in *Gunwantlal vs. State of M.P.* (1972) 2 SCC 194 possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the

person to whom physical possession is given holds it subject to that power of control.

25. The word "possession" means the legal right to possession (See: *Heath v. Drown* (1972) 2 All ER 561). In an interesting case it was observed that where a person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See: *Sullivan v. Earl of Caithness,* (1976) 1 All ER 844)

26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

14. The apex Court in *Dharampal Singh vs. State of Punjab,* (2010) 9 SCC 608, has held that:-

"14. Section 54 of the Act raises presumption from possession of illicit articles. It reads as follows:

> "54. Presumption from possession of illicit articles. - In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of -
>
> (a) any narcotic drug or psychotropic substance or controlled substance;
>
> (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
>
> (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or
>
> (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured,
>
> for the possession of which he fails to account satisfactorily."

15. From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and

when tested on this anvil, we find that the appellants have not been able to satisfactorily account for the possession of opium.

16. Once possession is established the Court can presume that the accused had culpable mental state and have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in the case of Madan Lal and another vs. State of H.P., 2003 (7) SCC 465, wherein it has been held as follows:

> "26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.
>
> 27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused- appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act.'" [Emphasis supplied]

15. Section 29 of the Act reads as under:

> "29. Punishment for abetment and criminal conspiracy. – (1) Whoever abets, or is a party to a criminal conspiracy to commit, an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal code, be punishable with the punishment provided for the offence.
>
> (2) A person abets, or is a party to a criminal conspiracy to the commit, as offence, within the meaning of this Section, who, in India abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which -
>
> (a) would constitute an offence if committed within India; or
>
> (b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India."

16. Abetment and conspiracy, under the provisions of the Indian Penal Code has been defined as under:-

> "107. Abetment of a thing. – A person abets the doing of a thing, who –
>
> First. – Instigates any person to do that thing; or
>
> Secondly. – Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

> Thirdly. – Intentionally aids, by any act or illegal omission, the doing of that thing.
>
> Explanation 1. – A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.
>
> Explanation 2. – Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

17. What is abetment has been considered by the apex Court in *Goura Venkata Reddy vs. State of A.P.,* (2003) 12 SCC 469, wherein it has been held as under:

> "8. Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in the Act as an offence. A person abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do any thing. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment then the offender is to be punished with the punishment provided for the original offence. "Act abetted" in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence."
>
> [See: *Kishore Lal vs. State of H.P.,* (2007) 10 SCC 797]

18. Section 107 IPC lays down the ingredients of abetment which include instigating any person to do a thing or engaging with one or more persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing, or intentional aid by any act or illegal omission to the doing of that thing.

19. As per the section, a person can be said to have abetted in doing a thing, if he, firstly, instigates any person to do that thing; or secondly engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing. Explanation to Section 107 states that any willful misrepresentation or willful concealment of material fact which he is bound to disclose, may also come within the contours of 'abetment'.

20. In order to constitute an offence of abetment, the abettor must be shown to have intentionally aided the commission of crime. No doubt prosecution has to prove and establish, beyond reasonable doubt, essential ingredients of abetment/conspiracy, however, it is not the requirement of law that the word "abetment"/"conspiracy" has to be stated by the witness. Ingredients can be inferred from the attending circumstances.

21. The appellant's conduct was only to facilitate the crime as otherwise he would not have reacted in the manner in which he so did. Also he did not protest his false implication and illegal detention at the first opportune time.

22. In our considered view, the appellant was engaged in conspiracy and abetted the crime with co-accused Ravi Thakur. With criminal intent he asked him to run away from the spot at the time when the contraband substance was carried by them. He facilitated commission of the crime.

23. Appellant has failed to discharge the statutory burden so imposed upon him [*Dharampal Singh* (*supra*)]. This he was absolutely required to do so in law, after the prosecution witnesses were able to establish his presence and his knowledge of co-accused possessing the contraband substance, by way of his conduct, and recovery of the contraband substance from his conscious possession which is constructive in nature.

24. We shall now deal with the decisions relied upon by Mr. Anup Chitkara, learned counsel, in support of his limited contention.

25. In *Abdul Rashid Ibrahim* (supra) the Court was dealing with a case where autorickshaw of the appellant was hired by co-accused and as such he was not in the know of the contraband substance so carried by them. Also as is evident from para-23 of this report, Court found the driver to have rebutted the statutory presumption by way of different means.

26. In *Narcotics Control Bureau, Jodhpur* (supra), Court was dealing with a case where the surviving accused persons, by leading credible evidence had established their false implication in the crime. Not only they protested their arrest but also disclosed the factum of injuries sustained by them, through the hands of the police, on the very first opportune time and occasion when they were produced before the Court. Prosecution failed to establish that the surviving accused persons were aware of the fact that their co-accused was carrying any contraband substance.

27. In *Sorabkhan Gandhkhan Pathan* (supra), Court was dealing with a case where the accused was travelling in an autorickshaw alongwith three other persons, out of whom only two were found to have been involved in the crime and also prosecution was not able to establish connection between both of them. The facts here are different.

28. In *Amarsingh Ramjibhai Barot* (supra), Court was dealing with a case where individual recoveries were effected from the accused persons who were seen together, which is not in the case in hand.

29. The decisions referred to in Sat Pal (supra), *Virabhai Kalabhai Aayar* (supra), and *Bachchan Lal* (supra) are clearly distinguishable on facts and need no further attention in view of the law discussed hereinabove.

30. In *Shri Ram* (supra) the Court has held intentional aiding by an act or illegal commission, the doing of that thing to be a crime. The Court categorically held "intentional aiding" and therefore "active complicity" to be the gist of abetment.

31. Each case has to be considered on its own given facts by applying the settled principles of law. As already observed, in the instant case, both the accused were in the company of each other. The appellant never protested against his alleged false implication in the crime. Accused belong to the same place and had not explained their presence on the spot. In our considered view, prosecution has been able to establish its case beyond reasonable doubt from the conscious possession of the appellant-accused.

32. For all the aforesaid reasons, there is 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. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any. Records of the Court below be immediately sent back.

****

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

Kesang Tamang .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 63 of 2012
Reserved on:April 08, 2015.
Decided on: April 09, 2015.

Indian Penal Code, 1860- Section 302- Accused killed his wife and child – he climbed on the roof and shouted that he had sacrificed his wife and son- he jumped from the roof and ran towards the jungle- wife and child were found dead with injuries on their necks- alleged conduct of the accused in climbing on the roof and admitting that he had killed his wife and son was contrary to normal human conduct- witnesses also admitted that it was raining and it was dark in the night- hence, prosecution version that accused had climbed on the roof during the night when it was raining heavily was not acceptable – prosecution had also not brought any motive on record- held, that in these circumstances, prosecution version was not proved. (Para-18 and 25 to 30)

Indian Evidence Act, 1872- Section 24- Extra Judicial Confession- as a matter of caution, Courts require some material corroboration to an extra judicial confessional statement. (Para-19)

Cases referred:

Ratan Gond vrs. The State of Bihar, AIR 1959 SC 18
State of Rajasthan vrs. Kashi Ram, (2006) 12 SCC 254
Sahadevan and another vrs. State of Tamil Nadu, (2012) 6 SCC 403,
Tejinder Singh vrs. State of Punjab and connected matters, (2013) 12 SCC 503
Pargan Singh vrs. State of Punjab and another, (2014) 14 SCC 619
Jadumani Khanda vrs. State, 1993 Cri.L.J. 2701

For the appellant: Mr. Jagdish 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 12.10.2011, rendered by the learned Sessions Judge, Kinnaur at Rampur Bhushar, H.P. in Sessions Trial No. 52 of 2010, 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 rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and in default of payment of fine to further undergo simple imprisonment for six months for causing death of Smt. Shirsahni and master Karsang Tamang.

2. The case of the prosecution, in a nut shell, is that one Mohan Lal, a contractor had taken the soling and tarring work of Nalaban-Olta road. He engaged the complainant as his Munshi. Mohan Lal had also engaged Nepali labourers, namely, Kesang Tamang, Chichi Tamang, Gam Bahdur as well as Sh. Nakley Lama, the Compressor Operator. The wives of the Nepali labourers were also engaged in the work. The labourers had their residences/Deras on the upper side of the road, near Nalaban forest. The complainant and Sh. Jagdish had kept their residence in Village Chaddi. On 25.7.2010, at about 11:15 PM, the complainant received a call from Nakley Lama, informing that the accused had run away after killing his wife and child. The complainant, alongwith Jagdish went to the Deras of labourers where he was told by Chichi Tamang that at about 11:00 PM, he heard a sound on the roof of Gum Bahadur indicating that someone was moving on their roof. They woke up and came out from their Deras and found that the accused was standing on the roof of Gum Bahadur, having some weapon. He was shouting to have sacrificed his wife and son. Thereafter, the accused jumped from the roof and ran towards jungle with the weapon. They found his wife and children lying dead on the bed in a pool of blood. They had injuries on their necks. The accused was searched but he was not traceable. The site plan was prepared. The dead bodies were sent to CHC Nankhari from where they were referred to IGMC, Shimla for post mortem. The accused made disclosure statement regarding the weapon (chhura) on 30.7.2010, on the basis of which chhura was got recovered. The viscera which was taken into possession at the time of post mortem examination was sent to FSL, Junga and report was obtained. The spot was inspected by Patwari Patwar Circle nankhari. The age of the deceased Smt. Shirsahni aged 33 years and son master Karsang aged 2 ½ years. 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 17 witnesses. The accused was also examined under Section 313 Cr.P.C. He specifically denied the incriminating circumstances put to him. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Jagdish Thakur, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. P.M.Negi, Dy. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 12.10.2011.

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

6. Sh. Ravinder Thakur, PW-1 deposed that on 26.7.2010 at about 7:00 AM, Santosh Kumar came at Nalaban and told him that a Nepali labourer had killed his wife and child and he brought Santosh Kumar in his vehicle to Nankhari where Santosh Kumar informed the police at Police Post, Nankhari.

7. Sh. Kalam Singh, PW-2 deposed that the accused has made disclosure statement vide Ext. PW-2/A to the effect that after committing the murder of his wife and child he had kept Chhura in Nalaban forest.

8. Sh. Hardayal Thakur, PW-3 deposed that the accused while in custody of the police led them to the place where he had kept weapon of offence at Nalaban forest and got

the knife (chhura) recovered from underneath the soil and told that it was the same knife with which he used for committing the murder of his wife and child. The sketch of knife is Ext. 3/A. It was sealed. The knife was taken into possession vide memo Ext. PW-3/C.

9. Sh. Jagdish Chand, PW-5 deposed that he alongwithSantosh had gone to sleep after taking dinner. At about 11:15 PM, Sh. Nakle Lama rang Santosh informing that the accused had murdered his wife and son and for this reason, they should come on the spot. They went to the spot but the accused was not found. They were taken to the spot/Dera of the accused by Sh. Chichi Lama. In the Dera of the accused, there were two dead bodies having cut marks on the throat.

10. Sh. Gum Bahadur, PW-6 is a material witness. He deposed that his Dera was at a distance of 10-12 paces from the Dera of the accused. On 25.7.2010, after taking meals, he along with Sh. Chichi Lama went to sleep. The accused came on the roof of their Dera and proclaimed that he had sacrificed his wife and child and that he was also to sacrifice them. They came out and in the meantime, the accused jumped from the roof and while doing so, gave him push and ran away. They all went to the Dera of Sh. Chichi Lama. The accused was not traceable. In his cross-examination, he deposed that their Dera was 10/12 feet in height. He also admitted that on that day, it was raining and also it was dark. He denied the suggestion that it was not possible to recognize a person even from a distance of one and a half feet.

11. Dr. Rahul Gupta, PW-11 deposed that he alongwith Dr. Piyush Kapila and Dr. H.S.Sekhon, conducted the post mortem on the person of Shirsahni, wife of accused. The cause of death of Smt. Shirsahni was due to chop wound over neck, leading to hemorrhagic shock and death. Time between injury and death was instantaneous and between death and post mortem was around 36 hours. The weapon of offence used was moderately heavy sharp object. They have issued post mortem report Ext. PW-11/C. The injuries mentioned in Ext. PW-11/C were possible with knife (chhura) Ext. P-2.

12. Dr. Abhay Sharma, PW-12 deposed that he alongwith Dr. Piyush Kapila conducted the post mortem on the person of master Karsang, son of accused. The cause of death of master Karsang was due to chop wound over neck, leading to hemorrhagic shock and death. Time between injury and death was instantaneous and between death and post mortem was around 36 hours. The weapon of offence used was moderately heavy sharp object. They have issued post mortem report Ext. PW-12/C. The injuries mentioned in Ext. PW-12/C were possible with knife (chhura) Ext. P-2.

13. Sh. Santosh, PW-13 deposed that he was in his quarter at place Chari. He received a call on his mobile from Nakle. He told that accused has killed his wife and son aged 3 years. He alongwith Jagdish Chand, tractor driver reached at the Dera of the accused and went to the Dera of Chichi Tamang as his residence was adjacent to the Dera of the accused. When he entered in the Dera of the accused alongwith Nakle Lama, Chichi Tamang and Jagdish, he saw the dead bodies of wife of the accused and his son, stained with blood lying in the blanket. They went to the Police Post in the morning of 26.7.2010 and reported the matter to the police. According to him, the accused had fled away from the spot and Chichi Tamang told them that accused has some weapon in his hand and was crying loudly and was saying **"Maine Apne Bibi Aur Bachon Ki Bali Chadha Di Hai Aur Ab Tum Sab Ki Bali Chadha Doonga".** At that time, he was standing on the roof and jumped from there and thereafter, he went towards the jungle alongwith the weapon.

14. Sh. Chichi Tamang, PW-14 is another material witness. According to him, the Dera of accused was adjacent to his Dera. All the labourers were residing with their

families. On 25.7.2010, during night, they were sleeping than at about 11:00 PM, he heard a noise and saw accused standing on the roof of Gum Bahadur. He was proclaiming that he has killed his wife and child and shall kill all. He was having some weapon in his hand. When they all assembled, accused jumped from the roof and fled away towards the road. The dead bodies were lying in the Dera of the accused stained with blood. In his cross-examination, he admitted that it was raining heavily on that day and it was dark also. There was no street light at the spot. There was only one roof of Dera of Gum Bahadur and his Dera.

15. Insp. Sangat Ram Negi, PW-15 deposed that on 26.7.2010, HC Mohan Joshi informed him telephonically that on 25.7.2010, accused has murdered his wife and son. He visited the spot and prepared the spot map Ext. PW-15/B. Photographs of the spot were taken. He filled in the inquest forms. He took into possession blood stained blanket Ext. P-4, a piece of mattress Ext. P-5 and the same were put in a gunny bag Ext. P-3 vide memo Ext. PW-13/A. It was signed by Santosh Kumar and Mohan Lal. The M.O. CHC, Nankhari, referred the bodies to IGMC, Shimla for post mortem examination. The accused was arrested on 26.7.2010 vide memo Ext. PW-15/K. In his cross-examination, he deposed that accused was arrested at a distance of 200 meters from the place of occurrence. The clothes of the accused were not taken into possession. He has not noticed blood on the clothes of the accused because the clothes were wet due to rain.

16. ASI Devi Singh, PW-16 deposed that the accused has made disclosure statement in the presence of Pratap Singh and Kalam Singh stating that on 25.7.2010, he kept concealed one knife Ext. P-2 in Nalaban jungle in the bushes and only he can get the same recovered. The statement was recorded vide Ext. PW-2/A. He along with accused proceeded to the spot and on the way associated Hardayal Singh and Surjan Singh. In the presence of these witnesses, the accused identified the place and got knife Ext. P-2 recovered which was hidden in the bushes which was half buried in the soil.

17. HC Liaq Ram, PW-17 deposed that on 28.7.2010, Insp. Sangat Ram Negi deposited one sealed parcel sealed with seal bearing impression “B” alongwith sample of seal. He entered the same in the malkhana register at Sr. No. 742. On 30.7.2010, HHC Duni Chand deposited 12 sealed parcels duly sealed with seal bearing impression DKG alongwith letter with him. He entered the same in the malkhana register at Sr. No. 745. On 31.7.2010, ASI Devi Singh deposited one sealed parcel duly sealed with seal bearing impression “M” alongwith the sample of seal. He entered the same at Sr. No. 746. On 2.8.2010, he handed over the parcels alongwith sample of seals, docket and letter vide RC No. 73/2010 to Surender Singh for depositing the same at FSL, Junga who after depositing the same in the laboratory handed over the receipt to him.

18. The case of the prosecution is entirely based on the circumstantial evidence. The case of the prosecution, precisely, is that the accused after killing his wife and son came to the roof of Dera of Gum Bahadur, PW-6 and proclaimed that he has scarified his wife and son and he would also sacrifice them. Thereafter, he jumped from the roof and went towards the forest with the weapon of offence i.e. knife Ext. P-2. It has come in the statement of Sh. Gum Bahadur, PW-6 and Sh. Chichi Tamang, PW-14 that all of them were living in Deras. According to Sh. Gum Bahadur, PW-6 the Dera of the accused was at a distance of 10-12 paces from his Dera. Sh. Gum Bahadur, PW-6 further deposed that he alongwith Sh. Chichi Tamang, went to sleep on 25.7.2010. The accused came on the roof of their Dera and proclaimed that he has sacrificed his wife and child. Similarly, Sh. Chichi Tamang, PW-14 deposed that they had gone to sleep on 25.7.2010, during night, at about 11:00 PM, he heard a noise and saw accused standing on the roof of Gum Bahadur. He was proclaiming that he has killed his wife and child and shall kill all. He was having some

weapon in his hand. It is not believable that the accused after killing his wife and son would have climbed the roof of Sh. Gum Bahadur, PW-6. The normal human conduct of the accused would have been to escape from the spot with the weapon of offence instead of climbing on the roof of Sh. Gum Bahadur, PW-6. Sh. Gum Bahadur, PW-6 in his cross-examination, admitted that height of their Dera was 10-12 feet and on that day, it was raining. At that time, it was dark also. Sh. Chichi Tamang, PW-14 has also admitted that it was raining heavily on that day and it was dark in the night. The learned trial Court has convicted the accused by treating the proclamation made by the accused that he has killed his wife and son from the roof of Sh. Gum Bahadur, PW-6 as extra-judicial confession. The accused has not confided to a respectable person in the locality, either before Panch or Pradhan or even his employer.

19. Their lordships of the Hon'ble Supreme Court in the case of ***Ratan Gond vrs. The State of Bihar,*** reported in ***AIR 1959 SC 18,*** have held that usually and as a matter of caution courts require some material corroboration to an extra-judicial confessional statement. It has been held as follows:

> "8. Excluding the statements of Aghani, what then is the evidence against the appellant ? Firstly, we have the extra- judicial confession. Then, we have the following circumstances which the courts below have held to have been clearly established against the appellant, namely, (a) recovery of the blood-stained " balua " from a room of the appellant, (b) recovery of the blood-stained strands of hair from a place pointed out by the appellant and (c) disappearance of the appellant from the village immediately after the murder and his arrest in village Karmapani in circumstances mentioned by Maheshwar Sai (P. W. 6). Lastly, there is another adverse circumstance which arises out of the total denial by the appellant of the recovery of the blood-stained " balua " and of his arrest in village Karmapani. As to the extra-judicial confession, two questions arise: is it voluntary, and, if so, is it true ? The appellant denied at a later stage that he had made a confession, but it is not necessary to consider in this case the abstract question as to whether, as against its maker, a conviction can be based on a confession which is found to be voluntary and true. It is enough to state that usually and as a matter of caution, courts require some material corroboration to such a confessional statement, corroboration which connects the accused person with the crime in question, and the real question which falls for decision in the present case is if the circumstances proved against the appellant afford sufficient corroboration to the confessional statement of the appellant, in case we hold that the confessional statement is voluntary and true."

20. Their lordships of the Hon'ble Supreme Court in the case of ***State of Rajasthan vrs. Kashi Ram,*** reported in ***(2006) 12 SCC 254,*** have held that extra-judicial confession must be proved like any other fact. In this case, accused allegedly made confession before a person known to deceased's brother but he was neither Sarpanch nor a ward member of the village and also before another person who admitted that he was not even acquainted with the accused. Thus, there was nothing to show that the accused had reasons to confide with these persons. It has been held as follows:

> "14. On appeal, the High Court reversed the findings of fact recorded by the trial court and acquitted the respondent. Before adverting to the other incriminating circumstances we may at the threshold notice two of them namely - the circumstance that the respondent made an extra-judicial

confession before PWs 3 and 4, and the circumstance that recoveries were made pursuant to his statement made in the course of investigation of the waist chord used for strangulating Kalawati (deceased) and the keys of the locks which were put on the two doors of his house. The High Court has disbelieved the evidence led by the prosecution to prove these circumstances and we find ourselves in agreement with the High Court. There was really no reason for the respondent to make a confessional statement before PWs 3 and 4. There was nothing to show that he had reasons to confide in them. The evidence appeared to be unnatural and unbelievable. The High Court observed that evidence of extra-judicial confession is a weak piece of evidence and though it is possible to base a conviction on the basis of an extra- judicial confession, the confessional evidence must be proved like any other fact and the value thereof depended upon the veracity of the witnesses to whom it was made. The High Court found that PW-3 Dinesh Kumar was known to Mamraj, the brother of deceased Kalawati. PW-3 was neither a Sarpanch nor a ward member and, therefore, there was no reason for the respondent to repose faith in him to seek his protection. Similarly, PW-4 admitted that he was not even acquainted with the accused. Having regard to these facts and circumstances, we agree with the High Court that the case of the prosecution that the respondent had made an extra-judicial confession before PWs-3 and 4 must be rejected."

21. Their lordships of the Hon'ble Supreme Court in the case of ***Sahadevan and another vrs. State of Tamil Nadu,*** reported in ***(2012) 6 SCC 403,*** have laid down the following principles regarding admissibility and evidentiary value of extra-judicial confession as under:

"13. There is no doubt that in the present case, there is no eyewitness. It is a case based upon circumstantial evidence. In case of circumstantial evidence, the onus lies upon the prosecution to prove the complete chain of events which shall undoubtedly point towards the guilt of the accused. Furthermore, in case of circumstantial evidence, where the prosecution relies upon an extra-judicial confession, the court has to examine the same with a greater degree of care and caution.

14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the 8 Page 9 court would be fully justified in ruling such evidence out of consideration.

16. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused. The Principles (i) The extra-judicial confession is a weak

evidence by itself. It has to be examined by the court with greater care and caution. 13 Page 14 (ii) It should be made voluntarily and should be truthful. (iii) It should inspire confidence. (iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence. (v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities. (vi) Such statement essentially has to be proved like any other fact and in accordance with law."

22. Their lordships of the Hon'ble Supreme Court in the case of ***Tejinder Singh vrs. State of Punjab and connected matters,*** reported in ***(2013) 12 SCC 503,*** have held as under:

"22. Further, the learned senior counsel has rightly placed reliance upon the testimony of PW-7 to whom, according to him, the accused persons namely, Gurdeep Singh, Harnek Singh and Sunny Lal Paswan, co-accused, made a disclosure statement describing the whole incident to him on 12.06.2000 who has neither recorded the alleged extra judicial confession nor made the disclosure of the said statement within reasonable time but 16 days to disclose the extra judicial confessions made by the accused persons to inform to the jurisdictional police. The delay in informing the police regarding the extra judicial confessional statement alleged to have made to him by some of the accused has not been explained by PW-7 and the reason sought to be given by him for non disclosure of the same to the police cannot be accepted by this Court as it is not natural and also not satisfactory.

23. Further, the learned senior counsel Mr. Tulsi has rightly placed reliance upon the judgment of this Court in Dwarkadas Gehanmal's case (supra) with regard to the conduct of the witness in the said case which is inconsistent with the conduct of an ordinary human being. The observations made in the abovementioned case with all fours applicable to the facts situations of the case in hand, that if extra judicial confessional statement was made by the accused as stated by him in his statement before the trial court were to be true, it was his duty to disclose the same immediately to the police or to the relatives of the deceased. That has not been done by him and therefore his evidence is not believable.

24. The extra judicial confession is a weak form of evidence and based on such evidence no conviction and sentence can be imposed upon the appellants and other accused. In support of this proposition, the relevant paragraphs of Pancho's case are extracted hereunder:

"16. The extra-judicial confession made by A-1, Pratham is the main plank of the prosecution case. It is true that an extra-judicial confession can be used against its maker, but as a matter of caution, courts look for corroboration to the same from other evidence on record. In Gopal Sah v. State of Bihar this Court while dealing with an extra- judicial confession held that an extra-judicial confession is on the face of it, a weak evidence and the courts are reluctant, in the absence of a chain of cogent circumstances, to rely on it for the purpose of recording a conviction. We must, therefore, first ascertain whether the extra-judicial confession of A-1, Pratham inspires

> confidence and then find out whether there are other cogent circumstances on record to support it." .....
>
> 25. This Court further noted that: (Kashmira Singh case, AIR p. 160, para 10) "10. ... cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession, he would not be prepared to accept." .....
>
> 27. This Court in Haricharan case further observed that Section 30 merely enables the court to take the confession into account. It is not obligatory on the court to take the confession into account. This Court reiterated that a confession cannot be treated as substantive evidence against a co-accused. Where the prosecution relies upon the confession of one accused against another, the proper approach is to consider the other evidence against such an accused and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused, the court turns to the confession with a view to assuring itself that the conclusion which it is inclined to draw from the other evidence is right."

25. Further, relevant paragraphs from Sahadevan's case are extracted hereunder:

> "14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration."

26. Reliance placed upon the decisions of this Court in the case of Sahadevan's case (supra) supports the case of the appellant herein. Hence, the reliance placed upon the evidence of PW-7 by both the Additional sessions judge and the High Court to convict the appellant and sentencing him for the offence under Section 201 IPC is erroneous in law for the reason that they have not appreciated the testimony of PW-7 in the backdrop of the legal principles laid down by this Court in the above referred cases on the question of extra judicial confession said to have been made by some of the accused to him. Non disclosure of the same either on the same day or within reasonable time either to the police or to the family members of the deceased does not inspire confidence to be accepted as testimony to sustain the conviction and sentence. After 16 days he had disclosed it to the jurisdictional police which would clearly go to show that the conduct of the

said witness is unnatural and improbable to believe and his conduct is not that of an ordinary human being."

23. Their lordships of the Hon'ble Supreme Court in the case of ***Pargan Singh vrs. State of Punjab and another,*** reported in ***(2014) 14 SCC 619,*** have held that where extra-judicial confession is warranted by suspicious circumstances, its credibility becomes doubtful and it loses its importance. It has been held as follows:

> "24. In any case, we are of the opinion that both the courts below have believed the statement of PW-1 who was the Pradhan of his Mohalla and not only a respectable person and had no axe to grind. We see no reason to differ with the conclusions of the two courts below accepting the statement of PW-1 to the effect that these two appellants had made extra-judicial confession before him. More so, we find that his version is corroborated by the two eye-witnesses namely PW-1 and PW-2. We are conscious of the fact that extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with great deal of care and caution. Where an extra-judicial confession is warranted by suspicious circumstances, its credibility becomes doubtful and it loses its importance. It is for this reason that Courts generally look for independent reliable corroboration before placing any reliance upon such a confession. (See Balwinder Singh v. State of Punjab, (1995) Supp (4) SCC 259, which was cited by the counsel for the appellants). However, we find that his statement is corroborated not by any circumstantial evidence but cast iron evidence in the form of two eye-witnesses. Furthermore, even if for the sake of arguments, we discard the testimony of PW-1, the evidence of two eye-witnesses who are found to be credible, is sufficient to uphold the conviction of the appellants."

24. In the case of ***Jadumani Khanda vrs. State,*** reported in ***1993 Cri.L.J. 2701***, the Division Bench of the Orissa High Court has held that confession must be addressed to somebody and not the way one goes on shouting in the street that he/she had killed someone. It has been held as follows:

> "6. The learned Sessions Judge relied on the evidence of P.Ws. 3 and 6 with regard to the extra judicial confession. On going through the evidence of these two witnesses we find that since they did not support the prosecution case, they were permitted to be cross-examined by the P.P. The learned Sessions Judge in para-11 of his judgment has observed that these two witnesses did not state anything about the confession but we are really surprised to note that the learned Sessions Judge utilised the statement of these witnesses recorded under Section 161, Cr.P.C. as substantive evidence before the Court. This is against the fundamental principle of procedural law. All that the learned Sessions Judge has found is that these witnesses saw Bayani entering the house of the appellant and the appellant chasing Bayani towards the jungle and thereafter coming back from the jungle, giving out to have killed Bayani. All these are found to be the statements recorded by the investigating officer under Section 161, Cr.P.C. which are wholly inadmissible and accepting them as evidence is utterly erroneous. Thus we hold that there was no extra judicial confession before P.Ws. 3 and 6.
>
> The learned Sessions Judge also relied on the evidence of P.W. 2 and while so relying observed that P.W. 2 was related to the appellant as his sister. She stated in her evidence that on the date of occurrence it was about noon time

when she along with some other children was playing near the mango tree close to the village tank. At that time the appellant came from the village side and passed by that way and while so passing by that way, he was giving out "MU AJI BAYANIKU KOTAL KOLT". At that time, the appellant was holding an exe. We have gone through the evidence of this witness. She admitted not to have asked anything to the accused about the incident. She admitted that on the following morning, she told her father that the accused killed Bayani. On going through the evidence of this witness we find no reason to believe her statement as to extra judicial confession firstly because she is found to be a child witness aged only 14 years and secondly, the evidence clearly indicates that the appellant did not make a conffession to this witness, but on the other hand, the witness heard the accused while passing by that way giving out to have killed Bayani. We cannot consider this as an extra judicial confession before P.W. 2, because it is well settled that the confession must be addressed to somebody and not the way one goes on shouting in the street that he/she had killed some one. No reliance can be put on the evidence of P.W. 2 which has been so held by the learned Sessions Judge and the finding being erroneous cannot be sustained. The learned Sessions Judge has treated this statement of the accused as relevant under Section 6 of the Evidence Act and has found to be a corroborative piece of material to the extra judicial confession made before P.W. 2.

So far as Section 6 of the Evidence Act is concerned, the principle laid down is that to form a particular statement as a part of the same transaction, utterance must be simultaneous with the incident or soon after it so as to make it reasonably certain that the speaker is still under stress of excitement in respect of the transaction in question. (Vide decision reported in AIR 1951 Orissa 53, Hadu v. The State).

In the present case, the learned Sessions Judge was oblivious to give a finding as to whether the declaration by the accused to have killed the lady was either at the time of commission of the crime or immediately thereafter so as to form the same transaction. There is no material at what time the appellant committed the act and how long after commission of the act he disclosed this fact by way of extra judicial confession before P.W. 2. In the absence of any such material we cannot consider such utterances by the accused as relevant under Section 6 of the Evidence Act. Therefore, we hold the statement as inadmissible."

25. While appreciating the extra-judicial confession, the Court has to see: i) to whom it was made; ii) the time and place of occurrence; iii) the circumstances in which it was made and iv) the Court has to look for any suspicious circumstances. In the instant case, there was no occasion, as noticed by us hereinabove, for the accused to make confessional statement by climbing on the roof of Sh. Gum Bahadur, PW-6 and that too during the night when it was raining heavily.

26. Mr. P.M.Negi, learned Dy. Advocate General, has drawn the attention of the Court to the statement of Sh. Santosh, PW-13. The statement of Sh. Santosh PW-13 is also hearsay. He has not heard the words **"Maine Apne Bibi Aur Bachon Ki Bali Chadha Di Hai Aur Ab Tum Sab Ki Bali Chadha Doonga",** uttered by the accused. It was told to him by Sh. Chichi Tamang, PW-14.

27. The accused, as per the statement of Insp. Sangat Ram Negi, PW-15, was arrested on 26.7.2010 at a distance of 200 meters from the place of occurrence. He has not noticed any blood on the clothes of the accused since, according to him, the clothes were wet due to rain. Mr. P.M.Negi, Dy. Advocate General, for the State has argued that as per Ext. PW-15/L, human blood of group 'O' was detected on Ext. P-2, knife. The disclosure statement was made by the accused on 30.7.2010, on the basis of which, knife Ext. P-2 was recovered. It has come in the evidence that it was raining heavily on that day and if it was raining heavily, there could not be any blood stains on the weapon of offence Ext. P-2. There was some possibility of the blood to be found on the clothes of the accused but not on the weapon of offence i.e. metallic knife.

28. In the case based on circumstantial evidence, the motive is very vital. The prosecution has failed to point out as to what could be the motive of the accused to kill his wife and son. The whole of the case of the prosecution is that the accused killed his wife and son and climbed on the roof and proclaimed that he has sacrificed his wife and son. There is no material on record that the behavior of the accused was abnormal before the alleged incident. There is no evidence how the accused has climbed 10-12 feet to reach the top of the roof of Sh. Gum Bahadur, PW-6. In case, the accused had jumped from the roof, he would have definitely sustained injuries.

29. According to Sh. Gum Bahadur, PW-6, the accused has fled away from the spot towards jungle carrying weapon of offence, however, according to Sh. Sangat Ram Negi, PW-15, the accused was arrested at a distance of 200 meters from the place of occurrence. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

30. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 12.10.2011, rendered by the learned Sessions Judge, Kinnaur at Rampur Bushahr, H.P., in Sessions trial No. 52 of 2010, is set aside. The accused is acquitted of the charges framed under Sections 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.

31. 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 P.S. RANA, J.

Mohit Khattar & others ....Petitioners

versus

State of H.P. & another ....Non-petitioners

Cr.MMO No. 110 of 2014
Reserved on 2.4.2015.
Decided on: 9th April, 2015.

Code of Criminal Procedure, 1973- Section 482- An FIR was registered on the basis of complaint filed by wife for the commission of offence punishable under Section 498-A read with Section 34 of IPC- the parties compromised the matter and agreed to withdraw the cases pending against each other- statement of wife was recorded in which she stated that

she had no objection for quashing the FIR- held, that criminal offences which are personal in nature can be quashed to maintain peace between the parties, however, criminal offences relating to murder, rape, dacoity, Prevention of Corruption Act should not be allowed to be quashed-since the offences involving marriage were personal in nature, therefore, the petition for quashing the proceedings allowed. (Para-4 and 5)

Cases referred:
Ravinder Singh @ Laddi & others vs. State of H.P. ,Latest HLJ 2014 page 1248
Narender Singh & others vs. State of Punjab and another, 2014 (4) SC 573 Judgment Today
Monika Kumar & another vs. State of U.P. & others, 2008 (8) SCC 781
B.S. Joshi vs. State of Haryana, AIR 2003 SC 1386

For the petitioners : Mr. Raman Prashar, Advocate.
For the non-petitioners : Mr. M.L. Chauhan, Addl. AG, for non-petitioner No.1.
Mr. Satyen Vaidya, Advocate, for non-petitioner No.2.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Present petition is filed under Section 482 Cr.P.C. for quashing of FIR No. 22 of 2011 dated 9.3.2011 registered under Section 498-A read with Section 34 IPC in Police Station East Shimla H.P. with further prayer to quash the pending proceedings in Criminal Case No. 94-2 of 2011 pending before the learned Judicial Magistrate Court No. 1 Shimla H.P. It is pleaded that present FIR was registered as per criminal complaint filed by wife of petitioner No.1 dated 9.3.2011 registered in Police Station East Shimla H.P. It is further pleaded that both the parties have mutually agreed to withdraw all the cases pending and also agreed to file joint divorce petition under Section 13 (B) of Hindu Marriage Act. It is further pleaded that no prejudice will be caused to any party if the petition is allowed and prayer for acceptance of petition sought.

2. Per contra no reply filed on behalf of State of Himachal Pradesh. Court heard learned Advocate appearing on behalf of the petitioners and non-petitioners and Court also perused entire record carefully.

3. Following points arise for determination in this petition:-

Point No. 1

Whether petition filed under Section 482 Cr.P.C. is liable to be accepted as mentioned in the memorandum of ground of petition?

Point No. 2

Final Order.

Findings on Point No.1

4. Submission of learned Advocate appearing on behalf of the petitioners that dispute inter-se the parties is relating to matrimonial dispute and parties have mutually entered into compromise and in view of the above stated facts petition filed under Section 482 Cr.P.C. be allowed is accepted for reasons hereinafter mentioned. Parties personally appeared before the Court and statement of parties were recorded. Smt. Shipra Khattar

complainant has specifically stated before the Court that she has no objection if FIR No. 22 of 2011 dated 9.3.2011 registered under Section 498-A read with Section 34 IPC in Police Station East Shimla and consequential criminal proceedings are quashed. Smt. Shipra also stated in positive manner that she had given statement voluntarily without any coercion and undue influence. Statement of accused persons also recorded by the Court and placed on record. All the accused persons had corroborated the version of complainant Smt. Shipra Khattar. It is well settled law that under Section 482 Cr.P.C. court has inherent power to quash criminal proceedings even in those cases which are not compoundable. It is also well settled law that power should be exercised sparingly and with caution. It is also well settled law that only those criminal offences should be quashed which are not against society. It is also well settled law that criminal offences which are personal in nature should be quashed in order to maintain peace and amity between the parties. ***See Latest HLJ 2014 page 1248*** *titled* ***Ravinder Singh @ Laddi & others vs. State of H.P.*** It is also well settled law that criminal proceedings relating to offences of murder, rape, dacoity, Prevention of Corruption Act should not be dropped and it is also well settled law that criminal cases relating to commercial transaction, matrimonial dispute and family dispute could be quashed under Section 482 Cr.P.C. ***See 2014 (4) SC 573 Judgment Today*** *titled* ***Narender Singh & others vs. State of Punjab and another.*** It was held in case reported in ***2008 (8) SCC 781*** *titled* ***Monika Kumar & another vs. State of U.P. & others*** that inherent jurisdiction under Section 482 Cr.P.C. has to be exercised sparingly, carefully and with caution. It was held in case reported in ***AIR 2003 SC 1386 titled B.S. Joshi vs. State of Haryana*** that in matrimonial offences it becomes the duty of the Court to encourage genuine settlements of matrimonial disputes.

5. In view of the fact that in the present case complainant Smt. Shipra Devi had given statement that she has no objection if the FIR and consequential criminal proceedings are quashed and in view of the fact that mutual divorce petition has been filed before the competent Court of law it is held that it is expedient in the ends of justice to allow the petition. Point No.1 is answered in affirmative.

***Point No.2*.**

Final Order

6. In view of findings upon point No.1 above petition filed under Section 482 Cr.P.C. is allowed and FIR No. 22 of 2011 dated 9.3.2011 and consequential criminal proceedings of case No. 94-2 of 2011 pending before learned Judicial Magistrate Court No.1 Shimla H.P. are ordered to be quashed. Petition is dispose of. Pending applications if any also disposed of.

****

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

Nasib Chand ...Appellant.

Versus

State of H.P. ...Respondent.

Cr. Appeal No. 16 of 2009
Judgment reserved on: 18.03.2015
Date of Decision: April 9, 2015

Indian Penal Code, 1860- Section 302- Accused murdered his wife and misled the others that she had committed suicide on account of stomach pain- Doctor opined that deceased had died due to strangulation - mark of ligature, corresponding to the thickness of the nylon cord, was found on the body of the deceased- As per Medical Officer, death could have been caused with nylon cord- Doctor also ruled out the possibility of the deceased hanging herself- brother of the deceased admitted that he had told the police that accused had disclosed to him that there was a quarrel between him and the deceased and due to the anger he had strangulated the deceased- he also admitted that he had told the police that accused had disclosed to him that he had strangulated the deceased to get rid of her- this amounts to extra judicial confession on the part of accused- accused was last seen with the deceased and burden was on him to prove as to how deceased had died- held, that in these circumstances, conviction of the accused was justified. (Para-9 to 38)

Indian Evidence Act, 1872- Section 3- Circumstantial Evidence – when there is no direct evidence of crime, the guilt of the accused can be proved by circumstantial evidence but the circumstances from which the conclusion of guilt is to be drawn, should be fully proved and must be conclusive in nature- all the links in the chain of circumstances must be established beyond reasonable doubt, proved circumstances should be consistent only with the hypothesis of guilt of the accused, and totally inconsistent with innocence of the accused- Court must adopt cautious approach while appreciating circumstantial evidence and great caution must be taken to evaluate the circumstantial evidence. (Para-12 and 13)

Indian Evidence Act, 1872- Section 155- Evidence of the hostile witness may contain elements of truth and should not be entirely discarded- evidence can also be relied upon by the prosecution to the extent to which it supports the prosecution version.

(Para-21 and 22)

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

Yomeshbhai Pranshankar Bhatt vs. State of Gujarat, (2011) 6 SCC 312

Bhajju alias Karan Singh vs. State of Madhya Pradesh, (2012) 4 SCC 327

Ramesh Harijan vs. State of Uttar Pradesh, (2012) 5 SCC 777

Shivaji Sahabrao Bobade & another vs. State of Maharashtra, (1973) 2 SCC 793

State of Rajasthan v. Raja Ram, (2003) 8 SCC 180

Jagroop Singh v. State of Punjab, (2012) 11 SCC 768

For the Appellant:	Mr. Vinay Thakur, Advocate.
For the Respondent:	M/s Ashok Chaudhary, V.S. Chauhan, Addl. AGs., and J.S. Guleria, Asstt. AG., for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In this appeal filed under Section 374 Cr.P.C., convict Nasib Chand has assailed judgment dated 29.12.2008, passed by Additional Sessions Judge, Una, District Una, H.P., in Sessions Case No.9 of 2008/Sessions trial No.17 of 2008, titled as State of H.P. Versus Nasib Chand, whereby he stands convicted for having committed an offence punishable under the provisions of Section 302 of the Indian Penal Code and sentenced to serve rigorous imprisonment for life and pay fine in the sum of Rs.10,000/- and in default thereof, further undergo simple imprisonment for a period of one year.

2. It is the case of prosecution that in the night intervening 12-13.11.2007, accused murdered his wife Smt. Popla Devi, but misled others making them believe that on account of stomach pain deceased committed suicide. Based on the complaint, made by Paramjit Singh (PW.11), uncle of the deceased, Inspector Mehar Chand (PW.18) after reaching the house of accused, carried out necessary investigation. He recorded statement of Ravinder Kumar (PW.10), brother of the deceased, on the basis of which FIR No.218/07, dated 13.11.2007 (Ex.PW.8/A) was registered, under the provisions of Section 302 IPC at Police Station, Amb, Tehsil Amb, District Una, H.P., against the accused. Investigating Officer got the spot photographed and prepared the spot map (Ex.PW.18/F). He also prepared the inquest reports (Ex.PW.18/G and Ex.PW.18/H) and sent the dead body for postmortem to the Regional Hospital, Una. Dr. Harmeet Singh (PW.6) conducted the postmortem and issued report (Ex.PW.6/C). On the spot, Investigating Officer completed the proceedings, including recording of statements of the relevant witnesses. With the receipt of the report of the Forensic Science Laboratory (Ex.PW.6/B), doctor opined the deceased to have died on account of strangulation. Certainly it was not a case of natural death or suicide. 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 Sections 302 and 201 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as eighteen witnesses. Statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took the following defence:-

> "My wife was suffering from T.B. and she committed suicide by hanging."

5. Trial Court based on the testimony of the prosecution witnesses, found the prosecution to have established its case, beyond reasonable doubt. Trial Court, found the accused to have first killed his wife and then created an alibi of the deceased committing suicide on account of serious ailment.

6. We have heard Mr. Vinay Thakur, learned counsel, on behalf of the appellant as also 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.

7. Fact that deceased was married to the accused is not in dispute. Such marriage was solemnized 15-20 years prior to the date of incident. From the wedlock two sons and two daughters were born is also not disputed. The dead body of the deceased was recovered from the house of the accused is also not disputed. In any event, it stands proved by the Investigating Officer (PW.18). That dead body was sent for postmortem is also not in dispute.

8. From the testimony of Dr. Harmeet Singh (PW.6), it is evident that a Board of Doctors was constituted for conducting the postmortem. At this juncture, it would be beneficial to reproduce the relevant portion of testimony of the doctor:

> "External Appearance:
>
> Body of well built female of length 5' 5" wearing light yellow print Salwar, Kamij and light pink Bra. Body was in Rigor mortis with flexion of both upper limbs at the elbow joint. There was a black nylon thread with multiple knots at regular intervals worn in the neck. There was a big knot on the left side corresponding to mark on the skin. The nylon cord/thread was strong enough to support the weight of head and neck to cause compression of neck. There was a ligature mark on the neck above the thyroid cartilage transverse measuring 20 cm starting from the angle of the mandible on the right to the nape of neck on the left side. Mark of ligature was corresponding to the thickness of the nylon cord. "
>
> [Emphasis supplied]

9. Evidently, ligature marks were found on the neck, above the thyroid cartilage of the deceased. Mark of ligature, corresponding to the thickness of the nylon cord, was found on the body of the deceased. According to the doctor, death could have been caused with this nylon cord (Ex.P-1). At the time of postmortem it was on the body of deceased and removed by the doctors. Also froth was coming from the right nostril. By cross-examining the witnesses an endeavour was made by the accused in establishing that symptoms found on the dead body, were in fact similar to suicide by hanging and not strangulation. In our considered view accused remained unsuccessful in such an attempt. Modi and Parekh do not say with certainty, as a matter of rule, that under all circumstances, in a case of strangulation, the tracheal cartilage, hyoid bone and the thyroid cartilage, must be broken or fractured.

10. It is not in dispute that there is no eye witness to the incident. Prosecution case primarily rests on circumstantial evidence and they being (i) recovery of dead body of the deceased from the house of the accused; (ii) incordial relationship between the accused and the deceased; (iii) accused being last seen in the company of the deceased; (iv) the postmortem report recording death to have been caused by strangulation; (v) accused having orally confessed his guilt with Tara Chand (PW.1); (vi) conduct of the accused and (vii) falsification of defence, so taken by the accused.

11. That death has taken by strangulation stands proved and discussed by us.

12. 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. [See: *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.].

13. Also, apex Court in *Padala Veera Reddy v. State of Andhra Pradesh and others,* 1989 Supp (2) SCC 706, Court 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."
>
> (Also 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).

14. 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.

15. 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 guilty of the accused.

16. To establish the remaining circumstances, prosecution relies upon the testimonies of Tara Chand (PW.1), Smt. Banta Devi (PW.4), Tari (PW.5), Rahual (PW.7), Ravinder Kumar (PW.10), Paramjit Singh (PW.11), Viney Kumar (PW.12), Ms. Kanchan Devi (PW.13), Mohinder Pal (PW.16) and Papu Sharma (PW.17).

17. At the threshold, it be only observed that neither from the suggestion put by the accused nor from any evidence led by him, it can be inferred, even remotely, that deceased was suffering from Tuberculosis. Section 106 of the Indian Evidence Act, 1872

enjoining duty on the accused to have placed on record some material/evidence to this effect.

18. The doctor has ruled out the possibility of the deceased hanging herself with the rope found around her neck. The report of FSL (Ex.PW.18/Q) evidences the fact that rope found around the neck of the deceased could not have withstood, without breaking, a sudden force of about 30 kg F. This force is the maximum that an average built man can apply on a loop constructed of the thread. Medical record establishes that deceased had strong body. She was 35 years of age, well built and having height of 5 ft. 5 inches. From the testimony of Dr. Harmeet Singh it has also come on record that deceased could not have hanged herself with the only thread found around her neck. Accused wants the Court to believe that deceased hanged herself from the hook of the fan, but the rope with which she hung herself has never handed over to the police. Nor was it found there. Thus medical evidence effectively negates the theory of suicide.

19. It be also observed that the son, daughter and neighbour of the accused/deceased have not fully supported the prosecution. They were extensively cross-examined by the Public Prosecutor and in our considered view their testimonies can be dissected and correctly appreciated and relied upon not only to prove the fact that accused misled the relatives in believing them of the theory of suicide, but also in corroborating the version so narrated by the prosecution witnesses.

20. Their Lordships of the Hon'ble Supreme Court in *Yomeshbhai Pranshankar Bhatt vs. State of Gujarat,* (2011) 6 SCC 312 have held that evidence of hostile witness may contain elements of truth and should not be entirely discarded. Their Lordships have held as under:

> "22. The learned counsel for the appellant further submitted the doctor had not given his written opinion that the deceased was fit enough to give her statement. Though orally, the doctor said so. Relying on this part of the evidence especially the evidence of the husband of the deceased, the learned counsel for the appellant submitted that even though the husband may have been declared hostile, the law relating to appreciation of evidence of hostile witnesses is not to completely discard the evidence given by them. This Court has held that even the evidence given by hostile witness may contain elements of truth.
>
> 23. This Court has held in State of U.P. vs. Chetram and others, AIR 1989 SC 1543, that merely because the witnesses have been declared hostile the entire evidence should not be brushed aside. [See para 13 at page 1548]. Similar view has been expressed by three-judge Bench of this Court in Khujji alias Surendra Tiwari vs. State of Madhya Pradesh, [AIR 1991 SC 1853]. At para 6, page 1857 of the report this Court speaking through Justice Ahmadi, as His Lordship then was, after referring to various judgments of this Court laid down that just because the witness turned hostile his entire evidence should not be washed out."

21. Their Lordships of the Hon'ble Supreme Court in *Bhajju alias Karan Singh vs. State of Madhya Pradesh,* (2012) 4 SCC 327 have held that evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. Their Lordships have held as under:

> "36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the

prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases:

(a) Koli Lakhmanbhai Chanabhai v. State of Gujarat (1999) 8 SCC 624

(b) Prithi v. State of Haryana (2010) 8 SCC 536

(c) Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1

(d) Ramkrushna v. State of Maharashtra (2007) 13 SCC 525"

22. Their Lordships of the Hon'ble Supreme Court in *Ramesh Harijan vs. State of Uttar Pradesh,* (2012) 5 SCC 777 have again reiterated that any portion of evidence consistent with case of prosecution or defence can be relied upon. Their Lordships have further held that seizure/recovery witnesses though turning hostile, but admitting their signatures/thumb impressions on recovery memo, they could be relied on by prosecution. Their Lordships have held as under:

"23. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide: Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).

24. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla v. Daroga Singh & Ors., AIR 2008

> SC 320; and Subbu Singh v. State by Public Prosecutor, (2009) 6 SCC 462. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. (See also: C. Muniappan & Ors. v. State of Tamil Nadu, AIR 2010 SC 3718; and Himanshu @ Chintu v. State (NCT of Delhi), (2011) 2 SCC 36)"

23. Perusal of statements of Rahual (PW-7) and Ms. Kanchan Devi (PW.13) reveal that relations between the accused and the deceased were cordial and deceased committed suicide by hanging herself with the hook of the fan. Reason being that she was suffering from T.B. remained ill. But from the cross-examination part of testimony of Ms. Kanchan Devi, it is evident that she is trying to help her father. Version that deceased committed suicide by hanging was not so disclosed by her to the police as she admits not to have got such fact recorded in her previous statement, so recorded by the police, with which she was confronted. She admits not to have complained about the factum of false implication of her father.

24. According to Mohinder Pal (PW.16), after learning about the death of deceased, he went to the house of accused, where he saw the deceased hanging from the ceiling fan. Surprisingly, he did not inquire about the cause of death. This witness undisputedly is a close relative of the accused. Deposition of this witness, in our considered view, is false. This we say so for the reason that deceased had already died at the time when he saw her hanging from the fan. Then why is it that he sent one Sanju to call for the doctor. Further witness states that deceased was hanging from a rope tied to the hook of the fan. Now where is this rope? Why is it that he did not disclose such fact to the police? Who concealed the rope from the Investigating Officer? Why did the accused not produce the same in the Court or hand it over to the Investigating Officer? these are the questions which remained unanswered, rendering version of children of the deceased as also this witness to be not worthy of credence, if not false. At this juncture, we may observe the demeanor of this witness, so recorded by the trial Court in the following language:-

> "While deposing the witness tended to be evasive while replying to the question in his examination in chief. He was more than eager to reply to the questions put by the defence counsel. The demeanor of the witness throughout the examination was such that he did not answer one question looking straight. Throughout his deposition the witness kept on gazing towards the floor."

25. We may only observe that their version, in no manner renders the prosecution case to be false or doubtful.

26. Hon'ble Supreme Court of India in *Shivaji Sahabrao Bobade & another vs. State of Maharashtra,* (1973) 2 SCC 793 has held that:-

> "6. Even at this stage we may remind ourselves of a necessary social perspectives in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary contest of escalating crime and escape. <u>The judicial instrument has a public accountability. The cherished principles of golden thread of proof beyond reasonable doubt which runs through the web of our law should not be</u>

> stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then breaks down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned author [*Glanville Williams in 'Proof of Guilt'*] has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that " a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent ... ..." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analysing the evidence and appraising the soundness of the contrary conclusions reached by the Courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant. In India the law has been laid down on these times long ago." [Emphasis supplied]

27. We find that even Pradhan of the Gram Panchayat namely Viney Kumar (PW.12), who had independently informed the police of the incident tried to support the accused. But when cross-examined by the Public Prosecutor on the question of relationship between the accused and the deceased, he admits to have informed the police about such fact and also got recorded in his prior statement Mark E with which he was confronted that on the basis of complaint, pertaining to discord between the accused and the deceased, 3-4 times Khangi Panchayat was convened. Thus this witness contradicts the version of the children that there was nothing wrong with the relations between the deceased and the accused. That something was amiss between the parties to the extent that the matter had to be taken out of the four walls of home, warranting interference of third party stands established on record.

28. To establish the fact that accused created evidence of misleading the cause of death of the deceased, prosecution seeks reliance upon the testimonies of Vebabh Lath (PW.14) and Sham Lal (PW.15). Conjoint reading of their testimonies would establish that in the middle of night, accused went to the house of Vebabh Lath and asked him to see the deceased who was suffering from a stomach pain. Sham Lal went on the asking of accused. Both the witnesses depose that when they reached the house of the accused, they found the dead body of the deceased lying on the double bed. Their testimonies remain unrebutted. Now if deceased had already committed suicide, then where was the question of accused having gone to the house of Vebabh Lath and also sent someone else to the house of Sham Lal, asking them to check the deceased who allegedly was suffering from stomach pain. Children state that while their father was sleeping with them, deceased committed suicide by hanging. So where does the issue of stomach pain arise. It is not the case of the accused that deceased complained about the stomach pain to him thereafter he went to get the doctor and in between she committed suicide. Noticeably, even Mohinder Pal (PW.16) states

that at the time when he went to the house of accused, deceased was hanging from the rope tied to the hook of the fan. Now if this were so, then why did he send someone to the house of Sham Lal (PW.15). Obviously he wanted to conceal the occurrence of the events and misled the Investigating Agency with regard to the same.

29. That relations between the accused and the deceased were not cordial, is evident from the testimony of relatives of the deceased, Tara Chand (PW.1) brother of the deceased, Ravinder Kumar (PW.10) and uncle Paramjit Singh (PW.11). According to the witness accused would often maltreat and beat the deceased, who informed her relatives of such acts. Even Pradhan admits of having convened a Khangi Panchayat for such purpose. One cannot forget that incident pertains to the remote corner of the State and parties are illiterate, poor and rustic villagers. They are not worldly-wise and familiar with the procedure of law. It is in this backdrop that deceased who was just 35 years of age, had informed her relatives of the maltreatment and complaints, oral in nature, were lodged with the Pradhan. Though the witness could not state the exact date and time of alleged atrocities but we cannot ignore the socio economic conditions and background surrounding the parties.

30. We find the accused to have confessed his guilt of having killed the deceased by strangulating her. Tara Chand (PW.1) states that in the night intervening 12-13.11.2007, Suresh, Madan and one Tari came to their house and informed that deceased was suffering from stomach pain. On their asking he went to the house of the deceased alongwith his brothers and their wives. In the house of accused they found the dead body of the deceased lying on the bed and 5-6 women sitting there. When enquired about the cause of death, accused disclosed that "deceased was suffering from a stomach pain and when he had gone to take medicine and when I returned back to his house he found Popla Devi dead. Except this the accused had nothing told to me." At this juncture, it be observed that this witness, brother of the deceased, was declared hostile and when cross-examined by the Public Prosecutor, he supported the prosecution by deposing that "*It is correct that I had also stated to the police that on my persistent enquiry the accused disclosed me that on 12.11.2007 there was quarrel between the accused and the deceased and the accused had also disclosed that in the quarrel and due to anger I strangulated the deceased with my hands with the help of amulet which was tied around the neck of the deceased in a nylon thread. I had also disclosed to the police that the accused Nasib Chand had also disclosed to me that in order to get rid off from the deceased I strangulated her.*" Now crucially, there is no cross-examination by the accused to this part of the testimony. That accused admitted to such guilt is also evident from the testimony of Kanta Devi (PW.4) wife of Ravinder Kumar (PW.10). She categorically states the accused to have informed "*that when he pulled the amulet string of nylon then Popla Devi died due to strangulation.*" We do not find version of the witnesses with regard to confessional statement, to be an exaggeration. It is so recorded in their previous statements recorded by the police, which fact is also corroborated by Inspector Mehar Chand (PW.18), who uncontrovertedly correctly recorded the same.

31. Law with regard to confessional statement is now well settled. The apex Court in *State of Rajasthan v. Raja Ram,* (2003) 8 SCC 180, has held thus:

> "18. Confessions may be divided into two classes, i.e. judicial and extra-judicial. Judicial confessions are those which are made before Magistrate or Court in the course of judicial proceedings. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or Court. Extra-judicial confessions are generally those made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to

record confessions under Section 164 of the Code or a Magistrate so empowered but receiving the confession at a stage when Section 164 does not apply. As to extra-judicial confession, two questions arise : (i) were they made voluntarily ? And (ii) are they true? As the section enacts, a confession made by an accused person is irrelevant in a criminal proceedings, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceedings against him. It follows that a confession would be voluntary if it is made by the accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. It would not be involuntary, if the inducement, (a) does not have reference to the charge against the accused person, or (b) it does not proceed from a person in authority; or (c) it is not sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he could gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of Section 24. The law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which the Court has to be satisfied with is, whether when the accused made confession, he was a free man or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the Court is satisfied that (in) its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of highest credit, because it is presumed to flow from the highest sense of guilt. [See R. v. Warwickshall; (1783) Lesh 263)]. It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law. An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of the harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is

made and threat of prosecution if it is not. (See Woodroffe Evidence, 9th Edn. Page 284). A promise is always attached to the confession, alternative while a threat is always attached to the silence-alternative; thus, in the one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the Court is to determine the absence or presence of inducment, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession. The words `appear to him' in the last part of the section refer to the mentality of the accused.

19. An extra-judicial confession, if voluntary and true and made in fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

(Emphasis supplied)

32. In *Jagroop Singh v. State of Punjab*, (2012) 11 SCC 768, the apex Court has held as under:

"29. The issue that emanates for appreciation is whether such confessional statement should be given any credence or thrown overboard. In this context, we may refer with profit to the authority in *Gura Singh v. State of Rajasthan,* (2001) 2 SCC 205, wherein, after referring to the decisions in *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh,* AIR 1954 SC 322, *Maghar Singh v. State of Punjab,* (1975) 4 SCC 234, *Narayan Singh V. State of M.P.,* (1985) 4 SCC 26, *Kishore Chand v. State of H.P.,* (1991) 1 SCC

286 and *Baldev Raj v. State of Haryana,* 1991 Supp (1) SCC 14, it has been opined that it is the settled position of law that extra judicial confession, if true and voluntary, can be relied upon by the court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extra-judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and his evidence is credible. The evidence in the form of extra-judicial confession made by the accused before the witness cannot be always termed to be a tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the court believes the witness before whom the confession is made and is satisfied that it was true and voluntarily made, then the conviction can be founded on such evidence alone. The aspects which have to be taken care of are the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak for such a confession. That apart, before relying on the confession, the court has to be satisfied that it is voluntary and it is not the result of inducement, threat or promise as envisaged under Section 24 of the Act or brought about in suspicious circumstances to circumvent Sections 25 and 26.

30. Recently, in *Sahadevan v. State of Tamil Nadu,* (2012) 6 SCC 403, after referring to the rulings in *Sk. Yusuf v. State of W.B.,* (2011) 11 SCC 754 and *Pancho v. State of Haryana,* (2011) 10 SCC 165, a two-Judge Bench has laid down that the extra-judicial confession is a weak evidence by itself and it has to be examined by the court with greater care and caution; that it should be made voluntarily and should be truthful; that it should inspire confidence; that an extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence; that for an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities; and that such statement essentially has to be proved like any other fact and in accordance with law. The Court cautioned that confession would have to be proved like any other fact, which would depend upon veracity of the witness. Also, such confession can be relied upon and conviction based thereupon, if evidence comes from the mouth of the witness, who appears to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought, which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused. The Court has to satisfy with regard to voluntariness of the confession, truthfulness thereof and corroboration, if so required. The Court further held that:-

> "15.6. Accepting the admissibility of the extra-judicial confession, the Court in the case of *Sansar Chand v. State of Rajasthan* [(2010) 10 SCC 604] held that:
>
> > "29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide Thimma and Thimma Raju v. State of Mysore, Mulk Raj v. State of U.P., Sivakumar v. State

(SCC paras 40 and 41 : AIR paras 41 & 42), Shiva Karam Payaswami Tewari v. State of Maharashtra and Mohd. Azad v. State of W.B.]

30. In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872."

15.7. Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Court in the case of *Rameshbhai Chandubhai Rathod v. State of Gujarat* [(2009) 5 SCC 740], held as under :

"It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true."

15.8. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. [Ref. *Sk. Yusuf v. State of W.B.* [(2011) 11 SCC 754] and *Pancho v. State of Haryana* [(2011) 10 SCC 165]." [Emphasis supplied]

33. We find that to Ravinder Kumar (PW.10), brother of the deceased, accused had given a totally different version of the cause of death. To him he disclosed that deceased died by hanging from the ceiling fan. At that time he was sleeping in the other room. Version so narrated, apparently was false, as the witness noticed dust on the ceiling fan and accordingly lodged complaint with the police (Ex.PW.10/A).

34. Paramjit Singh (PW.11) was the first one who had gone to the police and informed about the incident. Ex.PW.9/A is the daily diary report which records apprehension of the complainant party with regard to the death of the deceased. On such a complaint, police reached the spot. It is true that at that point in time, no specific suspicion against the accused was pointed out, but then apprehension was expressed. From the cross-examination part of the testimony of the witness, accused wants the prosecution to believe that during the night of the incident, he was sleeping with his children in one room, whereas, deceased was sleeping in the adjoining room. It is not a case where a third person ever entered the house. Accused never disclosed such apprehension. There is nothing against the children, pointing to their guilt. Thus involvement of third party is ruled out in

the instant case. That the deceased committed suicide by hanging cannot be said to have been probablized. In fact ocular or medical evidence belies such stand.

35. Accused was the last to have been seen in the company of the deceased. This fact stands established by the prosecution and admitted by the accused. For after all even according to him, she had complained about the stomach pain to him. There is no evidence of any medical history or ailment of the deceased. She was just 35 years of age at the time of her death. Even doctors, who conducted the postmortem did not find signs of previous ailment. As such, prosecution was able to establish even this circumstance of last seen, beyond reasonable doubt.

36. Conduct of the accused by creating evidence, showing that deceased was suffering from ailment as a result of which she committed suicide, is also a material circumstance pointing finger towards his guilt.

37. 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 accused committed murder of deceased Smt.Popla Devi.

38. 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. Hence, the appeal is dismissed. Records of the Court below be immediately sent back.

****

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

State of H.P. ....Appellant

Vs.

Rajak Mohammad son of Sh Kamal Deen. ....Respondent.

Cr. Appeal No. 357 of 2008.
Judgment reserved on: 25.3.2015.
Date of Judgment: April 9 ,2015.

Indian Penal Code, 1860- Section 376- Accused kidnapped the prosecutrix, aged 15 years old, in the truck- accused 'R' raped prosecutrix on the way to Kullu- Prosecutrix was taken to different destinations and was recovered from the house of 'R'- prosecutrix specifically stated that accused' R' gagged her mouth, kept a knife at her neck, threatened her with death and on the way to Kullu raped her- her testimony is cogent and reliable- her testimony is corroborated by other circumstances on record- medical evidence also corroborated the testimony of the prosecutrix- sole testimony of the prosecutrix is sufficient to convict the accused- her testimony is free from blemish and is trustworthy and reliable- hence, the accused convicted. (Para-11)

Indian Penal Code, 1860- Section 363- Accused had kidnapped the prosecutrix who was aged 15 years at the time of incident- date of birth of the prosecutrix was proved by the original school register- accused had taken the prosecutrix during the night without the consent of her parents- consent of the minor is immaterial in case of kidnapping- since,

there was no consent of the guardian, hence, accused convicted of the commission of offence punishable under Section 363 of IPC. (Para-12)

Indian Penal Code, 1860- Section 366- Accused had kidnapped the prosecutrix and had raped her- prosecutrix was taken to various places- held that version of the prosecution that prosecutrix was kidnapped for sexual purposes is duly proved- accused convicted of the commission of offence punishable under Section 366 of IPC. (Para-13)

Cases referred:

Mohd. Alam Vs. State (NCT of Delhi), 2007 Cr.L.J 803
Gurcharan Singh Vs. State of Haryana, AIR 1972 SC 2661
Sheikh Zakir Vs. State of Bihar, AIR 1983 S.C 911
B.B. Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753
State of Punjab Vs. Gurmit Singh and others AIR 1996 (2) SCC 384
State of Rajasthan Vs. N.K.Rao, 2000 (5) SCC 30
State of HP Vs. Lekh Raj and another, 2000 (1) SCC 247.
Madan Gopal Kakkad Vs. Naval Dubey and another, 1992 (3) SCC 204.
Parkash Vs. State of Haryana AIR 2004 SC 227
State of M.P. vs. Surendra Singh AIR 2015 SC 398

For the appellant:	Mr. Ashok Chaudhary and Mr. V.S.Chauhan Addl. Advocate General & Mr.J.S.Guleria, Assistant Advocate General.
For the respondent:	Mr.Anand Sharma, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment passed by learned Additional Sessions Judge Solan HP in Session Trial No.5-NL/7 of 2007/2004 titled State of HP Vs. Rajak Mohammad decided on 12.3.2008.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 13.8.2003 at about 9 PM co-accused Rajak Mohammad along with co-accused Vinod @ Negi kidnapped the prosecutrix in a truck bearing registration No.HP-11-3361 from Baner. It is alleged by prosecution that truck bearing registration No. HP-11-3361 was owned by PW4 Lok Pal and driven by PW2 Om Parkash. It is further alleged by prosecution that truck was taken to Kullu and thereafter truck was abandoned at Kullu and co-accused Rajak Mohammad asked cleaner PW19 Tilak Raj to take truck back. It is further alleged by prosecution that co-accused Rajak Mohammad kidnapped prosecutrix and committed sexual intercourse with her while on way to Kullu. It is further alleged by prosecution that thereafter co-accused Rajak Mohammad kept prosecutrix in a house at Kullu for 3/4 days and thereafter prosecutrix was took to different destinations and finally prosecutrix was recovered from the house of the sister of co-accused Rajak Mohammad at village Anand Ghat post office Jhanduta District Bilaspur and recovery memo Ext PW3/A was prepared. It is further alleged by prosecution that age of the prosecutrix was fifteen years as per school certificate placed on record. It is further alleged by prosecution that prosecutrix was medically examined by PW16 Dr. Sarita Agnihotri and as per MLC Ext PW16/B sexual intercourse was committed. It is further alleged by prosecution that as per MLC Ext PW15/B co-accused

Rajak Mohammad was capable to perform sexual intercourse. It is further alleged by prosecution that FIR Ext PW10/A was recorded and thereafter T-shirt and underwear of co-accused Rajak Mohammad took into possession vide seizure memo. It is further alleged by prosecution that spot map Ext PW18/A was prepared. It is further alleged by prosecution that as per report of chemical analyst human semen were found upon underwear Ext P5. It is further alleged by prosecution that disclosure statement of co-accused Rajak Mohammad was recorded and accused located the place of occurrence near Pandoh District Mandi HP where co-accused Rajak Mohammad has committed sexual intercourse with prosecutrix. Charge was framed by learned Additional Sessions Judge Solan HP against co-accused Rajak Mohammad under Sections 363, 366 and 376 IPC. Accused Rajak Mohammad did not plead guilty and claimed trial.

3. Prosecution examined nineteen witnesses in support of its case:

Sr.No.	Name of Witness
PW1	Smt. Raj
PW2	Om Parkash
PW3	Dalip Singh
PW4	Lok Pal
PW5	Jasdeep Kaur
PW6	Minakashi
PW7	Bimla Devi
PW8	Neelam Gupta
PW9	Nazir Khan
PW10	Anant Ram
PW11	Kamal Nain
PW12	Bhagat Ram
PW13	Jagdish Ram
PW14	Ashok Kumar
PW15	Suneel Gupta
PW16	Dr.Sarita Agnihotri
PW17	Balbir Singh
PW18	Harjit Singh
PW19	Tilak Raj

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

Sr.No.	Description:
Ex. PA	Statement of Smt. Raj.
Ex. PB	Disclosure Statement
Ex. PW2/A	Identification memo.
Ex. PW3/A	Recovery memo of truck along with its documents
Ex. PW4/A	Release memo of truck
Ex. PW5/A	Admission form

Ex. PW5/B	Certificate
Ex. PW8/A	Report
Ex. SK1 to SK4	Skiagrams
Ex. PW9/A	Rapat
Ex. PW10/A	Copy of FIR
Ex.PW11/A to Ex. P11/C	Extract of daily diary
Ex. PX	Chemical examiner report
Ex. PW15/A	Application
Ex. PW15/B	MLC of Rajak Mohd.
Ex. PW16/A	Application
Ex. PW16/B	MLC of Meenakshi
Ex. DX	Statement of Ashok kumar
Ex. PW18/A	Spot map.
Ex. PW18/B	Recovery memo of truck
Ex. PW18/C	Spot map.
Ex. PW18/D	Statement of Tek Bhadhur
Ex. PW18/F to Ex. PW18/H	Statements of witness of Om Prakesh and Meenakshi.

5. Statement of accused Rajak Mohammad was also recorded under Section 313 Cr PC. Accused has stated that prosecutrix voluntarily joined him and took accused to Sunder Nagar HP. Accused has stated that he had married prosecutrix. Accused did not examine any defence witness. Learned trial Court acquitted the accused.

6. Feeling aggrieved against the judgment of acquittal passed by learned Additional Sessions Judge Solan State of HP filed present appeal.

7. We have heard learned Additional Advocate General appearing on behalf of the appellant and learned Advocate appearing on behalf of respondent and also gone through the entire record carefully.

8. Point for determination before us is whether learned trial did not properly appreciate oral as well as documentary evidence placed on record Court and whether learned trial Court had committed miscarriage of justice.

9.ORAL EVIDENCE ADDUCED BY PROSECUTION:

9.1 PW1 Smt. Raj has stated that she is running a hotel at village Baner. She has stated that her daughter Sushma along with her three daughters are residing with her after the death of her husband. She has stated that on dated 13.8.2003 at 9 PM she along with her grand daughter prosecutrix went to road side to fetch fuel wood. She has stated that in the meanwhile prosecutrix was caught by co-accused Rajak Mohammad and co-accused Vinod Kumar @ Negi and thereafter lifted the prosecutrix and put her in truck No. HP-11-3361 and driven the truck towards Bilaspur (HP) side. She has stated that she raised hue and cry and thereafter reached her home. She has stated that thereafter Ashok Kumar informed at Police Station Bilaspur about kidnapping of prosecutrix. She has stated that police reached at the spot and recorded her statement Ext PA. She has stated that prosecutrix was traced after about 14/15 days. She has stated that co-accused Rajak

Mohammad was also arrested. She has stated that during custody co-accused Rajak Mohammad had made disclosure statement that he could identify the place where he committed sexual intercourse with the prosecutrix. She has stated that prosecutrix also located the site of incident. She has stated that prosecutrix was aged about fifteen years at the time of incident. She has denied suggestion that the age of the prosecutrix was 19/20 years at the time of incident. She denied suggestion that prosecutrix voluntarily joined the company of co-accused Rajak Mohammad.

9.2 PW2 Om Parkash has stated that he was driver in truck No. HP-11-3361 owned by Sh Lekh Raj. He has stated that Tikal Ram was conductor of the truck. He has stated that on dated 13.8.2003 he was driving truck from Roper to Darlaghat and stopped truck at Baner for taking tea. He has stated that after about half an hour he heard noise and came out from the truck and found that his truck was removed from the spot. He has stated that truck was recovered on the next day by police from Bilaspur and was took into possession vide memo Ext PW2/A. He has stated that he does not know co-accused Rajak Mohammad present in Court. He has stated that he did not see co-accused Rajak Mohammad on that day. He has denied suggestion that co-accused Rajak Mohammad has kidnapped prosecutrix in a truck. Witness was declared hostile by prosecution. He has denied suggestion that in order to save accused he had deposed falsely.

9.3. PW3 Dalip Singh has stated that he was President of Gram Panchayat Balgarh in the year 2001. He has stated that on dated 25.8.2003 police officials came to his residence at 4 PM. He has stated that thereafter he went along with police officials to the residence of Taj Din at village Anandghat. He has stated that co-accused Rajak Mohammad and prosecutrix were sleeping in one room. He has stated that he identified co-accused Rajak Mohammad in Court. He has stated that police officials prepared recovery memo Ext PW3/A. He has stated that prosecutrix did not disclose to police officials in his presence that prosecutrix had solemnized marriage with co-accused Rajak Mohammad.

9.4 PW4 Lok Pal has stated that he is owner of truck bearing registration No. HP-11-3361. He has stated that on dated 13.8.2003 the driver of the truck was Om Parkash. He has stated that in the night driver of the truck has informed him on telephone that his truck was stolen from village Baner. He has stated that thereafter he intimated police official at Police Station Bilaspur regarding theft of truck. He has stated that on the next day he received a telephone call from Police Station Bilaspur that truck in question was recovered. He has stated that thereafter he went to Police Station Bilaspur. He has stated that the cleaner of the truck was present there. He has stated that thereafter truck was subsequently released from the Court vide release memo Ext PW4/A.

9.5 PW5 Jasdeep Kaur has stated that she is posted JBT Teacher in Government Primary School Dungi since 1998. She has stated that she brought original admission form and admission and withdrawal register. She has stated that date of birth of the prosecutrix as per record is dated 10.8.1988. She has stated that photo copy of the birth certificate is Ext. PW5/A. She has stated that she issued certificate Ext PW5/B. She has stated that she brought original withdrawal register.

9.6 PW6 prosecutrix has stated that she and her maternal grand mother had gone to bring fuel wood which was kept nearby the road side. She has stated that at about 9 PM accused along with 10/15 boys forcibly dragged her and took her in a truck. She has stated that her grand mother raised hue and cry. She has stated that accused persons gagged her mouth and also kept knife at her neck and threatened her that in case she would raise alarm she would be killed. She has stated that thereafter accused persons took her to Kullu and while on way to Kullu accused Rajak Mohammad raped her. She has stated that

she was kept in a house for 3/4 days and thereafter she was took to unknown place by accused persons. She has stated that thereafter accused Rajak Mohamad took her to the house of his sister where she remained for thirteen days. She has stated that co-accused Rajak Mohammad used to administer intoxicated drugs to her. She has stated that thereafter police officials came to the house of co-accused Rajak Mohammad and she was recovered. She has stated that she was medically examined at CHC Nalagarh. She has stated that her salwar and shirt were took into possession by medical officer at the time of her medical examination. She has denied suggestion that accused person had not kidnapped her. She denied suggestion that she was more than eighteen years at the time of incident. She has stated that she has solemnized marriage with one Narinder about one and half years ago.

9.7 PW7 Bimla Devi has stated that Vinod Kumar is his younger brother and he is driver by profession. She has stated that on dated 16.8.2003 Vinod Kumar visited her house and he was accompanied with co-accused Rajak Mohammad and prosecutrix was also with him. She has stated that she inquired from her brother Vinod Kumar about co-accused Rajak Mohammad and prosecutrix. She has stated that thereafter Vinod Kumar told her that co-accused Rajak Mohammad was his friend and prosecutrix was the wife of co-accused Rajak Mohammad. She has stated that on the next morning Vinod Kumar left her house on the pretext that he would go to Kelong. She has stated that thereafter co-accused Rajak Mohammad and prosecutrix stayed in her house for about one and half days. She has stated that prosecutrix was happy and stayed voluntarily in her house. She has stated that she asked the prosecutrix as to why she did not place 'Bindi' (Sign of married woman on forehead). She has stated that prosecutrix told her that her husband is Mohamadan by caste and due to aforesaid reason she did not place 'Bindi' (Sign of married woman upon her forehead).

9.8 PW8 Dr. Neelam Gupta has stated that during August 2003 he was working as Radiologist in Civil Hospital Nalagarh. She has stated that on dated 26.8.2003 prosecutrix was referred to her by Dr. Sarita Agnihotri for X-ray examination. She has stated that thereafter she took X-ray of prosecutrix right shoulder, right elbow, right wrist and right knee. She has stated that on the basis of the report of Radiologist the age of the prosecutrix was between 17 to 18 years. She has stated that Skiagrams are Ext SK/1 to Ext SK/4 and report is Ext PW8/A.

9.9. PW9 Nazir Khan has stated that during August 2003 he remained posted SI Incharge Detective Ring Sadar Police Station Bilaspur. He has stated that on dated 14.8.2003 on receipt of telephonic message from Ashok Kumar that prosecutrix was kidnapped from village Baner in a truck having registration No. HP-11-3361 taken towards Darlaghat side. He has stated that he immediately rushed to Darlaghat but he did not find truck and girl. He has stated that thereafter he recorded the statement of complainant Smt. Raj under Section 154 Cr PC Ext PA. He has stated that thereafter the statement of complainant was sent through HHC Ved Parkash to Police Station Nalagarh for registration of the case.

9.10. PW10 Anant Ram has stated that during August 2003 he remained posted as SHO Police Station Nalagarh. He has stated that on dated 14.8.2003 on receipt of the statement Ext PA through HHC Ved Parkash he recorded FIR Ext PW10/A. He has stated that place of occurrence was within the jurisdiction of Police Post Joghon as the investigation was entrusted to ASI Harjeet Singh the then Incharge Police Post Joghon.

9.11. PW11 Kamal Nain has stated that he remained posted as MHC Police Station Nalagarh during the year 2003. He has stated that on dated 25.8.2003 Inspector Vijay

Kumar accompanied by ASI Harjeet Singh and Constable Pushpinder Kaur deposited with him two parcels and two bottles of the case which was duly sealed with seal 'CHC Nalagarh. He has stated that he entered the same in the malkhana register at serial No.666 of 2003. He has stated that on dated 30.5.2003 vide RC No.82 of 2003 he sent all articles along with relevant documents and sample of seals to FSL Bharari for analysis. He has stated that case property remained intact in his custody. He has stated that he brought original malkhana register, RC register and daily diary register in Court. He has stated that photo copies of the registers are Ext PW11/A, Ext PW11/B and Ext PW11/C which are correct copy as per original record.

9.12. PW12 Bhagat Ram has stated that he was posted as Constable at Police Post Joghon. He has stated that on dated 30.8.2003 MHC Kamal Nain entrusted to him two parcels and two bottles duly sealed with seal impression CHC Nalagarh along with relevant documents and envelope and sample of seal vide RC No. 82 of 2003 and directed him to deposit the same in FSL Bharari. He has stated that he had deposited articles at FSL Bharari. He has stated that case property remained intact in his custody.

9.13. PW13 Jagdish Ram has stated that he remained posted as Inspector/SHO Police Station Nalagarh w.e.f. September 2003 to December 2004. He has stated that after completion of investigation of the case and after receipt of report of Chemical Examiner Ext PX he prepared final report on dated 17.11.2003 and thereafter the same filed in Court.

9.14. PW14 Ashok Kumar has stated that he is transporter and complainant Smt. Raj is known to him. He has stated that on dated 13.8.2003 he was on his way to his home in Maruti Car No. HP-24-A-2631. He has stated that at about 9.30 PM when he reached near restaurant of complainant he stopped his vehicle to take tea. He has stated that he washed his hand and sat on the table. He has stated that in the meanwhile he heard noise that prosecutrix was kidnapped by co-accused Rajak Mohamad and Vinod @ Negi in truck No. HP-11-3361. He has stated that thereafter Sushma and her mother Raj requested him to intercept the said truck. He has stated that he followed the truck in his car accompanied by Smt. Raj and Sushma. He has stated that when he reached near Jamli he tried to over take the truck but truck driver did not give him pass. He has stated that as he took the pass truck driver struck his car and his car was damaged. He has stated that thereafter accused Rajak Mohammad and Vinod @ Negi fled away in the truck. He has stated that thereafter he informed Police Station Bilaspur. He has stated that occupants of the truck were known to him. He has stated that co-accused Rajak Mohammad present in Court is one of them. He has denied suggestion that he has relationship with prosecutrix, complainant Smt. Raj and Sushma.

9.15. PW15 Dr.Suneel Gupta has stated that he remained posted as Medical Officer Civil Hospital Nalagarh during the year 2003. He has stated that on dated 25.8.2003 at about 4.25 PM he examined co-accused Rajak Mohamad. He has stated that on examination he found that co-accused Rajak Mohammad was capable to perform sexual intercourse. He has issued MLC Ext PW15/B which bears his signature. He has stated that T-shirt Ext P3, pant Ext P4 and underwear Ext P5 were sealed by him and handed over to the police.

9.16 PW16 Dr. Sarita Agnihotri has stated that she remained posted as Medical Officer in CHC Nalagarh during August 2003. She has stated that on dated 25.8.2003 she examined prosecutrix. She has stated that prosecutrix was un-married. She has stated that prosecutrix at the time of examination was conscious, cooperative and well oriented. She has stated that there were no marks of external injury over the face, lips, around mouth, cheeks, neck, shoulder, back, upper limbs, chest abdomen, lower limbs and breast of the

prosecutrix. She has stated that hymen was torn. She has stated that vaginal was easily admitting two fingers. She has stated that there were no injuries over vaginal walls. She has stated that as per report of Radiologist the age of the prosecutrix was between 17 to 18 years. She has stated that there was nothing to suggest that sexual intercourse did not take place. She has stated that she issued MLC Ext PW16/B. She has stated that Shirt Ext P1 and salwar Ext P2 are the same. She has stated that duration of sexual intercourse could not be mentioned in MLC as there was no internal and external injury upon genitalia.

9.17 PW17 Balbir Singh has stated that he remained posted as Sub Inspector Police Station Nalagarh during the year 2003. He has stated that during the investigation of the case he recorded statements of the witnesses Tajdeen, Constable Bhagat Ram, MHC Kamal Nain and Ashok Kumar. He has denied suggestion that statement of witness Ashok Kumar Ext DX was written by him according to his own version. He denied suggestion that statement of Taj Deen, Constable Bhagat Ram and MHC Kamal Nain were written in Police Station.

9.18 PW18 Harjit Singh has stated that he remained posted as Incharge Police Post Joghon from 2003 to 2004. He has stated that FIR No. 124 of 2003 was registered at Police Station Nalagarh. He has stated that he conducted the investigation and on dated 15.8.2003 he visited the place of incident and prepared site map Ext PW18/A. He has stated that on dated 17.8.2003 Om Parkash driver of truck No. HP-11-3361 produced truck along with its documents and driving license which were took into possession vide seizure memo Ext PW18/B. He has stated that truck was released. He has stated that on dated 25.8.2003 prosecutrix was recovered along with co-accused Rajak Mohammad from the house of Tajdeen and thereafter prosecutrix was handed over to her mother vide memo Ext PW3/A. He has stated that he prepared spot map Ext PW18/C. He has stated that prosecutrix was also medically examined vide application Ext PW16/A. He has stated that that MLC Ext PW16/B of the prosecutrix was obtained. He has stated that thereafter co-accused Rajak Mohammad was also medically examined and his MLC Ext PW15/B was also obtained. He has stated that during the investigation he recorded statement of the witnesses as per their versions. He has stated that thereafter he handed over case file to ASI Balbir Singh for further investigation. He has denied suggestion that prosecutrix and co-accused Rajak Mohammad were living as husband and wife in the house of Tajdin. He has admitted that prosecutrix has implicated her brother-in-law in the case of rape which was tried by learned Sessions Judge camp at Nalagarh.

9.19. PW19 Tilak Raj has stated that he was working as cleaner in truck No. HP-11-3361. He has stated that truck was owned by Inder Kumar. He has stated that the driver of the truck was Om Parkash. He has stated that while he was returning back after unloading the clinker at Ropar he had slept in the cabin from Kiratpur. He has stated that truck had hit some vehicle near Gamberpool and thereafter he woken up. He has stated that driver of the vehicle was not in the truck. He has stated that he saw two boys and a girl inside the truck. He has stated that one boy was driving the truck. He has stated that thereafter he inquired about the driver of the truck and he was informed that driver would come after short time. He has stated that thereafter the truck was driven towards Mandi. He has stated that truck was abandoned at Kullu and he was asked to take back the vehicle. He has stated that one of the boy was Rajak Mohamad and he identified accused Rajak Mohammad in Court. He has stated that another accused was Vinod @ Negi. He has stated that truck was driven by Vinod @ Negi and co-accused Rajak Mohammad and prosecutrix were sitting in the back seat in the cabin of truck. He has stated that he was sitting in the conductor seat. He has stated that accused persons had threatened him that in case he

would disclose the incident to anybody they would kill him. He has stated that thereafter he brought back the truck from Kullu.

10. Submission of learned Additional Advocate General appearing on behalf of the State that offence under Section 376 IPC is proved against co-accused Rajak Mohammad beyond reasonable doubt in the present case is accepted for the reason hereinafter mentioned. We have carefully perused the testimony of prosecutrix. Prosecutrix has stated in positive manner that at about 9 PM co-accused Rajak Mohammad forcibly lifted the prosecutrix in a truck along with other co-accused Vinod @ Negi who could not be traced and thereafter co-accused Rajak Mohammad gagged the mouth of prosecutrix and kept knife on her neck and threatened her with death in case she would raise alarm. Prosecutrix has stated in positive, cogent and reliable manner that thereafter co-accused Rajak Mohammad took her to Kullu and on way to Kullu he committed rape upon prosecutrix. Prosecutrix has specifically stated in positive, cogent and reliable manner that thereafter the prosecutrix was kept for 3/4 days in the house and thereafter the prosecutrix was took to the house of the sister of the accused Rajak Mohammad and was kept for thirteen days. Prosecutrix has stated in positive manner that accused used to administer intoxicated drugs to her. Testimony of the prosecutrix is trust worthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of the prosecutrix. There is no evidence on record that prosecutrix has hostile animus against accused Rajak Mohammad at any point of time. Testimony of prosecutrix is corroborated by PW1 Smt. Raj who has specifically stated in positive manner that on dated 13.8.2003 at 9 PM accused Rajak Mohamad lifted prosecutrix in truck No. HP-11-3361 and thereafter took truck towards Bilaspur side. Testimony of the prosecutrix is further corroborated by PW14 Ashok Kumar. PW14 has stated in positive manner that on dated 13.8.2003 at 9 PM he stopped his car at the restaurant of complainant Smt. Raj to take tea and he heard noise that prosecutrix was kidnapped by co-accused Rajak Mohammad and co-accused Vinod @ Negi in truck No. HP-11-3361. PW14 has specifically stated in positive manner that thereafter Sushma and her mother Raj requested PW14 Ashok Kumar to intercept the truck and thereafter he followed the truck on his car accompanied by Smt. Raj and Sushma and when he reached near Jamli he tried to over take the said truck but the driver of the truck did not give him pass and when he tried to take the pass the driver struck his truck with his car and his car was damaged. PW14 has specifically stated in positive manner that thereafter co-accused Rajak Mohammad and co-accused Vinod @ Negi fled away in the truck along with prosecutrix. Testimony of PW14 is trust worthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW14. There is no evidence on record that PW14 has hostile animus against the accused at any point of time. Even PW16 Dr. Sarita Agnihotri Medical Officer has also given opinion that sexual intercourse could not be ruled out. Even PW15 Dr.Suneel Gupta has stated in positive manner that co-accused Rajak Mohammad was capable of performing sexual intercourse.

11. The testimony of oral evidence is also corroborated by documentary evidence i.e. disclosure statement of co-accused Rajak Mohammad placed on record. Even as per chemical analyst report Ext PX human semen was found upon the underwear of co-accused Rajak Mohamad. Even as per MLC report Ext PW15/B placed on record co-accused Rajak Mohammad was capable of performing sexual intercourse. It is well settled law that sole testimony of prosecutrix is enough to convict a person accused of rape if testimony of the prosecutrix is free from blemish. It is well settled law testimony of prosecutrix does not require corroboration if same is trust worthy and reliable. See 2007 Cr.L.J 803 titled Mohd. Alam Vs. State (NCT of Delhi). Also see AIR 1972 SC 2661 titled Gurcharan Singh Vs. State of Haryana. Also see AIR 1983 S.C 911 titled Sheikh Zakir Vs. State of Bihar. It was held in case reported in AIR 1983 SC 753 titled B.B. Hirjibhai Vs. State of Gujarat that refusal to

act on the testimony of a victim of sexual assault is adding insult to the prosecutrix unless the evidence of the prosecutrix suffer from any basic infirmity or improbability. It is well settled law that testimony of prosecutrix must be appreciated in the background of the entire case and trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation. See AIR 1996 (2) SCC 384 titled State of Punjab Vs. Gurmit Singh and others. Also see 2000 (5) SCC 30 titled State of Rajasthan Vs. N.K.Rao. Also see 2000 (1) SCC 247 titled State of HP Vs. Lekh Raj and another. Also see 1992 (3) SCC 204 titled Madan Gopal Kakkad Vs. Naval Dubey and another.

12. Another submission of learned Additional Advocate General appearing on behalf of the State that prosecution proved its case against the accused beyond reasonable doubt under Section 363 IPC is also accepted for the reason hereinafter mentioned. It is proved on record that the age of the prosecutrix at the time of incident was fifteen years. PW5 Jasdeep Kaur posted as JBT Teacher in the school has specifically stated in positive manner that as per original school register date of birth of the prosecutrix was dated 10.8.1988. The incident took place on 13.8.2003 at 9 PM. Kidnapping from lawful guardianship is defined under Section 361 IPC and the age of male for the purpose of kidnapping has been mentioned as sixteen years and age of female for the purpose of kidnapping has been mentioned as eighteen years. As per school certificate placed on record it is prove on record that at the time of incident the prosecutrix was fifteen years of age. Accused Rajak Mohamad has lifted the prosecutrix during night period at 9 PM without consent of lawful guardianship and thereafter co-accused Rajak Mohammad took prosecutrix in a truck during the night period to Kullu and thereafter kept prosecutrix at several places. It is well settled law that consent of minor is immaterial in criminal offence under Section 363 IPC. It is well settled law that it is only the guardian consent which is necessary to take the case out of the purview of Section 363 IPC. See AIR 2004 SC 227 titled Parkash Vs. State of Haryana

13. Another submission of learned Additional advocate General appearing on behalf of the State that prosecutrix was kidnapped by accused Rajak Mohamad in a truck during night period without consent of lawful guardian with the intention to compel the prosecutrix to marry is also accepted for the reason hereinafter mentioned. It is proved on record that co-accused Rajak Mohammad had kidnapped the prosecutrix during the night period in a truck towards Kullu side and thereafter compelled the prosecutrix for her marriage. It was held in case reported in 1999 Cr.L.J 345 titled Mohan Lal Suryavansi Vs. State of M.P that consent of minor prosecutrix does not matter if the prosecutrix was taken to separate places for making sexual intercourse away from her lawful guardian. In the present case prosecutrix was taken by co-accused Rajak Mohammad for the purpose of sexual intercourse without consent of lawful guardian.

14. Submission of learned Advocate appearing on behalf of the accused that prosecution has not been able to establish that prosecutrix was minor at the time of incident and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reason hereinafter mentioned. Prosecution has placed on record admission form Ext PW5/A and in admission form the date of birth of the prosecutrix has been shown as 10.8.1988. Even the then Head Master of the school has also given certificate Ext PW5/B that age of the prosecutrix as per admission register is dated 10.8.1988. Even PW5 Jasdeep kaur has specifically stated on oath when she appeared in witness box that as per school record the prosecutrix was born on 10.8.1988. PW5 Jasdeep Kaur has produced original register in the trial Court. Birth certificate Ext PW5/B and Ext PW5/A has been given by public servant in discharge of his official duty and is a relevant factor under Section 35 of the Indian Evidence Act. See AIR 1981 Cr.L.J 1 titled Harpal Singh and another Vs. State of

HP. Hence it is held that prosecutrix was minor at the time of incident as per school certificate placed on record. It was held in case reported in AIR 2011 (6) SCC 111 titled Murugan Vs. State of Tamil Nadu that if the document was prepared ante litem motam the same could be relied safely when such document is admissible under Section 35 of the Indian Evidence Act. Similarly in the present case entry in the school register was recorded ante litem motam and same could be safely relied by the Court. Possibility of fabrication of document is ruled out.

15. Another submission of learned Advocate appearing on behalf of the accused that as per ossification test the age of the prosecutrix was 17 to 18 years and the prosecutrix was major at the time of incident and on this ground appeal filed by State be dismissed is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that exact age of the prosecutrix is not determinable through ossification test and variation of two years is possible on either side. In the present case the prosecutrix is minor and court exercised discretion in favour of minor prosecutrix because as per law Court is the guardian of the minor prosecutrix. The ossification report is contradicted by birth entry certificate issued by competent authority of law in discharge of his official duty wherein it has been specifically mentioned that prosecutrix was born on dated 10.8.1988

16. Another submission of learned Advocate appearing on behalf of the accused that prosecutrix roamed freely in the company of accused from one place to another and present case is a case of sexual consent and on this ground appeal filed by State be dismissed is also rejected being devoid of any force for the reason hereinafter mentioned. As per school certificate placed on record prosecutrix was born on 10.8.1988 and incident took place on dated 13.8.2003. School certificate has been issued by public official in discharge of his official duty and is a relevant factor under Section 35 of the Indian Evidence Act 1872. It is well settled law that consent of minor in sexual cases is immaterial. Hence it is held that in the present case the prosecutrix was minor at the time of incident and it is held that consent of prosecutrix is immaterial in the present case. Even the case of co-accused Rajak Mohammad is not covered in the concept of consent theory because prosecutrix has specifically stated in positive manner when she appeared in witness box that accused used to give her intoxicated drugs. It is well settled law that any consent obtained after giving intoxicated drugs is no valid consent as per law. Even accused did not cross examined prosecutrix when she appeared in the witness box that no intoxicated drugs was given to her by accused. Even as per section 114-A of Indian Evidence Act 1872 where sexual intercourse is proved and prosecutrix states in her evidence before Court that she did not consent then Court shall presume that prosecutrix did not consent.

17. Another submission of learned Advocate appearing on behalf of the accused that there was no external or internal injury upon the vagina of prosecutrix and on this ground appeal filed by State be dismissed is also rejected being devoid of any force for the reason hereinafter mentioned. Prosecutrix has specifically stated in positive manner that sexual intercourse was committed by the accused after placing knife upon her neck and after threatened the prosecutrix that she would be killed in case she cry or narrate the incident to anybody. It is held that consent of the prosecutrix in the present case was not voluntarily but was obtained after giving her intoxicated drugs and after threatening the prosecutrix that she would be killed in case she narrate the incident to anybody.

18. Another submission of learned Advocate appearing on behalf of the accused that there are material contradiction in the evidence of the prosecution and on this ground appeal filed by State be dismissed is also rejected being devoid of any force for the reason hereinafter mentioned. Learned defence Advocate did not point out any material contradiction which goes to the root of the case. In the present case incident took place on

13.8.2003 at 9 PM and the statements of the prosecution witnesses were recorded on 12.4.2005, 13.4.2005, 6.12.2005, 7.12.2005, 11.9.2007, 14.9.2007, 6.12.2007 and 8.2.2008. It is well settled law that when the statements of the prosecution witnesses are recorded after a gap of sufficient time then minor contradictions are bound to come in criminal case.

19. In view of the above stated facts it is held that learned trial court did not properly appreciate oral as well as documentary evidence adduced by the prosecution and the learned trial Court had committed miscarriage of justice. Hence appeal filed by the State is allowed and judgment passed by learned trial Court is set aside. Accused is convicted under Sections 363, 366 and 376 IPC. Now accused be heard on the quantum of sentence on 29.4.2015.

****

Cr.Appeal No.357 of 2008.

QUANTUM OF SENTENCE

29.4.2015

Present: Mr. Ashok Chaudhary and Mr.V.S.Chauhan Addl. Advocate General for the appellant.
Mr. Anand Sharma, Advocate, for the convicted.
Convicted Rajak Mohammad is in custody of HHC Kewal Kishor No. 479 of P.S. Sadar Bilaspur.

20. We have heard learned Additional Advocate General appearing on behalf of the State and Mr.Anand Sharma learned Advocate appearing on behalf of the convicted on quantum of sentence.

21. Learned Advocate appearing on behalf of the convicted submits that convicted is first offender and he has family and parents to support and lenient view be adopted in present case. On contrary learned Additional Advocate General appearing on behalf of State submits before us that convicted had committed sexual assault upon the minor and deterrent punishment be awarded to him in order to maintain majesty of law.

22. We have considered the submission of learned Advocate appearing on behalf of the convicted and learned Additional Advocate General appearing on behalf of State carefully. Sexual offences are increasing in the society day by day. It is well settled law that murder destroys the body of victim but rapist degrades soul of victim. It was held in case reported in *AIR 2015 SC 398 titled State of M.P. vs. Surendra Singh* that imposition of sentence should commensurate with gravity of offence. In view of above stated facts we sentence the convicted as follows:-

Sr. No.	Offence	Sentence imposed
1	Offence under Section 376 IPC	Rigorous imprisonment for seven years and fine to the tune of Rs.25,000/- (Rupees twenty five thousand only). In default of payment of fine convicted shall further

		undergo rigorous imprisonment for one year.
2.	Offence under Section 366 IPC	Rigorous imprisonment for five years and fine to the tune of Rs.10,000/- (Rupees ten thousand only). In default of payment of fine convicted shall further undergo rigorous imprisonment for one year.
3.	Offence under Section 363 IPC	Rigorous imprisonment for four years and fine to the tune of Rs.10,000/- (Rupees ten thousand only). In default of payment of fine convicted shall further undergo rigorous imprisonment for six months.

23. All sentences shall run concurrently. Period of custody during investigation, inquiry and trial will be set off. Copy of judgment and sentence will be supplied to the convicted forthwith free of cost. Case property will be confiscated to State of H.P. after the expiry of period of filing further legal proceedings in accordance with law. File of learned trial Court along with certified copy of judgment and sentence be sent back forthwith. The Registrar (Judicial) will issue warrant of commitment to Superintendent Jail in accordance with law for compliance of sentence. Appeal stands disposed of. Pending application if any also disposed of.

****

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

Anshul Sharma .....Petitioner.

Versus

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

CWP No. 2007 of 2013.
Reserved on: 25.3.2015
Date of decision: 10th April, 2015.

Constitution of India, 1950- Article 226- Petitioner applied for the post of lecturer in Automobile Engineering, Class-1 (Gazetted) – petitioner and two other persons were found suitable and were recommended for appointment- respondents No. 1 and 2 refused to appoint the petitioner on the ground that he did not have requisite qualification as

qualification of B. Tech. in Automobile Engineering is not equivalent to the qualification of the B. Tech. in Mechanical Engineering- advertisement notice specifically mentioned that a candidate must have 1st Class Bachelor's Degree in Automobile Engineering/Technology or equivalent- Public Service Commission found that petitioner is eligible to appear in the written examination- petitioner has placed on record equivalence certificate issued by the Lovely Professional University, indicating that B. Tech. in Automobile Engineering is equivalent to B. Tech. in Mechanical Engineering – this certificate was not taken into consideration by the respondent- respondent had deprived the petitioner from his legitimate right- petition allowed and the respondent directed to consider the recommendation made by the petitioner. (Para-4 to 14)

Cases referred:
Chandrakala Trivedi versus State of Rajasthan and others (2012) 3 SCC 129
Dr. Basavaiah v. Dr. H.L. Ramesh and others with Dr. Manjunath v. H.L. Ramesh and others 2010 AIR SCW 5907.

For the petitioner:	Mr. Rajesh Kumar, Advocate.
For the respondents:	Mr.Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. M.A. Khan, Addl. Advocate Generals and Mr. J.K. Verma, Deputy Advocate General for respondents No. 1 and 2. Mr. D.K. Khanna, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Himachal Pradesh Public Service Commission invited applications for filling up of the posts of lecturers in Automobile Engineering, Class-1 (Gazetted), in terms of advertisement notice dated 4.2.2012, Annexure P2. The petitioner alongwith others applied for the same. After scrutinizing the qualification certificates and other credentials, the candidates were called for the written examination on 31.5.2012, vide Annexure P-3. The petitioner and other candidates qualified the written examination and they were called for the interview. After conducting the interview on 24.7.2012, Public Service Commission found the petitioner and other two candidates suitable and accordingly made the recommendation for their appointment. Respondents No. 1 and 2 refused to appoint the petitioner on the ground that he was not having requisite qualification, constraining him to file the present writ petition.

2. Respondents No. 1 and 2 have filed the reply and contended that the petitioner was not having requisite qualification. It is further contended that they constituted a Committee, which submitted its report Annexure R-3, and found that the qualification of B. Tech. in Automobile Engineering is not equivalent to the qualification of the B. Tech. in Mechanical Engineering.

3. The Public Service Commission has chosen not to file the reply. Thus, the averments contained in the writ petition stand admitted by the Commission.

4. The moot question is whether respondents No. 1 and 2 were within their power to refuse appointment to the petitioner? In order to determine this issue, it is necessary to reproduce relevant extract of the advertisement notice herein:

"Item No. I.(B).....

Essential Qualification:- 1st Class Bachelor's Degree in Automobile Engineering/ Technology or equivalent....."

5. The advertisement notice specifically provides that a candidate must be having 1st Class Bachelor's Degree in Automobile Engineering/Technology or equivalent.

6. The Public Service Commission, after examining the documents and the qualification certificates of the petitioner, found him eligible and permitted him to appear in the written examination. He made the grade in the written examination and successfully made the grade in the interview also.

7. The Public Service Commission scrutinized the application and found all the papers in order and made recommendation for selection. How can the respondents make 'U'-turn and deny him the appointment.

8. The petitioner has placed on record equivalence certificate issued by the Lovely Professional University, Annexure P6, which clearly indicates that B. Tech. in Automobile Engineering is equivalent to B. Tech. in Mechanical Engineering. It is apt to reproduce paras 1 and 2 of the said certificate herein.

"(i)This is in reference to your advertisement for lecturer in Automobile on HPPSC website. The program B. Tech in Mechanical Engineering (Lateral Entry) from Lovely Professional University (LPU) has been mapped against B. Tech in Automobile Engineering (Lateral Entry) from JawaharLal Nehru Technological University, Hyderabad (Annexure-1). The overall Curriculum of B. Tech in Mechanical Engineering (Lateral Entry) offered by LPU is at par with B. Tech in Automobile Engineering (Lateral Entry) offered by JawaharLal Nehru Technological University. More than 75% of courses of B. Tech in Mechanical Engineering (Lateral Entry) from Lovely Professional University(LPU) and B. Tech in Automobile Engineering (Lateral Entry) from JawaharLal Nehru Technological University, Hyderabad are same.

(ii) As you know LPU has been established by the State Legislature of Govt. of Punjab vide Act No. 25 of 2005 (Annexure-2), it has also been recognized by UGC under Section 2 (f) of UGC Act, 1956 by notification NO. F.9-10/2006 (CPP-1) and is included in the list of universities maintained by UGC (Annexure-3). Besides, LPU is also a member of Association of Indian Universities (AIU; Annexure-4). LPU is a statuary University set up through Punjab Legislative and thus degrees are awarded by LPU stand registered. The students graduating from LPU are being admitted to institution of Higher education in all parts of the world"

9. The said certificate has not been taken into consideration by respondents No. 1 and 2. The entire exercise made by the respondents amounts to taking away the legitimate right of the petitioner. When the concerned University, i.e., the expert body has stated that qualification of B. Tech in Automobile Engg. is equivalent to the qualification of B. Tech. in Mechanical Engineering, and that is why the said certificate was accepted by the

Public Service Commission, then how can it lie in the mouth of respondents No. 1 and 2 that it is not equivalent and petitioner was not eligible to participate in the selection process.

10. The apex Court in ***Chandrakala Trivedi*** *versus* ***State of Rajasthan and others*** reported in ***(2012) 3 SCC 129,*** held that the word "equivalent" must be given a reasonable meaning. If a person is provisionally selected, it is not within the powers of the department to refuse appointment when he has been found suitable by the Commission and recommendation has been made for his appointment. It has been further held that a recommendee has legitimate expectation which cannot be taken away on flimsy grounds. It apt to reproduce paras 7 to 10 of the said judgment herein.

> *"7. In the impugned judgment, the High Court has given a finding that the higher qualification is not the substitute for the qualification of Senior Secondary or Intermediate. In the instant case, we fail to appreciate the reasoning of the High Court to the extent that it does not consider higher qualification as equivalent to the qualification of passing Senior Secondary examination even in respect of a candidate who was provisionally selected.*
>
> *8. The word 'equivalent' must be given a reasonable meaning. By using the expression, 'equivalent' one means that there are some degrees of flexibility or adjustment which do not lower the stated requirement. There has to be some difference between what is equivalent and what is exact. Apart from that after a person is provisionally selected, a certain degree of reasonable expectation of the selection being continued also comes into existence.*
>
> *9. Considering these aspects of the matter, we are of the view that the appellant should be considered reasonably and the provisional appointment which was given to her should not be cancelled. We order accordingly. However, we make it clear that we are passing this order taking in our view the special facts and circumstances of the case.*
>
> *10.We hope and expect that the respondent Rajasthan Public Service Commission shall make a suitable recommendation in the light of the observation in this judgment within four weeks from today and the State, which is also a party, will make an appointment accordingly within four weeks thereafter. The appeal is disposed of. No costs."*

11. The apex Court has also dealt with this issue in case titled ***Dr. Basavaiah v. Dr. H.L. Ramesh and others*** with ***Dr. Manjunath v. H.L. Ramesh and others*** reported in ***2010 AIR SCW 5907***. It is apt to reproduce paras 32, 33, 35 and 44 of the said judgment herein.

> *"32. According to the experts of the Selection Board, both the appellants had requisite qualification and were eligible for appointment. If they were selected by the Commission and appointed by the Government, no fault can be found in the*

same. The High Court interfered and set aside the selections made by the experts committee. This Court while setting aside the judgment of the High Court reminded the High Court that it would normally be prudent and safe for the courts to leave the decision of academic matters to experts. The Court observed as under:

> *"7. ....When selection is made by the Commission aided and advised by experts having technical experience and high academic qualifications in the specialist field, probing teaching research experience in technical subjects, the Courts should be slow to interfere with the opinion expressed by experts unless there are allegations of mala fides against them. It would normally be prudent and safe for the Courts to leave the decision of academic matters to experts who are more familiar with the problems they face than the Courts generally can be..."*

33. In Dr. J. P. Kulshrestha & Others v. Chancellor, Allahabad University & Others (1980) 3 SCC 418, the court observed that the court should not substitute its judgment for that of academicians:

"17. Rulings of this Court were cited before us to hammer home the point that the court should not substitute its judgment for that of academicians when the dispute relates to educational affairs. While there is no absolute ban, it is a rule of prudence that courts should hesitate to dislodge decisions of academic bodies. ... ..."

34……. ……..

35. In Neelima Misra v. Harinder Kaur Paintal & Others (1990) 2 SCC 746, the court relied on the judgment in University of Mysore (AIR 1965 SC 491) and observed that in the matter of appointments in the academic field, the court generally does not interfere. The court further observed that the High Court should show due regard to the opinion expressed by the experts constituting the Selection Committee and its recommendation on which the Chancellor had acted.

36 to 43. ….. ……

44. In All India Council for Technical Education v. Surinder Kumar Dhawan & Others (2009) 11 SCC 726, again the legal position has been reiterated that it is a rule of prudence that courts should hesitate to dislodge decisions of academic bodies."

12. Applying the test, it is apparent that the respondents have deprived of the petitioner from his legitimate right.

13. It was brought to my notice during the course of hearing by the learned Advocate General that the post is still lying vacant against which the petitioner has been recommended.

14. Accordingly, the writ petition is allowed and the respondents are directed to consider the recommendation made by the Public Service Commission and pass appropriate orders, within four weeks from today.

15. The petition stands disposed of as indicated hereinabove, alongwith pending applications, if any.

****

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

Himachal Pradesh Financial Corporation Officer's Association. .....Petitioner.

Versus

Himachal Pradesh Financial Corporation Through its Managing Director .....Respondent.

CWP(T) No.14779 of 2008.
Judgment reserved on : 23.03.2015.
Date of decision: April 10, 2015.

Constitution of India, 1950- Article 226- Respondent was being paid ex gratia amount equivalent to 20% of pay and D.A. or two months and ten days' pay whichever was less but payment of the amount was stopped- a Writ Petition was filed which was allowed and the respondent was directed to pay the amount to the petitioner –SLPs were preferred before Hon'ble Supreme Court of India which were dismissed – subsequently, Rule-66-A was incorporated providing that the payment of the amount would be dependent upon the financial condition of the respondent and would require the approval of the Board of the Directors- the condition was imposed by the respondent due to precarious financial condition of the respondent- held, that economic capacity of the employer is a relevant yardstick while adjudicating the claim of the employees- financial restructuring was required due to the precarious financial condition- the corporation had to close some of the branches- payment of ex gratia amount on the basis of financial condition cannot be said to be arbitrary- employee cannot contend that he should be given the same benefits irrespective of the financial condition of the employer. (Para-19 to 32)

Cases referred:

Officers & Supervisors of I.D.P.L. versus Chairman & M.D., I.D.P.L and others (2003) 6 SCC 490

All India Reserve Bank Retired Officers Association and others versus Union of India and others AIR 1992 SC 767

Delhi Development Horticulture Employees' Union versus Delhi Administration, Delhi and others AIR 1992 SC 789

P.U.Joshi and others versus Accountant General, Ahmedabad and others (2003) 2 SCC 632

For the Petitioner : Mr.Ajay Mohan Goel, Advocate.
For the Respondent : Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner Association by medium of this writ petition has claimed the following substantive reliefs:-

"a) Declare notification dated 9th November 2005, Annexure P6, whereby Regulation 66-A has been inserted in Himachal Pradesh Financial Corporation Staff Regulations, 2004 with the sole purpose to defeat the judgment delivered by the Hon'ble High Court of Himachal Pradesh in CWP No.791/1991 and which regulation has been inserted in violation of the Statutory provisions of Section 48 of 1951 Act as arbitrary, illegal an act of colourable exercise of power and hence unconstitutional and quash the same.

b) Direct the respondent Corporation to pay to the members of the original applicant Association ex gratia at the rate of 20 percent of pay and DA or two months ten days pay which ever is less from 9.11.2005 onwards."

The facts may first be noticed.

2. Petitioner is an Association of the Officers of the respondent Corporation and is registered and recognized as such by the respondent Corporation.

3. Respondent Corporation is a statutory body and has been constituted/established under the provisions of the State Financial Corporation Act, 1951 (for short the 'Act').

4. The respondent was paying to its employees including members of the petitioner Association apart from pay and allowances an ex gratia amount equivalent to 20% of pay and D.A. or equivalent to two months and ten days' pay whichever was less for every Financial Year from 1st April to 31st March.

5. It appears that the respondent Corporation vide communications dated 15.10.1988, 10.01.1991 and 05.09.1991 stopped the payment of these amounts constraining them to file CWP No.791 of 1991 before this Court claiming therein the following substantive reliefs:-

"(ii) that the respondent-corporation be directed to release and disburse the exgratia @ 20% of pay and DP or equivalent to 2 months and 10 days pay subject to 20% of pay and DA as in the previous years to its employees for the years 1989-90 and 1990-91 and also to continue to make payment at the usual rates in the coming years as well without seeking any approval from the State Government;

(iii) That the letters and the communications as contained in Annexures P-5, P-9, P-10, P-12, P-14,P-15 and P-19 be quashed as violative of the Constitution of India and the provisions of the State Financial Corporations Act, 1951;"

6. The learned Division Bench of this Court vide judgment dated 11th December, 1992 allowed the petition in the following terms:-

"The result of the aforesaid discussion, therefore, is that the present writ petition succeeds and is allowed. The respondents are directed to make exgratia payments to the petitioners regularly at the rate of 20% of pay and DA or two months 10 days' pay, which-ever is less, and the directions to the contrary issued on the subject by the respondents are hereby quashed."

7. The judgment passed by this Court was assailed by the State of H.P. as also the respondent Corporation by way of SLP Nos.13292/93 and 7789/93. These SLPs were dismissed by the Hon'ble Supreme Court vide its judgment dated 19.10.1995 by holding that the findings of the High Court that ex gratia payment had become a condition of service cannot be said to be unsustainable.

8. Members of the petitioner Association continued to receive the ex gratia payment every year until a notification was issued by the respondent dated 09.11.2005 which was published in the gazette on 12.11.2005 whereby regulation 66A was introduced which reads as under:-

> "**66A Good Performance Reward** The Board of Directors of the Corporation may sanction Good Performance Reward in the form of ex gratia payment in favour of all the regular employees of the Corporation including the Managing Director, for the proceeding accounting year, at such rate as may be considered appropriate depending upon the working results/liquidity position of the Corporation during the relevant accounting year. No employee shall be entitled for the ex gratia unless the Corporation earns a net profit in the relevant accounting year and unless approved by the Board of Directors as heretofore."

9. The net result of the introduction of the aforesaid regulation was that henceforth the payment of ex gratia was made dependent on the respondent earning a net profit with a further rider that the same would also require an approval by the Board of Directors of the respondent Corporation. Even the rate at which the ex gratia was to be paid had now been left to the discretion of the Corporation on yearly basis.

10. Aggrieved by the action of the respondent, the petitioners have filed this petition on the ground that the introduction and insertion of regulation 66A is in violation of the statutory provisions contained in Section 48 of the Act. The impugned regulation has been introduced to circumvent and set at naught the judgment passed by this Court in CWP No.791 of 1991 as affirmed by the Hon'ble Supreme Court in SLP Nos.13292/93 and 7789/93 and that the impugned regulation gives unfettered powers and discretion to the authorities in the matter regarding payment of ex gratia to its employees and is, therefore, arbitrary and unconstitutional being violative of Article 14 of the Constitution of India. Lastly, it was contended that even if it is assumed that regulation 66A is valid, even then it could have only been applied prospectively to those employees, who joined service after coming into force of the said regulation and not to the employees, who are already in service of the respondent.

11. The respondent Corporation in their reply has raised certain preliminary objections like the Association having no legal enforceable right against the respondent and the petition being barred by delay and laches. The factual aspects of the matter have not been denied. However, the justification for introducing regulation 66A has been set out in para-12 of the reply wherein it is stated that the respondent had been incurring losses continuously from the year 1998-99 when it incurred a loss of Rs.218.78 lacs and the cumulative losses upto 31.03.2006 have now swelled to `8959.22 lacs (with provisioning of `5947.56 lacs in accordance with the RBI guidelines). Despite such huge losses, the respondent still continued releasing ex gratia payment.

12. During the Financial Year 2003-04, the Small Industries Development Bank of India (for short 'SIDBI') from whom the respondent borrows money had infact prepared a revival package for the State Financial Corporation subject to signing of Memorandum of Understanding (for short 'MOU') by the concerned State Financial Corporation and the State Government with 'SIDBI' incorporating the undertaking to initiate various measures for improving the working of the Corporation.

13. In order to avail the said package, the respondent also took up the matter with the 'SIDBI'. The terms and conditions of the 'MOU' required to be signed by the respondent for availing of the said revitalization package had stipulated conditions like reduction in establishment cost/expenditure to the extent of 10% of income in a phased manner, improvement in quality of loan portfolio, reduction of non-performing assets etc. On 25.06.2004, the respondent, the State Government and 'SIDBI' finally signed the 'MOU'.

14. The respondent in furtherance of the 'MOU' closed two of its branch Offices at Mehatpur and Barmana and also introduced Voluntary Retirement Scheme for its employees and also encouraged its employees to go on deputation and get absorbed in other Government Departments/Organizations as a measure to cut down the administrative and establishment costs. But, despite these measures the Corporation was not even close to the target stipulated in the 'MOU'.

15. The matter regarding payment of ex gratia was also considered by the Board of Directors of the respondent in its meeting dated 13.12.2004 and the Board observed that in view of the 'MOU', it was imperative for the respondent to reduce its administrative costs and release of ex gratia payment of the employees would adversely affect the liquidity position of the Corporation making its recuperation and improvement very difficult. However, since the ex gratia was being paid as per the orders passed by this Court in CWP No.791 of 1991, the Board desired that further action be taken only after obtaining legal advice.

16. The Board of Directors again considered the matter for payment of ex gratia in its meeting on 01.03.2005 and on the basis of legal advice, the Board approved the proposal for insertion of regulation 66A and resolved that the proposal for insertion of this regulation be sent to the State Government and 'SIDBI' for approval under Section 48 of the Act. 'SIDBI' in response to the proposal informed the respondent Corporation vide their letter dated 13.04.2005 that in terms of the provisions of Section 48(1) of the Act, it was only required to be consulted for making regulations and no 'approval' was required in the matter. It further advised that the respondent may with the sanction of the State Government take a view in the matter as it may deem fit in the interest of the Corporation.

17. The State Government vide its letter dated 22.07.2005 accorded its approval for the insertion of the regulation 66A and thereafter the necessary notification for enforcing the provisions was issued by the respondent and published as aforesaid.

18. The respondent Corporation has sought to justify action by claiming that the impugned regulation has been inserted after complying with the provisions of Section 48 of the Act and it therefore in no manner amounts to circumventing or setting at naught the judgment passed by this Court in CWP No.791 of 1991 as affirmed by the Hon'ble Supreme Court. It is also claimed that the Corporation had not discontinued the payment of ex gratia to its employees in future but the same had been made dependent upon the working results and profitability of the Corporation and lastly that the respondent Corporation is well within its rights to make applicable the provisions of the impugned regulation to the employees, who are already on its rolls and the same cannot be termed to be illegal or arbitrary.

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

19. From the stand taken by the respondent which has not been disputed even by the petitioner, there is an indication that the respondent's financial condition is not conducive for purposes of releasing the payment of ex gratia and, therefore, impugned regulation was introduced. This aspect cannot be ignored because respondent has specifically and categorically stated and referred to the financial crunch of the Corporation without specifically denying the entitlement of the petitioner, however, making the same conditional in terms of the impugned regulation.

20. In the backdrop of the aforesaid facts, one of the questions, therefore, falls for our consideration is as to whether the respondent Corporation which is limping under financial stress and strain can nevertheless be whipped by a judicial order to go on paying the ex gratia as before. Similar question fell for consideration before the Hon'ble Supreme Court in ***Officers & Supervisors***

of I.D.P.L. *versus* ***Chairman & M.D., I.D.P.L and others (2003) 6 SCC 490*** wherein the Hon'ble Supreme Court after taking into consideration the earlier judgments on the subject held as under:-

> ***"7. In the above background, the question, which arises for consideration, is whether the employees of public sector enterprises have any legal right to claim revision of wages that though the industrial undertakings or the companies in which they are working did not have the financial capacity to grant revision is pay-scale, yet the Government should give financial support to meet the additional expenditure incurred in that regard.***
>
> ***8. We have carefully gone through the pleadings, the Annexures filed by both sides and the orders passed by the BIFR and the judgments cited by the counsel appearing on either side. Learned counsel for the contesting respondent drew our attention to a recent judgment of this Court in A.K. Bindal and Anr. v. Union of India (2003) 5 SCC 163 in support of her contention. We have perused the said judgment. In our opinion, since the employees of government companies are not government servants, they have absolutely no legal right to claim that the Government should pay their salary or that the additional expenditure incurred on account of revision of their pay-scales should be met by the Government, Being employees of the companies, it is the responsibility of the companies to pay them salary and if the company is sustaining losses continuously over a period and does not have the financial capacity to revise or enhance the pay-scale, the petitioners, in our view, cannot claim any legal right to ask for a direction to the Central Government to meet the additional expenditure which may be incurred on account of revision of pay-scales. We are unable to countenance the submission made by Mr. Sanghi that economic viability of the industrial unit or the financial capacity of the employer cannot be taken into consideration in the matter of revision of pay-scales of the employees.***
>
> ***9. A Constitution Bench of this Court had examined the questions of revision of wages of workmen in Express Newspaper (P) Ltd. v. Union of India AIR 1958 SC 578. This Court land down the following principles for fixation of rates of wages : (AIR p.605 para 73)***
>
> > ***"(1) that in the fixation of rates of wages which include within its compass the fixation of scales of wages also, the capacity of the industry to pay is one of the essential circumstances to be taken into consideration except in cases of bare subsistence or minimum wage where the employer is bound to pay the same irrespective of such capacity.***
> >
> > ***(2) that the capacity of the industry to pay is to be considered on an industry-cum-region basis after taking a fair cross section of the industry, and***
> >
> > ***(3) that the proper measure for gauging the capacity of the industry to pay should take into account the elasticity of demand for the product the possibility of tightening up the organization so that the industry could pay higher wages***

> ***without difficulty and the possibility of increase in the efficiency of the lowest-paid workers resulting in increase in production considered in conjunction with the elasticity of demand for the product-no doubt against the ultimate background that the burden of the increased rate should not be such as to drive the employer out of business."***

10. The same question was again examined in Hindustan Times Ltd v. Workmen, AIR 1963 SC 1332 and this Court gave the following reasons: (AIR p. 1336, para 7)

> ***"7. While industrial adjudication will be happy to fix a wage structure which would give the workmen generally a living wage, economic considerations make that only dream for the future. That is why the Industrial Tribunals in this country generally confine their horizon to the target of fixing a fair wage. But there again, the economic factors have to be carefully considered. For these reasons, this Court has repeatedly emphasized the need of considering the problem on an industry-cum-region basis and of giving careful consideration to the ability of the industry to pay."***

11. In our view, the economic capability of the employers also plays a crucial part in it, as also its capacity to expand business or earn more profits. The contention of Mr. Sanghi, if accepted that granting higher remuneration and emoluments and revision of pay to workers in the other governmental undertakings and, therefore, the petitioners are also entitled to the grant of pay revision may, in our opinion, only lead to undesirable results. Enough material was placed on record before us by the respondents which clearly show that the first respondent had been suffering heavy losses for the last many years. In such a situation the petitioners, in our opinion, cannot legitimately claim that their pay-scales should necessarily be revised and enhanced even though the organization in which they are working are making continuous losses and are deeply in the red. As could be seen from the counter affidavit, the first respondent company which is engaged in the manufacture of medicines became sick industrial company for various reasons and was declared as such by the BIFP. and the revival package which was formulated and later approved by the BIFR for implementation could not also be given effect to and that the modifications recommended by the Government of India to the BIFR in the existing revival package was ordered to be examined by an operating agency and, in fact, IDBI was appointed as an operating agency under Section 17(3) of SICA. It is also not in dispute that the production activities had to be stopped in the two major units of the company at Rishikesh and Hyderabad w.e.f. October, 1996 and the losses and liabilities are increasing every month and that the payment of three instalment of interim relief could not also be made due to the threat of industrial unrest and the wage revision in respect of other employees is also due w.e.f. 1992 which has also not been sanctioned by the Government of India.

16. We have already referred to the judgment of this Court in A.K. Bindal (supra) in which this Court had decided that the employees under public sector enterprises cannot be treated as Central Government employees and if the company does not have enough funds no way the revision can be given.

17. In A.K. Bindal (supra) this Court specifically held that the economic viability or the financial capacity of the employer is an important factor which cannot be ignored while fixing the wage structure otherwise the unit itself may not be able to function and may have to close down which will inevitably have disastrous consequences for the employees themselves. The Court also negatived other contentions raised by the employees and referred to and relied upon the fact that the company was a sick unit. Facts in the present case are similar.

18. Further directions issued in Jute Corpn. of India Officers' Assn. v. Jute Corpn. Of India Ltd., (1990) 3 SCC 436 would have no bearing in the present case as the Scheme under the SICA has failed to revive the Company. When the Company cannot be revived because of large losses, there is no question of enhancing scales of pay and dearness allowances. Direction (ii) issued in that case indicates that the employees appointed on or after 1-1-1989 will be governed by such pay scales and allowances as may be decided by the Government in its discretion. If the company itself is dying, the government has discretion not to grant enhanced pay scales or deamess allowances and for the same reason Direction (i) cannot be implemented."

21. A perusal of the aforesaid judgment would clearly show that the economic capacity of the employer is also a relevant yardstick while adjudicating the claims of the present kind. Even otherwise, it is the respondent, who is the best authority to decide regarding payment of ex gratia and this Court will not interfere so long as the decision is not unconstitutional, arbitrary, unreasonable or otherwise illegal.

22. It cannot be disputed that the regulation framed in exercise of powers conferred under Section 48 of the 1951 Act is statutory in nature and, therefore, binding not only upon the Corporation, but also on its employees with equal force. It was on account of the continuous financial losses that the respondent was constrained to introduce the impugned regulation. Therefore, in such circumstances, the Corporation itself required financial restructuring and several measures were indeed taken towards the same.

23. Indisputably, it was on account of the conditions set-forth by the 'SIDBI' that reduction in establishment cost/expenditure to the extent of 10% of income in a phased manner had to be adopted by the Corporation. Admittedly, the respondent in furtherance of the 'MOU' closed two of its branch Offices at Mehatpur and Barmana and even introduced Voluntary Retirement Scheme for its employees and at the same time had encouraged them to go on deputation and get absorbed in other Government Departments/Organizations as a measure to cut down the administrative and establishment cost. It can also not be disputed that the decision taken to reduce the staff strength or steps taken to reduce the establishment cost are actions taken in public interest.

24. It is further indisputable that the Corporation is a statutory Corporation, a State within the meaning of Article 12 of the Constitution of India, well-funded by the public funds. The loss incurred by the Corporation is loss to the public fund. The expenses incurred by the

Corporation are also funded by the public exchequer, therefore, any action taken to save pubic fund or public exchequer would definitely be a step taken in public interest.

25. The next question which arises for consideration is as to whether the notification introducing regulation 66A has been inserted solely for the purpose to defeat the judgment delivered by this Court in CWP No.791 of 1991 which in turn has been affirmed by the Hon'ble Supreme Court. We do not feel so. Once the action of the respondent is in public interest and is further supported by relevant record showing that it had suffered a loss of Rs.218.78 lacs in 1998-99 and the cumulative losses upto 31.03.2006 have now swelled to Rs.8959.22 lacs (with provisioning of Rs.5947.56 lacs in accordance with the RBI guidelines), it cannot be said that the impugned regulation only seeks to defeat the earlier judgment rendered by this Court. Indisputably, the financial implication is a valid consideration and the capacity or otherwise of the employees to absorb, the financial burden cannot be ignored. (*Refer:* ***All India Reserve Bank Retired Officers Association and others*** *versus* ***Union of India and others AIR 1992 SC 767***, ***Delhi Development Horticulture Employees' Union*** *versus* ***Delhi Administration, Delhi and others AIR 1992 SC 789****).*

26. Now the mere fact that the ex gratia payment has been made dependent on the working results and the profitability of the Corporation cannot be in any manner termed to be arbitrary, unreasonable or even illegal. After-all, the financial constraints which are beyond the means of the Corporation is a valid reason for making the scheme of releasing the ex gratia subjective. Even otherwise, while considering the question of implication of any scheme, it is not possible to dissociate the question from financial solvency and the capacity of the employer to bear financial burden pursuant to any such scheme.

27. The matter can be looked at from a different angle. The question relating to the Constitution, pattern, nomenclature of posts, cadres, categories their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotion etc. pertained to the field of policy and within the exclusive discretion and jurisdiction of the employer subject, of course, to the limitations or restrictions envisaged in the Constitution of India. There is no right in any employee to claim that the rules governing conditions of service should be forever the same as the one when he entered service for all purposes. In taking this view, we are supported by the judgment of the Hon'ble Supreme Court in ***P.U.Joshi and others*** *versus* ***Accountant General, Ahmedabad and others (2003) 2 SCC 632*** wherein it has been held as under:-

> "***10. We have carefully considered the sub-missions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/substraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute***

different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing the existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."

28. It may be noticed that the decision to grant ex gratia was not a policy decision but an administrative action. This was so held even by this Court while adjudicating CWP No.791 of 1991. That being so, then it was always open for the respondent to change its decision from time to time under the changing circumstances which cannot be questioned. It is not within the domain of the Court to weigh the pros and cons of administrative decision, or scrutinize it, except where the same is arbitrary or violative of any constitutional or statutory or any other provisions of law.

29. The petitioner would then argue that prior to introduction of the impugned regulation there was no effective consultation by the respondent with 'SIDBI'. We are afraid that even this submission of the petitioner cannot be accepted because there is no material placed on record by the petitioner whereby it can be inferred that there has been no effective consultation before introducing the impugned regulation. After-all, consultation is nothing but a process which requires meeting of minds between the parties involved to evolve a correct or atleast a satisfactory solution.

30. It is not in dispute that it was 'SIDBI' which prepared the revival package for the respondent subject to its signing a tripartite Memorandum of Understanding (MOU) wherein apart from 'SIDBI' and the Corporation, even the State Government would be a party. It is also not disputed that the 'MOU' was duly signed by the parties and in the terms and conditions incorporated therein, the respondent for availing revival package was required to reduce its establishment cost/expenditure to the extent of 10% of income in a phased manner, improve the quality of loan portfolio, reduction of non-performing assets etc. Therefore, in the given circumstances, it cannot be said that there was no effective consultation prior to introduction of the impugned regulation.

31. Lastly, it is forcefully argued by learned counsel for the petitioner that if at all the validity of the regulation is to be upheld, the same should be made prospective and should not be made applicable to employees, who are in the service of the Corporation.

32. This submission is equally meritless because there is no provision whereby the regulation can only be made applicable to a selective section of the employees or else the same will be discriminatory. It is in administrative exigencies that the earlier decision has been altered and the same cannot be dubbed to be arbitrary unless it is shown to be capricious and whimsical. After all, the Courts have always recognized the absolute administrative right of the employer to change, alter or modify the rules of service if the justice of the matter so requires.

33. In view of the aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed leaving the parties to bear their own costs. Pending application (s), if any, also stands disposed of.

****

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

FAOs No. 334 & 335 of 2007
Decided on: 10.04.2015

FAO No. 334 of 2007

Jarnail Singh ...Appellant.

Versus

Ms. Deep Kaur & others ...Respondents.

.....

FAO No. 335 of 2007

Jarnail Singh ...Appellant.

Versus

Bhai Lal & others ...Respondents.

Motor Vehicle Act, 1988- Section 149- Deceased was travelling in the vehicle as a gratuitous passenger- therefore, owner had committed willful breach; hence, Insurer was rightly directed to satisfy the award with the right of recovery. (Para-7 to 10)

Cases referred:

Sh. Rajeev Chauhan versus Shri Hari Chand Bramta & others alongwith National Insurance Company Ltd. versus Shri Hari Chand Bramta & others, Latest HLJ 2014 (HP) 1253

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

For the appellant(s): Mr. Ramakant Sharma, Advocate.

For the respondents: Ms. Shweta Joolka, Advocate, as Court Guardian for respondents No. 2 to 4 in FAO No. 335 of 2007.
Mr. G.D. Sharma, Advocate, for insurer in both the appeals.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

FAO No. 334 of 2007 is directed against the award, dated 29th April, 2006, made by the Motor Accident Claims Tribunal (II), Una, District Una, H.P. (for short "the Tribunal") in M.A.C. Petition No. 58 of 2002, titled as Deep Kaur and others versus Rajesh Kumar @ Raj Kumar and others, whereby compensation to the tune of Rs.2,09,800/- with interest @ 7.5% per annum from the date of the petition till its deposition came to be awarded in favour of the claimants (for short "the impugned award-I").

2. The subject matter of FAO No. 335 of 2007 is award, dated 29th April, 2006, made by the Tribunal in M.A.C. Petition No. 40 of 2002, titled as Bhai Lal and others versus Rajesh Kumar @ Raj Kumar, whereby compensation to the tune of Rs.3,12,700/- with interest @ 7.5% per annum from the date of the petition till its deposition came to be awarded in favour of the claimants (for short "the impugned award-II").

3. Both the impugned awards are outcome of a motor vehicular accident, which was allegedly caused by driver, namely Shri Rajesh Kumar @ Raj Kumar, while driving

Canter, bearing registration No. PB-10 AU-4128, rashly and negligently on 06.04.2002 at about 4.30 p.m., near Village Majehar. Smt Kamal Kaur and Smt. Babli Devi were travelling in the said canter, sustained injuries and succumbed to the injuries.

4. The claimants filed two separate claim petitions, came to be granted in terms of the awards, which are impugned in these appeals.

5. I deem it proper to club and determine both these appeals by this common judgment.

6. I have gone through the impugned awards and perused the entire record.

7. The Tribunal, after scanning the evidence, oral as well as documentary, has rightly recorded the findings that the deceased were travelling in the offending vehicle as gratuitous passengers, thus, the appellant-owner-insured has committed the willful breach and held that the owner-insured was in breach and directed the insurer to satisfy the award with a right of recovery.

8. The insurer, the driver and the claimants have not questioned the impugned awards on any count, thus, have attained finality so far it relate to them.

9. The appellant-owner-insured has questioned the impugned awards on the grounds taken in the respective memo of appeals.

10. In view of the law laid down by the Apex Court and by this Court in a series of cases including **Sh. Rajeev Chauhan versus Shri Hari Chand Bramta & others alongwith National Insurance Company Ltd. versus Shri Hari Chand Bramta & others,** reported in **Latest HLJ 2014 (HP) 1253,** the Tribunal has rightly held that the deceased were travelling in the offending vehicle as gratuitous passengers and the owner-insured has committed the willful breach.

11. Having said so, the impugned awards are to be upheld whereby right of recovery has been granted to the insurer.

12. At this stage, learned counsel for the insurer stated at the Bar that amount stands already deposited before this Registry.

13. Mr. Ramakant Sharma, learned counsel for the appellant, stated that the amount awarded in M.A.C. Petition No. 58 of 2002, which is subject matter of FAO No. 334 of 2007, is excessive, as the Tribunal has held that the age of the deceased was 55 years at the time of accident and applied the multiplier of '11', is on higher side, multiplier of '8' was to be applied.

14. The claimants have averred in the claim petition that the deceased was 55 years of age at the time of accident. The documents annexed with the claim petition, the evidence, oral as well as documentary, do disclose that the age of the deceased was 55 years at the relevant point of time. Thus, the Tribunal has rightly held that the age of the deceased was 55 years.

15. The claimants have not questioned the adequacy of the compensation. Thus, the only question to be determined is - whether the multiplier of '11' came to be rightly applied?

16. While going through the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "the MV Act"), multiplier of '8' was to be applied in view of the ratio laid down by the Apex Court in **Sarla Verma (Smt) and others versus Delhi Transport**

Corporation and another, reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.**

17. The Tribunal has assessed the monthly income of the deceased as Rs. 2,100/-, after deducting one third towards her personal expenses, held the claimants entitled to compensation to the tune of Rs.16,800/- per annum under the head "loss of estate".

18. Viewed thus, it is held that the the claimants are entitled to compensation to the tune of Rs.16,800 x 8 = Rs.1,34,400/- under the head "loss of estate". The claimants are also held entitled to compensation to the tune of Rs.10,000/- under the head "funeral charges", Rs. 10,000/- under the head "loss of love and affection" and Rs. 5,000/- under the head "taxi charges".

19. Accordingly, the claimants in FAO No. 334 of 2007 are held entitled to compensation to the tune of Rs. 1,59,400/- (i.e. Rs. 1,34,400/- + Rs.10,000/- + Rs.10,000/- + Rs.5,000/-) with interest @ 7.5% per annum from the date of the petition till its realization.

20. Having glance of the above discussions, the impugned award in FAO No. 335 is 2007 is upheld and the impugned award in FAO No. 334 of 2007 is modified, as indicated hereinabove. Both the appeals are disposed of accordingly.

21. Registry is directed to release the awarded amount, if deposited, in favour of the claimants strictly as per the terms and conditions contained in the impugned awards.

22. Send down the record after placing copy of the judgment on each of the Tribunal's files.

****

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

FAO No. 188 of 2010 a/w FAO No. 189 of 2010 &
Cross Objections No. 391 of 2010,
FAOs No. 190, 191 & 192 of 2010.
Date of Decision: 10.04.2015

1. **FAO No. 188 of 2010 &**
Cross Objections No. 390 of 2010
National Insurance Company Ltd. ...Appellant
Versus
Chandru Devi & others ...Respondents

2. **FAO No. 189 of 2010 &**
Cross Objections No. 391 of 2010
National Insurance Company Ltd. ...Appellant
Versus
Vir Singh & others ...Respondents

3. **FAO No. 190 of 2010**
National Insurance Company Ltd., ...Appellant
Versus
Brestu Ram & others ...Respondents

4. **FAO No. 191 of 2010**

National Insurance Company Ltd. ... Appellant

Versus

Devi Singh & others ...Respondents

5. **FAO No. 192 of 2010**

National Insurance Company Ltd. ...Appellant

Versus

Dev Raj & others ...Respondents

Motor Vehicle Act, 1988- Section 149- Insurance policy covered only 2+1 person meaning thereby that the policy covered the risk of the driver and two passengers – Insurer has to satisfy the two awards which are on the highest side and the compensation awarded in other cases is to be satisfied by the Insurer at the first instance with the right of recovery. (Para-7 to 14)

Cases referred:

United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917

National Insurance Company Limited versus Anjana Shyam & others, 2007 AIR SCW 5237

FAO No. 188 of 2010

For the appellant: Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. G.R. Palsra, Advocate, for respondents No. 1 to 6.
Mr. Naresh K. Sharma, Advocate, for respondent No. 7.
Mr. C.N. Singh, Advocate, for respondent No. 8.

FAO No. 189 & 190, 191 & 192 of 2010

For the appellant: Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. G.R. Palsra, Advocate, for respondent No. 1.
Mr. Naresh K. Sharma, Advocate, for respondent No. 2.
Mr. C.N. Singh, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

All these appeals are outcome of a common award, dated 8th March, 2010, made by the Motor Accident Claims Tribunal (1) Mandi, (hereinafter referred to as "the Tribunal") in Claim Petition No. 110 of 2007, titled Smt. Chandru Devi & others versus Sh. Mohinder Singh & others, Claim Petition No. 118 of 2007, titled Sh. Vir Singh versus Sh. Mohinder Singh & others, Claim petition No. 132 of 2007, titled Sh. Devi Singh versus Sh. Mohinder Singh & others, Claim Petition No. 133 of 2007, titled Dev Raj versus Sh. Mohinder Singh & others and Claim petition No. 134 of 2007 titled as Brestu Ram versus Sh. Mohinder Singh & others, whereby and whereunder compensation to the tune of Rs.6,71,800/-, Rs.30,000/-, Rs.33,000/- Rs.33,000/- and Rs.29,000/- in claim petitions No. 110, 118, 132, 133 & 134 of 2007, respectively, with interest @ 7.5% per annum from the date of filing of the claim petitions till its realization, came to be awarded in favour of the claimants and the insurer-National Insurance Company Limited was saddled with the liability, hereinafter referred to as "impugned award".

2. Alongwith these appeals, the respondents-claimants have filed Cross Objection No. 390 of 2010 in FAO No. 188 of 2010 and respondent No. 1-Vir Singh-claimant has filed Cross Objection No. 391 of 2010 in FAO No. 189 of 2010, for enhancement of the compensation.

3. The insured-owner and the driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

4. The facts are not in dispute. However, I deem it proper to give brief resume of the case herein.

5. The claimants being victims of the motor vehicular accident had filed claim petitions before the Tribunal for grant of compensation, as per break-ups given in the respective claim petitions. It is averred in the claim petitions that driver, namely, Sanjiv Kumar, was driving vehicle-Mahindra Pick-Up bearing registration No. PB-11-AD-4799, rashly and negligently, on 1.8.2007, at about 4.30 a.m., at Natwain on Mandi-Kullu road, caused the accident and Narpat Ram, Vir Singh, Devi Singh, Dev Raj and Brestu sustained injuries and Narpat Ram succumbed to the injuries.

6. The fact of the insurance is not in dispute. The only dispute herein is whether the insurer has to satisfy the impugned award or only to the extent, as per the insurance contract.

7. As per the insurance policy, Ext. RW-1/B on the file of MAC Petition No. 110 of 2007, the insurance contract covers only 2 + 1 persons, meaning thereby, the policy covers the risk of the driver and two passengers. The insurer has to satisfy the liability as per the terms and conditions of the insurance contract.

8. My this view is fortified by the judgment of the Apex Court in the case titled as **United India Insurance Company Limited versus K.M. Poonam & others,** reported in **2011 ACJ 917.** It is apt to reproduce relevant portion of para 24 of the judgment herein:

> "24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle.

9. It is also apt to reproduce para 15 of the judgment of the Apex Court in the case titled as **National Insurance Company Limited versus Anjana Shyam & others,** reported in **2007 AIR SCW 5237,** herein:

> *"15.* In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of Section 147(1)(b)(ii) of the Act. We are of the view that the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading."

10. Learned Counsel for the appellant-Insurance Company argued that at the best, the appellant-insurer-Insurance Company has to satisfy two awards, which are at higher side and rest of the liability is on the insured-owner.

11. Viewed thus, the total compensation amount of two awards, made in MAC Petition No. 110 of 2007, titled Smt. Chandru Devi & others versus Sh. Mohinder Singh & other and MAC Petition No. 132 of 2007, titled as Devi Singh versus Mohinder Singh & others, is to be satisfied by the insurer-Insurance Company and the compensation amount awarded in other awards, is to be satisfied by the insurer with the right of recovery. The insurer-insurance company is at liberty to move an application for recovery before the Tribunal.

12. The claimants have filed Cross Objections No. 390 of 2010 in FAO No. 188 of 2010 and Cross Objections No. 391 of 2010 in FAO No. 189 of 2010, respectively, for enhancement of the compensation.

13. I have gone through the claim petitions, evidence and the findings recorded by the Tribunal.

14. I am of the considered view that the amount of compensation awarded is just and appropriate, cannot be said to be inadequate. It is also to be kept in mind that the insurance company has to satisfy only two awards, which are at higher side and the rest are to be satisfied by the insurer at the first instance with right of recovery. Viewed thus, the claimants have not made out a case for enhancement. Accordingly, the cross objections are dismissed.

15. Having said so, the impugned awards are modified, as indicated above and the appeals and the cross-objections are disposed of.

16. The Registry is directed to release the entire compensation amount in favour of claimants, strictly as per the terms and conditions, contained in the impugned award.

17. Send down the records after placing a copy of the judgment on the file of the claim petitions.

****

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

National Insurance Company Ltd. ...Appellant
Versus
Smt. Ranjeeta & others ..Respondents

FAO No. 222 of 2010
Reserved on : 27.03.2015
Decided on : 10.04.2015

Motor Vehicle Act, 1988- Section 163-A- Claimant filed a Claim Petition for the death of 'S' who was driving the vehicle bearing registration no. HP-01-0517 - the vehicle was hit by a bus bearing registration no. HP-31-6555 - driver of the bus was rash and negligent in driving the bus- it was contended that the claimant had filed a Petition under Section 163-A of M.V. Act which was not maintainable- held, that it is not material whether the petition is filed under Section 163-A and 166 of the Act- the purpose of the Act is to grant compensation as early as possible to save claimant from the social evil- the claimant had specifically stated that accident was outcome of rash and negligent driving of the bus driver- this fact was not denied specifically by the respondent - procedural wrangles and tangles, procedural-technicalities, mystic maybes, niceties of law and other technical grounds cannot be pressed into service to defeat the purpose of granting compensation to the victims of the motor vehicle accident - mere mentioning of wrong section cannot be a ground to dismiss the petition. (Para- 15 to 33)

Cases referred:
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Madan Mohan and another, 2013 AIR (SCW) 3120
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
Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627
Oriental Insurance Company Limited versus Premlata Shukla & others, 2007 AIR SCW 3591
Surinder Kumar Arora & another versus Dr. Manoj Bisla & others, 2012 AIR SCW 2241
Dulcina Fernandes & Ors. versus Joaquim Xavier Cruz & Anr., 2013 AIR SCW 6014
Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors., 2009 AIR SCW 4298

For the appellant: Ms. Devyani Sharma, Advocate.
For the respondents: Ms. Leena Guleria, Advocate vice Mr. G.R. Palsra, Advocate, for respondents No. 1 to 4.

Mr. S.K. Acharya, Advocate, for respondents No. 5 & 6.
Mr. Raghunandan Chaudhary, Advocate, for respondent No. 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The appellant-insurer has questioned the award dated 12th January, 2010, passed by the Motor Accidents Claims Tribunal (I) Mandi, District Mandi, H.P. (hereinafter referred to as 'the Tribunal'), in Claim Petition No. 12 of 2008, whereby compensation to the tune of Rs. 4,17,500/- with interest @ 7.5% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimants-respondents No. 1 to 4 herein and the insurer--National Insurance Company-appellant herein, was saddled with the liability, (hereinafter referred to as 'the impugned award').

Brief Facts:

2. The claimants, being victims of the vehicular accident, filed a claim petition before the Tribunal, on 26th February, 2008, titled as Smt. Ranjeeta & others versus Arun Kumar & others, for grant of compensation to the tune of Rs.7,20,000/-, as per the break-ups given in the claim petition, on the ground that one Raj Kumar had driven the bus bearing registration No. HP-31-6555, rashly and negligently, on 14.09.2001, at about 4.00 p.m., near Gupta Furniture House at Slapper, District Mandi, hit Maruti Van bearing registration No. HP-01-0517, which was being driven by deceased, namely, Sanjay Kumar @ Sanju, who sustained injuries and succumbed to the injuries on the spot. The claimants have also pleaded in the claim petition that the deceased was earning Rs.3300/- per month and they have lost their sole bread earner.

3. The respondents contested the claim petition on the grounds taken in their objections.

4. Following issues came to be framed by the Tribunal:

"1. *Whether death of Sanjay Kumar was caused in an accident in which bus No. HP-31-6555 is involved? ...OPP*

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

3. Whether the driver of bus No. HP-31-6555 was not holding a valid and effective driving licence to drive the bus at the time of accident? OPR-3

4. Relief."

5. The claimants have examined Head Constable Devinder Kumar (PW-1), Dr. H.K. Abrol (PW-2), Sh. Bittu Ram (PW-4) and Shri Sanju Kumar (PW-5). One of the claimants, Smt. Ranjeeta (widow), also appeared in the witness box as PW-3. The claimants have placed on record documents, i.e. Ex. P-A, copies of FIR, Ext. PB, post mortem report, Mark-A, death certificate, Ext. PC & Marks-B & D, certificates and Mark-C, driving licence of deceased Sanjay Kumar, in support of their case.

6. Arun Kumar, owner of the bus, appeared in the witness box as RW-1. The insurer has examined Sub Inspector Shiv Chand as RW-2. Respondents have also placed on record documents, i.e. Ext. RW-2/A -1 to Ext. RW-2/A-4, copies of statement, Ext. RW-1/A,

FIR, Ext. RW-1/B, driving licence, Ext. RW-1/C, route permit and Ext. RW-1/D, Insurance policy.

7. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that driver, Raj Kumar had driven the offending bus, rashly and negligently, caused the accident and caused injuries to deceased Sanjay Kumar @ Sanju, who succumbed to the injuries on the spot.

8. I have gone through the evidence and the documents on the record.

9. The claimants have proved that the driver, namely, Raj Kumar had driven the offending bus, rashly and negligently and caused the accident. The driver has not led any evidence nor stepped into the witness box. The insurer and insured have not led any evidence in rebuttal to the evidence of the claimants. Thus, the evidence led by the claimants has remained unrebutted. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

10. Before, I deal with issue No. 2, I deem it proper to deal with issue No. 3.

11. It was for the insurer to plead and prove that the driver of the bus, Raj Kumar, was not having a valid and effective licence to drive the said vehicle. It has failed to discharge the onus. The copy of the driving licence of driver Raj Kumar, Ext. RW-1/B, is on the file of the claim petition, issued by the Transport and Licensing Authority, Bilaspur, which does disclose that the driver was having effective and valid driving licence to drive the bus. Thus, it is held that the driver was having the valid and effective driving licence to drive the offending vehicle. Accordingly, the finings returned by the Tribunal on issue No. 3, are also upheld.

12. The claimants have pleaded and proved that the income of the deceased was Rs.3,300/- per month. The Tribunal, after deducting 1/3rd of the income towards personal expenses of the deceased, held that the claimants have lost source of dependency to the tune of Rs.24,000/- per annum. It has correctly applied the multiplier of '17', in view of the Schedule appended to the Motor Vehicles Act, 1988, for short 'the Act" and ratio laid down by the Apex Court in case titled as **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.** The Tribunal has also awarded Rs.9,500/- under the head 'conventional charges'.

13. It is apt to record herein that 1/4th of the income was to be deducted towards personal expenses, in view of the law laid down by the apex Court in the judgments, *supra*, and the claimants were also held to be entitled for compensation under the other heads, but they have not questioned the same. Thus, the findings recorded by the Tribunal on issue No. 2 are upheld.

14. The offending bus was insured with the appellant-National Insurance Company, which is not in dispute. The deceased was the third party, thus, the insurer came to be rightly saddled with the liability.

15. Learned Counsel for the appellant argued that the claimants had invoked the jurisdiction of the Tribunal by filing a claim petition under Section 163-A of the Act, which was not maintainable and the Tribunal was under legal obligation to dismiss the same.

16. It is immaterial whether the claim petition has been filed under Section 163-A or Section 166 of the Act, for the reason that the purpose, aim and object of granting

compensation, is social one**,** is to be granted, as early as possible, in order to save claimants from social evils.

17. The 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 Act. It is apt to reproduce sub Section 6 of Section 158 of the Act, herein:

> *"**158. Production of certain certificates, licence***
>
> ***and permit in certain cases.***
>
> *(1) .....*
>
> *(2) .....*
>
> *(3) .....*
>
> *(4) .....*
>
> *(5) .....*
>
> *(6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer."*

18. It provides that it is the duty of the police officer to send a copy of the report to the Claims Tribunal having jurisdiction and that report is to be treated as a claim petition in terms of Section 166, sub-section (4), which too was added in terms of the amendment by Act No. 54 of 1994 in the Act. It is profitable to reproduce Sub section (4) of Section 166 herein:

> *"**166. Application for compensation.***
>
> *(1) .....*
>
> *(2) .....*
>
> *(3) .....*
>
> *(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act."*

19. Viewed thus, the argument of the learned Counsel for the appellant that the claim petition was to be dismissed, is devoid of any force.

20. The claimants have specifically pleaded in para-24 (i) of the claim petition that the bus driver has driven the vehicle rashly and negligently. The aforesaid para reads as under:-

> "*That on 14.09.2001, while Sh. Sanjay Kumar was driving a Maruti Van No. HP-01-0517 and was going from Slapper to Barmana, when the Maruti Van*

reached near Gupta Furniture House at Village Slapper at about 4.00 p.m., then a Bus No. HP-31-6555 which was being driven by the respondent No. 2 in a very high speed and also in a negligent manner collided with the Maruti Van, as a result of which Sanjay Kumar and one Joginder Kumar, who was the occupant of Maruti Van, died on spot. The driver of the bus by seeing Sanjay Kumar and Joginder Kumar died on the spot, lodged the FIR against the deceased with a motive to save himself from the civil and criminal liabilities. As a matter of fact, there was no negligence on the part of Maruti Van driver."

21. Respondents No. 1 & 2 and the insurer in their replies to the aforesaid para, have not specifically denied the averments contained therein, thus stand admitted.

22. I deem it proper to reproduce the opening para and para 24(i) of the reply filed on behalf of respondent No. 4 herein:-

"*In reply to opening para, it is submitted that the deceased Sanjay Kumar had come to purchase Maruti Van No. HP-01-0517 from the replying respondent and had taken the vehicle for the purpose of checking in order to verify the fitness of the vehicle with the representation that he will drive the same uptill one kilometer and will come back, but later on, the respondent No. 4 came to know that the van was hit by the bus No. HP-31-6555 in a rash and negligent manner being driven by the respondent No. 2."*

24(i) In reply to this para it is submitted that the deceased Sanjay Kumar had come to replying respondent for purchasing the Maruti Van bearing No. HP-01-0517 from the respondent No. 4 and had taken the same for checking its fitness with the promise to drive it one kilometer only from the house of replying respondent but he took the same ahead and later on the respondent No. 4 came to know that the van was hit by the bus driver in a rash and negligent manner due to which the van was damaged badly and occupants received serious injuries and died. The driver of the bus taking undue advantage of the death of occupants of van lodged the FIR against the van driver."

23. Having said so, the claimants have specifically pleaded in the claim petition that the accident was outcome of rash and negligent driving of the bus driver and the respondents have not specifically denied the same.

24. It is beaten law of the land that procedural wrangles and tangles, procedural-technicalities, mystic maybes, niceties of law and other technical grounds cannot be pressed into service to defeat the purpose for granting compensation to the victims of the motor vehicular accident.

25. My this view is fortified by the judgment of the Apex Court in the case titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354.** It is apt to reproduce relevant portion of para 3 of the judgment herein:

"3. Road accidents are one of the top killers in our country, specifically when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accident Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not

escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard. Emphasis supplied"

26. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the MV Act is Social Welfare Legislation and the procedural technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."

27. It is also apt to reproduce relevant portion of para 12 of the judgment of the Apex Court in the case titled as **Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627,** herein:

12. .....While interpreting the "contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment debtor in respect of the liability in view of subsection (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident

Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."

28. Rash and negligent driving is *sine qua non* for maintaining a claim petition seeking compensation in terms of the provisions of Section 166 of the Act.

29. My this view is fortified by the Apex Court judgment in case titled as **Oriental Insurance Company Limited versus Premlata Shukla & others,** reported in **2007 AIR SCW 3591.** It is apt to reproduce para-10 of the judgment herein:-

> "10. *The insurer, however, would be liable to re-imburse the insured to the extent of the damages payable by the owner to the claimants subject of course to the limit of its liability as laid down in the Act or the contract of insurance. Proof of rashness and negligence on the part of the driver of the vehicle, is therefore, sine qua non for maintaining an application under Section 166 of the Act."*

30. The Apex Court in another case titled as **Surinder Kumar Arora & another versus Dr. Manoj Bisla & others,** reported in **2012 AIR SCW 2241,** has laid down the same principle. It is apt to reproduce paras 9 & 10 of the judgment herein:

> "*9. Admittedly, the petition filed by the claimants was under Section 166 of the Act and not under Section 163-A of the Act. This is not in dispute. Therefore, it was the entire responsibility of the parents of the deceased to have established that respondent No.1 drew the vehicle in a rash and negligent manner which resulted in the fatal accident. Maybe, in order to help respondent No.1, the claimants had not taken up that plea before the Tribunal. Therefore, High Court was justified in sustaining the judgment and order passed by the Tribunal. We make it clear that if for any reason, the claimants had filed the petition under Section 163-A of the Act, then the dicta of this Court in the case of Kaushnuma Begum (Smt.) & Ors. (AIR 2001 SC 485 : 2001 AIR SCW 85) (supra) would have come to the assistance of the claimants.*
>
> 10. *In our view the issue that we have raised for our consideration is squarely covered by the decision of this Court in the case of Oriental Insurance Co. Ltd. (AIR 2007 SC 1609 : 2007 AIR SCW 2362) (supra). In the said decision the Court stated:*
>
> > *".....Therefore, the victim of an accident or his dependents have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."*

31. It would also be profitable to reproduce para-7 of the judgment rendered by the Apex Court in the case titled as **Dulcina Fernandes & Ors. versus Joaquim Xavier Cruz & Anr.,** reported in **2013 AIR SCW 6014** herein:

> *"7. It would hardly need a mention that the plea of negligence on the part of the first respondent who was driving the pick-up van as set up by the claimants was required to be decided by the learned Tribunal on the touchstone of preponderance of probability and certainly not on the basis of proof beyond reasonable doubt. [Bimla Devi & Ors. v. Himachal RTC (2009) 13 SCC 530 : (Air 2009 SC 2819 : 2009 AIR SCW 4298)]. In United India Insurance Company Limited Vs. Shila Datta & Ors. (2011) 10 SCC 509 : (AIR 2012 SC 86 : 2011 AIR SCW 6541) while considering the nature of a claim petition under the Motor Vehicles Act, 1988 a three-three judge- bench of this Court has culled out certain -propositions of which propositions (ii), (v) and (vi) would be relevant to the facts of the present case and, therefore, may be extracted hereinbelow:*
>
> *"(ii) The rules of the pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal.*
>
> *(v) Though the Tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation.*
>
> *(vi) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to assist it in holding the enquiry."*
>
> *The following further observation available in paragraph 10 of the report would require specific note:*
>
> *"We have referred to the aforesaid provisions to show that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute."*

32. The Apex Court in another case titled as **Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors.,** reported in **2009 AIR SCW 4298,** has laid down the same principle. It is apt to reproduce paras 12 and 15 of the judgment herein:

> *"12. While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a Tribunal stricto sensu is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimant's predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a post mortem vis-a-vis the averments made in a claim petition.*

13. .....

14. .....

15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."

33. Mere recording of wrong section in the title clause of the claim petition, cannot be a ground to dismiss the same. The pleadings and the averments contained in the petition/plaint determine the jurisdiction. What relief is to be granted, is to be determined in terms of the pleadings of the parties read with the evidence on record.

34. Keeping in view the discussion made hereinabove, the appeal is dismissed and the impugned award is upheld.

35. The Registry is directed to release the entire compensation amount in favour of claimants, strictly as per the terms and conditions, contained in the impugned award.

36. Send down the records after placing copy of the judgment on the file of the claim petition.

****

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

FAOs No. 257, 258 of 2006, 436 of 2007,
445, 521 of 2008, 23 & 32 & 148 of 2012.
Date of decision: 10.04.2015

---

1. **FAO No. 257 of 2006**
   National Insurance Company Ltd. ...Appellant
   Versus
   Smt. Sumna @ Sharda & others ..Respondents
2. **FAO No. 258 of 2006**
   National Insurance Company Ltd. ...Appellant
   Versus
   Smt. Sumna @ Sharda & others ..Respondents
3. **FAO No. 436 of 2007**
   Smt. Kubja Devi ...Appellant
   Versus
   Smt. Neeta Devi & others ..Respondents
4. **FAO No. 445 of 2008**
   National Insurance Company Ltd. ...Appellant
   Versus
   Smt. Dropti Devi & others ..Respondents

5. **FAO No. 521 of 2008**

National Insurance Company Ltd. ...Appellant

Versus

Smt. Kubja Devi & others ..Respondents

6. **FAO No. 23 of 2012**

Smt. Anita Bundel ...Appellant

Versus

Smt. Savitri Devi & others ....Respondents

7. **FAO No. 32 of 2012**

Smt. Savitri Devi & others ...Appellants

Versus

Smt. Anita Bundel & others ...Respondents

8. **FAO No. 148 of 2012**

National Insurance Company Ltd. ...Appellant

Versus

Smt. Savitri Devi & others ...Respondents

Motor Vehicle Act, 1988- Section 149- Insurance policy covered only 2+1 person meaning thereby that the policy covered the risk of the driver and two passengers – Insurer has to satisfy the two awards which are on the highest side and the compensation awarded in other cases is to be satisfied by the Insurer at the first instance with the right of recovery.

(Para-14 to 17)

Cases referred:

United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917

National Insurance Company Limited versus Anjana Shyam & others, 2007 AIR SCW 5237

FAO No. 257 of of 2006

For the appellant: Ms. Devyani Sharma, Advocate.

For the respondents: Mr. Surinder Sharma, Advocate, for respondent No. 2.
Nemo for respondents No. 1 & 2.

FAO No. 258 of 2006

For the appellant: Ms. Devyani Sharma, Advocate.

For the respondents: Nemo for respondents No. 1 to 3.
Mr. Surinder Sharma, Advocate, for respondent No. 4.
Nemo for respondent No. 5.

FAO No. 436 of 2007

For the appellant: Mr. G.S. Rathore, Advocate.

For the respondents: Mr. Virender Singh Chauhan, Advocate, for respondents No. 1 (i), 1(iii) and 2.
Mr. Ramakant Sharma, Advocate, for respondent No. 3.

FAO No. 445 of 2008

For the appellant: Ms. Devyani Sharma, Advocate.

For the respondents: Ms. Sheetal Kimta, Advocate, for respondent No. 1.
Mr. Virender Singh Chauhan, Advocate,
for respondents No. 2(i) and 2(iii).
Mr. Surinder Sharma, Advocate, for respondent No. 3.

FAO No. 521 of 2008

For the appellant: Ms. Devyani Sharma, Advocate.

For the respondents: Mr. G.S. Rathore, Advocate, for respondent No. 1.
Mr. Virender Singh Chauhan, Advocate, for respondents No. 3(i) 3(iii)
Mr. Surinder Sharma, Advocate, for respondent No. 4.

FAO No. 23 of 2012

For the appellant: Mr. Virender Singh Chauhan, Advocate.

For the respondents: Ms. Sheetal Kimta, Advocate, for respondents No. 2 & 3.
Ms. Devyani Sharma, Advocate, for respondent No.4.
Nemo for respondents No. 5 to 7.

FAO No. 32 of 2012

For the appellant: Ms. Sheetal Kimta, Advocate.

For the respondents: Mr. Virender Singh Chauhan, Advocate, for respondents No. 1(a) to 1(d) & No. 2.
Ms. Devyani Sharma, Advocate, for respondent No. 3.

FAO No. 148 of 2012

For the appellant: Ms. Devyani Sharma, Advocate.

For the respondents: Ms. Sheetal Kimta, Advocate, for respondents No. 2 & 3.
Mr. V.S. Chauhan, Advocate, for respondents No. 4, 5 & 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

CMP (M) No. 1757 of 2012 & CMP No. 793 of 2012 in FAO No.23 of 2012

The appellant has moved CMP No. 793 of 2012 to delete the name of deceased respondent No. 1 Shri Devi Ram from the array of the respondents, who has passed away on 23.12.2011. CMP (M) No. 1757 of 2012 has been moved to condone the delay in filing the aforesaid application.

2. Granted. The name of respondent No. 1 is deleted from the array of the respondents. The Registry to make necessary entries in the cause title. The applications are disposed of.

CMP (M) 1880 of 2012 & CMP No. 1879 of 2012 in FAO No. 32 of 2012

3. The appellant has moved CMP No. 1879 of 2012 for bringing on record the legal representatives of deceased respondent No. 1 Mohan Singh Bundel, who has passed away on 15.11.2011. CMP(M) No. 1880 of 2012 has been moved to condone the delay in filing the aforesaid application.

4. Granted. The legal representatives of deceased respondent No. 1 Mohan Singh Bundel are ordered to be brought on record and shall figure as party respondents No. 1(a) to 1(d) in the appeal. Registry to make necessary entries in the cause title. The application stands disposed of.

FAO No. 32 of 2012

5. Issue notice to respondents No. 1 (a) to 1(d). Shri Virender Singh Chauhan, Advocate, waives the same on behalf of the aforesaid respondents.

FAOs No. 257, 258 of 2006, 436 of 2007, 445, 521 of 2008, 23 & 32 & 148 of 2012.

6. All these eight appeals have been preferred against the awards, passed on different dates, in different claim petitions, by the Motor Accident Claims Tribunal, (II), Shimla (hereinafter referred to as "the Tribunal"), which are outcome of a motor vehicular accident involving vehicle-Mahindra Pick-Up bearing registration No. HP-09A-0935 (hereinafter referred to as "the impugned awards"). Thus, I deem it proper to determine all these appeals by a common judgment.

7. In **FAOs No. 257, 258 of 2006, 445, 521 of 2008 & 148 of 2012,** the insurer-National Insurance Company Limited has questioned the impugned awards passed in MAC Petition No. 57-S/2 of 2002, dated 25.04.2006, MAC Petition No. 58-S/2 of 2002, dated 25.04.2006, MAC Petition No. 71-S/2 of 2002, dated 03.05.2008, RBT No. 19-S/2 of 2005/2002, dated 05.07.2007 and MAC Petition No. 3-S/2 of 2009, dated 09.11.2011, respectively, on grounds taken in the memo of appeals.

8. By the medium of **FAOs No. 436 of 2007 and 32 of 2012,** the claimants have disputed the adequacy of the compensation and questioned the impugned awards made by the Tribunal in RBT No. 19-S/2 of 2005/2002, dated 05.07.2007 and MAC Petition No. 3-S/2 of 2009, dated 09.11.2011, respectively, on the grounds taken in the memo of appeals.

9. In **FAO No. 23 of 2012,** the owner-insured has questioned the impugned award passed in MAC Petition No. 3-S/2 of 2009, dated 09.11.2011, to the extent of granting right of recovery to the insurer, on the grounds taken in the memo of appeal.

10. The driver has not questioned the impugned award. Thus it has attained finality, so far as it relates to him.

11. The facts are not in dispute. However, I deem it proper to give brief resume of the case herein.

12. The claimants being victims of the motor vehicular accident had filed claim petitions before the Tribunal for grant of compensation, as per the break-ups given in the respective claim petitions. It is averred in the claim petitions that driver, namely, Veejender Singh Bundel, was driving vehicle-Mahindra Pick-Up bearing registration No. HP-09A-0935, rashly and negligently, on 11.04.2002, at about 7.00 a.m., near Dhaneri, Tehsil and Police Station Theog, District Shimla, caused the accident and Shri Joginder Singh, Rajinder Singh, Partap Verma, Bhagat Ram and Shyam Lal sustained injuries and succumbed to the injuries.

13. The fact of the insurance is not in dispute. The only dispute herein is whether the insurer has to satisfy all the impugned awards or only to the extent, as per the insurance contract.

14. As per the insurance policy, Ext. RW-3 on the file of MAC Petition No. 58-S/2 of 2002, the insurance contract covers only 2 + 1 persons, meaning thereby, the policy covers the risk of the driver and two passengers. The insurer has to satisfy the liability as per the terms and conditions of the insurance contract.

15. My this view is fortified by the judgment of the Apex Court in the case titled as **United India Insurance Company Limited versus K.M. Poonam & others,** reported in **2011 ACJ 917.** It is apt to reproduce relevant portion of para 24 of the judgment herein:

> "24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle.

16. It is also apt to reproduce para 15 of the judgment of the Apex Court in the case titled as **National Insurance Company Limited versus Anjana Shyam & others,** reported in **2007 AIR SCW 5237,** herein:

> *"15.* In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of Section 147(1)(b)(ii) of the Act. We are of the view that the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading."

17. Learned Counsel for the appellant-Insurance Company argued that at the best, the appellant-insurer-Insurance Company has to satisfy the two awards, which are at higher side and rest of the liability is on the insured-owner.

18. Viewed thus, the total compensation amount of two awards in MAC Petition No. 58-S/2 of 2002, titled as Smt. Sumna alias Sharda & others versus Sh. Vijender Bundel alias Nittu & others, dated 25.04.2006 and MAC Petition No. 71-S/2 of 2002, titled as Dropti Devi versus Shri Mohan Lal & others, dated 03.05.2008, is to be satisfied by the insurer-Insurance Company and the compensation amount awarded in other awards, is to be satisfied by the insurer with the right of recovery. The insurer-Insurance Company is at liberty to move an application for recovery before the Tribunal.

19. The claimants have filed **FAOs No. 436 of 2007 and 32 of 2012**, challenging the awards made by the Tribunal in RBT No. 19-S/2 of 2005/2002, dated 05.07.2007 and MAC Petition No. 3-S/2 of 2009, dated 09.11.2011, respectively, for enhancement of the compensation.

20. I have gone through the claim petitions, evidence and the findings recorded by the Tribunal.

21. I am of the considered view that the amount of compensation awarded is just and appropriate, cannot be said to be inadequate. It is also to be kept in mind that the insurance company has to satisfy only two awards, which are at higher side and the rest are to be satisfied by the insurer at the first instance with right of recovery. Viewed thus, the claimants have not made out a case for enhancement. Accordingly, the appeals filed by the claimants, i.e. **FAOs No. 436 of 2007 and 32 of 2012** are dismissed.

22. **In FAO No. 23 of 2012**, the insured-owner has questioned the impugned award so far as it relates to saddling him with the liability.

23. I have discussed the issue hereinabove. The insurer has to satisfy the liability in terms of the insurance contract, as discussed hereinabove. The Tribunal has rightly granted the right of recovery to the insurer-Insurance Company.

24. Having said so, the impugned awards are modified, as indicated above and the appeals are disposed of.

25. The Registry is directed to release the entire compensation amount in favour of claimants, strictly as per the terms and conditions, contained in the impugned award.

26. Send down the records after placing a copy of the judgment on the file of the claim petitions.

****

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

FAO Nos.62, 63, 64, 65, & 66 of 2008
Decided on: April 10, 2015.

1. FAO No.62 of 2008:	
The New India Assurance Company Ltd.	...Appellant.
Versus	
Janak Rani and others	...Respondents.
2. FAO No.63 of 2008:	
The New India Assurance Company Ltd.	...Appellant.
Versus	
Suraksha Devi and another	...Respondents.

3. FAO No.64 of 2008:

The New India Assurance Company Ltd. ...Appellant.

Versus

Hans Raj and others ...Respondents.

4. FAO No.65 of 2008:

The New India Assurance Company Ltd. ...Appellant.

Versus

Ranjeet Singh and others ...Respondents.

5. FAO No.66 of 2008:

The New India Assurance Company Ltd. ...Appellant.

Versus

Meera Rani and others ...Respondents.

Motor Vehicle Act, 1988- Section 149- the burden is upon the insurer to prove the breach of the policy- Insurer had not led any evidence to prove the breach- Insurer had failed to prove that driver of the offending vehicle did not have a valid and effective licence or vehicle was being plied in violation of the terms and conditions of the policy-held that the insurer was rightly held liable by the MACT. (Para-7)

Case referred:

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

For the appellant(s): Mr.Praneet Gupta, Advocate.

For the respondents: M/s Onkar Jairath, Ajay Sharma and Subhash Sharma, Advocates.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral):

By the medium of FAO Nos.62, 63 and 66 of 2008, the insurer-appellant has questioned the common award, dated 29th October, 2007, passed by Motor Accident Claims Tribunal(II), Una, H.P., (for short, the Tribunal), in Claim Petition No.43 of 2004, titled Meera Rani vs. Rakesh Kumar and another, Claim Petition No.44 of 2004, titled Suraksha Devi vs. Rakesh Kumar and another, and Claim Petition No.45 of 2004, titled Janak Rani and another vs. Rakesh Kumar and another, while in FAO No.64 of 2008, challenge is to the award, dated 29th October, 2004, in Claim Petition No.42 of 2004, titled Hans Raj and others vs. Rakesh Kumar and another, and in FAO No.65 of 2008, the award, dated 29th October, 2007, passed in Claim Petition No.41 of 2004, titled Ranjit Singh and others vs. Rakesh Kumar and another, is under challenge, (for short, the impugned awards).

2. Vide the impugned awards, the Claim Petitions, filed by the claimants, came to be determined and compensation was granted in their favour, by saddling the insurer with the liability.

3. The owner/insured and the claimants have not questioned the impugned awards on any count, thus, the same have attained finality in so far as the impugned awards relate to them.

4. The insurer, feeling aggrieved, has questioned the impugned awards on the ground that the Tribunal has fallen in error in saddling the insurer with the liability, inasmuch as the driver of the offending vehicle was not having a valid and effective driving

licence and the owner has committed willful breach of the terms and conditions of the insurance policy.

5. The Tribunal, after going through the entire evidence, has recorded categorical findings on issues No.3 and 4 that the driver of the offending vehicle was having a valid and effective driving licence and that the vehicle was not being plied in contravention to the insurance policy.

6. Onus to prove issues No.3 and 4 was on the insurer. It is apt to place on record that the insurer has not led any evidence to prove these issues, thus has failed to discharge the onus.

7. During the course of hearing, the learned counsel for the appellant/insurer was asked whether there is any proof on the file in terms of Section 149 of the Motor Vehicles Act, 1988, read with the judgment of the Apex Court in **National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531,** to the effect that the insured/owner has committed willful breach. He frankly conceded that the insurer has not led any evidence. Thus, the insurer has failed to prove that the driver of the offending vehicle was not having a valid and effective driving licence or that the vehicle was being plied in violation of the terms and conditions of the insurance policy.

8. Having said so, all the appeals are mis-conceived and the same are dismissed accordingly. Consequently, the impugned awards are upheld.

9. The Registry is directed to place a copy of this judgment on the record of each file and to release the compensation amount in favour of the claimants, strictly in terms of the conditions contained in the impugned awards, if not already released.

****

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

Oriental Insurance Company Ltd. ...Appellant.
Versus
Shri Kewal Singh & others ...Respondents.

FAO No. 400 of 2007
Decided on: 10.04.2015

Motor Vehicle Act, 1988- Section 149- Insurer was held liable to pay the amount with the right of recovery- held, that insurer is supposed to satisfy the liability of 3rd party with the right of recovery, even if the owner/insured and driver had committed willful breach of the terms and conditions of the policy. (Para-6 and 7)

For the appellant: Mr. J.L. Kashyap, Advocate.
For the respondents: Mr. Ajay Sharma, Advocate, for respondent No. 1.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is award, dated 27th June, 2007, made by the Motor Accident Claims Tribunal (III), Kangra at Dharamshala (for short "the Tribunal") in

M.A.C.P. No. 15-D/07/02, titled as Kewal Singh versus Rajeev Kumar and others, whereby compensation to the tune of Rs.1,93,400/- with interest @ 7.5% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimant-injured, namely Shri Kewal Singh and the appellant-insurer was saddled with liability with right of recovery (for short "the impugned award").

2. The claimant-injured, 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 Tribunal has fallen in error in directing the insurer to satisfy the award at the first instance and then to recover the same from the owner-insured and the driver.

4. I have perused the record.

5. I wonder why such a mighty and reputed Insurance Company has filed the appeal in hand.

6. It is known to everyone and is beaten law of land that the insurer is supposed to satisfy the liability of third party with right of recovery if the owner-insured and the driver have committed the willful breach.

7. The Tribunal has rightly marshalled out the facts and law and came to the conclusion that the owner-insured and the driver have committed the willful breach and directed the appellant-insurer to satisfy the award at the first instance with a right to recover the same from them.

8. Having said so, no illegality is found in the impugned award. Accordingly, the appeal merits to be dismissed and the impugned award is to be upheld.

9. The appeal is dismissed and the impugned award is upheld, as indicated hereinabove.

10. 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 through payee's account cheque.

11. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

Shri Ranjit Singh ...Appellant.
Versus
Shri Ram Asra & another ...Respondents.

FAO No. 392 of 2007
Decided on: 10.04.2015

Motor Vehicle Act, 1988- Section 149- The Insurance policy covered the risk of two passengers-held that policy was a package policy which covered risk not only of third party but also of the occupants of the vehicle. (Para-8 and 9)

Cases referred:
New India Assurance Company Limited versus Smt. Anuradha and others, 2014 (1) Him. LR 208

For the appellant: Mr. Ramakant Sharma, Advocate.
For the respondents: Nemo 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 award, dated 14th June, 2007, made by the Motor Accident Claims Tribunal, Solan (for short "the Tribunal") in MAC Petition No. 16-NL/2 of 2007/06, titled as Shri Ram Asra versus Shri Rajnit Singh and another, whereby compensation to the tune of Rs.1,57,871/- with interest @ 9% per annum from the date of filing of the petition till its deposition came to be awarded in favour of the claimant-injured, namely Shri Ram Asra and the appellant-insured was saddled with liability (for short "the impugned award").

2. The claimant-injured and the insurer have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-owner-insured has questioned the impugned award on the ground that the Tribunal has fallen in error in saddling him with liability and exonerating the insurer.

4. Thus, the only question involved in this appeal is - whether the Tribunal has rightly held that the risk of the pillion rider was not covered? The answer is in negative for the following reasons:

5. I have perused the record. While going through the insurance cover, Ext. R-1, and the insurance policy, Ext. R-4, one comes to an inescapable conclusion that the risk of the pillion rider is covered.

6. Learned counsel for the insurer was confronted with the insurance cover and the insurance policy, Ext. R-1 and R-4, respectively. He has frankly conceded that in terms of the insurance cover, Ext. R-1, risk of two passengers is covered.

7. Perusal of the insurance cover, Ext. R-1, does disclose that the risk of two passengers was covered. It is apt to reproduce relevant portion of the insurance cover, Ext. R-1, herein:

DESCRIPTION OF THE VEHICLE INSURED

Make & Registration No. of the vehicle	*Year of manufacture*	*Cubic capacity*	*Licensed Carrying Capacity*		*Insured's estimate of value including accessories*
			Goods (Gross vehicle weight)	*Passengers*	

HP 12 A 0639 Bj Chetak	*2000*	*150 cc*		*Two*	*7000/-*

8. I deem it proper to record herein that the insurance policy, Ext. R-4, on the face of it, is a package policy and a package policy covers the risk not only of a third party, but also of the occupants of the vehicle.

9. Even otherwise, this Court in **New India Assurance Company Limited versus Smt. Anuradha and others,** reported in **2014 (1) Him. LR 208,** has held that the comprehensive/package policy covers the risk of persons travelling in the vehicle including the owner.

10. Having said so, the Tribunal has fallen in an error in exonerating the insurer and saddling the owner-insured with liability.

11. Viewed thus, the appeal deserves to be allowed. Accordingly, the appeal is allowed and the impugned award is modified by providing that the insurer has to satisfy the entire liability.

12. Insurer is directed to deposit the awarded amount within six weeks before the Registry. On deposition of the amount, the same be released in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award.

13. The amount already deposited by the appellant-insured before the Registry be released in his favour through payee's account cheque.

14. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

Roshan Lal ...Appellant.

Versus

State of H.P. ...Respondent.

Criminal Appeal No.351 of 2011
Reserved on : 31.3.2015
Date of Decision : April 10, 2015

Indian Penal Code, 1860- Section 302-Accused had a dispute with his wife- he gave beating with Danda on her head resulting in her death- he went to the police station and confessed to commission of murder- an FIR was registered at his instance- the fact that accused had made a confessional statement to the police on which FIR was registered was duly proved by the testimonies of the police officials- medical evidence also proved that death was caused by a stick blow- the fact that accused used to beat his wife was also proved by the prosecution witnesses- accused had not examined any person to prove the defence taken by him- held, that in these circumstances, prosecution version was duly proved and accused was rightly convicted by the Court. (Para-14 to 31)

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 : Mr. Sunil Chaudhary, Advocate.
For the Respondent : Mr. Ashok Chaudhary, Additional Advocate General and Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Roshan Lal, hereinafter referred to as the accused, has assailed the judgment dated 9.10.2009, passed by the Presiding Officer, Fast Track Court, Mandi, Himachal Pradesh, in Sessions Trial No.4 of 2008, titled as *State of Himachal Pradesh v. Roshan Lal*, whereby he stands convicted of the offence punishable under the provisions of Section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life and pay fine of Rs.5000/-, and in default of payment thereof to further undergo rigorous imprisonment for a period of six months.

2. It is the case of prosecution that accused Roshan Lal had a dispute with his wife Meena Devi (deceased). Despite his assurances of mending his ways, cruelties continued to be perpetuated. He would beat not only his wife but also his children. In the evening of 26.9.2008, accused again quarreled with the deceased. He also gave a blow with a *danda* on her head, resulting into her death. On 27.9.2008, he of his own went to Police Station, Jogindernagar and confessed with SHO Dorje Ram (PW-16) of having committed murder. Version narrated by the accused was fed in the Computer by HC Mangat Ram (PW-12) and print of the statement (Ex. PW-16/A) so taken out was read over and explained to the accused, which was signed by him. Accordingly, FIR No.189, dated 27.9.2008 (Ex.PW-16/A) was registered at Police Station, Jogindernagar. The SHO called Sanjeev Kumar (PW-7) and Manoj Sharma (PW-15) to the Police Station, in whose presence accused again made a disclosure statement (Ex.PW-7/A) of having murdered his wife and getting the incriminating articles identified and recovered. In the presence of independent witnesses Ward Member Durga Singh (PW-1) and Up Pradhan Durga Singh (PW-14), accused got the *danda*, blood stained clothes and dead body recovered from his room. Dorje Ram got the spot photographed. He prepared inquest report (Ex. PW-1/A) and sent the dead body for postmortem. On the spot, he seized *Danda* (Ex.P-2), blood stained clothes (Ex. P-10 and P-11), blood stained pillow cover (Ex.P-12) and other incriminating material, which were sealed with seal impression 'T'. Blood stained clothes (Ex.P-4 & P-5) of the accused, which he had washed, were also seized by the police. Dr. Mikesh Kumar (PW-6) and Dr. R.N. Jarial (PW-8), conducted the postmortem and issued report (Ex. PW-6/C), which revealed the deceased

to have died on account of injury to vital of the brain. Incriminating material recovered from the spot was sent for chemical analysis and report of the FSL, Junga (Ex.PW-6/B) obtained and 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 an offence punishable under the provisions of Section 302 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 16 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 the following defence:

> "I am innocent and a false case has been prepared/registered against me. Also stated that on dated 27-09-2008, I and my wife got up in the morning then, I went to answer the call of nature in the field/Nala and when after some time I returned back to my house I saw the blood stains scattered in the verandah. Then I went to my room and saw my wife lying on the cot and I checked her. I found that she was dead and her head and clothes were stained with blood. Then I came out from my room and called the neighbourer, but no-one came out from their houses. Then, I shut the door of my house and went to the police station to lodge the FIR but when I reached at the police station and told the police that somebody has murdered my wife and I don't know who has murdered my wife. But the police official slapped me and gave beatings to me and told me that it is me who has murdered my wife and took my signatures forcibly on some blank papers."

Accused preferred not to lead any evidence in defence.

5. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused of the charged offence and sentenced him as aforesaid. Hence, the present appeal by the accused.

6. Prosecution case rests on circumstantial evidence. None has seen the accused murder the deceased. It be also observed that accused has not led any evidence to probablize his defence. Neither any neighbour nor his family has supported him. Accused also did not protest against the alleged beatings given by the police officials. Accused has not explained the reason of not informing the factum of death of his wife either to his children, neighbour or anyone of his relatives. It is not that village Aal lies in the remotest corner of the State, which is totally cut-off by all means of communication. It is also not that the accused has no relatives,to whom he could have disclosed the factum of murder of his wife.

7. Not only in his statement, under the provisions of Section 313 of the Code of Criminal Procedure, but also from the line of cross-examination, it is apparent that dead body of the deceased was recovered from the house of the accused. He was last person to be in the company of the deceased. Even according to the accused, he had gone to the fields only to ease out himself. Shortly he returned and saw his wife dead. Normal human conduct would have been to call the relatives or the Pradhan, if neighbourhood not responded to his oral calls.

8. 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. [See: *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.].

9. Also, apex Court in *Padala Veera Reddy v. State of Andhra Pradesh and others,* 1989 Supp (2) SCC 706, Court 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."
>
> (Also 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).

10. 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.

11. 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 guilty of the accused.

12. Prosecution wants the Court to believe that the accused, after committing the crime, went to the police station and confessed his guilt with Dorje Ram. Version so narrated by the accused was typed out on the Computer by Mangat Ram (PW-12) and print thereof was registered as FIR (Ex. PW-16/A).

13. Admissibility of the confession made by the accused, before the Police Officer, at the time when he was not in custody, has been dealt with by the trial Court.

Without expressing any opinion on the correctness of the same, we clarify that we have not taken into account this confessional statement, while coming to the conclusion as to whether prosecution has been able to establish its case, against the accused, beyond reasonable doubt or not.

14. When we peruse the testimony of Dorje Ram, we find that there is some doubt with regard to the version so narrated by him. The doubt emanates only on account of tardy investigation, which he has conducted in the present case. It is not that the witness has deposed falsely or that his statement is rendered to be uninspiring in confidence, on material facts. It is also a settled position of law that mere faulty investigation would not render the prosecution case to be fatal. Such part of the statement, which inspires confidence, can be considered for determining the guilt of the accused.

15. Dorje Ram states that on 27.9.2008, accused came to the Police Station and disclosed that on 26.9.2008, he quarreled with his wife, for the reason that she had returned late from the fields. Even prior thereto, they had several quarrels, as a result of which he used to beat her. On the fateful day, he gave a blow of *danda* on the head of the deceased, as a result of which she died. After locking his house, he has come to the Police Station demanding legal action. Mangat Ram (PW-12), after typing his statement, took out the print, which was read over and explained to him, which he admitted to be correct. The same was registered as FIR (Ex. PW-16/A). Witness further states that thereafter he associated independent witnesses Rajiv Kumar (PW-7) and Manoj Sharma (PW-15), before whom accused again made a similar statement (Ex.PW-7/A). He then associated independent witnesses Ward Member Durga Singh (PW-1) and Up Pradhan Durga Singh (PW-14), in whose presence accused identified the room, where the dead body was lying; got recovered the dead body; and handed over the weapon of offence. Witness further states that he took into possession blood stained clothes (Ex.P-10 & P-11) of the deceased and pillow cover (Ex. P-12). The seized articles were sealed with seal impression 'T'. He prepared inquest report (Ex. PW-1/A) and sent the dead body for postmortem. The spot was got photographed. Also spot map Ex.PW-16/B) was prepared on the spot. The sealed samples were sent for chemical analysis and reports (Ex.PW-6/B & PA) obtained and taken on record. He presented the challan (main and supplementary) in the Court.

16. Now, in cross-examination, we find that on material fact of recording of disclosure statement (Ex. PW-7/A) and recovery of the incriminating articles, linking the accused to the crime, there is either any improvement nor any contradiction or embellishment. The witness can be believed to have deposed truthfully. He admits that arrest memo of the accused is not on the Court file and that the factum of FIR being sent to the Magistrate is not so recorded in the FIR (Ex. PW-16/A) or that the photographs, taken on the spot, are also not on the Court file. We have dealt with this point in the later part of the opinion. He admits to have enquired from the neighbours about the accused, yet did not record their statements. He admits not to have obtained finger prints from *danda* (Ex. P-2), lock and key (Ex. P-7 & P-8). It has come on record that the matter was also investigated from the point of view of involvement of third person in the crime. Only for these reasons, we have initially expressed our doubt with regard to the correctness of his version. But, then as we have observed, there are factors concerning faulty investigation and not germane to the fact in issue and material aspect about the guilt of the accused. We do find the Magistrate was otherwise promptly informed of the crime. In the teeth of otherwise inspiring testimony of the witnesses to recovery, no finger print sampling was required.

17. Now, when we examine the testimonies of Rajiv Kumar and Manoj Sharma, before whom confessional statement (Ex. PW-7/A) was made, we do not find any illegality or discrepancy. Rajiv Kumar categorically states that on 27.9.2008, on the asking of the SHO,

he went to Police Station, Jogindernagar. In his presence, as also in the presence of Manoj Sharma and the SHO, accused made a disclosure statement to the following effect:

> "In the evening of 26-9-2008 he gave the danda blow on the head of his wife and he killed her and the dead body, danda and blood stained clothes are kept in the house/room and he can effect the recovery of dead body, danda and blood stained clothes."

After such statement was recorded, on further query, accused disclosed the cause of crime. He had a fight with his wife. We do not find testimony of this witness to have been impeached in any manner.

18. Though Manoj Sharma corroborates such version but does state that the accused gave his statement in *Mandyali* language (local dialect). However, Dorje Ram has clarified that the statement was read over and explained to the accused and only after admitting the contents thereof to be correct, accused and the witnesses appended their signatures on the same. It is not the case of the accused that he is not conversant with Hindi language. In fact, from his statement, under the provisions of Section 313 of the Code of Criminal Procedure, as also document (Ex.PW-7/A), it is apparent that accused having signed in English was familiar with all languages. It is not that he is a rustic villager.

19. Thus, in our considered view, prosecution has been able to establish, beyond reasonable doubt, the circumstance of confessional statement so made by the accused, admitting his guilt.

20. The next circumstance, pressed by the prosecution is recovery of the dead body, weapon of offence and other incriminating articles.

21. That dead body was recovered from the house of the accused is not disputed by him. We have already observed that the accused has not been able to probablize his defence. Be that as it may, from the conjoint reading of testimonies of Durga Singh (PW-1), Durga Singh (PW-14) and Dorje Ram (PW-16), it is evident that dead body was recovered from the house of the accused.

22. Circumstance of the accused showing the place where the dead body was lying and other articles were recovered stood proved by independent witnesses. Durga Singh (PW-1), who is Panch of Gram Panchayat, Dar, states that on 27.9.2008, he was associated as a witness by the police. In his presence, accused opened the lock of his house with the key, which he had kept in his pocket. In the second room of the house, dead body of Meena Devi, wife of the accused, was lying on the cot. Since the room was dark, dead body was lifted and placed outside, in the Courtyard. Police inspected the dead body and there were injuries on the face. The dead body was identified by him as also Durga Singh (PW-14). Whereafter accused brought *danda* (Ex.P-2) and handed it over to the police. It was sealed with seal impression 'T', specimen of which is (Ex. PW-1/C). Clothes of the accused (Ex. P-4 & P-5) were also recovered vide memo (Ex. PW-1/D). Blood stained clothes of the deceased and pillow cover (Ex.P-12) were also seized and sealed with seal impression 'T'. Blood stained ashes (Ex.P-15) were taken into possession vide Memo (Ex.PW-1/H), and broken bangles (Ex. P-18) and ear-rings (Ex.P-19 & P-20) belonging to the deceased were also seized by the police vide Memo (Ex.PW-1/J). Now, in cross-examination, we do not find testimony of the witnesses to have been impeached at all. Witness only admits an incident of previous quarrel between accused Roshan Lal and his neighbour Khem Singh. But, this does not, in any manner, probablizes the defence of the accused. Except for suggesting it to this witness, defence of animosity qua Khem Singh has not been put to any other witness.

23. Statement of this witness, as we have seen, is fully corroborated by Dorje Ram. Thus, prosecution has been able to establish that the accused opened the lock of his house with the key which he had in his pocket and took the police inside the room, where the dead body was lying, which was so recovered by the police. Prosecution has also been able to prove recovery of the *danda* and other incriminating articles.

24. We further find that viscera and incriminating articles were deposited with MHC Mangat Ram, who made entries in the Malkhana Register (Ex.PW-12/B). The sealed parcels were handed over by Mangat Ram to Milkhi Ram (PW-11), who vide road certificate (Ex.PW-12/C & 12/D) took the same to the Forensic Science Laboratory (Junga), where it was deposited on 4.10.2008. Witnesses admit that so long as the property remained with them, it was kept in safe custody. Report dated 29.4.2009 (Ex. PA) of the Forensic Science Laboratory reveals that blood was found on the weapon of offence and clothes of the deceased, but the result was found inconclusive in respect of blood group. However, blood found on the shirt (Ex.P-25) and *Salwar* (Ex. P-24) matched with that of the deceased and the blood found on the shirt of Roshan Lal was insufficient for further examination. However, second report (Ex.PW-6/B) conclusively establishes that no alcohol/poison was detected in the viscera.

25. In the absence of any positive scientific evidence with regard to blood on the weapon of offence, can it be said that the prosecution case is rendered doubtful? In our considered view – No. This we say so for the reason that the doctors (PW-6 and P-8), who conducted the postmortem of the dead body, have uncontrovertedly opined that deceased could have received the injuries with the *danda* (Ex.P-2). Cause of death, according to the doctor was injury to "vital of brain underlying fracture right temporal bone of skull". On physical examination doctors found that the deceased, who was well built, had received an injury on the right temporal region of the skull, where blood had clotted, and the bone was fractured. Postmortem report (Ex. PW-6/C) corroborates such fact.

26. Thus, prosecution has been able to establish the cause of death being blow given with *danda* (Ex.P-2), which was recovered pursuant to the disclosure statement made by the accused.

27. We find the motive of crime, so stated by the witnesses to the confessional statements, to have been corroborated by other witnesses examined by the prosecution. Kanshi Ram (PW-2), father of the accused, has deposed that the accused would often beat the deceased. A meeting of the Panchayat was called in which accused agreed to improve his conduct. Also, six months prior to the incident, accused had desired the deceased to vacate the house as he wanted to sell the same to his brother Om Parkash. From his unrebutted and uncontroverted testimony, it is apparent that accused was not having any independent income and as such was not in a position to bring up his family. From his testimony, it also stands established that school going son and daughter of the accused were not staying with him, but in the house of their maternal grandparents and uncles. The witness denies having made any application, alleging involvement of one Prakash Chand in the crime.

28. Govind Ram (PW-3), son of the accused, has corroborated the version of his grandfather Kanshi Ram.

29. Neena Devi (PW-4), an acquaintance of the deceased, has further established and corroborated the prosecution version of the accused giving beatings to the deceased. She clarifies that on 26.9.2008, she and deceased had cut the grass together in the fields. Thereafter, deceased went to her house where she was residing with her husband.

30. Sohan Lal (PW-5) is the Up Pradhan of the concerned Gram Panchayat. He has corroborated the version of Kanshi Ram of having convened the *Khangi Panchayat*, on the complaints of the deceased. The factum of accused giving beatings to the deceased is also deposed by this witness. In fact, from his testimony it is clear that accused not only confessed to his misconduct but undertook to improve his conduct and not beat his wife again. From his testimony, it is evident that the accused did not mend his ways.

31. We find that for unexplainable reason, Patwari Jai Singh (PW-9), who prepared Tatima (Ex.PW-9/A) of the house, resiled from his previous statement. However, through the testimony of Khem Chand (PW-13), previous statement (Ex.PW-13/A) of this witness, which was so recorded by the police, with which the witness was confronted, stands proved on record. In any event, factum of the witness not supporting the prosecution, would have no bearing as the place of recovery of the dead body, and the factum of the house belonging to the accused, is not in dispute.

32. Contradiction in the testimonies of the witnesses, with regard to timing, stands succinctly dealt with by the trial Court in Para-73 of the judgment. FIR was received by the Judicial Magistrate in his Office on the very same day at 2 p.m. Also, it cannot be alleged that there was any ulterior motive on the part of the prosecution to have deliberately delayed the same. There is no suggestion of due deliberation and consultation before recording of the FIR. Remand papers reveal the accused to have been arrested very same day.

33. We find non-examination of the neighbours would not render the prosecution case to be doubtful, for it is nobody's case that such persons were prime suspects.

34. We find the accused to have taken a false defence. He admits that on 27.9.2008, his wife was alive. In the morning, he went to answer the call of nature and on his return saw blood stains scattered in the veranda and inside the room. His wife was lying dead on the cot. He called his neighbours but none came from their houses. Thereafter, shutting the door of his house, he went to the police to lodge the report. Now significantly, it is alleged that police not only gave him beatings but after forcibly getting blank papers signed, falsely implicated him. None has been examined by the accused in the Court to prove that deceased was alive in the morning of 27.9.2008 or that any beatings were given by the police. He never protested against his false implication or beatings at the time of his remand. In fact from his admission circumstance of the deceased being last in the company of the deceased stands proved.

35. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused 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 accused. 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 accused 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. In our considered view, prosecution has been able to establish guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, not only ocular but also corroborative in the shape of recovery of weapon of offence and other incriminating material.

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/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

****

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

United India Insurance Company Ltd. ...Appellant.

VERSUS

Kedar Singh and others ...Respondents.

FAO No.52 of 2008.
Decided on: April 10, 2015.

Motor Vehicle Act, 1988- Section 149- Insurer has to satisfy the liability with respect to 3rd party with the right of recovery if the insured and the driver had committed willful breach.(Para-6)

For the appellant: Mr.Ashwani K. Sharma, Advocate.
For the respondents: Mr.Vijay Chaudhary, Advocate, for respondent No.1.
Mr.H.R. Bhardwaj, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral):

By the medium of the present appeal, the insurer has questioned the award, dated 24th October, 2007, passed by Motor Accident Claims Tribunal(III), Shimla, H.P., (for short, the Tribunal), whereby Claim Petition No.77-S/2 of 2005/03, titled Kedar Singh vs. Rach Pal and others, came to be determined and compensation to the tune of Rs.1,60,000/-, with interest at the rate of 7.5% per annum, was awarded in favour of the Claimant and the insurer was saddled with the liability, with right of recovery, (for short, the impugned award).

2. The claimant, the owner/insured and the driver have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them. It is also placed on record that the driver was proceeded against ex parte before the Tribunal.

3. The only controversy needs to be set at rest in this appeal is - Whether the insurer was rightly saddled with the liability?

4. The main thrust of argument of the learned counsel for the appellant was that the insured was in breach and was to be saddled with the liability.

5. The argument is not sustainable as it is beaten law of the land that the insurer has to satisfy the third party claims, but with a right to recover in such cases.

6. I have gone through the impugned award, is well reasoned and needs to be upheld. Accordingly, the appeal fails and the same is dismissed. However, the appellant/insurer is at liberty to lay a motion for effecting recovery from the insured.

7. The Registry is directed to release the compensation amount in favour of the claimant strictly in terms of the impugned award, through payee's account cheque.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

H.P. State Electricity Board Ltd. .....Appellant
Versus
K.C. Aggarwal ...Respondent.

LPA No. 47 of 2012.
Date of decision: 16th April, 2015.

Constitution of India, 1950- Article 226- Writ Petitioner had filed a petition for quashing the order of re-fixation of his pay after the age of superannuation and for quashing the order of recovery – held, that there was no averment in the reply that fixation of the pay was made at the instance of the petitioner- entire exercise was made by the Board on its own, therefore, it is not permissible to effect the recovery- Appeal dismissed. (Para-5 to 7)

Case referred:
State of Punjab and others etc. vs. Rafiq Masih (White Washer) etc. 2015 AIR SCW 501

For the appellant: Mr. Satyen Vaidya, Advocate.
For the respondent: Mr. Sanjeev Bhushan, Advocate.

The following judgment of the court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This Letters Patent Appeal is directed against the judgment and order dated 15.9.2011, passed by the learned Single Judge in CWP No. 4160 of 2009, titled *Shri K.C. Aggarwal versus H.P. State Electricity Board,* whereby the writ petition came to be allowed with command to the respondent not to effect recovery from the petitioner, for short "the impugned judgment".

2. Petitioner Shri K.C. Aggarwal, filed Civil Writ Petition No. 4160 of 2009, for quashing the order dated 12.8.2009 Annexure P19, appended with the writ petition, whereby fixation of his pay and recovery order was made, that too, after reaching the age of superannuation.

3. Learned Single Judge, after examining the pleadings, came to the conclusion that the petitioner has not played any role in fixation of pay, was fixed by writ

respondent/appellant, made the wrong order without hearing him and ordered its quashment.

4. The writ respondent/appellant, feeling aggrieved by the said judgment, filed the present appeal on the grounds taken in the memo of appeal.

5. Admittedly, there is no averment contained in the appeal or in the reply filed in the writ petition that the fixation of pay was made at the behest of the writ petitioner or any role was attributed to him. The entire exercise was made by the respondent-Board at its own. The Writ Court has discussed the entire pleadings and the law applicable right from paras 8 to 15 of the impugned judgment.

6. The apex Court in ***State of Punjab and others etc. vs. Rafiq Masih (White Washer) etc***. reported in ***2015 AIR SCW 501*** has laid down the same principles of law. It is apt to reproduce paras 6, 7, 9,10 and 11 of the said judgment herein.

> *"6.In view of the conclusions extracted hereinabove, it will be our endeavour, to lay down the parameters of fact situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same. In our considered view, the instant benefit cannot extend to an employee merely on account of the fact, that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of the employee.*
>
> *7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.*
>
> *8. ....*
>
> *9. The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the doctrine of equality, can be found in Articles 14 to 18, contained in Part III of the Constitution of India, dealing with "Fundamental Rights". These Articles of the Constitution, besides assuring equality*

before the law and equal protection of the laws; also disallow, discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracized section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39, 39A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the "Directive Principles of State Policy". These Articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice - social, economic and political, by inter alia minimizing monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.

10. In view of the afore-stated constitutional mandate, equity and good conscience, in the matter of livelihood of the people of this country, has to be the basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent, that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India.

11.....Premised on the legal proposition considered above, namely, whether on the touchstone of equity and arbitrariness, the extract of the judgment reproduced above, culls out yet another consideration, which would make the process of recovery iniquitous and arbitrary. It is apparent from the conclusions drawn in Syed Abdul Qadir's case , that recovery of excess payments, made from employees who have retired from service, or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer. It cannot be forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement). Keeping the aforesaid circumstances in mind, we are satisfied that recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement, or

soon before retirement. A period within one year from the date of superannuation, in our considered view, should be accepted as the period during which the recovery should be treated as iniquitous. Therefore, it would be justified to treat an order of recovery, on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee's retirement, or within one year of the date of his retirement on superannuation.....”

7. Having said so, we are of the considered view that the Writ Court has rightly made the impugned judgment, needs no interference.

8. Accordingly, the appeal is dismissed alongwith pending applications, if any.

****

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

State of Himachal Pradesh .....Appellant.
Versus
Kamal Dev .....Respondent.

Cr. Appeal No. 419 of 2008
Reserved on: April 10, 2015.
Decided on: April 16, 2015.

Indian Penal Code, 1860- Sections 376 and 506- Accused raped the prosecutrix- prosecutrix narrated the incident to her mother when she was pregnant by 4-5 months- Investigating Officer admitted that prosecutrix had not disclosed the place where she was raped- Investigating Officer had not even prepared site plan- radiological age of the prosecutrix was between 17 to 19 years – the delay was not explained- held, that in these circumstances, prosecution version was not proved and acquittal of the accused was justified. (Para-13 and 14)

For the appellant: Mr. M.A.Khan, Addl. AG.
For the respondent: Mr. Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 15.3.2008, rendered by the learned Sessions Judge, Chamba, H.P. in Sessions Trial No. 3 of 2008, whereby the respondent-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 376 and 506 IPC, has been acquitted.

2. The case of the prosecution, in a nut shell, is that the prosecutrix (PW-1), had gone to her maternal Uncle's house in Village Kumarkha, in the month of March. When she was returning to her home from her maternal Uncle's house, accused followed her. He asked her to marry him. Thereafter, he caught hold of her from arm and took her aside and committed rape without her consent and also criminally intimidated her with dire

consequences. The prosecutrix narrated the incident to her mother after about 4-5 months. Thereafter, FIR was registered. The prosecutrix was medically examined and 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 7 witnesses. The accused was also examined under Section 313 Cr.P.C. He has denied the prosecution case. The learned trial Court acquitted the accused, as noticed hereinabove.

4. Mr. M.A.Khan, learned Addl. Advocate General, for the State has vehemently argued that the prosecution has proved the case against the accused. On the other hand, Mr. Lakshay Thakur, Advocate, has supported the judgment of the learned trial Court dated 15.3.2008.

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

6. The prosecutrix has appeared as PW-1. She deposed that she had gone to her maternal Uncle's house at Kumarkha. The accused followed her when she was returning to home from Uncle's house. He caught hold of her from her arm and took her to the side of path and committed forcible intercourse with her twice or thrice. She conceived and was having pregnancy of 4-5 months. She asked the accused to marry her but he refused and asked her to terminate the pregnancy. She told her mother that she was pregnant by 4-5 months. She was medically examined. In her cross-examination, she deposed that the passage where the incident has happened was frequently visited by the passersby. The accused took her from the passage upto a distance of five yards. She raised hue and cry at that time. It was 2:00 PM. She did not raise any alarm when the accused was committing sexual intercourse with her. She gave tooth bite and she also scratched the face of the accused. The accused again committed rape with her when she was grazing cattle at jungle Kazalkot. She disclosed to her mother about the conceiving of child in the month of June, 2008. Volunteered that she did not remember the exact date. Her mother discussed the matter with Mama and Mami. Enquiries were made from the accused. Her statement was recorded by the police. The police did not inquire from her about the place of subsequent rape. She did not disclose to the police about the subsequent rape with her by the accused at Kajalkot jungle. She came to Chamba and went to the Office of Deputy Commissioner and filed an application. Her stomach started bulging out after 6 months pregnancy. None of the villagers asked her about it.

7. Smt. Devki PW-2 is the mother of the prosecutrix. She deposed that in the month of March, 2007, her daughter had gone to her maternal Uncle's house in village Kumarkha. She came to her house but she did not report about the incident. After 5-6 months, she disclosed to her that she is carrying a pregnancy of 5-6 months in her womb and that child belongs to the accused. The prosecutrix told her that in the month of March, when she was on way to her home, accused committed rape with her on the pretext of marrying her. Thereafter, she filed an application Ext. PA before the Deputy Commissioner, Chamba. When the rape was committed, the prosecutrix was 16 years old. She has studied up to 4th Class. Her daughter was medically examined at Chamba Hospital. She did not know the date of birth of prosecutrix nor the date of her marriage.

8. Dr. Bandana, PW-3 has medically examined the prosecutrix. On the basis of the report of ultra sound Ext. PW-3/B, the gestational age of foetus was 29 weeks. She proved X-ray film Ext. PW-3/C and PW-3/D. According to report of the Radiologist, the radiological age of the prosecutrix was between 17 to 19 years. She issued MLC Ext. PW-3/E.

9. Sh. Jai Singh, PW-4 has proved the birth certificate of the prosecutrix vide Ext. PW-4/A. In his cross-examination, he admitted that the admission form is filled in at the time of admission of a student. He has not produced the same before the Court.

10. HC Charan Singh, PW-5 deposed that on 23.8.2007, LC Indu Bala deposited with him one parcel duly sealed with the seals of RH Chamba, one envelope addressed to Director FSL, Junga. On 26.8.2007, HHC Rashid Mohammad deposited with him blood sample of accused alongwith one envelope which were duly entered by him in malkhana register. All these articles were sent to FSL Junga vide RC No. 49/07 dated 6.10.2007.

11. Const. Raj Singh, PW-6 deposed that on 6.10.2007 MHC Charan Singh handed over to him one parcel, one vial, one envelope for being taken to FSL Junga vide RC No. 49/07. He deposited the same at FSL Junga on 8.10.2007.

12. Sh. Krishan Lal, PW-7 testified that application Ext. PA was received in the Police Station, on the basis of which, FIR Ext. PW-5/A was registered at PS Tissa. He has investigated the case. He got the prosecutrix medically examined. He also obtained report of the Radiologist alongwith the X-ray report. The date of birth certificate was also obtained. The prosecutrix was medically examined on 21.8.2007. The prosecutrix had not stated the place of first sexual intercourse with her though he asked her about it. The prosecutrix has not disclosed the place of subsequent sexual assaults with her. He did not prepare any site plan. He has also not obtained the birth record of the prosecutrix from the concerned Panchayat.

13. According to the case of the prosecution, the incident has happened in the month of March, 2007, however, FIR was registered vide Ext.PW-5/A on 21.8.2007. The version of the prosecutrix is that the accused has committed rape with her when she was coming back from the house of her maternal Uncle. However, she has not narrated this incident to her mother. According to the prosecutrix, she was again sexually assaulted when she was grazing cattle at Jungle Kajalkot. She narrated the incident to her mother when she was carrying pregnancy of 4-5 months. It is not believable that mother could not notice the pregnancy of her daughter. She would be rather the first person to know the pregnancy of her daughter. The prosecutrix was medically examined by Dr. Bandana, PW-3. According to Dr Bandana (PW-3), the gestational age of the foetus, on the basis of the report of ultra sound Ext. PW-3/B, was 29 weeks. According to report of the Radiologist, the radiological age of the prosecutrix was between 17 to 19 years.

14. The mother of the prosecutrix has not reported the matter to the police about the incident. It was only after 5-6 months, the prosecutrix disclosed to her mother that she was carrying pregnancy of 5-6 months. Thereafter, application Ext. PA was filed before the Deputy Commissioner, which led to the registration of FIR Ext. PW-5/A. The mother of the prosecutrix did not remember the date of her marriage. She did not know even the date of birth of the prosecutrix.

15. SHO Krishan Lal, PW-7 in his cross-examination, has admitted that the prosecutrix has not disclosed the place where she was firstly raped by the accused. She did not disclose even the place of subsequent sexual assault also. PW-7 Krishan Lal has not even prepared the site plan. He has not obtained the birth record of the prosecutrix from the Panchayat. Sh. Jai Singh (PW-4) has proved Ext. PW-4/A. The date of birth of the prosecutrix as per Ext. PW-4/A was 3.2.1992. He has neither brought the school admission register nor the admission form of the prosecutrix. The radiological age of the prosecutrix as per the report of the radiologist was between 17 to 19 years. It is settled law that the registration of the FIR should be prompt but if there is any delay, the same is required to be

explained. In the instant case, the prosecution has not at all explained the delay in lodging the FIR. We have already noticed that it is not believable that the mother was not aware about the incident and she came to know about it only after 5-6 months. The prosecutrix, at least should have told her mother about the incident immediately in the month of March, 2007. She has remained silent for a period of 4-5 months. The learned trial Court has correctly scanned the entire evidence and there is no reason for us to interfere with the well reasoned judgment of the learned trial Court.

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

****

BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR,C.J. AND HON'BLE MR.JUSTICE DHARAM CHAND CHAUDHARY, J.

The Residents of Rajhoon .....Petitioner.

Versus

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

CWP No.2143 of 2015
Decided on: April 16, 2015.

Constitution of India, 1950- Article 226- Petitioner has filed a Writ Petition commanding the respondents to shift all the institutions/offices/Banks situated at Gadiyara Gram Panchayat Rajhoon- held, that relief sought was within domain of the Legislature and Court cannot sit in appeal over a policy decision- Writ Petition is not maintainable. (Para-2 and 3)

Case referred:
Bhubaneswar Development Authority and another versus Adikanda Biswal and others, (2012) 11 SCC 731

For the Petitioner: Mr.Manohar Lal Sharma, Advocate.

For the Respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma & Mr.V.S. Chauhan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for respondents No.1 to 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

By means of present writ petition, the petitioner has sought writ of mandamus commanding the respondents to shift all the institutions/offices/banks situated at Gadiyara to Gram Panchayat Rajhoon and further also sought writ of mandamus commanding the respondents to make the said institutions functional at Gram Panchayat Rajhoon, like they were functioning at Gadiyara.

2. It is moot question whether the writ petition is maintainable. The petitioner is seeking the relief which is the domain of the Legislature and not of this Court. The Court cannot sit in appeal and examine correctness of policy decision. 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:

> "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 SC3313)]."

3. 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.

4. Having said so, the writ petition is dismissed in limine being not maintainable. However, the petitioner is at liberty to seek appropriate remedy.

5. Pending CMPs, if any, also stand disposed of.

****

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

Bhagat Singh Thakur ...Petitioner.
Versus
State of Himachal Pradesh and others ...Respondents.

Cr. MMO No. 4106 of 2013
Judgment reserved on: 09.04.2015
Date of decision : April 17th, 2015

Code of Criminal Procedure, 1973- Section 482- A dispute arose between residents of the two villages regarding the water supply scheme- a Writ Petition was filed before the High Court who directed both the parties to remove the locks – further, direction was issued to SP to remove the locks in case locks are not removed by the parties- petitioner in the capacity of Additional Superintendent of Police along with SHO and SDO, I & PH visited the spot – parties removed their locks and submitted a report to the SP- the Writ Petition was disposed of with a liberty to the parties to approach the Civil Court – respondent No. 4 filed a Petition under Section 156 (3) of the Cr.P.C for registration of the criminal case against the residents of the other villages and petitioner- held, that delay of three months in reporting the matter to the police makes the case of the complainant improbable when such delay is not properly explained- the compliance report submitted by the petitioner was considered by the High Court and no fault was found with the same- the allegations made against the petitioner are vague- petitioner being a public servant cannot be harassed without any basis and if public

servants are harassed on the basis of vague allegations it would not be possible for any public servant to discharge his duties without fear and favour – in these circumstances, FIR registered against the petitioner quashed. (Para-7 to 20)

For the Petitioner : Mr. P.S. Goverdhan, Advocate.
For the Respondents: Mr. V.K.Verma, Ms. Meenakshi Sharma and Mr. Rupinder Singh, Addl. A.Gs., with Ms. Parul Negi, Dy. A.G., for respondent No.1 to 3.
Mr. Rajiv Jiwan, Advocate, for respondent No.4.

The following judgment of the Court Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner by medium of this petition under Section 482 of the Code of Criminal Procedure has sought quashing of FIR No. 57 of 2013 registered at Police Station, Swarghat on 17.9.2013 under Sections 143, 430, 447, 448, 120B IPC (for short the 'Code') and Sections 3 (1) (5), 3 (1) (13) and 3 (2) (7) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short the 'Act').

2. The petitioner is an HPS Officer and has been arraigned as accused in the aforesaid FIR. It appears that during the year 2003, the residents of two villages namely Dadwal and Khurni got sanctioned a Government water supply scheme known as 'Vikas Main Jan Sahyog'. A dispute arose amongst the villagers of the aforesaid villages. The matter finally reached this Court when respondent No.4 filed a writ petition i.e. CWP No. 2096 of 2010 titled Vir Singh vs. State of H.P. and others and claiming therein the following relief:

> *"i) That the respondents No. 2 and 3 be directed to ensure that supply of drinking water is immediately restored to the residents of Scheduled Caste village Dadwal from the water lifting pump situate at a place known Jharod in Village Dadwal, set up under the scheme known as* ***"VIKAS MAIN JAN SAHYOG KARYAKRAM".***

3. In this petition, respondent No.4 prayed for a direction to the official respondents to ensure that the supply of drinking water is immediately restored to the residents of village Dadwal from the water lifting pump situate at a place known Jharod in Village Dadwal.

4. Initially, the Deputy Commissioner, Bilaspur was directed to submit his report regarding the water supply and thereafter this Court directed the Chairman, District Legal Services Authority to look into the complaint. In compliance to the directions of this Court, the Chairman, District Legal Services Authority, Bilaspur visited the spot on 29.5.2010 and submitted his report which reads:

> *"I have visited the spot on 29.5.2010 at 8.30 A/M/ as per the direction given by Legal Services Authority alongwith Police officials of Police Station, Swarghat, the rought sketch of the Pump House prepared at spot and photographs were also drawn. The Pump House is locked with two locks. There is only one 2", G.I. Pipe to the water tank situated at village Dhadwal which is about 1000 meter above the pump house side. There is another ½" pipe line for one tap in the temple*

complex just near to the pump house for drinking water to the general public and cattle.

The village Kharuni is also 1 kilometer away from the pump house, but it is at the same level or slightly at the lower level from the pump house. There is no water pipe line connected with pump house to village Kharuni. There is kacha pit about 10 meter away from the pump house in the Nallah and one plastic pipe is lying by the side of the pit which takes water to village Khaurni by gravitational force. There are about 1 to 2 houses only which can get water gravity at village Kharuni. When I passed through the village Kharuni then I also noticed taps and G.I. pipe which means there is water supply scheme to village Kharuni and that village is also connected with the road. The village Dhadwal is neither connected with any road nor it is having drinking water supply scheme except the water from present source and pump house. The rough sketch of the spot, C.D. of photographs taken with my own mobile phone, black and white print of the photographs are also attached with the report for the perusal of the Legal Services Authority."

5. When the petition came up for hearing on 3.6.2010 this Court passed the following orders:

"We are informed that each parties have their own locks on the pumping system. There will be direction to the parties to remove the locks within 24 hours. In case, the locks are not removed, there will be direction to the Superintendent of Police, Bilaspur to see that the locks are dismantled and water supply is restored as it existed before 20th March, 2010."

6. It is after the aforesaid direction that the role of the petitioner to execute the order passed by this Court comes into picture. It is averred that the petitioner in his capacity of Additional Superintendent of Police alongwith SHO, Police Station, Swarghat, and SDO, I&PH Sub Division, Swarghat visited the spot on 5.6.2010 and conveyed the aforesaid orders to both the parties and thereafter both the parties removed their respective locks from the pump house and the petitioner submitted a compliance report on the affidavit to the Superintendent of Police, Bilaspur on 9.6.2010.

7. The writ petition was again listed before this Court on 6.9.2010 on which date the following order came to be passed:

"This petition involves disputed question of facts and law which cannot be settled only by filing affidavits. Faced with this situation, Sh.Rajiv Jiwan, learned counsel for the petitioner prays for leave to withdraw the writ petition with liberty reserved to the petitioner to take out appropriate proceedings in the appropriate forum. Prayer allowed. It is made clear that till the petitioner approaches the civil court and obtains appropriate interim order from the Civil Court the direction dated 3.6.2010 shall continue. It is also made clear that the civil Court will decide the interim application on its own merits totally uninfluenced by any order passed by this Court."

8. The respondent No.4 instead of approaching the Civil Court appears to have approached the learned Chief Judicial Magistrate, Bilaspur by invoking the provision of Section 156 (3) of the Code of Criminal Procedure for registration of the criminal case against the villagers of village Khurni and certain other persons, officials etc. including the present petitioner. The learned Chief Judicial Magistrate allowed the complaint and ordered the registration of FIR against the petitioner and other persons and consequently FIR No. 57 of 2013 came to be registered on 17.9.2013.

9. The petitioner has sought quashing of FIR on the ground that it is a grave misuse of the process of law and the petitioner had in his capacity of Additional Superintendent of Police carried out the directions which had been passed by this Court in the writ petition preferred by Vir Singh, respondent No.4. Apart therefrom, the petitioner has questioned the bonafides of respondent No.4 in filing a complaint before the learned Magistrate after inordinate delay of more than three months.

10. The official respondents filed their reply wherein they raised objection regarding maintainability of the petition on the ground that the case was still under investigation.

11. It is only the respondent No.4, who has mainly contested the petition on the ground that the petitioner had only on the dictates of the local MLA stopped the supply of water to the residents of Dadwal village and thereby committed an offence under Section 3 of the Act as the village was predominantly inhabited by Scheduled Caste.

12. I have heard learned counsel for the parties and gone through the records of the case carefully and meticulously.

13. Indisputably, the only allegation which has been attributed to the petitioner, who has been referred to as accused No.12, is contained in para 13 of the FIR which reads thus:

> *"13. That when all remedies which were otherwise available to the complainant were exhausted by the complainant but were made futile by accused No. 8 with his influence and no waterways restored to harizan Basti then a writ was filed in the Hon'ble High Court on 3.6.2010 to restore the supply of water within 24 hours by removing the locks put by the parties. Therefore, in view of the said direction the water supply was restored to the complainant and to the other resident of Dadwal on 5.6.2010. But at this movement of time accused No. 1 to 7, 9 to 12 came on the spot and under the direction of accused No.8 opened a new channel of water from the covered tank to give supply of water to accused No.1 to 7 and a new pipe line was connected with the tank at a lower level (which is still incomplete) was a clear indication of criminal conspiracy of accused No.8 with all other accused persons in order to commit an offence under the Schedule Caste and Schedule Tribes Act."*

14. It is also not in dispute that the petitioner did not visit the spot of his own but had visited the same only to comply with the direction of this Court passed in the writ petition i.e. CWP No. 2096 of 2010.

15. Now, the question arises as to whether the petitioner had exceeded his jurisdiction in executing the orders of this Court and thereby is guilty of commission of the

aforesaid offences, if so, why then did not the respondent No.4, who admittedly was the petitioner in the writ petition bring this fact to the knowledge of this Court. What prevented him from doing so and further why he awaited for more than three months to file an application under Section 156 (3) of the Code before the learned Chief Judicial Magistrate, Bilaspur, is not forthcoming?

16. Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding its true version. In case, there is some delay in filing the FIR, the complainant must give explanation for the same. Undoubtedly, delay in lodging the FIR does not make the complainant's case improbable when such delay is properly explained. However, deliberate delay in lodging the complaint may prove to be fatal. When there is no proper explanation for the delay, the Court can always presume that the allegations were an after thought or that the complainant had given a coloured version of events. The Court has to carefully examine the facts before it, for the reason, that the complainant party may initiate criminal proceedings just to harass the other side with malafide intentions or with ulterior motive of wreaking vengeance. The Court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution. In such a case, where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the Court may take a view that it amounts to an abuse of the process of law.

17. The compliance report submitted by the petitioner on the affidavit of the Superintendent of Police, Bilaspur, was duly considered by this Court and not only did this Court not find any action of the petitioner to be uncalled for but even the respondent No.4 at that stage did not make any grievance regarding the action or the report submitted by the petitioner. Admittedly, this report was submitted to this Court on 9.6.2010 and it was only thereafter on 6.9.2010 that the petition filed by the respondent No.4 was finally disposed of. Why during the interregnum between 9.6.2010 uptil 6.9.2010 or rather uptil 13.12.2010 when for the first time the respondent No.4 filed an application under Section 156 (3) of the Code before the learned Chief Judicial Magistrate, Bilaspur did not respondent No.4 make any grievance? In absence of any explanation at all, it can safely be concluded that the allegations are an after thought and the complainant has given a coloured version simply to harass the petitioner.

18. Not only this, the allegations against the petitioner are otherwise vague and do not in any manner attract the applicability of Section 3 of the Act. The petitioner, who is a public servant cannot be unnecessarily harassed on the basis of such vague allegations which even if taken on the face value, do not constitute an offence. If the Government servant on the basis of such vague allegations is put to ordeal of a trial, it would not be possible for any public servant to discharge his duties without fear and favour.

19. The criminal proceedings instituted against the petitioner at the instance of respondent No.4 are manifestly attended with malafide and ulterior motive and, therefore cannot be sustained.

20. In view the aforesaid discussion, there is merit in this petition and the same is accordingly allowed and FIR No. 57 of 2013 registered at Police Station, Swarghat on 17.9.2013 under Sections 143, 430, 447, 448, 120B IPC and Sections 3 (1) (5), 3 (1) (13) and 3 (2) (7) of the Act insofar as it relates to the petitioner is quashed. Pending application, if any, is also disposed of in view of disposal of the main petition.

****

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

Chuni Lal .....Appellant.
Versus
State of H.P .....Respondents.

Cr. Appeal No. 446 of 2011
Reserved on: 8.4.2015
Decided on : 17.4.2015

N.D.P.S. Act, 1985- Section 20(b) (ii) (C)- police party stopped the bus for checking- as soon as the bus stopped, accused opened the door of bus and ran towards the fields with black coloured bag- he was apprehended and his search was carried during which 5 kg. of charas and 250 grams of opium were found in the bag- PW-1 stated in his cross-examination that accused re-entered the bus after recovery of the contraband which suggested that bag remained inside the bus- police had prepared a concocted and false story regarding the possession of the bag by the accused- police had given an option to the accused to be searched by the police or Gazetted Officer, which was not required and suggested that document was brought into existence subsequently - option to be searched before the police was not in accordance with Section 50 of N.D.P.S. Act- held, that in these circumstances, prosecution version is not proved- accused acquitted. (Para-9 to 11)

For the Appellant: Mr. G.R Palsra, Advocate.
For the Respondent: Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the impugned judgment rendered on 26.11.2011, by the learned Special Judge, Mandi Himachal Pradesh in Sessions trial No. 34 of 2010, whereby, the learned trial Court convicted and sentenced the accused/appellant to undergo rigorous imprisonment for a period of fifteen years and to pay a fine in a sum of Rs.1,50,000/- (One Lac Fifty Thousand) and in default to further undergo imprisonment for a period of six months for commission of offence under Section 20(b) (ii) (C) of Narcotic Drugs and Psychotropic Substances Act, 1985.

2. Brief facts of the case are that on 23.2.2010 at about 9.30 a.m., PW-10 SHO Pratap Singh alongwith PW-1 Constable Nand Lal, PW-3 Puran Chand, PW-6 HC Leeladhar, HC Prakash Chand , HC Ram Singh and HHC Prittam Lal were present at Dadour near Saini Petrol Pump. A bus bearing registration No. HR-68-4369 came from Manali was signaled to stop. As soon as the bus stopped, the accused opened the door of bus and ran towards the fields with black coloured bag (Ex.P-2). On chase by the police, the accused disclosed his name to be Chunni Lal. The accused was told by the police that they suspected the possession of Narcotics in the bag being carried by him and he could give his search to the Magistrate or Gazetted officer or the police. The accused opted to be searched by the police Officials. Police gave their personal search to the accused, no contraband was found in their possession. On search of the bag, it was found to be containing blue coloured pant Ex.P-7, one white shirt Ex.P-6, one muffler

Ex.P-4, one shawl Ex.P-5 and carton wrapped with cello tape. Carton was opened and it was found to be containing stick like pancake like black coloured substance Ex.P-8 wrapped in polythene, it was burnt and smelled and it was found to be cannabis. One packet wrapped with cello tape Ex.P-9 was recovered, which was found to be opium. Memo Ex. PW-1/C was prepared. On weighing, weight of cannabis was found to be 5 kg and weight of opium was found to be 250 grams. All the articles aforesaid were again put in the bag and the bag was wrapped in a piece of cloth. Parcel Ex.P-1 was prepared and sealed with ten impressions of seal H. Sample seal was taken on separate piece of cloth and one such impression is Ex. PW-1/D. Form NCB-1 in triplicate was filled in. Seal impression was taken on NCB-1 form. Parcel was seized vide seizure memo comprised in Ex.PW-1/E. Rukka Ex.PW-10/B was prepared and through Constable Puran Chand the same was handed over to ASI Braham Dass in the police station. ASI Braham Dass made an endorsement on the rukka and sent the case file to the spot through same constable. Investigation was conducted by PW-10 SI Partap Singh. Site plan comprised in Ex.PW-10/C was prepared. Photographs Ex. PW-10/D-1 to Ex. PW-10/D-5, negative whereof are Ex. PW-10/D-6 to Ex.PW-10/D-10 were taken. The statements of the witnesses were recorded. Accused was arrested and memo of arrest is comprised in Ex.PW-1/F. Memo regarding personal search of the accused Ex. PW-1/G was prepared. Ticekts (Ex. PW10/H-1 to Ex. PW/10-H-3) were recovered. Case property was handed over to HC Leeladhar. PW-6 HC Leeladhar deposited the parcel, NCB-1 form, sample seal in the Malkhana and made an entry in the register of Malkhana at Serial No. 1112, copy of which is Ex.PW-6/A. He thereafter handed over all the articles to C Vijay Kumar with the directions to carry these to FSL Junga vide RC No. 48/10, copy of which is Ex.PW-6/B. PW-13 deposited all the articles at FSL and handed over the receipt to MHC on his return. Special report, copy of which is Ex.PW-8/A was handed over to Dy SP Narender Kumar on 24.2.2010. After making an endorsement by Dy.S.P the same was handed over to his Reader. The reader made an entry in the register of special report at Sr. No. 50 and filed it in the record. Dy.S.P Narender Kumar executed an affidavit comprised in Ex.PW-8/B regarding the receipt of special report. Result of analysis is comprised in Ex. PW-10/I showing therein that the sample was of charas which was containing 34.63% w/w resin in it and of opium which was containing 3.04% morphine in it. On conclusion of the investigation, into the offence, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

3. The accused/appellant was charged for his having committed offences punishable under Sections 20(b) (ii) (C) of NDPS Act and Section 18(b) of NDPS Act, by the learned trial Court to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 13 witnesses. On closure of prosecution evidence, the statement of the accused, under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He chose to lead evidence in defence and examined one witness in defence.

5. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the appellant/accused for his having committed offence punishable under Section 20(b) (ii) (C) ND&PS Act.

6. The learned counsel appearing for the appellant has concertedly, and, vigorously contended, that, the findings of conviction, recorded by the learned trial Court, are, not based on a proper appreciation of 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, exercise of its appellate jurisdiction, and, be replaced by findings of acquittal.

7. The learned Assistant Advocate General 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. The factum of charas weighing 5 kg and opium weighing 250 grams recovered from a black coloured bag Ex. P-2 from the conscious and exclusive possession of the accused has been proved by the deposition of PW-1. The deposition of PW-1 Constable Nand Lal qua the fact aforesaid as deposed by him has been corroborated by the testimonies of PW-2 Subhas, PW-3 Constable Puran Chand, PW-6 HC Leeladhar and PW-10 SI SHO Pratap Singh. Amongst the aforesaid PWs, PW-2 is an independent witness. Apparently, the prosecution version hence appears to be imbued with veracity , obviously then it gives formidable succor to the genesis of the prosecution case of Charas weighing 5 kg. and opium weighing 250 grams having been recovered from the conscious and exclusive possession of the accused. Nonetheless, a circumspect, deep and incisive scanning of the deposition of PW-1 comprised in his cross-examination wherein he has deposed qua the factum of the accused having alighted from the bus on which he was aboard whereafter he fled towards the fields, hence rearing/arousing suspicion of the police officials who after chase, nabbed him and on search of bag Ex. P-2, contraband aforesaid was recovered therefrom, whereafter the police having re-entered the bus, spurs an inference of the prosecution version as propounded by the prosecution witnesses in their respective depositions of the contraband having been recovered from the purported, conscious and exclusive possession of the accused, after his having alighted from the bus and on his having fled towards the fields nursing the suspicion of the police who after chase nabbed him, comes to be imbued with pervasive falsity. The concomitant effect of germination of the aforesaid inference is also hence that bag Ex.P-2 did not come to be purportedly exclusively possessed by the accused at the apt stage of it having come to be recovered by the police officials, rather it remained inside the bus. The reentry of the police officials in the bus after nabbing of the accused and theirs having recovered contraband from his purported exclusive and conscious possession, besides also conveys that the police had proceeded to obviously then, concoct a false story qua theirs recovering from the purported, conscious and exclusive possession of the accused, contraband in the manner as deposed by the police officials, rather it appears that even when it remained inside the bus and when there is lack of unflinching evidence, rather there is abysmal dearth of evidence portraying the factum of bag Ex. P2 being owned by the accused that even when it came to be recovered from inside the bus after the departure of the accused therefrom, the prosecution has nursed a wholly invented version qua it being owned by the accused while proceeding to impute its being consciously and exclusively possessed by the accused. The arousal of the aforesaid inference leaves this Court to derive a deduction that the prosecution version in its entirety is discrepant and infirm. Naturally, then any infirmity and discrepancy seeping into the prosecution version cannot constrain this Court to draw a formidable conclusion that the prosecution has been able to prove the guilt of the accused rather the pervasive infirmities and discrepancies arising from the aforesaid inferences and deductions upsurge a fervent conclusion that

the bag Ex.P-2 has been without existence of cogent evidence connected with the accused.

10. Further more, a grave and incisive scanning of the testimonies of the prosecution witnesses brings to the fore the factum of prior to and subsequent to his being nabbed by the police officials in the fields, after his departure from the bus on which he was aboard and preceding recovery of contraband from bag Ex.P-2, which he was purportedly carrying in his conscious and exclusive possession wherefrom recovery and seizure of contraband was effected, he was asked to give his personal search and preceding the carrying out of his personal search and of bag Ex.P-2 at the instance of the police officials, his option to get his personal search and of his bag Ex.P-2 being carried out by the police officials or both his personal search and of his bag Ex.P-2 being carried out before any Magistrate or Gazetted Officer was elicited under memo Ex. PW-1/A. Even though, the accused under memo Ex.PW-1/A conveyed his consent for his personal search as well as of bag Ex.P-2 being carried out by the police officials, nonetheless the exercise or endeavor concerted to by the police officials to elicit the option of the accused for search of his bag purportedly carried by him bearing Ex.P-2 was wholly needless as there being no legal obligation cast under Section 50 of the NDPS Act upon the police officials to before proceeding to carry out search of bag carried by the accused with him elicit his consent for it being searched either by the police officials or search thereof being carried out by a Magistrate or a Gazetted officer**.** The aforesaid factum perse is personificatory of the police having proceeded to elicit consent of the accused for carrying out search of bag Ex.P-2 alongwith search of his person, as bag Ex.P-2 was introduced by a sheer contrivance and machination on the part of the police officials for inventing a factum of its being in existence and at a time contemporaneous to the nabbing of the accused in the fields or it being carried by him at the apt and relevant stage, even when it for the reasons aforesaid remained inside the bus. Even otherwise, the fact as displayed in memo Ex.PW-1/A of the consent of the accused having come to be elicited for his personal search, nonetheless tears to shreds also the factum of bag Ex.P-2 being carried by the accused at the relevant stage, in as much as at the time of preparation of Ex.PW-1/A or at the time of its purported seizure on the spot qua which memo Ex.PW-1/E was prepared, when consent comprised in Ex.PW-1A was concerted to be elicited from the accused. Besides while hence having been concluded with vigour that bag Ex.P-2 cumulatively for the reasons assigned by this Court was never in existence, the police officials having elicited option of the accused for being personally searched under memo Ex.PW-1/A by the police officials or by a Magistrate or a Gazetted Officer, rather conveys that the police had a suspicion qua the factum of the accused carrying contraband on his person and as such had concerted to search his body prior to which they had obtained consent comprised in Ex.PW-1/A. Even if assuming that recovery of contraband in the manner as enunciated aforesaid was effected in pursuance to a personal search of the accused, nonetheless the phraseology in which his consent was elicited preceding his personal search is not cast in the apt legal phraseology in as much as, in it the accused has not been, as ordained by law awakened to or apprised of his having a more valuable legal right of his being liable to personal search before a Magistrate or a Gazetted officer vis-à-vis his being personally searched by the police officials. A keen discernment of the phraseology in which Ex. PW-1/A is cast is rather communicative of the accused having been not awakened and apprised by the police officials while seeking his option to be searched either by them or by a Magistrate or a Gazetted Officer of his having a legal right to be searched before a Magistrate or a Gazetted Officer. The lack of existence of a communication in Ex.PW-1/A of the accused having been therein apprised of his legal right to be personally searched before a Magistrate or a Gazetted officer before his

exercising his option to be searched by the police officials undermines the legal efficacy of Ex.PW-1/A. It appears that lack of articulation of the aforesaid fact in Ex.PW-1/A occurs as the police intended to preempt the accused to exercise his option to be searched before the Magistrate or a Gazetted officer as a manner of a machination to plant charas on his person by the police. Consequently, consent if any, accorded by the accused to the police for his personal search by them stands vitiated, it having been obtained in a mechanical and perfunctory manner with the accused having remained un-awakened of his legal right of his personal search before a Magistrate or a Gazetted Officer, which option in case he had chosen would have forestalled his personal search by the police besides would have precluded planting of charas on his person by the police. In sequel, the ready and apt inference/deduction is that even assuming that the contraband was recovered from the personal search of the accused it having been recovered in pursuance to a consent having been obtained from the accused without a communication to him of his legal right to be searched before a Magistrate or Gazetted Officer, leaves the recovery, if any, of the contraband in pursuance to his personal search by the police official to be having no legal effect. Consequently it is both tainted and a vitiated search to which no legal leverage can be accorded by this Court.

11. 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 learned trial Court merit interference.

12. In view of above discussion, the appeal is allowed and the impugned judgment of 26.11.2011, rendered by the learned Special Judge, Mandi is set aside. The appellant/accused is acquitted of the offences 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.

13. The registry is directed to prepare the release warrant of the accused and send it to the Superintendent of the jail concerned, in conformity with this judgment forthwith. Records be sent down forthwith.

****

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

Ex. Nk Puran Singh .....Petitioner

Versus

State of H.P & others .....Respondents.

CWP No. 458 of 2015
Reserved on: 2.4.2015
Decided on: 17.04.2015

Constitution of India, 1950- Article 226- Petitioner joined the Indian Army in the year 1995- he was discharged in the year 2010- he registered his name with Employment Exchange, Paonta Sahib with basic qualification of matriculation- he passed Sahitya Sudhakar (Sampuran) on 8.10.2013 and got his educational qualification registered with the Employment Exchange on 26.11.2013- the posts of Constable for Ex-servicemen were advertised- petitioner appeared before the Interview Board but his candidature was rejected

on the ground that he got himself registered in the Ex-servicemen cell in the year 2013- respondent contended that petitioner had not renewed his earlier candidature and his seniority was to be calculated from 26.11.2013- held, that interview of the petitioner was held on the strength of registration certificate issued on 18.11.2010- petitioner could not have been sponsored unless he was found eligible by the Employment Exchange and rejection of the candidature on the ground of lack of seniority was unjustified. (Para-2)

For the Petitioner: Mr. Vinod Chauhan, Advocate.
For the Respondents: Mr. P.M Negi, Deputy Advocate General and Mr. Ramesh Thakur, Assistant Advocate General, for the respondent-State.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The petitioner in his writ petition avers that in the year 1991, he obtained matriculation certificate after his having successfully cleared his matriculation examination conducted by the H.P Board of School Education. In the year 1994, the petitioner joined the Indian Army. However, in the year 2010, he was discharged from the Indian Army on compassionate grounds and in the same year the petitioner registered his name with the employment exchange Paonta Sahib vide NCO Code No. X0120/X01-10 of 18.11.2010 and bearing registration No. 1103/2011 (201000998) with basic qualification of matriculation. On 4.7.2011 the petitioner cleared Hindi Bhasha Rattan examination from Mumbai Hindi Vidyapeeth. The petitioner on 8.10.2013 passed Sahitya Sudhakar (Sampuran), equivalent to BA from Mumbai Hindi Vidyapeeth. After obtaining degrees aforesaid, the petitioner on 26.11.2013 got his educational qualification registered with the employment exchange concerned and on basis thereof his qualification was registered vide NCO Code No. X010/660-20/57420 with the next date of renewal being November, 2016. In November 2014, the respondents No.1 and 2 proceeded to advertise posts of Constables and amongst them few were reserved for ex-servicemen. A call letter was issued to the petitioner on 11.12.2014 intimating him that the State Selection Committee is to conduct interview for the post of Constable on 2.1.2015 at 10.00 a.m. in the Sainik Rest House Hamirpur and the petitioner was asked to bring alongwith him his necessary testimonials. On the petitioner reaching on 2.1.2015 the venue prescribed in the call letter, the Interviewing Board rejected his candidature on the score that he had got himself registered in Ex-servicemen cell in the year 2013 only thereupon he was construed to be hence unfit, his not enjoying seniority for facilitating his participation in the interview. The petitioner contends the rejection of his candidature by the Interviewing board on the score of his being registered with the employment exchange only in the year 2013 is un-tenable as given the facts recited hereinabove, he had got himself registered with the employment exchange concerned in the year 2010 as such his seniority for facilitating his participation in the interview is to be reckoned there-from.

2. It is an un-controverted fact that amongst vacancies of constables advertised for being filled up, some of the vacancies were reserved for Ex-servicemen. The petitioner belongs to the Ex-servicemen category, hence had a tenable right for being considered for selection and consequent appointment for the post of Constable from amongst the category of ex-servicemen, for which category certain vacancies stood reserved. The respondents also do not controvert the factum of the petitioner being a matriculate in the year 2010. Besides there is a portrayal in the reply of the respondents, of the participation of the petitioner in the interview to be held or conducted for his selection as Constable in the police department from the Ex-servicemen quota, having been elicited on

the strength of NCO Code X01.10 as registered on 18.11.2010. The grounds as meted out in the reply of the respondents are that he was debarred from participating in the interview in which his participation was elicited on the score of there being no record/endorsement of his continuing to maintain the seniority of his registration by renewal thereof since his initial registration on 18.11.2010 and his having not produced his X-10 card registered on 18.11.2010. It is contended in the reply of the respondents that omission of production of aforesaid on the part of the petitioner at the time he stood for interview before the Interviewing Board besides necessitated rejection of his candidature as his registration with the employment exchange concerned in the year 2010 stood un-renewed resulting in his loosing his seniority, as such his seniority has been contended to be reckonable only from 26.11.2013. As a corollary it is further contended that the aforesaid reckonable date for computing his seniority rendered him ineligible for participation in the interview. The grounds as meted out by the respondents in the reply are flimsy, shaky and nebulous. The participation of the petitioner in the interview to be held by the interviewing board concerned at the designated venue was elicited on the strength of his X01.10 registered with the employment exchange concerned on 18.11.2010. The sponsorship of the candidature of the petitioner by the employment exchange concerned would not have occurred unless preceded by a thorough scrutiny of the claim of the petitioner for participation in the tests/proceedings before the interviewing board, whereupon his having been found eligible in all respects inclusive of his seniority for participation to be computed from the year 2010, his name was sponsored. The apt and germane rules, enjoining upon the petitioner the necessity of his after his initial registration in the year 2010 with the employment exchange concerned getting it renewed for maintaining his seniority, absence whereof forbidding and interdicting the petitioner from participating in the interview for the post concerned to be filled up amongst others by Ex-servicemen, have not been placed on record. For lack of adduction of apt and relevant rules by the respondents with a disclosure therein that the petitioner even when he got himself registered with the employment exchange concerned in the year 2010 there was an enjoined legal obligation cast upon him to get his registration renewed for fastening seniority qua registration, fillips hence an inference that omission, if any, on his part to obtain renewal of his registration did not strip him of his seniority to be reckonable hence from 2010. Consequently, the ground as meted out by the respondents of his having not produced the record/endorsement of his maintaining his seniority after his initial registration with the employment exchange concerned, rendering his candidature to be dis-cardable as well as prohibiting him to participate in the interview, is wholly un-tenable as well as flimsy rather his seniority is to be computed from the year 2010 when he initially got himself registered with the employment exchange even without his having produced any record before the interviewing board qua the factum of his having maintained his seniority with the employment exchange concerned. Besides, the lack of omission of production by the petitioner of his X-10 card registered with the employment exchange concerned before the said selection committee though is contended to be a ground for rejection of his candidature, it also is an entirely pretextual ground in as much as given the fact of his sponsorship by the employment exchange concerned which would not have occurred unless his name stood registered with the employment exchange concerned, besides its hence fastening a legitimate claim for his consideration for selection by the interviewing board, dispels the effect, if any, of the omission on his part to produce his X-10 card registered on 18.11.2010. In view of above, the present petition is allowed. The respondents are hence directed to consider the candidature of the petitioner by subjecting him to an interview by a duly constituted interviewing board and in case he stands selected, then he shall be, in accordance with rules, appointed against a vacancy occurring in future. All pending applications stand disposed of.

****

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

FAO Nos.44 and 45 of 2008
Decided on: April 17, 2015.

1. FAO No.44 of 2008:

Hans Raj and others ...Appellants.

Versus

Rakesh Kumar and another ...Respondents.

2. FAO No.45 of 2008:

Ranjit Singh and others ...Appellants.

Versus

Rakesh Kumar and another ...Respondents.

Motor Vehicle Act, 1988- Section 166- Claimant had contended that awarded amount was quite less- Tribunal had rightly applied multiplier keeping in view the age of deceased- held, that no case for enhancement is made out- Appeal dismissed. (Para-8 to 10)

For the appellant(s): Mr.Subhash Sharma, Advocate.

For the respondents: Mr.Ajay Sharma, Advocate, 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):

FAO No.44 of 2008:

By the medium of this appeal, the Claimant has challenged the award, dated 29th October, 2007, passed by Motor Accident Claims Tribunal(II), Una, H.P., (for short, the Tribunal), in Claim Petition No.42 of 2004, titled Hans Raj and others vs. Rakesh Kumar and another, whereby compensation to the tune of Rs.1,64,000/-, with interest at the rate of 7.5% per annum, was awarded in favour of the claimants (appellants herein) and the insurer was saddled with the liability.

FAO No.45 of 2008:

2. This appeal, preferred by the claimants, is the outcome of the award dated 29th October, 2007, passed by Motor Accident Claims Tribunal(II), Una, H.P., (for short, the Tribunal), in Claim Petition No.41 of 2004, titled Ranjit Singh and others vs. Rakesh Kumar and another, whereby compensation to the tune of Rs.2,18,000/-, with interest at the rate of 7.5% per annum, was awarded in favour of the claimants (appellants herein), by directing the insurer (respondent No.2 herein) to indemnify the same.

3. Since the Claim Petitions are the outcome of one accident, therefore, both these appeals are taken up together for disposal.

4. At the very threshold, it is apt to place on record that, feeling aggrieved, only the insurer had challenged the impugned awards by the medium of FAO No.64 of 2008 and FAO No.65 of 2008, passed in Claim Petition No.41 of 2004, titled Ranjit Singh and others vs. Rakesh Kumar and Claim Petition No.42 of 2004, titled Hans Raj and others vs. Rakesh

Kumar and another, respectively, which came to be dismissed by this Court vide judgment dated 10th April, 2015 and the impugned awards were upheld.

5. The owner/insured has not questioned the impugned awards on any count, thus, the same have attained finality in so far as the impugned awards relate to him.

6. The claimants, feeling aggrieved, have questioned the impugned awards on the ground that the amount of compensation awarded by the Tribunal is meager and needs to be enhanced.

7. Thus, the only question needs to be determined in these appeals is whether the amount awarded by the Tribunal is inadequate.

8. The main grounds urged by the learned counsel for the appellants/claimants are that the Tribunal has fallen in error while determining the income of the deceased and the multiplier has also been wrongly applied by the Tribunal.

9. I have gone through the impugned awards. The Tribunal, while awarding compensation in both the claim petitions, has made detailed discussion, and rightly so, in paragraphs 17 to 20 of the impugned awards. Keeping in view the age of the deceased and the dependency, the Tribunal has rightly applied the multiplier in both the cases.

10. Having said so, the appellants/claimants have failed to carve out a case for enhancement of compensation. Accordingly, both the appeals are dismissed.

11. The Registry is directed to release the compensation amount in favour of the claimants through payees' account cheque, strictly in terms of the impugned award. A copy of this judgment be also placed on the record of the connected appeal.

****

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

Khem Singh alias Nitu .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 90 of 2012
Reserved on: April 16, 2015.
Decided on: April 17, 2015.

Indian Penal Code, 1860- Section 302- Accused had quarreled with the complainant on 15.2.2010- accused pelted the stone on the house of the complainant and abused him- complainant and one 'A' went to the village of the accused to inquire the reasons for abusing the complainant- 'A' asked the accused as to why he had abused the complainant and had pelted the stones on his house – accused went inside the house and came out with an Axe and inflicted the blow on the head of 'A'- accused run away from the spot after the incident- according to PW-1, one blow was given on the head of the deceased 'A', however, PW-9, Medical Officer, found two injuries on the body of the deceased- he noticed wound on the skull and neck of the deceased- prosecution did not explain the second injury- according to PW-1, wife of PW-2 was present but she was not examined- PW-1 also admitted that he had enmity with the accused- complainant had not lodged any report with the police regarding pelting of the stone- result was inconclusive regarding the blood group on the T-shirt of the

accused- held, that in these circumstances, prosecution version is not proved- accused acquitted. (Para-16 to 25)

Cases referred:
Balbir Vrs. Vazir and others and connected matters, (2014) 12 SCC 670
Parkash vrs. State of Karnataka, (2014) 12 SCC 133

For the appellant: None.
For the respondent: Mr. P.M.Negi, Dy. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 20.8.2011/25.8.2011, rendered by the learned Sessions Judge, Kullu, H.P. in Sessions Trial No. 29 of 2010, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 302 IPC, has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 10,000/-.

2. The case of the prosecution, in a nut shell, is that the statement of Narotam Ram, PW-1 was recorded under Section 154 Cr.P.C. vide memo Ext. PW-1/A to the effect that there was a Fagli festival on 15.2.2010 in the village. He alongwith his family members, brother-in-law and one Hukam Singh of Village Chhardi as well as Khem Singh alias Nitu were taking their meals. The complainant enquired the reason from the accused as to why he had come to the house of the complainant. The father of the complainant revealed that accused had come with him. Thereafter, accused got annoyed and left the room and started abusing the complainant from outside the house and he also pelted stones on the house of the complainant. When the complainant came out of the house, the accused fled away from the spot. On 16.2.2010, there was bhandara in the temple of deity Girmil. The complainant could not inquire the reasons for abusing and throwing the stone from the accused. On 17.2.2010, the maternal uncle of complainant, namely, Aelu Ram came and thereafter the complainant accompanied by Aelu Ram went to the village Bradha to enquire the reasons from the accused for abusing and sat in the courtyard of the house of Mohar Singh (PW-2). They enquired from Mohar Singh as to whether accused would be available at home or not. Mohar Singh revealed that at that time, accused may not be available. The accused was noticed playing cricket with other boys at some distance from the house of Mohar Singh. The maternal uncle of the complainant Aelu Ram asked the reason from the accused as to why he has abused the complainant and his family and pelted stones on their house on 15.2.2010. The accused went towards his house and the complainant and his maternal uncle remained sitting outside the house of Mohar Singh who went inside his house. At about 2:00 PM, accused again came there with an axe and inflicted blow with it on the head of Aelu Ram from behind due to which woolen cap worn by the deceased Aelu Ram was cut and blow was so deep that blood oozed out from the head of the deceased. He fell unconscious on the spot. Thereafter, Mohar Singh and other people of the village gathered at the spot and accused fled away from the spot. PW-2 Mohar Singh informed Bhupinder Thakur, PW-4 about the incident. Bhupinder Thakur informed the police on telephone. Aelu Ram was lifted to the courtyard of Mohar Singh PW-2 where he died. On the statement of the complainant, SI Om Chand made endorsement Ext. PW-13/A on statement Ext. PW-1/A and sent the same to the Police Station. FIR Ext. PW-13/J was recorded on the basis of the rukka. The I.O. visited the spot. He took into possession the blood stained soil vide

memo Ext. PW-4/A. The inquest report was prepared. The dead body was photographed. It was sent for post mortem examination. Dr. Ashok Rana (PW-9) issued the post mortem report Ext. PW-9/B. The accused made disclosure statement Ext. PW-3/A, on the basis of which Axe Ext. P-2 was recovered. The complainant also produced stone Ext. P-6 on 22.2.2010. 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 14 witnesses. The accused was also examined under Section 313 Cr.P.C. He has denied the prosecution case. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. P.M.Negi, Dy. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 20.8.2011/25.8.2011.

5. Sh. Narotam Ram, PW-1 testified that in the month of Falgun on 15th he had gone to the temple of deity Girmal at 9:00 AM. He used to beat drum there. At about 8-9 AM, he returned to his home and noticed his father, wife, brother-in-law Khimi Ram and Nitu accused taking liquor. Except those persons, nobody was there. He enquired from his father that as to who invited Nitu accused. Accused got up and fled from there. His father disclosed him that the accused has come with them. The accused hurled a stone in their room when he went outside and except this accused did not reveal anything and fled away from the spot. No injury was received by anybody. On the next day there was a Bhandara in the temple of the Deity and he remained busy throughout the day. Aelu Ram was his maternal Uncle. He had revealed all this incident to Aelu Ram who told him to enquire about it from the accused. He and his maternal uncle Aelu Ram went to village Bradha where accused used to reside. They were sitting in the kacha courtyard of the house of Mohar Singh. They were talking with each other. His maternal uncle Aelu Ram enquired from Mohar Singh about the house of accused. He disclosed them about the same. He narrated the activities of the accused to Mohar Singh. He noticed the accused from the courtyard of the house of Mohar Singh playing cricket on the road with other children. His uncle Aelu Ram asked the accused as to why he had gone to their house. Except this Aelu Ram did not ask anything. The accused at once left the place and went to his house. They both remained there and Mohar Singh went inside his house. At about 1-1:30 PM, accused came there with an Axe in the courtyard of Mohar Singh with a Kilta on his back. The moment accused came there, he at once attacked with Axe on the head of Aelu Ram with full force. The blow was inflicted with axe from its sharp edged side. Due to the blow the cap of Aelu Ram was cut and blood started oozing out from his head. Thereafter, accused fled away from the spot. After this incident, Mohar Singh also came to the spot and whole of the story was narrated to him. Mohar Singh informed the Police on telephone and he tried to give water to his maternal uncle but he was dead. The police came on the spot. His statement was recorded by the police vide Ext. PW-1/A. The police has taken into possession cap. He identified the Axe Ext. P-2. The axe was taken into possession vide memo Ext. PW-1/C. The stone was recovered by the police on 22.3.2010 vide memo Ext. PW-1/D. Kulvi cap is Ext. P-3. The stone is Ext. P-6, which was identified by PW-1 Narotam Ram. In his cross-examination, he deposed that on that date, Mohar Singh and his wife were present in the house. She was also sitting in the courtyard at a distance of about more than two meters. He also admitted that in and around the house of Mohar Singh, there are other houses. The children were playing cricket on the side of the road. The number of those children was 4-5. The accused was also playing cricket with them. He also admitted that the house of accused Khekh Ram is situated at a distance of 600-700 meters upward. He also admitted that on 15.2.2010, accused was stalking his wife. He also used filthy

language and abused him. He also admitted that the activities of the accused resulted into a scuffle between him and the accused. He did not lodge any report or complaint of the matter regarding throwing of Ext. P-6 in his room to the police or to the Pradhan of the Gram Panchayat.

6. Sh. Mohar Singh, PW-2 testified that at about 2:00 PM on 17.2.2010, Aelu Ram and Narotam, both residents of Gahar came to his house. Aelu Ram inquired about the house of Jogi Ram. They simply inquired about the house and nothing except it was inquired by them from him. Except this, he witnessed nothing. They stayed in his house for about one hour. He noticed the accused running away with an axe in his hand. He also noticed Aelu Ram lying in front of his courtyard. The blood was oozing out from his head. Thereafter, he informed the police through Pradhan of the Gram Panchayat. At about 4:00 PM, the police came to his house from the Police Station Kullu. PW-1 Narotam was holding deceased Aelu Ram and he was shifted to other place in the courtyard. The police lifted the blood stained earth from the spot. The same was put in a parcel and was sealed with six seals of seal-O and taken into possession vide memo Ext. PW-2/A. At the relevant time, his wife was inside the house. In his cross-examination, he categorically admitted that the incident in which deceased was killed did not happen in his presence. He denied that his wife was also sitting in the verandah at that time. Voluntarily stated that she was sitting inside the room.

7. Sh. Raj Kumar, PW-3 testified that accused in the police custody disclosed in is presence and in the presence of the villagers including Devi Chand, that he had concealed the axe with which he inflicted the injury to the deceased in the rivulet known as “Tharman nullah”. He also disclosed that he had concealed the said axe in the bushes. Memo regarding the disclosure statement of the accused is Ext. PW-3/A. The accused in pursuance of his disclosure statement Ext. PW-3/A got recovered the axe Ext. P-2 from the bushes from the rivulet known as “Tharman nullah”.

8. Sh. Bhupinder Singh, PW-4 deposed that he received telephonic call from village Bradha regarding the murder of one person resident of village Gahar. He reached the spot at about 2:30 PM. The police was already present on the spot. In his presence, the police took into possession the blood stained earth which was put in the polythene bag and the same was put in the cloth parcel.

9. Const. Baldev Singh, PW-5 deposed that on 22.2.2010, he was present with the I.O. at village Khawor. The complainant Narotam produced a stone Ext. P-6. The same was taken into possession and put in cloth parcel.

10. HC Jawala Singh, deposed that the accused made disclosure statement to the effect that he had kept concealed his clothes, worn by him on the day of incident near Tharman rivulet in the branches of Paza tree. He also disclosed that those clothes were blood stained and that he can get the same recovered from that place. The disclosure statement of the accused was recorded vide memo Ext. PW-6/A. In pursuance to the disclosure statement, the police got recovered the clothes and the same were taken into possession by the police.

11. Sh. Hukam Ram, PW-8 deposed that on 15.2.2010, there was a festival known as Fagli in their village. He had gone to the house of Narotam. At about 8:00 PM, he alongwith Khimi Ram were present in the house of Narotam. They were talking with each other. In the meanwhile, accused Nitu and Gulab Chand also came there. At about 9:00 PM, Narotam PW-1 also reached at the house. Narotam raised objection regarding the presence of accused. Upon this, Gulab Chand disclosed to him that accused had come with

him. Thereafter, accused Khem Singh left the house. From outside the house he pelted two stones. However, no harm was caused to anyone. Thereafter, he left for his house.

12. Dr. Ashok Rana, PW-9 has conducted the post mortem examination on the dead body of Aelu Ram on 18.2.2010. He noticed wound on skull and neck of the deceased. The wound which was found on the neck was present on the anterior aspect of neck at the level of cricoids cartilage measuring 7 cm in length x 3 cm deep, gaping was present extending from left to right side of neck. The margins were incised, cut and lacerated. There was clotted blood present around the skin and internal structure. In addition to this, he also noticed an injury on the skull. There was cut wound spindled shape size was 11.5 cm x 1 cm x 7 cm deep, extending from right parietal region to left occipital region posterior, the margins were incised, cut and lacerated. Clotted blood was present on the skin, in skull fracture of parietal and occipital bones was noticed. Margins of fracture were tapering anteriorly and broad base posteriorly which was forming wedge shaped depressed fracture. Splinters of skull bone with margin of fracture near the inner table of skull were present. In the opinion of the Board, the deceased died of severe head injury leading to comma, then cardio respiratory arrest and hence death. The probable duration between injury and death was 0 to few minutes i.e. about 15 minutes approximately and between death and post mortem examination was 18 to 30 hours.

13. HC Ram Krishan, PW-10 deposed that on 17.2.2010, SI Om Chand deposited four parcels in this case with him. First parcel was stated to be containing weapon of offence i.e. axe which was sealed with 12 seals of 'H' alongwith sample seal of 'H'. Second parcel was stated to be containing woolen cap sealed with six seals of 'O'. The third parcel was stated to be containing blood stained soil sealed with six seals of 'O' and fourth parcel was stated to be containing controlled earth which was sealed with six seals of 'O' alongwith sample seal of impression 'O'. He entered all these articles at Sr. No. 30 in the malkhana register. The abstract of the register is Ext. PW-10/A. On the same day, Const. Diwan Chand deposited two parcels with him. One parcel containing wearing apparel of deceased Aelu Ram which was sealed with four seals of 'H' and second parcel stated to be containing viscera of the deceased which was sealed with seal 'CH' was also handed over to him. He entered these articles at Sr. No. 31. On 19.2.2010, SI Om Chand deposited one parcel stated to be containing clothes of the accused which were sealed in a parcel which was sealed with 9 seals of 'B' alongwith sample seal with him. He duly entered all these articles in the register No. 19. The case property was sent on 22.2.2010 to FSL, Junga through Const. Sunil Kumar vide RC No. 53/2010. Const. Sunil Kumar, deposited the case property with FSL Junga on 22.2.2010 itself.

14. SI Om Chand, PW-13 has investigated the matter. According to him, on 17.2.2010, he recorded the statement of complainant vide Ext. PW-1/A. Thereafter, he attested his signature and made endorsement Ext. PW-13/A on Ext. PW-1/A. He took cap into possession. He also took into possession soil sample Ext. P-7. He also took into possession blood stained soil Ext. P-8. The accused has got recovered Axe Ext. P-2. He measured the same. On 19.2.2010, accused was interrogated by him. He disclosed in the presence of witnesses HC Hawala Singh and Const. Krishan that he had concealed blood stained clothes worn by him at Tharman Nallah under a Paza tree and can get the same recovered. He prepared the recovery memo Ext. PW-6/A. Thereafter, the clothes were got recovered. On 22.2.2010, complainant produced a stone Ext. P-6 which was taken into possession vide memo Ext. PW-1/B in the presence of Const. Baldev Singh and Ruma Devi. He prepared the inquest papers after examining the body of the deceased. The neck of the deceased was smeared with blood and as such he could not detect the injury on the cricoids cartilage. In his cross-examination, he admitted that there is courtyard in front of the house

of Mohar Singh, PW-2. He also admitted that there are some residential houses adjoining to the house of Mohar Singh. He has not recorded the statements of children since they were of the age between 3 to 4 years. He also admitted that the accused had previous enmity with PW-1. Volunteered that accused had visited the house of Narotam in the night of 15.2.2010. He was questioned about his presence in the house of Narotam. Thereafter, he came out and pelted stones upon PW-1. PW-1 had gone alongwith the deceased to inquire from him about this incident. No complaint was made by Narotam to the police about this incident. Mohar Singh was alone in the house and no family member was present there on the date of occurrence. He denied that the wife of Mohar Singh was sitting in the courtyard and PW-1, deceased and Mohar Singh were taking liquor in the courtyard. He had not recorded the statement of wife of Mohar Singh since she was not present in the house.

15. Const. Narender Kumar, PW-14 has proved Ext. PW-14/A and PW-14/B.

16. What emerges from the statement of Narotam Ram, PW-1 is that the accused had pelted stone at his house. He alongwith his maternal Uncle had gone to the house of PW-2 Mohar Singh. His maternal uncle inquired why he has thrown stones on the house of PW-1 Narotam Ram. The accused left the spot and came back with Axe. He gave one blow on the head of Aelu Ram with full force. The cap of Aelu Ram was cut. Blood started oozing out from the head. Thus, according to PW-1 Narotam Ram, only one blow was given and that too on the head of the deceased Aelu Ram.

17. PW-9 Dr. Ashok Rana, has noticed two injuries on the body of deceased. He has noticed wound on skull and neck of the deceased. The prosecution has not explained how the deceased received second injury on the neck when according to PW-1 Narotam Ram, only one blow was inflicted by the accused on the head of the deceased.

18. PW-1 Narotam Ram, has stated that when he went with his maternal uncle to the house of Mohar Singh, the wife of Mohar Singh was sitting in the courtyard at a distance of more than two meters. PW-2 Mohar Singh stated that his wife at that time had gone inside the house. The I.O. PW-13 SI Om Chand testified that no member of the family of Mohar Singh was present in the house. If the statement of PW-1 Narotam Ram is accepted, then Mohar Singh's wife ought to have been examined. According to PW-1 Narotam Ram, Mohar Singh PW-2 was also sitting in the courtyard but Mohar Singh in his cross-examination has categorically deposed that the incident in which the deceased was killed did not happen in his presence. Mr. P.M.Negi, learned Dy. Advocate General, has argued that Mohar Singh PW-2 has seen the accused running away with the Axe. Merely that PW-2 Mohar Singh has seen the accused running with Axe would not establish that the accused has hit the deceased.

19. PW-1 Narotam Ram, in his cross-examination, admitted that on 15.2.2010, accused was stalking his wife. He also used filthy language and abused him. He also admitted that the activities of the accused resulted into a scuffle between him and the accused. He did not lodge any report or complaint of the matter regarding throwing of Ext. P-6 in his room to the police or to the Pradhan of the Gram Panchayat. PW-13 SI Om Chand has also admitted that there was enmity between Narotam Ram and the accused. The enmity between the parties is double edged weapon. The possibility of the accused being falsely implicated due to enmity can also not be ruled out.

20. Their lordships of the Hon'ble Supreme Court in the case of ***Balbir Vrs. Vazir and others and connected matters,*** reported in ***(2014) 12 SCC 670,*** have held that motive is a double edged weapon and just as there is a possibility of murders having

been committed because of motive due to enmity, there is also a possibility of false implication of innocent people to settle past scores. It has been held as follows:

> "12. We are dealing with an appeal against acquittal. The acquittal is not recorded by the trial court but by the High Court. We shall therefore see whether there were sufficient reasons for the High Court to set aside the conviction. We must however bear in mind that if the view taken by the High Court is a reasonably possible view it should not be disturbed because the acquittal of the accused by the High Court has strengthened the presumption of their innocence. We must also mention that according to the prosecution this is a case of strong motive. Land disputes between the two sides and earlier attacks made on deceased Krishna Gir have been deposed to by the witnesses. The High Court has observed that no documentary evidence is produced by the prosecution in support of this case. However, we cannot dismiss the prosecution case of enmity between the two sides lightly because reference to it is made by several witnesses. But that by itself does not help the prosecution. Just as there is a possibility of murders having been committed because of motive due to enmity, there is also a possibility of false implication of innocent people to settle past scores. That is why it is said that motive is a double edged weapon. We shall keep this in mind and approach the case."

21. Their lordships of the Hon'ble Suprme Court in the case of ***Parkash vrs. State of Karnataka,*** reported in ***(2014) 12 SCC 133,*** have held that when the blood stained clothes are recovered, a serological comparison of blood of deceased and appellant and blood stains on his clothes was necessary and that was absent from evidence of prosecution. In this case, the prosecution has sought to prove that blood group of deceased was AB and blood stains on appellant's seized clothes also belong to blood group AB. This does not lead to any conclusion that bloodstains on appellant's clothes were those of deceased's blood. There are millions of people who have blood group AB and it is quite possible that even appellant had the blood group AB. Thus, merely since clothes of appellant were bloodstained and stains bore same blood group as that of deceased, circumstances could not be used against the appellant. Their lordships have further held that recovery of crime/incriminating material, at the instance of the accused, is not enough to incriminate the accused, unless it is also established that the recovery of articles connect with the crime. It has been held as follows:

> "40. The second discrepant statement was that Shivanna stated that the police had kept Prakash's clothes on the table. It was submitted, in other words, that the blood stained clothes were already seized by the police and kept on the table. We are not sure whether the actual statement made by Shivanna has been lost in translation.
>
> 41. In any event, the recovery of the blood stained clothes of Prakash do not advance the case of the prosecution. The reason is that all that the prosecution sought to prove thereby is that the blood group of Gangamma was AB and the blood stains on Prakash's seized clothes also belong to blood group AB. In our opinion, this does not lead to any conclusion that the blood stains on Prakash's clothes were those of Gangamma's blood. There are millions of people who have the blood group AB and it is quite possible that even Prakash had the blood group AB. In this context, it is important to mention that a blood sample was taken from Prakash and this was sent for examination. The report received from the Forensic Science Laboratory

[Exh.P-27] was to the effect that the blood sample was decomposed and therefore its origin and grouping could not be determined. It is, therefore, quite possible that the blood stains on Prakash's clothes were his own blood stains and that his blood group was also AB.

45. We are not satisfied with the conclusion of the High Court that since the clothes of Prakash were blood stained and the stains bore the same blood group as that of Gangamma, the circumstance could be used Prakash. A serological comparison of the blood of Gangamma and Prakash and the blood stains on his clothes was necessary and that was absent from the evidence of the prosecution."

22. The incident has taken place on 15.2.2010 whereby according to the prosecution, the accused pelted stones at the house of PW-1 Narotam Ram. It has come on record that Narotam Ram has not lodged any complaint with the police and PW-13 SI Om Chand has also admitted that no complaint was lodged with the police about this incident. In case the incident, as per the prosecution version has happened on 15.2.2010 at night, the matter was required to be taken up with the police immediately. It is not believable why Narotam Ram PW-1 and his maternal uncle Aelu Ram would visit the house of accused and that too on 17.2.2010.

23. There were many houses around the house of Mohar Singh but no independent witnesses have been associated from these houses. The accused is about 25 years of age. It is not believable as per the prosecution version Om Chand PW-13 that he was playing cricket with children of 3-4 years of age.

24. Though, human blood was detected on the T- shirt of the accused but the result was inconclusive in respect of the blood groups as per the forensic report. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

25. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 20/25.8.2011, rendered by the learned Sessions Judge, Kullu, H.P., in Sessions trial No. 29 of 2010, is set aside. The accused is acquitted of the charges 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.

26. 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 MANSOOR AHMAD MIR, C.J.

New India Assurance Company Limited ...Appellant

VERSUS

Kirpa Nand Negi and another ...Respondents.

FAO No.50 of 2008.
Decided on: 17.04.2015.

Motor Vehicle Act, 1988- Section 166- Motorcycle of the claimant was hit by a Mahindra Utility- claimant sustained 30% disability- Insurance Company contended that Driver did

not have a valid driving licence – photocopy of the Driving Licence proved that driver was competent to drive light motor vehicle- unladen weight of the vehicle was 1690 kg. and thus, vehicle would fall within the definition of light motor vehicle- burden was upon the Insurance Company to prove the breach of the terms and conditions of the policy – mere plea was not sufficient to exonerate the Insurance Company. (Para- 9 to 16)

Cases referred:

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

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

For the Appellant:	Mr.B.M. Chauhan, Advocate.
For the Respondents:	Mr.Satyen Vaidya, Advocate, for respondent No.1. Mr.Vijay Verma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Challenge in this appeal is to the award, dated 13th November, 2007, passed by Motor Accident Claims Tribunal(III), Shimla, (hereinafter referred to as the 'Tribunal'), in MAC Petition No.16-S/2 of 2005/03, titled Kirpa Nand Negi vs. Surinder Kumar and another, (for short the 'impugned award'), whereby a sum of Rs.2,15,000/-, with interest at the rate of 7.5% per annum, stands awarded in favour of the claimant (respondent No.1 herein) and the appellant was directed to satisfy the impugned award.

2. It is necessary to give a flash back of the case, the womb of which has given birth to the present appeal. The claimant Kirpa Ram, on 9th May, 2002, was going on Motorcycle bearing No.HP-07-4013 towards Portmore School, Shimla and when he reached near Vikasnagar, a Mahindra Utility bearing No.HP-51-2199, being driven by the driver, namely, Surinder Kumar, rashly and negligently, hit the said motorcycle. As a result, the claimant sustained injuries, was taken to Indira Gandhi Medical College, Shimla, where he remained under treatment as indoor patient till 6th June, 2002. Thus, the claimant having suffered 30% permanent disability, claimed compensation to the tune of Rs.2,50,000/-, as per the break-ups given in the Claim Petition.

3. Respondents i.e. the driver/owner and the insurer resisted the Claim Petition.

4. On the pleadings of the parties, the Tribunal framed the following issues:

> "1. Whether the petitioner suffered injuries as a result of accident with Mahindra Utility Jeep No.HP-51-2199 which was being driven in a rash and negligent manner by respondent No.1? OPP.
>
> 2. Whether the Motor Vehicle was being driven in violation of the terms and conditions of the Insurance Policy and against the provisions of Motor Vehicle Act and without a valid and effective driving licence? OPR-2
>
> 3. Whether the accident in question was occurred because of negligence on the part of the petitioner if so, to what effect? OPR
>
> 4. Relief"

5. The Claimant examined as many as six witnesses, in support of his case, while Surinder Kumar, driver of the offending vehicle, stepped into the witness box as RW-1 and Khem Chand, official from the office of Registering and Licensing Authority (Rural), Shimla, was examined as RW-2.

6. The Tribunal, after scanning the entire evidence, decided all the issues in favour of the claimant and against the respondents and the claimant was held entitled to the compensation to the tune of Rs.2,15,000/-, with 7.5% interest per annum from the date of Claim Petition till the amount is deposited.

7. The findings, recorded by the Tribunal, have attained finality insofar as the insured/owner/driver and the claimant are concerned, since they have opted not to question the same. However, the insurer-appellant has questioned the same by way of filing the present appeal.

8. I have heard the learned counsel for the parties and have scanned the evidence available on the record.

9. During the course of hearing, the learned counsel for the appellant/insurer has argued that the driver of the offending vehicle was not having a valid and effective driving license, and thus, the owner/insured has committed breach.

10. The argument canvassed by the learned Counsel for the appellant is devoid of any force for the reason that Ext.RW-1/A, photocopy of the driving license on the trial Court file, would show that the driver was competent to drive a light motor vehicle and the said license was valid at the time of accident. Registration certificate of the vehicle has been proved on record as RW-1/B, wherein it is mentioned that the unladen weight of the offending vehicle was 1690 kg. Thus, the offending vehicle, in terms of Section 2(21) of the Motor Vehicle Act, which is reproduced hereinbelow, comes under the definition of "light motor vehicle".

> *"2. ....*
> *(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either or which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms."*

11. The above provision clearly shows that the vehicle, with unladen weight not exceeding 7,500 kilograms, would fall within the definition of "light motor vehicle".

12. Admittedly, the driver of the offending vehicle was having driving license to drive vehicles falling within the definition of "light motor vehicle", thus, was having valid and effective driving licence.

13. It is beaten law of the land that the insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms contained in the policy and mere plea here and there cannot be a ground for seeking exoneration.

14. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*

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

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

(v).....

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

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

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran ingh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

16. The next point urged by the learned counsel for the appellant is that the compensation awarded by the Tribunal is excessive. I have gone through the record. The claimant has proved the disability certificate as Ext.PW-2/B, wherein it has been clearly mentioned that the claimant has suffered 30% permanent disability, has undergone pain and suffering and has to suffer throughout. Therefore, I am of the considered view that the compensation, awarded by the Tribunal, is, in no way, on the higher side, rather it is meager. However, the claimant has not challenged the impugned award, the same is reluctantly upheld.

17. In view of the foregoing discussion, there is no merit in the appeal and the same is dismissed. The Registry is directed to release the award amount in favour of the claimant through payees' account cheque strictly in terms of the impugned award.

****

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

Oriental Insurance Company Ltd. .....Appellant.
Versus
Smt. Amra Devi and others ...Respondents

FAO (MVA) No. 125 of 2008.
Date of decision: 17th April, 2015.

Motor Vehicle Act, 1988- Section 147- A Maruti Van was involved in the accident which was registered as a Light Motor Vehicle- definition of the light motor vehicle includes a transport vehicle – held that a Driver possessing a driving license to drive a light motor vehicle was competent to drive light motor vehicle and the Tribunal had rightly held Insurance Company liable to pay the compensation. (Para-3 to 19)

Cases referred:
Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791
National Insurance Company Ltd. Vs. Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906
Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Lal Chand versus Oriental Insurance Co. Ltd., 2006 AIR SCW 4832,
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant: Mr. Lalit K. Sharma, Advocate.
For the respondents: Mr. Bimal Gupta, Advocate, for respondent No.3
Mr. Suneet Goel, Advocate, for respondent No. 5.
Nemo for other respondents.

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 11.10.2007, made by the Motor Accident Claims Tribunal, Kullu, H.P. in Cl. Pet. No. 51/2005 titled

Smt. Amra Devi and another versus Vikas Sood and others, whereby compensation to the tune of Rs.2,20,500/- with 7% interest was awarded in favour of the claimants and insurer/appellant came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claimants, owner and driver have not questioned the impugned award on any ground, so it has attained finality so far it relates to them. Thus, the only question to be determined in this appeal is whether the Tribunal has rightly saddled the insurer with the liability.

3. Admittedly, the vehicle was Maruti Van bearing registration No.HP-01K-0289, which is a light motor vehicle. The said vehicle falls within the definition of "light motor vehicle" in terms of Section 2 (21) of the Motor Vehicles Act, for the following reasons.

4. I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:

> *"2. .....*
>
> *(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.*
>
> *xxx xxx xxx*
>
> (21) *"light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.*
>
> *xxx xxx xxx*
>
> *(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.*
>
> *xxx xxx xxx*
>
> *(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."*

5. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

6. At the cost of repetition, definition of "light motor vehicle" includes the words "transport vehicle" also. Thus, the definition, as given, mandates the "light motor vehicle" is itself a "transport vehicle", whereas the definitions of other vehicles are contained in Sections 2(14), 2 (16), 2 (17), 2 (18), 2 (22), 2 (23) 2 (24), 2 (25), 2 (26), 2 (27), 2 (28) and 2 (29) of the MV Act. In these definitions, the words "transport vehicle" are neither used nor included and that is the reason, the definition of "transport vehicle" is given in Section 2 (47) of the MV Act.

7. In this backdrop, we have to go through Section 3 and Section 10 of the MV Act. It is apt to reproduce Section 3 of the Act herein:

> ***"3. Necessity for driving licence.*** *- (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.*
>
> *(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."*

8. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

9. My this view is supported by Section 10 of the MV Act, which reads as under:

> *"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*
>
> *(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-*
>
> *(a) motor cycle without gear;*
>
> *(b) motor cycle with gear;*
>
> *(c) invalid carriage;*
>
> *(d) light motor vehicle;*
>
> *(e) transport vehicle;*
>
> *(i) road-roller;*

(j) motor vehicle of a specified description."

10. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, which was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stand deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

11. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> *"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgement hereunder:-*
>
> > *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
> >
> > *.....*
> >
> > *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a*

> *passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."*
>
> *In the given circumstances of the case PSV endorsement was not required at all."*

12. The mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.*
>
> *20. .....*
>
> *21. .....*
>
> *22. .....*
>
> *23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of*

Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

13. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. .....

10. .....

11. .....

12. .....

13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods

vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'. A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

14. The Apex Court in a latest judgment in the case titled as **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** held that endorsement is not required.

15. Having glance of the above discussions, I hold that the endorsement was not required.

16. The Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** has laid down the same principles. 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."

17. In a case titled as **Lal Chand versus Oriental Insurance Co. Ltd.,** reported in **2006 AIR SCW 4832,** the owner had performed his job whatever he was required to do and satisfied himself that the driver was having valid driving licence. The Apex Court held the insurer liable. It is apt to reproduce paras 8, 9 and 11 of the judgment herein:

"8. We have perused the pleadings and the orders passed by the Tribunal and also of the High Court and the annexures filed along with the appeal. This Court in the case of United India Insurance Co. Ltd. v. Lehru & ors., reported in 2003 (3) SCC 338, in paragraph 20 has observed that where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). He will, therefore, have to check whether the driver has a driving licence and if the driver produces a driving licence, which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take test of the driver, and if he finds that the driver is competent to drive the vehicle, he will hire the driver.

9. In the instant case, the owner has not only seen and examined the driving licence produced by the driver but also took the test of the driving of the driver and found that the driver was competent to drive the vehicle and thereafter appointed him as driver of the vehicle in question. Thus, the owner has satisfied himself that the driver has a licence and is driving competently, there would be no breach of Section 149(2)(a)(ii) and the Insurance Company would not then be absolved of its liability.

10. .....

11. As observed in the above paragraph, the insurer, namely the Insurance Company, has to prove that the insured, namely the owner of the vehicle, was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant point of time."

18. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

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

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

19. Applying the test, the Tribunal has rightly recorded the findings and saddled the insurer with the liability. No interference is called for.

20. Accordingly, the appeal is dismissed and the impugned award is upheld. Send down the record, forthwith, after placing a copy of this judgment.

21. 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.

****

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

Oriental Insurance Company ...Appellant.

Versus

Smt. Bresti Devi & others ...Respondents.

FAO No. 308 of 2007
Reserved on: 10.04.2015
Decided on: 17.04.2015

Motor Vehicle Act, 1988- Section 166- Claimant asserted that driver was driving the vehicle in a rash and negligent manner- driver-cum-owner did not deny the Para regarding rashness or negligent specifically but asserted that the car was stationary and was hit by a Truck- however, the particulars of the Truck and the name of the driver were not mentioned in the reply- driver was not arrayed as a party- no evidence was led in support of the plea taken by the owner- evidence proved that the vehicle was being driven by the owner-cum-driver in a rash and negligent manner- Tribunal had not recorded any specific findings

regarding the rashness and negligence but this fact was duly proved from the record- appeal dismissed. (Para-9 to 22)

For the appellant:	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Mr. G.R. Palsra, Advocate, for respondents No. 1 to 3. Respondent No. 4 ex-parte.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Subject matter of this appeal is award, dated 12th April, 2007, made by the Motor Accident Claims Tribunal, Mandi, H.P. (for short "the Tribunal") in Claim petition No. 41 of 2005, titled as Besti Devi and others versus Sh. Nand Lal and another, whereby compensation to the tune of Rs. 4,90,000/- with interest @ 7.5% from the date of petition came to be awarded in favour of the claimants (for short "the impugned award").

2. The insured/owner-cum-driver and the claimants have not questioned the impugned award on any ground, 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. Mr. G.C. Gupta, learned Senior Counsel appearing on behalf of the appellant-insurer, while referring to paras 14 and 15 of the impugned award, argued that the Tribunal has not recorded findings about the rash and negligent driving of the driver, namely Shri Nand Lal, and prayed that the claim petition be dismissed.

5. Thus, the only question to be determined in this appeal is - whether the claimants have proved that the driver has driven the offending vehicle rashly and negligently?

6. In order to thrash out and marshal out the said issue, it is necessary to give a flashback of the case, the womb of which has given birth to the instant appeal.

7. The claimants have invoked the jurisdiction of the Tribunal in terms of Section 166 of the Motor Vehicles Act, 1988 (for short "the MV Act") for grant of compensation to the tune of Rs.10,00,000/-, as per the break-ups given in the claim petition.

8. Precisely, the case of the claimants, as given in para 24 (i) of the claim petition, is that on 31.05.2005, deceased, namely Shri Mahipal, husband of claimant No. 1 and father of claimants No. 2 & 3, was travelling in a car, bearing registration No. HP-31 A-0517, which was coming to Nagchala from Dharamshala, was being driven by its driver-cum-owner, namely Shri Nand Lal, rashly and negligently, lost control and dashed towards hill side, deceased, namely Shri Mahipal, sustained injuries, was taken to Zonal Hospital, Mandi, whereby he succumbed to the injuries.

9. The driver-cum-owner, who was respondent No. 1 in the claim petition, filed reply to the claim petition, denied para 24 (i) and pleaded that he had not driven the offending vehicle rashly and negligently, but the car was stationary at Bijani, was hit by a truck, which was coming from Jogindernagar side, the deceased sustained injuries and succumbed to the injuries.

10. The appellant-insurer, who was respondent No. 2 in the claim petition, has evasively denied para 24 (i), while filing reply, by recording *'denied for want of knowledge'*.

11. The owner-cum-driver has admitted the factum of accident and the death of the deceased. Thus, the only question to be determined in this appeal is - whether the accident was caused by the car or by the truck?

12. It is apt to record herein that the driver-cum-owner of the offending vehicle has neither disclosed the particulars of the truck nor he has made a whisper here and there as to which truck was involved in the accident and who was driving the said truck. He has also not taken steps to array the driver of the said truck as party-respondent nor he has led any evidence in support of the said factum.

13. The claimants have examined eight witnesses including one of the claimants, namely Smt. Bresti Devi, who appeared in the witness box as PW-1. The owner-cum-driver, namely Shri Nand Lal, has appeared himself in the witness box as RW-1 and the insurer has examined Shri Parveen Kumar as RW-2 in support of its case. The Tribunal has discussed the evidence in paras 11 to 13 of the impugned award.

14. PW-4, namely Shri Jai Pal, who was also travelling in the offending vehicle at the time of accident, has specifically stated that Shri Nand Lal had driven the offending vehicle rashly and negligently. PW-2, namely Shri Suresh Kumar, has proved the contents of FIR, Ext. PD, which does disclose that FIR was lodged to the effect that Shri Nand Lal had caused the accident while driving the offending vehicle rashly and negligently.

15. The owner-cum-driver of the offending vehicle, namely Shri Nand Lal, while appearing in the witness box as RW-1, has stated that he was travelling in the offending vehicle alongwith his friends, namely Shri Jai Pal and Shri Mahipal, and on their request, he stopped the car, the car was hit by a truck and all of them sustained injuries.

16. I deem it proper to record herein that Shri Jai Pal has been examined by the claimants as PW-4, who has deposed that Shri Nand Lal was driving the offending vehicle in fast speed and caused the accident rashly and negligently.

17. PW-4, Shri Jai Pal, one of the occupants of the offending vehicle, has supported the case of the claimants, not of the owner-cum-driver.

18. Having said so, the claimants have proved that Shri Nand Lal had driven the offending vehicle rashly and negligently on the date of accident and caused the accident, in which deceased, namely Shri Mahipal, sustained injuries and succumbed to the injuries.

19. It is a fact that the Tribunal has not recorded the findings about the rash and negligent driving of the offending vehicle by its driver, but while going through the impugned award, one comes to an inescapable conclusion that virtually the Tribunal has come to the conclusion that the accident was outcome of the rash and negligent driving of the offending vehicle by its driver.

20. However, be that as it is, as discussed hereinabove, the claimants have proved the rash and negligent driving of the offending vehicle by its driver, namely Shri Nand Lal, in order to maintain claim petition under Section 166 of the MV Act.

21. *Sine qua non* for maintaining claim petitions under Section 166 of the MV Act is rash and negligent driving, which the claimants have pleaded and proved, as discussed hereinabove.

22. Learned counsel for the appellant-insurer has not argued about the adequacy of compensation, any willful breach on the part of the owner-cum-driver and has also not questioned the impugned award on any other ground.

23. Viewed thus, no case for interference is made out. Hence, the appeal merits to be dismissed and the impugned award is to be upheld. Ordered accordingly.

24. 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.

25. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

Oriental Insurance Company Ltd. ...Appellant.
Versus
Smt. Champi Devi & others ...Respondents.

FAO No. 101 of 2008
Decided on: 17.04.2015

Motor Vehicle Act, 1988- Section 149- Right of third party cannot be defeated due to the breach on the part of the owner/insured - compulsory duty has been imposed on the owners to get the vehicles insured so that rights of third party are not defeated- Tribunal had held that owner had committed breach and had directed the insurer to satisfy the award with the right of recovery which cannot be faulted. (Para- t 6 to 11)

Case referred:
S. Iyyapan versus United India Insurance Company Limited and another, (2013) 7 Supreme Court Cases 62

For the appellant: Mr. Lalit K. Sharma, Advocate.
For the respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 1 to 6.
Nemo for respondents No. 7 and 8.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Mr. Ramesh Thakur, Advocate, had appeared in this appeal on behalf of respondents No. 7 and 8. Today, there is no representation on behalf of respondents No. 7 and 8. Hence, they are set ex-parte.

2. This appeal is directed against the award, dated 30th November, 2007, made by the Motor Accident Claims Tribunal, Kullu, H.P. (for short "the Tribunal") in Claim Petition No. 73/2006, titled as Smt. Champi Devi and others versus Shri Jagar Nath and others, whereby compensation to the tune of Rs. 2,55,000/- 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 claimants and the appellant-insurer was directed to satisfy the award at the first instance with right to recover the same from the owner-insured (for short “the impugned award), on the grounds taken in the memo of appeal.

3. The appellant-insurer has questioned the impugned award only on the ground that the Tribunal has fallen in error in directing the appellant-insurer to satisfy the award with right of recovery.

4. I am of the considered view that the Tribunal has not committed any error in directing the appellant-insurer to satisfy the award at the first instance and to recover the same from the owner-insured. The Tribunal has rightly made discussion in paras 17 to 19 of the impugned award.

5. Admittedly, the deceased was a third party and the claimant No. 1 is the widow, claimants No. 2 to 5 are the minor daughters & sons and claimant No. 6 is the mother of the deceased.

6. It is beaten law of land that right of third party cannot

be defeated and even if the owner-insured has committed breach, the insurer has to satisfy the award.

7. In order to ensure that victim of vehicular accident, i.e. third party, receives compensation and his/her rights are not defeated, the Motor Vehicles Act, 1988 (for short "The MV Act") has undergone a sea change and Section 146 was introduced. The mandate of Sections 146, 147 and 149 of the MV Act is to protect the rights of third parties and that is why, compulsory duty has been imposed on the owners to get the vehicles insured and claim of third parties cannot be defeated.

8. It is apt to reproduce Section 146 of the MV Act herein:

> *"**146. Necessity for insurance against third party risk.** - (1) No person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter :*
>
> *Provided that in the case of a vehicle carrying, or meant to carry, dangerous or hazardous goods, there shall also be a policy of insurance under the Public Liability Insurance Act, 1991 (6 of 1991).*
>
> *Explanation. - A person driving a motor vehicle merely as a paid employee, while there is in force in relation t the use of the vehicle no such policy as is required by this sub-section, shall not be deemed to act in contravention of the sub-section unless he knows or has reason to believe that there is no such policy in force.*
>
> *(2) Sub-section (1) shall not apply to any vehicle owned by the Central Government or a State Government and used for Government purposes unconnected with any commercial enterprise.*
>
> *(3) The appropriate Government may, by order, exempt from the operation of sub-section (1) any vehicle owned by any of the following authorities, namely:-*

(a) the Central Government or a State Government, if the vehicle is used for Government purposes connected with any commercial enterprise;

(b) any local authority;

(c) any State transport undertaking:

Provided that no such order shall be made in relation to any such authority unless a fund has been established and is maintained by that authority in accordance with the rules made in that behalf under this Act for meeting any liability arising out of the use of any vehicle of that authority which that authority or any person in its employment may incur to third parties.

Explanation. - For the purposes of this sub-section, "appropriate Government" means the Central Government or a State Government, as the case may be, and -

(i) in relation to any corporation or company owned by the Central Government or any State Government, means the Central Government or that State Government;

(ii) in relation to any corporation or company owned by the Central Government and one or more State Governments, means the Central Government;

(iii) in relation to any other State transport undertaking or any local authority, means

that Government which has control over that undertaking or authority."

9. The Apex Court has also discussed this aspect in a case titled as **S. Iyyapan versus United India Insurance Company Limited and another,** reported in **(2013) 7 Supreme Court Cases 62.** It is apt to reproduce para 16 of the judgment herein:

"16. The heading "Insurance of Motor Vehicles against Third Party Risks" given in Chapter XI of the Motor Vehicles Act, 1988 (Chapter VIII of 1939 Act) itself shows the intention of the legislature to make third party insurance compulsory and to ensure that the victims of accident arising out of use of motor vehicles would be able to get compensation for the death or injuries suffered. The provision has been inserted in order to protect the persons travelling in vehicles or using the road from the risk attendant upon the user of the motor vehicles on the road. To overcome this ugly situation, the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force."

10. Viewed thus, the Tribunal has rightly held that the owner-insured has committed breach and directed the appellant-insurer to satisfy the award with right of recovery.

11. Having glance of the above discussions, the appeal merits to be dismissed and the impugned award is to be upheld. Accordingly, the appeal is dismissed and the impugned award is upheld.

12. 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.

13. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

Parkash Chand ..... Petitioner
Vs.
State of H.P. & ors. ..... Respondents

CWP No. 11334 of 2011.
Judgement reserved on: 9.4.2015.
Date of decision: 17.4.2015.

Constitution of India, 1950- Article 226- Petitioner filed a Writ Petition seeking direction to immediately construct/ repair the road from Bhathmana Bus Stand to Dharvidhar road – it was pleaded that demand for construction of link road was made by all residents but no action was taken by Gram Panchayat- Gram Panchayat passed a resolution seeking grant of Rs. 5 lacs for the construction of the road- Gram Panchayat constructed a jeepable road – Government sanctioned amount of Rs. 3,60,000/- but the amount is not being used for the construction of the road- respondent stated that private land was located adjacent to the road and it was not possible to acquire the private land for construction of the road- respondent No. 5 also contended that a direction to acquire the land of private land owners at the cost of the petitioner or the other beneficiaries of the road is in violation of letter and spirit of Article 300-A – held, that Court does not have jurisdiction to issue direction to acquire the land of the persons merely, because petitioner and other beneficiaries are willing to pay the price of the same- deprivation of property can only be for the public purpose when the cost of acquisition is born either wholly or partly by the Government- but when the cost is born by an individual, group of individual or a company, it cannot be treated to be an acquisition for the public purpose- in the present case, petitioner was seeking acquisition of the land on the payment of money by him which is not permissible- petition dismissed. (Para-10 to 18)

Case referred:
Union of India and another vs. S.B.Vohra and others (2004) 2 SCC 150

For the petitioner : Mr. Hamender Chandel, Advocate.
For the respondents : Mr. Virender Kumar Verma and Mr. Rupinder Singh, Additional Advocate Generals with Ms. Parul Negi, Dy. Advocate General, for respondents No. 1 to 3, 10 and 11.
Mr. Narender Sharma, Advocate, for respondent No.4.
Mr. Bhupender Gupta, Sr. Advocate with Mr. Dalip K. Sharma, Advocate, for respondent No. 5.
Mr. Karan Singh Kanwar, Advocate, for respondents No. 6 to 8.
Mr. Bimal Gupta, Advocate, for respondent No. 9.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By medium of this writ petition, the petitioner has prayed the following substantive reliefs:

(i) That the respondents may be directed to immediately construct/ repair the road from Bhathmana Bus Stand to Dharvidhar road.

(ii) That the respondents may be directed to take all the necessary steps to make the road usable for at least the small vehicles like Ambulance and utility vehicles.

2. The grievance set out in the petition is that respondents have failed to construct and maintain the road from Bhathmana Bus Stand to Dharvidhar, as a result whereof, the petitioner as well as the other residents of Gram Panchayat are facing great difficulty in approaching the main road "Bhathmana to Shimla". The demand for construction of link road was raised by the residents, but the government did not take any steps for the construction of the road. Vide resolution dated 8.12.2009, the Gram Panchayat resolved that a grant of Rs.5,00,000/- may be provided for construction of the road. The Gram Panchayat started construction of the road by contributing money as also providing labour and resultantly the road became jeepable in the year 2009 which provides connectivity to about 300 residents of the Gram Panchayat.

3. It is alleged that since the link road was constructed by the residents, it required further leveling by the expert agency of the government and at few places retaining wall and breast walls were also required to be constructed. The residents of the area repeatedly represented to the government and finally the government sanctioned an amount of Rs.3,60,000/- for the construction of the road, but the said amount is not being used for the construction of the road.

4. The official respondents in their reply have raised preliminary objection regarding the maintainability of the petition and it is submitted that the villagers had started the construction of Ambulance road out of their personal funds. The respondent No. 2 had sanctioned a sum of Rs.1,00,000/- for the construction of the road on 15.1.2010. The respondent No. 3 further released funds to the Gram Panchayat on 24.11.2010 to construct the said road after completing all codal formalities mandatory for its execution. However, a complaint was received in the office of respondent No.3 Sub Divisional Magistrate, Shimla, where one of the land owners whose land falls adjacent to the public path had requested to stop construction of the road till the construction of the breast wall for protection of his house. Two kilometers of road was constructed by the local residents themselves but then the same was damaged and washed away due to heavy rains in many places. It was further reported that road from RD 0/000 to 0/075 is quite narrow and there were houses towards the hilly side, which required additional funds for their protection.

5. This court vide various interim orders had directed the official respondents to look into the feasibility of construction of the road, pursuant to which various amounts were also sanctioned by the official respondents. However, the State expressed its inability to acquire the private lands including the land belonging to respondent No.3 on account of its policy decision not to acquire any private land for the construction of rural link road as it would lead to multiplicity of litigation in other similarly situated cases throughout the State. Later, when the petitioner offered to bear the entire cost of the acquisition as also the

construction, the official respondents were not averse to such proposal as would be clear from the detailed order passed by this court on 18.12.2014, which reads thus:-

> "In compliance to the directions passed by this Court on 12.12.2014, Engineer-in-Chief, HPPWD, Shimla is present. On 15.9.2014, this Court passed the following order:
>
> > *"It is represented by the learned counsel for the petitioner that the petitioner and the co-villagers are ready to bear the cost of acquisition of the land belonging to respondents No. 5 and 9, in case the State is willing to acquire the same in accordance with law, let the State obtain instructions in this regard."*
>
> When the matter was listed subsequently, it was pointed out by learned Additional Advocate General that the respondent-State is unable to acquire the land belonging to respondents No. 5 to 9 being its policy decision not to acquire any private land for the construction of rural link road as it shall lead to multiplicity of litigation in other similar situated cases throughout the State. It has been brought to the notice of Engineer-in-Chief, HPPWD, Shimla that the entire cost towards acquisition and construction of five mtrs. wide road on land comprised in Khasra No.773, including override charges thereof
>
> advertisement etc.etc. shall also be borne by the petitioner and the co-villagers. He has also been apprised of the fact that the acquisition of this land on behalf of the State would not in any manner mean that it is for the HPPWD to construct the road over this khasra number or beyond this point.
>
> Learned Advocate General, on instructions from the Engineer-in-Chief, HPPWD, has stated that they are not averse to the proposal that in case the entire cost of acquisition and construction of the road is borne by the petitioner, then it will have no objection in issuing necessary notification under the Right to Fair Compensation and Transparency in Land Acquisition, Re-habilitation and Re-settlement Act, 2013 (for short 'Act'). Accordingly, let the Land Acquisition Collector, HPPWD, Winter Field, Shimla make a tentative assessment of the value of the land for construction of five mtrs. wide road over Khasra No. 773 including the structure(s), if any, over the same in accordance with the Act, within a period of eight weeks.
>
> In the meanwhile, learned counsel for the petitioner shall also seek instructions in this regard from the petitioner because before passing any final order regarding acquisition, the petitioner will have to file an undertaking before this Court undertaking therein that it will be the petitioner who shall bear all the costs of acquisition and construction of the road and no amount whatsoever shall be paid from the State Exchequer for the construction of the road and the mere fact that the State will issue the necessary notification under the Act would not in any manner be construed to mean that the road would be constructed by the State Government. It further be undertaken that the land having width of

only five mtrs would be acquired. The presence of Engineer-in-Chief, HPPWD, Shimla, is dispensed with.

List on 27.2.2015.

Copy ***dasti.”***

6. However, the respondent No. 5 has now raised a preliminary objection regarding the very maintainability of the petition by arguing that direction to acquire the land of the respondent and other private land owners by the State at the expense and cost of the petitioner or the other beneficiaries of the road is in violation of letter and spirit of Article 300-A of Constitution of India and therefore, the petition ought to be dismissed on this ground alone. The learned counsel for the petitioner on the other hand would argue that petition of the present nature is still maintainable.

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

7. The learned counsel for the petitioner has vehemently argued that taking into the peculiar facts and circumstances of the case where the construction of the road is for the general public, the same cannot be obstructed by a single individual and if that be so a writ in the nature of mandamus can always be issued directing the respondents to acquire the land since the petitioner and the other beneficiaries, who were always ready and willing and are still ready and willing to bear the cost not only of the acquisition but also of the construction of the road. He in support of his contention has placed reliance upon a three Judges Bench judgement of Hon’ble Supreme Court in **Union of India and another** vs. **S.B.Vohra and others (2004) 2 SCC 150,** more particularly the following observations:-

> “28. The broad principles of judicial review as has been stated in the speech of Lord Diplock in Council of Civil Services Unions v. Minister for the Civil Service [(1985) A.C. 374], i.e., illegality, irrationality and procedural impropriety, have greatly been overtaken by other developments as for example, generally not only in relation to proportionality and human rights but also in the direction of principles of legal certainty, notably legitimate expectations.
>
> 30. Judicial review is a highly complex and developing subject. It has its roots long back and its scope and extent varies from case to case. It is considered to be the basic feature of the Constitution. The Court in exercise of its power of judicial review would jealously guard the human rights, fundamental rights and the citizens' rights of life and liberty as also many noon-statutory powers of governmental bodies as regards their control over property and assets of various kinds which could be expended on building hospitals, roads and the like, or overseas aid, or compensating victims of crime (See for example, R. v. Secretary of State for the Home Department ex parte Fire Brigades Union [1995] 2 WLR 1.
>
> 31. The Court, however, exercises its power of restraint in relation to interference of policy. In his recent book `Constitutional Reform in the UK' at page 105, Dawn Oliver commented thus :
>
> > "However, this concept of democracy as rights-based with limited governmental power, and in particular of the role of the courts in a democracy, carries high risk for the judges - and for the public. Courts may interfere inadvisedly in public administration.

> The case of Bromley London Borough Council v. Greater London Council ([1983] 1 AC 768, HL) is a classic example. The House of Lords quashed the GLC cheap fares policy as being based on a misreading of the statutory provisions but were accused of themselves misunderstanding transport policy in so doing. The courts are not experts in policy and public administration - hence Jowell's point that the courts should not step beyond their institutional capacity (Jowell, 2000). Acceptance of this approach is reflected in the judgments of Laws LJ in International transport Roth GmbH v. Secretary of State for the Home Department ([2002] EWCA Civil 158, [2002] 3 WLR 344) and of Lord Nimmo Smith in Adams v. Lord Advocate (Court of Sessions, Times, 8 August 2002) in which a distinction was drawn between areas where the subject matter lies within the expertise of the courts (for instance, criminal justice, including sentencing and detention of individuals) and those which were more appropriate for decision by democratically elected and accountable bodies. If the courts step outside the area of their institutional competence, government may react by getting Parliament to legislate to oust the jurisdiction of the courts altogether. Such a step would undermine the rule of law. Government and public opinion may come to question the legitimacy of the judges exercising judicial review against Ministers and thus undermine the authority of the courts and the rule of law."

8. The learned Senior counsel for respondent No. 5 on the other hand has vehemently argued that his client cannot be deprived of his property only because some moneyed persons are willing to offer the price of his land while the State of its own is admittedly not interested in acquiring the land.

9. I have weighed the rival contentions of the parties and of the considered view that this court is not vested with the jurisdiction to issue direction to the State to acquire third party's land only because the petitioner and other beneficiaries are willing to pay the price of the same, particularly when admittedly, the State of its own is not willing to acquire the land.

10. No doubt, the right to hold property has ceased to a fundamental right under the Constitution of India but then it has been left to the legislature to deprive a person of his property but in accordance with law. This right cannot be exercised by an individual(s) because Article 300-A provides that a person cannot be deprived of his property by executive feat and it can only be done in accordance with law. No law, no deprivation of property is the principle underlying under Article 300 A of Constitution of India, an executive order depriving of his property without being backed by law is not constitutionally valid. Under this Article right to property is not a human, but also a constitutional right and hence it cannot be taken away except in accordance with law.

11. Taking possession or acquisition should be in the connotation of acquisition or requisition of property for public purpose. The word "law" used in Article 300-A of Constitution of India must be an act of Parliament or of State Legislature, a rule or statutory order having force of law. The deprivation of property as observed earlier shall be only by authority of law, be it an Act of Parliament or State Legislature, but not by executive feat or an order. Deprivation of property is by acquisition or requisition or taking possession of for public purpose. It is more than settled that in case the owner of the immovable property is

interdicted to deal with his property as he likes it would be violative of Article 300-A of Constitution of India.

12. The deprivation of property by a statute within the meaning of Article 300-A generally speaking must take place for public purpose or public interest. The concept of eminent domain, which applies when a person is deprived of his property postulates that the purpose must be primarily public and not primarily of private interest and merely incidentally beneficial to the public. An act or law, which deprives of a person of his private property for private interest will be unlawful and unfair and undermines the rule of law and can be subjected to judicial review.

13. The concept "public purpose" has been given fairly expansive meaning, which has to be justified upon the purpose and object of the Land Acquisition Act as also the policy of the legislation, if any. The public purpose is therefore a condition precedent for deprivation of a person from his property under Article 300-A. Article 300-A would be violated if the provisions of the law authorizing deprivation of property have not been complied with in letter and spirit. The law has to be reasonable and must comply with other provisions of the Constitution.

14. It is now well established that if the cost of acquisition is borne either wholly or partly by the government, the acquisition can be said to be for a public purpose within the meaning of Land Acquisition Act, but if the cost is entire borne by an individual, group of individual(s), or a company etc., then the same cannot be treated to be an acquisition for a public purpose within the meaning of Land Acquisition Act. No doubt, even if a trifling sum or even token or nominal contribution is made by the government, the same is held to be sufficient compliance with the second proviso to section 6 of Land Acquisition Act. In ultimate analysis, an acquisition can only be held to be for public purpose, if only the government comes forward to sanction the payment of a nominal sum towards compensation.

15. Indisputably acquisition of land is an act falling within the purview of eminent domain of the State and it essentially relates to the concept of compulsory acquisition as opposed to voluntary sale. But then the decision to acquire the property has to be of the State and not individual(s).

16. The acquisition of property of respondent No. 5 by proxy acquisition where not only the provisions of the Land Acquisition Act would be invoked but even the cost of acquisition and publication will be paid by some other third agency would in fact mean depriving the respondent No. 5 of his property save and except by authority of law, which would be contrary to the letter and spirit of Article 300 A of Constitution of India.

17. Article 300 A imposes a duty and an obligation that no person can be deprived of his property save by the authority of law. In case such a course is permitted then the same would also be against the very object for which the Land Acquisition Act was enacted. All business, houses individuals etc. would then on their sheer financial strength be able to acquire prime properties. This obviously cannot be permitted as nobody can be permitted to buy others property without his consent.

18. The government while exercising the power as eminent domain may of its own chose and come to the rescue of the petitioner, but then this court in teeth of Article 300 A is not competent to issue directions to the State to compulsory acquire the land of 5th respondent even despite the fact that petitioner and other beneficiaries are not only willing but are ready to bear not only the cost of acquisition but also the cost of construction of the road. This would mean proxy acquisition, which is prohibited by law.

19. In view of the aforesaid discussion, the preliminary objection raised by the respondents is accepted and the petition is dismissed as being not maintainable, so also all the pending application, if any.

****

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

Puran Dutt ....Petitioner.
Versus
Salil Seth and another ....Respondents.

CMPMO No.40 of 2014
Reserved on: 8.4.2015
Decided on: 17.4.2015

H.P. Urban Rent Control Act, 1987- Section 14- Summons were issued to the petitioner for 21.8.2006 – process server reported that petitioner had retired and was living in the village- fresh summons were ordered to be issued for 29.9.2006- process server effected the service by way of affixation on which petitioner was proceeded exparte- held, that once it was reported that the petitioner had retired and was residing in the village, personal service was not possible- summons could have been affixed in the court house as well as residential house- summons were affixed on the residential house which is a proper service – hence, the petitioner was rightly proceeded exparte. (Para- 4 to 11)

Cases referred:
The Commissioner of Income-Tax, Punjab, Jammu and Kashmir and Himachal Pradesh vs Daulat Ram Khanna, AIR 1967 SC 1552
Janta Sirap Co. v. Murti Shri Raghunath Ji Maharaj, 1996 (49) RCR 117
Narender v. Pradeep Kumar, 2005 (1) RCR (Rent) 549

For the Petitioner : Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the Respondents: Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This petition is instituted against the order dated 11.11.2013 rendered by the learned Rent Controller, Shimla in case No. 284-6 of 2012.

2. "Key facts" necessary for the adjudication of this petition are that respondents filed an eviction petition under section 14 of the H.P. Urban Rent Control Act against the petitioner. Rent Controller issued noticed on 6.6.2006 to the petitioner for 21.8.2006. On 21.8.2006, Process Server gave report dated 19.6.2006 stating therein that the premises were locked and the petitioner has retired and has started living in his village. The matter was again taken up on 21.8.2006 and fresh summons were directed to be issued for 29.9.2006. The Process Server affixed the copy of the summons on the door of the petitioner on 25.9.2006. Thereafter, petitioner was proceeded *ex parte* on 29.9.2006. Rent

Controller passed the eviction order against the petitioner on 28.12.2006. He has returned specific findings that the premises in question have become unfit and unsafe for human habitation and the premises were *bona fide* required by the respondents for building and re-building, which could not be carried out without the premises being evicted by the tenant. Respondent No.1 Salil Seth has appeared as PW-1 and Vivek Karol has appeared as PW-2. He has proved report Ex.PW-2/A.

3. Petitioner filed an application under order 9 rule 13 read with section 151 of the Code of Civil Procedure for setting aside *ex parte* order dated 28.12.2006. The application was contested by the respondents. Rent Controller dismissed the application on 11.11.2013. The specific case put up by the petitioner before the Rent Controller was that he has received the notice of Execution Petition No.40/2012 and prior to this, he had no knowledge about the *ex parte* order dated 28.12.2006.

4. It is evident from the facts enumerated hereinabove is that the notice was affixed on the door of the premises in question. The service has been effected upon the petitioner as per the provisions of order 5 rules 17 and 20 of the Code of Civil Procedure. Since the petitioner could not be served by ordinary process, he was required to be served by way of affixation of summons.

5. In the present case, petitioner was absent at the time of service and there was no likelihood of his being found since after his retirement, he had started living in his village and no one was present there to accept the service. The affixation of summons has been ordered after the respondents despite taking all due diligence could not find the petitioner and there was no person at whom service could be effected. It was also not a case of temporary absence of the petitioner. Process Server has assigned the reason under which he has affixed the summons on the outer door of the premises in question. He has also stated that no witness was present on the spot on 25.9.2006.

6. Mr. G.D. Verma, learned Senior Advocate, has also argued that even assuming that the copy of notice was affixed on the outer door but the same was not affixed in the court house, as per order 5 rule 20 of the Code of Civil Procedure.

7. Their Lordships of the Hon'ble Supreme Court of India in ***The Commissioner of Income-Tax, Punjab, Jammu and Kashmir and Himachal Pradesh*** vs ***Daulat Ram Khanna***, AIR 1967 SC 1552 have held that sub-rule (1) of Rule 20 of order 5 of the Code of Civil Procedure prescribes the manner in which the Court may follow and this manner consists of two acts: (1) affixing a copy of the summons in the court house, and (2) affixing it in some conscious part of the residential house or the business premises of the defendant. It is for the Court, which mode is to be adopted. Their Lordships have held as under:

> **9. In our view, here is great deal of force, in what Mr. Sen urges. It seems to us that the last ten words in sub-r. (1) of R. 20, do confer a discretion on the Court to adopt any other manner of service. The sub rule prescribes one manner which the Court may follow and this manner consists of two acts; (l) affixing a copy of the summons in the Court house, and (2) affixing it in some conspicuous part of the residential house or the business premises of the defendant. If the High Court were right we would expect that the word "also" would be repeated and inserted between the word "or" and "in" in the last ten words. The alternative manner which the Court decides to adopt for serving must of course be such as gives notice to the person to be served."**

8. Learned Single Judge of Punjab & Haryana High Court in Janta Sirap Co. v. Murti Shri Raghunath Ji Maharaj, 1996 (49) RCR 117, has held that report of process server is public document and there is no reason for Rent Controller to disbelieve the report of Process Server. Learned Single Judge has held as under:

> **"10. Second service was effected by Bodh Raj Process-server on 5.2.1990 but he is not examined by the petitioner-tenant. His report is dated 5.2.1990. This is a public document. There was no reason before the Rent Controller not to believe this report. If Bodh Raj would have been examined, he would have proved whether alongwith summons copy of the eviction petition was accompanied or who got the tenant identified or whether he himself has identified the tenant. Without examining Bodh Raj tenant-petitioner can not be allowed to raise doubts about this public document. Lastly, even after this service, the tenant did not appear before the lower Court and finally service was effected through munadi by the order dated 16.7.1990, which was effected on 18.5.1990 by the Process-server Kirpal Singh, who also filed his report. About this report also, the tenant-petitioner has raised the same allegations that there is no mention that copy of the eviction petition was attached with it or there is no mentioned as to who identified the tenant and it is not attested by any witness. If Kirpal Singh would have been examined, he would have proved all these things. Without examining him, such doubts cannot be raised against his report. This may be a very weak type of evidence, but in the eye of law, it ia mode of service and once if is effected and the tenant does not appear, the Court has jurisdiction to proceed ex parte against such an erring party. Thus, it is apparent that the tenant-petitioner was served on 5.2.199 and again on 18.5.1990, but he declined to appear in the Court.**

9. In the instant case also, the Process server has opined that doors were locked and he has affixed the summons on the outer door of the house.

10. Their lordships of the Hon'ble Supreme Court have in **Narender v. Pradeep Kumar**, 2005 (1) RCR (Rent) 549, have held that when tenant not appeared despite service and he did not file any appeal and ex parte order has become final in such a situation High Court can not set aside ex parte order in exercise of powers under Article 227 of the Constitution of India. Their Lordships have held as under:

> **[4] We have heard learned counsel for the parties and have also gone through the order of the learned single Judge of the high Court The first and foremost point is when the summons were served on the respondent and he did not appear, he has to thank himself for serious lapse on his part both learned Additional Rent Controller as well as the learned Rent Control Tribunal have found that the summons were served by registered post with acknowledgment due as well as through the process of the court Despite that the respondent has chosen not to put in appearance. Therefore, there was no option left on the part of the Additional Rent Controller but to proceed against the respondent It examined the ex parte order on merit and held that the plaintiff has successfully proved his case under Section 14 (1) (h) of the Act It was also held that an application for setting aside the ex parte decree was filed, but that application was dismissed on march 5, 2003. The**

respondent did not take up this matter before the higher forum and felt satisfied with the order dated March 2003 Dismissing his application for setting aside the ex parte order under Order ix Rule 13 of the Code of Civil Procedure therefore, the ex parte decree passed by the learned Additional Rent Controller became final Against this order of the Tribunal, a writ petition under Article 227 of the constitution was filed and the learned single judge only felt persuaded to remana the case back to the Additional Rent Controller for disposal We fail to understand how can learned single Judge exercise extraordinary jurisdiction under Article 227 for the benefit of a person who himself has not pursued his application under Order IX Rule 13 of the Code of Civil Procedure which was dismissed The Rent Control Tribunal both on facts and law has found that the view taken by the Additional Rent Controller is correct as the wife of the tenant-respondent has purchased a flat and they have alternative accommodation We do not see any ground for giving this latitude to the respondent We are of the view that the view taken by the learned single Judge of the High Court appears to be not sustainable in view of the concurrent finding by the courts below i. e. the Additional Rent controller as well as the Rent Control Tribunal no reasons are disclosed in the order of the High Court for holding that the alternative accommodation acquired was not for residential purpose We do not see any reason for the High Court to have interfered with the matter Hence we allow this appeal and set aside the impugned order dated July 23 2004 passed in Civil miscellaneous Mam No 328 of 2003 by the high Court of Delhi and affirm the orders passed by the Additional Rent Controller as well as the Rent Control Tribunal. There shall be no order as to costs.

11. Petitioner has failed to show sufficient reasons for setting aside the ex parte order. There is neither any illegality nor any perversity in the order dated 11.11.2013 passed by the Rent Controller.

12. Consequential, there is no merit in the petition and the same is dismissed. Pending applications, if any, are also disposed of. No costs.

****

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

Rajesh Kumar & another ...Appellants

Versus

Smt. Sangeeta Devi & others ....Respondents

FAO No. 342 of 2012
Date of Decision: 17.04.2015

Motor Vehicle Act, 1988- Section 166- Deceased was hit by a motor cycle - he was earning Rs. 6,000/- per month- Tribunal deducted 1/4th of the income towards personal expenses of the deceased and held that claimants had lost source of the dependency to the extent of Rs. 4,500/- per month- multiplier of 14 was applied –held that MACT had calculated the compensation in accordance with the law laid down by Hon'ble Supreme Court of India.

(Para-13)

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. Neel Kamal Sharma, Advocate.
For the respondents: Ms. Anjali Soni Verma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Subject mater of this appeal is the award, dated 5th May, 2012, made by the Motor Accident Claims Tribunal (III), District Kangra, H.P., (hereinafter referred to as "the Tribunal") in RBT MACP No. 154-K/07/10, titled Smt. Sangeeta Devi & others versus Rajesh Kumar alias Pintu & another, whereby compensation to the tune of Rs.8,66,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants and against the respondents, (hereinafter referred to as the "impugned award").

2. The claimants have not questioned the impugned award, on any count. Thus, it has attained finality so far as it relates to them.

3. The respondents, i.e. the owner and the driver have challenged the impugned award on the grounds taken in the memo of appeal.

4. It is necessary to give a brief summary of the case, the womb of which has given birth to the present appeal.

5. The claimants being victims of the motor vehicular accident, had invoked the jurisdiction of the Tribunal, in terms of Section 166 of the Motor Vehicles Act, 1988, for short "the Act", for grant of compensation to the tune of Rs.15,00,000/-, as per the break-ups given in the claim petition. It is averred in the claim petition that appellant Rajesh Kumar, had driven the vehicle-Motor Cycle bearing registration No. HP-39-6213, rashly and negligently, on 31.12.2006, at about 7.00 p.m., near Bagadu, in front of Trigart Flower Nursery, Tehsil Shahpur, District Kangra, H.P., hit Ashok Kumar, who was a pedestrian on the road, caused injuries to him, who succumbed to the injuries. The claimants have also pleaded in the claim petition that they were dependants upon the deceased who was their sole bread earner and was earning Rs.6,000/-, being mason by profession.

6. The respondents contested the claim petition on the grounds taken in their memo of objections.

7. Following issues came to be framed by the Tribunal:

> "1. *Whether the deceased Ashok Kumar died due to the striming of motorcycle HP-39-6213 by respondent No. 1 against him on the road at Bagdu within police station Shahpur as alleged? …OPP*
>
> *2. Whether the petitioner being legal heirs of the deceased are entitled to compensation for his death from the respondents. If so to what amount and who is liable to pay this compensation to the petitioners? …OPP*

3. *Whether the petition is not maintainable in the present form as alleged? …OPR*

4. *Whether the offending vehicle was not involved in the accident on 31.12.06 as alleged? If so its effect? …OPR*

5. *Relief"*

8. The claimants examined Shri Harbans Lal (PW-1), Shri Harbans Singh (PW-3) and Shri Om Parkash (PW-4). One of the claimants, namely, Smt. Sangeeta Devi also appeared in the witness box as PW-2. Driver Rajesh Kumar appeared in the witness box as RW-1 and Ajay Kumar owner-insured also appeared in the witness box as RW-2.

9. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that driver, namely, Rajesh Kumar had driven the offending vehicle, rashly and negligently, caused the accident and caused injuries to deceased Ashok Kumar, who succumbed to the injuries.

10. I have gone through the evidence and the documents on the record and am of the considered view that the Tribunal has not fallen in error in recording findings on issues No. 1 & 4. Accordingly, the same are upheld.

11. Before I deal with Issue No. 2, I deem it proper to deal with issues No. 3.

12. It was for the appellants to prove issue No. 3 but have failed to discharge the onus. I have gone through the record and am of the considered view that the claim petition was maintainable under Section 166 of the Act. Accordingly, the findings returned by the Tribunal on issue No. 3 are also upheld.

13. The claimants have pleaded and proved that the income of the deceased was Rs.6,000/- per month. The Tribunal, after deducting 1/4th of the income towards personal expenses of the deceased, held that the claimants have lost source of dependency to the tune of Rs.4500/- per month. It has correctly made deductions and applied the multiplier of '14', in view of the Schedule appended to the Act and the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** read with **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.** Accordingly, the findings recorded by the Tribunal on issue No. 2 are also upheld.

14. At this stage, learned Counsel for the respondents-claimants stated at the Bar that the appellants have deposited only Rs.25,000/- at the time of filing of the appeal and the claimants have filed execution petition which is pending before the Tribunal for the last more than two years despite the fact that there was no stay.

15. The learned Presiding is directed to decide the said execution petition within two months from today.

16. Having said so, the impugned award is upheld and the appeal is dismissed.

17. 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.

United India Insurance Company Ltd. ...Appellant
Versus
Shri Sher Singh & another ....Respondents

FAO No. 313 of 2008
Date of Decision: 17.04.2015

Motor Vehicle Act, 1988- Section 149- Driver had a licence which was valid w.e.f. 2001 to 14th April, 2006- dealing Assistant from Transport Office, Hoshiarpur stated that driving licence was renewed from 2001 till 2006 which shows that driving licence was valid on the date of the accident i.e. 29.3.2004- Insurer had failed to prove that licence was not valid and it was rightly held liable to pay compensation. (Para-14 to 20)

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Ms. Salochana Kaundal, Advocate, for respondent No. 1.
Mr. Ramesh Sharma, Advocate, 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 invoked the jurisdiction of this Court in terms of Section 173 of the Motor Vehicles Act, 1988, for short "the Act", whereby it has questioned the award, dated 31st March, 2008, made by the Motor Accident Claims Tribunal, Una, Himachal Pradesh, (hereinafter referred to as "the Tribunal") in MAC Petition No. 16 of 2006, titled Sher Singh versus Krishan Dev and another, whereby compensation to the tune of Rs. 1,56,108/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimant and against the respondent-insurer, (hereinafter referred to as the "impugned award").

2. Sher Singh, the claimant-injured and Krishan Dev, the driver-cum-owner have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The appellant-insurer has questioned the impugned award on the ground that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident, i.e. 29th March, 2004. Thus, the Tribunal has fallen in error in saddling it with the liability.

4. It is necessary to give a brief summary of the case in order to return findings on the issue raised by the appellant.

5. It was pleaded by the claimant in the claim petition that he became victim of the motor vehicular accident on 29th March, 2004, at about 7.30 a.m., when he was walking on the left side of the road at Village Kalruhi and was hit by the vehicle-scooter bearing registration No. HP-19-7278, which was being driven by its driver, namely, Krishan Dev, rashly and negligently. He sustained injuries and was rushed for treatment to Primary Health Centre, Amb. Thereafter, he was referred to Zonal Hospital, Una. He suffered 30% permanent disability.

6. The respondents contested the claim petition on the grounds taken in their memo of objections.

7. Following issues came to be framed by the Tribunal:

"1. *Whether petitioner Sher Singh sustained grievous injuries in a motor accident caused by rash and negligent driving of a scooter (No. HP-19-7278) by Krishan Dev (respondent 1) on March 29, 2004? ….OPP*

2. If the above issue 1 is proved, whether the petitioner is entitled to compensation. If so, to what amount and from whom?…OPP

3. Whether the driver of the vehicle (No. HP-19-7278) was not holding any valid and effective driving licence to drive the type of vehicle involved in the accident? …OPR-2

4. Whether the vehicle in question was being driven in violation of the terms and conditions of the insurance policy?…OPR-2

5. Whether the petition is bad for misjoinder of parties and non-joinder of the owner, the driver and the insurer of the vehicle No. (HP-19-7278) …OPR-2

6. Relief."

8. The parties have led evidence. The claimant has proved that driver-cum-owner, namely, Krishan Dev has driven the offending vehicle, rashly and negligently, on the said date, caused the accident and he sustained injuries which rendered him permanently disabled to the extent of 30%. The findings returned by the Tribunal on issue No. 1 are upheld.

9. Before I deal with Issue No. 2, I deem it proper to deal with Issues No. 3 to 5.

10. Issues No. 3 to 5 are inter-linked, so I deem it proper to determine all these issues together.

11. The driver was having driving licence Ext. RW-1/A. In terms of Ext. RW-2/A, the driving licence Ext. RW-1/A was valid w.e.f. 2001 to 14th April, 2006.

12. Learned Counsel for the appellant-insurer argued that though the driving licence was not valid on 29th March, 2004, i.e. the date of accident, was renewed w.e.f. 2001 to 14th April, 2006, which is not in accordance with the provisions of the Act. The factum of renewal of licence with retrospective date i.e. w.e.f. 2001 to 14th April, 2006, is not in dispute, but its validity is questioned.

13. I have gone through the evidence and the record. As per Ext. RW-2/A, the driving licence Ext. RW-1/A was renewed w.e.f. 2001 to 14th April, 2006.

14. Shri Gogal Kishor Agnihotri, Assistant, District Transport Office, Hoshiarpur, appeared in the witness box as RW-2, who has stated that as per the record, driving licence Ext. RW-1/A was renewed from the year 2001 upto 2006, was valid and effective. The said statement is the proof of the fact that the driving licence was valid w.e.f. 2001 to 14th April, 2006. He has supported the case of the owner and not of the insurer-appellant.

15. The Tribunal has discussed the statement of the aforesaid witness in para 20 of the impugned award.

16. Thus, it is held that that the driving licence Ext. RW-1/A was valid on the date of accident, i.e. 29th March, 2004.

17. It was also for the insurer to plead and prove that the owner-insured has committed willful breach. There is no such evidence on the file, which can be made basis for holding that the insured had committed any breach.

18. This Court in a judgment dated 11th July, 2014, rendered in **FAO No. 291 of 2007,** titled **Vinod Kumar versus United India Assurance Company Limited and another** has determined the said issue.

19. Having said so, the Tribunal has rightly saddled the appellant-insurer with the liability. Accordingly, the findings returned by the Tribunal on Issues No. 2 to 4 are upheld.

20. The onus to prove Issue No. 5 was upon the appellant-insurer, but it has failed to discharge. Accordingly, the findings returned on Issue No. 5 are also upheld.

21. The appellant-insurer has not questioned the adequacy of compensation.

22. Having said so, the impugned award is maintained and the appeal is dismissed.

23. The Registry is directed to release the awarded amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees account cheque.

24. Send down the records after placing a copy of the judgment on the file of the claim petition.

****

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

State of H.P. .....Appellant.
Versus
Gian Chand .....Respondent.

Cr. Appeal No. 575 of 2008
Reserved on: April 17, 2015.
Decided on: April 18, 2015.

Indian Penal Code, 1860- Sections 498-A and 306- Deceased was married to the accused- deceased went to the cut grass on 22.8.2003 but she did not return- subsequently, a complaint was filed by her father that his daughter is missing since 22.8.2003 and that accused, his parents and nephew used to harass her- PW-1, PW-2 and PW-3 admitted that accused had refused to accept any dowry- PW-6 and PW-7 admitted that accused was living happily with his wife and she had never complained to them about the beating- View of the Court that the deceased might have slipped into the river Beas accidently cannot be termed as perverse – held, that in these circumstances, the acquittal of the accused was justified. (Para-15 to 18)

For the appellant: Mr. M.A.Khan, Addl. AG.

For the respondent: Mr. Surinder Saklani, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 13.5.2008, rendered by the learned Addl. Sessions Judge, Mandi, H.P. in Sessions Trial No. 31 of 2004, whereby the respondent-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 498-A and 306 IPC, has been acquitted.

2. The case of the prosecution, in a nut shell, is that Preeti Devi, daughter of the complainant Sh. Duni Chand (PW-1) was married with the accused on 7.3.1995. The accused was employed in Health Department of the Himachal Pradesh. On 22.8.2003, Preeti Devi went to cut grass but she did not return home. On 25.8.2003, Duni Chand PW-1 submitted a complaint to the Incharge, Police Post Dharampur, wherein he submitted that his daughter Smt. Preeti Devi, wife of the accused was missing since 22.8.2003. It was also stated in the complaint that Gian Chand, his parents and nephew used to harass and torture Preeti Devi. They also used to beat her. On the basis of the written complaint, FIR was registered and the case was investigated. 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 12 witnesses. The accused was also examined under Section 313 Cr.P.C. He has denied the prosecution case. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal at the instance of the State.

4. Mr. M.A.Khan, learned Addl. Advocate General, appearing on behalf of the State, has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Surinder Saklani, Advocate, for the accused has supported the judgment of the learned trial Court dated 13.5.2008.

5. We have heard learned counsel for both the sides and gone through the records of the case minutely.

6. Sh. Duni Chand, PW-1 is the father of the deceased Preeti Devi. According to him, the accused has told that he did not want any dowry. He was employed in the Health Department. The accused started giving beatings to Preeti Devi within one month from her marriage. His second daughter Sunita told him about the beatings given to Preeti Devi. He went to the house of the accused. He saw injuries on left arm and left leg of Preeti Devi. She told him that she was beaten up by "Lathi" by the accused. Somebody informed him that Preeti Devi was missing on 22.8.2003. He identified the body of Preeti Devi. He suspected the accused to have killed Preeti Devi since he used to beat her. In his cross-examination, he admitted that he told about the beatings given to the Preeti to the mother of the accused. However, he did not disclose this fact to any other person. He did not report the matter about beatings given to Preeti to any Authority under the belief that the behavior of the accused may improve in future. He did not disclose this matter to any authority till her death.

7. Ms. Madhu, PW-2 is the sister of deceased Preeti Devi. According to her on 20.8.2003, Preeti visited her house. She told her that her husband was drug addict. She also told her that accused used to beat her with danda for bringing insufficient dowry. The accused was also with Preeti on that day at her house and next morning, accused and Preeti

went away at 6:00 AM. She asked Preeti and accused to stay at her house on that day. She did not disclose this fact to any other person under the belief that accused would improve his behavior. In her cross-examination, she admitted that the accused refused to receive any dowry. She made the statement to the police that Preeti told her that she was being beaten up for not bringing dowry by the accused person. (Whereas it is not so recorded in mark 'C').

8. Smt. Jaswanti, PW-3 is the step mother of the deceased. She also stated that the accused had refused to accept dowry at the time of marriage with Preeti Devi. Whenever Preeti visited their house, she used to tell her that she was being harassed and beaten up by the accused person for bringing more dowry and she used to tell her that she was being tortured and humiliated.

9. Dr. Navnit Chauhan, has conducted the post mortem examination on 28.8.2003. The post mortem report is Ext. PW-4/C. According to her opinion, the cause of death was due to drowning.

10. Sh. Jai Singh, PW-6 deposed that on 22.8.2003, at about 5:30 PM, he was sitting in the temple of Rira, when Preeti Devi came with a sickle and plastic envelope in her hand. She was going to cut grass. She told him that he should also go to cut grass and he told her that she may go to cut and bring grass. Sickle is Ext. P-1 and plastic bag is Ext. P-2. At about 7/7:30 PM, on the same day, he met Amku Devi in his house, the mother of the accused. She told him that Preeti Devi did not return home who had gone to cut grass. He told Amku Devi that he had seen Preeti Devi going towards Beas river at about 5:30 PM. Thereafter, he alongwith other villagers went in search of Preeti Devi on the bank of river Beas. he also admitted in his cross-examination that so long Preeti Devi lived with the accused, they never heard about her beatings, harassment and torture by the accused nor Preeti told them about beating, harassment and torture. She was living happily and peacefully with the accused.

11. Sh. Om Prakash, PW-7 deposed that they came to know that Preeti had gone to cut grass and she did not return back to her home. He alongwith the villagers went to search Preeti Devi in the jungle and on river side also. He also admitted in his cross-examination that Preeti Devi never made any complaint to any villager about beatings, harassment or torture by the accused person. Preeti Devi and Gian Chand were living happily and peacefully and Gian Chand had also constructed new house in the village.

12. Smt. Sunita Devi, PW-10 is also the sister of deceased Preeti Devi. She also stated that Gian Chand told before marriage that he did not require any dowry.

13. ASI Arjun Dass, PW-11 testified that he went to the spot on the bank of river Beas where Dupatta, pair of Chappal and pair of ear ring was kept on the bank of river. Duni Chand father of deceased Preeti alongwith several villagers was not on the spot. Gian Chand was there who identified Dupatta etc. to be of his wife Preeti Devi. He recorded the statement of Duni Chand on 25.8.2003 vide Ext. PW-1/A. The dead body of Preeti Devi was found in Beas river at lower Beri village. He also prepared the spot map. In his cross-examination, he stated that the statement of Duni Chand was recorded by him on 23.8.2003 but it was not shown to him in the Court. He had placed the statement with the case file. He did not remember what statement was made by Duni Chand. According to him, no case was made out on the basis of that statement of Duni Chand.

14. SI Anil Verma, PW-12 stated that on the basis of the application Ext. PW-1/A on 25.8.2003, FIR Ext. PW-9/A was registered.

15. What emerges from the appraisal of the statements of the witnesses discussed hereinabove, is that the marriage of accused was solemnized with Preeti Devi on 7.3.1995. Sh. Duni Chand, PW-1 has admitted categorically that the accused has not accepted any dowry. He has also admitted that he has told about the beatings given to Preeti Devi to the mother of the accused. He has not disclosed this fact to any other person. Ms. Madhu, PW-2 has also admitted that the accused had refused to receive any dowry. According to her, she has made statement to the police that Preeti had told her that she was being beaten up for not bringing sufficient dowry. However, she was confronted with her earlier statement wherein it is not so recorded. Smt. Jaswanti Devi, PW-3 step mother of the deceased Preeti Devi, deposed that the accused had refused to accept dowry at the time of his marriage with Preeti. Sh. Jai Singh, PW-6 and Om Prakash PW-7 have categorically stated in their cross-examination that the accused was living happily and peacefully with Preeti Devi. She has never complained to them about the beatings, harassment or torture by the accused. Smt. Sunita Devi, PW-10 is also sister of the deceased. She also admitted that Gian Chand accused told before marriage that he did not require any dowry.

16. It has come on record that the statement of Sh. Duni Chand, PW-1 was recorded on 23.8.2003 but it has not been placed on record. ASI Arjun Dass, PW-11 has admitted in his cross-examination that on the basis of the complaint dated 23.8.2003, no case was made out against the accused. The prosecution has miserably failed to prove that the accused has abetted the deceased to suicide. The prosecution has also failed to prove that the acts of the accused have caused mental or physical cruelty to the deceased.

17. The view of the learned trial Court that the deceased might have slipped into the river Beas accidently cannot be termed as perverse. Sh. Jai Singh, PW-6 in his examination-in-chief has stated that the deceased has asked him also to go with her to cut the grass. However, if she had to commit suicide, she would have gone quietly to river Beas instead of asking Jai Singh PW-6 to accompany her to cut grass. Thus, the prosecution has miserably failed to prove the case against the accused.

18. Accordingly, there is no merit in this appeal and the same is dismissed. There is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court dated 13.5.2008.

****

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

Cr. Appeal Nos. 141, 219 & 221 of 2012.
Reserved on: April 16, 2015.
Decided on: April 18, 2015.

1. Cr. Appeal No. 141 of 2012.
Vikas Sharma .....Appellant.
Versus
State of H.P. .....Respondent.
2. Cr. Appeal No. 219 of 2012.
Bhupender Singh .....Appellant.
Versus
State of H.P. .....Respondent.
3. Cr. Appeal No. 221 of 2012.
Gaurav Singh .....Appellant.
Versus
State of H.P. .....Respondent.

N.D.P.S. Act, 1985- Section 20- Accused was driving an Alto Car and accused 'B' and 'G' were sitting on the rear seat - one bag was recovered from the back seat of the car, which was lying between accused 'B' and 'G' - bag was containing 4 kg 500 gms of charas- there was no entry of deposit of NCB form in the malkhana- it was also not explained as to who had brought the parcel from the FSL, Junga to police station - it was not explained as to why six seals out of nine were broken- possibility of tempering with the case property cannot be ruled out when six seals were broken- no entry was made when the case property was taken out from the Malkhana for production before the Court- held, that in these circumstances, prosecution had failed to prove exclusive and conscious possession of the contraband, hence, accused acquitted.(Para-14 to 18)

For the appellant(s): M/S. R.K.Gautam, Sr. Advocate with Mr. Gaurav Gautam, Ajay Kochhar, Rajiv Jiwan and Varun Chandel, Advocates. for appellants in the respective appeals.

For the respondent(s): Mr. P.M.Negi, Dy. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these appeals, all these appeals were taken up together for hearing.

2. These appeals are directed against the common judgment dated 30.3.2012, rendered by the learned Special Judge(II), Kinnaur at Rampur, H.P, in RBT No. 64-AR-3 of 2011, whereby the appellants-accused (hereinafter referred to as the "accused", namely, Bhupender Singh, Gaurav Singh, Vikas Sharma), who were charged with and tried for offences punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act) and under Sections 181 and 196 of the Motor Vehicles Act, 1988, have been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay fine of Rs. 1,00,000/- each and in default of payment of fine, they were further ordered to undergo simple imprisonment for one year each under Section 20(ii)(C) of the ND & PS Act. Convict Bhupender was further sentenced to pay fine of Rs. 500/- and in default to undergo S.I. for one month under Section 181 of the MV Act, 1988. He was further sentenced to pay fine of Rs. 1000/- and in default to undergo S.I. for one month under Section 196 of the M.V. Act, 1988. Accused Bahadur Singh was acquitted by the learned trial Court.

2. The case of the prosecution, in a nut shell, is that on 2.2.2011, the police party headed by SI Gurbachan Singh PW-9, HHC Kashmi Ram PW-3, HHC Roshan Lal PW-4, HC Chaman Lal and Const. Jaswant Gupta was present at place called Baliowl in connection with routine patrol duty. At about 5:45 AM, one Alto car bearing regn. No. HP-69-1295 came from Gugra side which was being driven by accused Bhupender Singh. The car was stopped by the police for checking. Accused Bhupender Singh could not produce the documents of the vehicle and his driving licence. On checking, it was found that accused Vikas Sharma and Gaurav Singh were sitting on the rear seat of the car. The place where the vehicle was stopped was an isolated and secluded place. There was no habitation nearby. SI Gurbachan Singh, PW-9 sent HHC Kashmi Ram PW-3 and HHC Roshan Lal PW-4 in search of independent witnesses but they came back after 10 minutes and told him that they could not find any independent witnesses. SI Gurbachan Singh, PW-9 joined PW-3 and PW-4 as witnesses and thereafter, he informed the accused persons that the police intended to conduct their personal search along with the car. The accused persons opted to be

searched by the police vide consent memo Ext. PW-3/A on the spot. The accused were searched. During search one bag was recovered from the back seat of the car which was lying in between accused Gaurav and Vikas Sharma. On opening the bag, charas in the shape of small balls was found lying in the bag. It was weighed. It weighed 4 kg 500 gms. The charas was put back into the same bag which was put in parcel and sealed with seal bearing impression "C". NCB form Ext. PW-9/A was updated in triplicate and after drawing sample of seal Ext. PW-3/D, the seal was handed over to HHC Roshan Lal PW-4. The case property was taken into possession vide memo Ext. PW-3/E. The rukka was prepared. It was sent to the Police Station Ani. SI Gurbachan Singh, PW-9 deposited the case property with HC Amar Singh PW-5 in the malkhana of PS Ani. On 3.2.2011, PW-5 HC Amar Singh sent the case property to FSL, Junga through Const. Chet Ram PW-6 vide RC No. 12/2011 Ext. PW-5/B on the same day. The report of the chemical examiner is Ext. PW-9/L. 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 9 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 accused Bhupender Singh, Gaurav Singh and Vikas Sharma, as noticed hereinabove. Accused Bhadur Singh was acquitted. Hence, these appeals on behalf of the accused.

4. M/S. R.K.Gautam, Sr. Advocate with Mr. Gaurav Gautam, Ajay Kochhar, Rajiv Jiwan and Varun Chandel, Advocates, appearing on behalf of the respective accused, have 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 30.3.2012.

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

6. HC Harbans Lal, PW-1 deposed that he was working as reader to Addl. S.P. Kullu, since April, 2010 to August, 2011. On 3.2.2011, special report of this case was sent by SHO Gurbachan Singh. It was sent in the office at 6:00 PM. The report was perused by Addl. S.P. Sh. Sandip Dhawan. The copy of the special report is Ext. PW-1/A.

7. HHC Kashmi Ram, PW-3 deposed that on 2.2.2011, he alongwith SI Gurbachan Singh, HC Chaman Lal, HHC Roshan Lal, Const. Jaswant Gupta left PS Ani in official vehicle towards Gogra side in connection with routine patrolling and nakabandi. At about 5:45 AM when they were present at Baliowl, one car came from Gogra side towards Shamshar which was stopped by them for checking. Accused Bhupender Singh was the driver of the car. They suspected that the accused persons were possessing contraband of narcotic substance. SI Gurbachan Singh sent him and HHC Roshan Lal in search of independent witnesses as the place where accused were intercepted was isolated and secluded place. There was no habitation nearby. He alongwith HHC Roshan Lal made search for the independent witnesses but could not find any witness and came back and apprised SI Gurbachan Singh about the same. Thereafter, SI Gurbachan Singh joined them as witnesses. The car was searched. One packet was recovered from the back side of the car. On opening the bag, charas in the shape of small balls was found therein. It weighed 4 kg. 500 gms. NCB form in triplicate was updated and sample of seal Ext. PW-3/D was drawn. Rukka Ext. PW-3/F was also prepared. It was delivered to MHC Amar Singh in the P.S. Ani, on the basis of which, FIR Ext. PW-3/G was registered. The case property was produced at the time of examination of HC Kashmi Ram PW-3. Three seals of FSL and "C"

were found intact. However, the remaining seals were damaged. In his cross-examination, he deposed that first of all, they went to Ani side and thereafter they went towards Gugra side. They went up to a distance of 100 meters on both sides. He was aware about the topography of the area. There is temple at Shamshar.

8. HHC Roshan Lal, PW-4 deposed the manner in which the accused were apprehended, recovery was made and the codal formalities were completed on the spot. In his cross-examination, he deposed that he alongwith HHC Kashmi Ram went in search of the witnesses for a distance of 400 meters, first towards Ani side and thereafter towards Gogra side.

9. HC Amar Singh, PW-5 deposed that on 2.2.2011, at about 8:10 AM, HHC Kashmi Ram delivered rukka Ext. PW-3/F, on the basis of which FIR Ext. PW-3/G was registered. SI Gurbachan Singh deposited the case property comprising one parcel sealed with seal bearing impression seal 'C" alongwith samples of seal and NCB form in the malkhana of the Police Station. He incorporated the entries at Sr. No. 233. He sent the case property to FSL, Junga through Const. Chet Ram. In his cross-examination, he admitted that as per the entry contained in the malkhana register, when the case property was brought back from FSL, Junga, at that time 6 seals were broken.

10. Const. Chet Ram, PW-6 deposed that on 3.2.2011, MHC Amar Singh handed over the case property comprising of one sealed parcel sealed with seal bearing impression "C" alongwith sample seal and NCB form in triplicate and a docket vide RC No. 12/2011, dated 3.2.2011 which he delivered at FSL, Junga and handed over the receipt to the MHC.

11. Sh. Madan Lal, PW-7 was declared hostile.

12. Sh. Rajesh Kumar, PW-8 deposed that he was called by the police to Police Station to sign the documents. He signed only one document. Accused persons were present in the Police Station, Ani. Besides signing the document he did not do anything. The accused persons did not make any statement in his presence. He was also declared hostile.

13. SI Gurbachan Singh, PW-9 is the I.O. He also narrated the manner in which the accused were apprehended, contraband was recovered and seized. He prepared the rukka and sent the same to the Police Station. He deposited the case property with MHC Amar Singh in the malkhana of the Police Station. He also prepared the special report on 3.2.2011. In his cross-examination, he deposed that at the place where the accused were apprehended, there was no habitation nearby.

14. We have gone through Ext. PW-5/A. There is no entry of deposit of NCB form in the malkhana at Sr. No. 233. The case property was handed over by PW-5 Amar Singh to Const. Chet Ram, PW-6. According to him, he has taken the case property to FSL, Junga vide RC No. 12/2011 dated 3.2.2011. According to Ext. PW-9/L, FSL report, after examination of the exhibit, the original cloth parcel containing remnants of the exhibit has been sealed with the seal of FSL-II and returned. The parcel was received in the malkhana through HHC Gulab Singh No. 202 with six seals of FSL Junga and nine seals of "C" in which six seals were broken and three seals were legible. The prosecution has not examined HHC Gulab Singh, who has brought the parcel from FSL Junga to be deposited in the malkhana. The prosecution has not explained how six seals out of the nine were broken. The police has not made any daily diary report about the six seals being found broken as per Ext. PW-5/A.

15. According to Amar Singh, PW-5, SI Gurbachan Singh PW-9 has deposited the case property alongwith NCB forms. SI Gurbachan Singh, PW-9 also deposed that he has deposited the case property with MHC Amar Singh in the malkhana after coming to the Police Station, Ani. He did not depose that he has deposited the NCB forms alongwith the case property. There is no entry of NCB forms deposited in the malkhana alongwith the contraband at Sr. No. 233, though in RC there is mention of NCB forms in triplicate. If, no form was deposited at Police Station, how the same could be sent to FSL, Junga. Who has tempered with six seals during the transit of the parcel from FSL Junga to malkhana, has not been explained by the prosecution. Though the case property was also sealed with seals of FSL but the possibility of the case property being tampered with cannot be ruled out entirely. We could ignore if only two or three seals were broken. But, in the instant case, six seals were found broken immediately after the receipt of the case property from FSL, Junga. The seals are put to ensure the safety of the case property. In case the seals are broken, the possibility of the case property being tampered with cannot be ruled out. There is also no corresponding entry when the case property was taken out from the malkhana to be produced before the Court. The procedure required is that entry is made when the case property is taken out from the malkhana and daily diary report is also prepared. The case property is handed over to the Naib Court to be produced in the Court and thereafter the same is returned and required to be re-deposited in the malkhana. At that time too, entry is required to be made and daily diary report is also prepared. There is no daily diary report, as noticed above, when the case property was taken out and produced before the Court and received back in the malkhana.

16. We have also noticed that when the case property was produced in the Court, it was ordered to be resealed with the seal of Tehsildar Rampur Mahasu. It was handed over to Ganga Ram Naib Court, as per the order of the learned trial Court dated 21.10.2011. Naib Court Ganga Ram was also required to keep the case property in safe custody. There is no evidence on record as to where Ganga Ram has kept the case property since there is no entry in the malkhana register when it was again taken out and produced in the Court at the time of recording of the statement of SI Gurbachan Singh, PW-9.

17. The accused Bhupinder Singh has also been convicted under Section 181 and 196 of the M.V.Act, 1988 by the learned trial Court. Though, HHC Kashmi Ram PW-3, HHC Roshan Lal, PW-4 and Const. Chet Ram PW-6 have deposed that Bhupinder Singh could not produce the documents. However, HHC Kashmi Ram, PW-3 in his cross-examination has stated that the accused was not even separately challaned under the provisions of M.V.Act. Thus, it casts doubt whether the police party has asked the accused to produce the documents of the vehicle bearing registration No. HP-69-1295. The learned trial Court has convicted the accused Bhupinder Singh under these sections by referring to the statements of HHC Kashmi Ram PW-3, HHC Roshan Lal, PW-4 and SI Gurbachan Singh PW-9 without taking into consideration the deposition of HHC Kashmi Ram, PW-3 in his cross-examination that the accused persons were not separately challaned under the provisions of M.V.Act, 1988.

18. The prosecution has failed to prove that the contraband was recovered from the exclusive and conscious possession of the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 20 of the N.D & P.S., Act. The prosecution has also failed to prove the case against accused Bhupinder Singh under Sections 181 and 196 of the M.V.Act, 1988.

19. Accordingly, in view of the analysis and discussion made hereinabove, the appeals are allowed. Judgment of conviction and sentence dated 30.3.2012, rendered by the learned Special Judge(II), Kinnaur at Rampur, H.P., in RBT No. 64-AR-3 of 2011, is set

aside. Accused are acquitted of the charges framed against them by giving them benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

20. The Registry is directed to prepare the release warrants 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.

Sh. Manohar Lal .....Petitioner.
Versus
Smt. Kusum Lata Malhotra & ors. .....Respondents.

CMPMO No. 125 of 2015.
Decided on: 20.4.2015.

Code of Civil Procedure, 1908- Order 21- a decree was passed for the specific performance of the agreement and J.D was directed to execute the conveyance deed- when the deed was not executed, plaintiff filed an execution petition- objections were taken by the objector stating that his father was missing since November, 2007 and no valid service was effected- objections were dismissed by the Executing Court- report of the process server showed that sons of the J.D had refused to accept the summons on which service was effected by way of affixation- Executing Court had issued summons for the service of J.D but the service could not be effected- held, that affixation of the summons on the house when the sons of the J.D had refused to receive the summons cannot be said to be bad- Objector had claimed that his father had died, however, no declaration was sought regarding this fact- burden of proof that the person is dead is upon the person who asserts it, especially when daughter-in-law of the J.D had admitted that J.D was living in Delhi for last 2-3 years. (Para-5 to 13)

Cases referred:
L.I.C. of India vrs. Anuradha, AIR 2004 SC 2070
Oriental Insurance Company Limited vrs. Sorumai Gogoi and others, (2008) 4 SCC 572,
Eliamma Simon and another vrs. Seven Seas Transportation Ltd. and others, AIR 2002 Kerala 219

For the petitioner: Mr. R.K.Bawa, Sr. Advocate with Mr. Amit Kumar Dhumal, Advocate.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is instituted against the order dated 21.5.2014, rendered by the learned District Judge (Forests), Shimla and also against the orders dated 16.1.2015 and 20.2.2015, passed by the learned Addl. District Judge,-II, Shimla in Execution Petition No. 35-S/10 of 14/09.

2. Key facts, necessary for the adjudication of this petition are that respondent-decree holder instituted a civil suit No. 4-S/1 of 2008 for specific performance of the agreement against the proforma respondent/JD Sh. Devi Saran. The proforma respondent No. 2 was proceeded against ex-parte by the learned trial Court. The suit was decreed by the learned Addl. District Judge, (FTC), Shimla on 21.1.2009 and decree for specific performance of the agreement dated 3.9.2007 was passed in favour of the decree holder and against the judgment debtor. The judgment debtor was directed to execute the conveyance deed of the disputed land after the receipt of the balance sale price from the decree holder within 3 months from the passing of the judgment. The decree holder filed Execution Petition bearing No. 35-S/10 of 14/09 for the execution of the judgment and decree dated 21.1.2009. In the Execution Petition, the petitioner/objector filed the objections. According to him, his father was missing since November, 2007 and he was not traceable. The complaint was also lodged with the Police Station (West), Boileauganj. He came to know about the suit when the court had issued notice in the name of Sh. Devi Saran for his appearance on 16.12.2010. According to him, no legal and valid service of Sh. Devi Saran was effected in the suit. The learned District Judge (Forests) Shimla, dismissed the objections on 21.5.2014. Thereafter, the consequential orders dated 16.1.2015 and 20.2.2015 were passed by the learned Addl. District Judge-II, Shimla. Hence, this petition.

3. I have heard Mr. R.K.Bawa, Sr. Advocate, for the petitioner and gone through the impugned orders dated 21.5.2014, 16.1.2015 and 20.2.2015, carefully.

4. The suit was instituted on 7.3.2008. The summons/notice was issued to the judgment debtor. The report of the Process Server is at page 69 of the paper book. According to his report, Sh. Devi Saran was not found at his residence but his two sons, namely, Sh. Gopal and Sh. Manohar, who were adult were present and were residing in a joint family. He requested them to accept the summons. However, they refused to accept the same. They told him that Devi Saran was missing for the last 2-3 months. They did not have any telephone number of Devi Saran. It is in these circumstances, the judgment debtor was proceeded exparte and the decree was passed on 21.1.2009.

5. The Executing Court has passed various orders for effecting service on the judgment debtor in the Execution Petition. According to the report submitted by the Process Server, he went on 4.11.2009 to the house of judgment debtor. He could not be traced. His daughter-in-law told him that the judgment debtor Devi Saran was her father-in-law. He has not visited the house for the last 2-3 years and he was residing at Delhi. She has refused to accept the service of summons and also the affixation of the summons. The Executing Court again issued summons for the service of judgment debtor. The Process Server met the daughter-in-law of judgment debtor on 20.11.2009. She told him that Devi Saran was not residing there. Sh. Devi Saran's son Gian Chand told him that his father was missing for the last several years and they have lodged complaint with the police at PS Boileauganj. She has refused to accept the service of the summons. The summons were again refused by the members of the family of the judgment debtor on 30.8.2010. Ms. Madhu Devi, daughter-in-law of the judgment debtor, again refused the service of summons on 5.10.2010 and told the Process Server that judgment debtor was missing and she could not accept the summons. Thereafter, the Process Server affixed the summons on the door in the presence of son of judgment debtor Sh. Amar Chand Thakur.

6. The decree holder has taken all steps for the service of judgment debtor and despite his best efforts, judgment debtor could not be served and it is in these circumstances summons were affixed on the door of his house. The affixation of summons on the house of the judgment debtor is in accordance with law. The members of the family of the judgment debtor have refused to accept the summons repeatedly, as discussed

hereinabove, on the basis of the report furnished by the Process Server. The only ground taken by the objector-petitioner in the objections preferred in the Execution Petition was that his father was missing since 2007 and he would be presumed to be dead. However, there is no declaration to this effect, as rightly observed by the learned Executing Court in its order dated 10.6.2014.

7. Their lordships of the Hon'ble Supreme Court in the case of ***L.I.C. of India vrs. Anuradha,*** reported in ***AIR 2004 SC 2070,*** have held that the onus of proving that a person was alive/dead on particular date/time lies on the person who asserts it. It has been held as follows:

> "14. On the basis of the abovesaid authorities, we unhesitatingly arrive at a conclusion which we sum up in the following words. The law as to presumption of death remains the same whether in Common Law of England or in the statutory provisions contained in Sections 107 and 108 of the Indian Evidence Act, 1872. In the scheme of Evidence Act, though Sections 107 and 108 are drafted as two Sections, in effect, Section 108 is an exception to the rule enacted in Section 107. The human life shown to be in existence, at a given point of time which according to Section 107 ought to be a point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in Section 108. If the persons, who would have naturally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for seven years the presumption raised under Section 107 ceases to operate. Section 107 has the effect of shifting the burden of proving that the person is dead on him who affirms the fact. Section 108, subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised under Section 108 is a limited presumption confined only to presuming the factum of death of the person who's life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to the date or time of death. There is no presumption as to the facts and circumstances under which the person may have died. The presumption as to death by reference to Section 108 would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised on expiry of 6 years and 364 days or at any time short of it. An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority who is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings the occasion for raising the presumption does not arise.
>
> 15. If an issue may arise as to the date or time of death the same shall have to be determined on evidence-direct or circumstantial and not by assumption or presumption. The burden of proof would lay on the person who makes assertion of death having taken place at a given date or time in order to succeed in his claim. Rarely it may be permissible to proceed on premise that the death had occurred on any given date before which the period of seven years' absence was shown to have elapsed."

8. The Apex Court in the case of ***Oriental Insurance Company Limited vrs. Sorumai Gogoi and others,*** reported in ***(2008) 4 SCC 572,*** have held that Section 108 applies where death of a person is in issue. It does not apply to all situations. Their

lordships have further held that Section 108 does not apply in respect of a person who absconds from justice or evades trial or is otherwise charged for commission of a grave offence. It has been held as under:

> "17. The employer lodged a first information report against Bipul Gogoi. A charge sheet was also filed. There is nothing on record to show that the death had occurred to Bipul Gogoi in an accident arising out of or in course of employment. If some miscreants have taken away the driver along with the vehicle or has murdered him, it is an offence. It, except in certain situations, does not give rise to a presumption that the death had occurred arising out or in the course of an employment. Some evidence should have been adduced in that behalf. If the version brought on records by the police was correct, namely, he had himself ran away with the vehicle and had not been heard for a period of seven years, particularly, when he had been declared a proclaimed offender by a Court of law, presumption under Section 108 of the Evidence Act could have been invoked by the criminal court for dropping the criminal case that he is dead. In our opinion, in a case of this nature, the said provisions could not have been invoked for the purpose of grant of compensation under the 1923 Act without any other evidence having been brought on records.
>
> 18. Sections 108 and 109 of the Evidence Act are founded on the presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until contrary is established by evidence either direct or circumstantial. The said provision can be invoked in a legal proceeding by the death of a person may be an issue. The Section does not say that presumption would be applicable in all situations. It shall not apply in respect of a person who absconds from justice nor evade a trial or is otherwise charged for commission of a grave offence as he in that situation may not communicate with his relations. Furthermore in a case of this nature, it is also difficult to rely upon a self serving statements made by the claimants that they had not heard of their son for a period of seven years. The Commissioner of Workmen Compensation or the High Court did not assign any reason as to why the fact disclosed in the charge sheet which was filed upon investigation that Bipul Gogoi himself had run away with the vehicle would not be a relevant fact, particularly, when cognizance had been taken by a competent court of law on the basis thereof."

9. In the instant case, the judgment debtor was evading the service of summons.

10. The Division Bench of Kerala High Court in the case of ***Eliamma Simon and another vrs. Seven Seas Transportation Ltd. and others,*** reported in ***AIR 2002 Kerala 219***, has held that the date of death has to be proved in the same manner as any other fact is proved. Section 108 does not automatically give rise to presumption as to exact date of death of missing person. The Court cannot presume date of death of missing person as the date that immediately followed the lapse of seven years from date of his disappearance. It has been held as follows:

> "7. We are afraid, we cannot agree with the submission of the appellant's counsel. In our opinion, there is a fallacy in the argument advanced on the basis of Section 108 of the Evidence Act. The date of expiry of seven years mentioned in that Section cannot be understood as the date of death of the

person who has not been heard of during the period of seven years. It is true that Section 108 enables the courts under the circumstances stated therein to draw the statutory presumption that a man is not alive unless the contrary is proved by the opposite party. But that does not mean that Section 108 can be called in aid to establish to exact date of death of the person. The date of death has to be proved in the same manner as any other fact is proved.

11. In the light of the aforesaid pronouncements on the scope of the presumption available under Section 108 of the Evidence Act, it is not necessary for us to labour much on that aspect of the matter. Suffice it to say that the contention of the appellant that proof regarding the existence of facts necessary to attract the presumption under Section 108 of the Evidence Act does not automatically give rise to a presumption as to the exact date of death of the missing man. We reject the contention that the court should presume the date of death of Simon Joseph as the date that immediately followed the lapse of seven years from the date of his disappearance."

11. In the instant case, it was incumbent upon the petitioner to establish by tangible evidence that the whereabouts of judgment debtor were not known and he was not heard for the last seven years, at the time of filing of the suit. Appropriate inquiry is also required to be held to prove that the person is not heard for the last seven years. It has come in the statement of daughter-in-law of the judgment debtor that infact, judgment debtor was living in Delhi for the last 2-3 years. This statement was made by the daughter-in-law of the judgment debtor in the year 2009. Merely filing the complaint before the Police Station, Boileauganj, would not establish that the judgment debtor is not alive.

12. There is no illegality or perversity in the order dated 21.5.2014, rendered by the learned District Judge (Forests), Shimla and orders dated 16.1.2015 and 20.2.2015, passed by the learned Addl. District Judge,-II, Shimla in Execution Petition No. 35-S/10 of 14/09.

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

****

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

Sunil Kumar .....Petitioner.

Versus

Mohinder Kumar .....Respondent.

CMPMO No. 113 of 2015.
Decided on: 20.4.2015.

Code of Civil Procedure, 1908- Order 9 Rule 9- Plaintiff and his counsel did not appear before the Court on which suit was dismissed in default- subsequently, an application for setting aside the order was filed which was allowed- held, that Advocate had noticed date of hearing as 15.6.2014 and had not appeared on 13.6.2014- plaintiff should not suffer due to negligence of his counsel- therefore, application was rightly allowed. (Para-3 to 7)

Case referred:
Sunder Kukreja and others vrs. Mohan Lal Kukreja and ors., (2003(1) RCR 426

For the petitioner: Mr. Sanjay Jaswal, Advocate.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is instituted against the order dated 25.2.2015, rendered by the learned Civil Judge (Jr. Divn.)(II), Kangra at Dharamshala, H.P. in CMA No. 0000499/2014 in Civil Suit No. 527 of 2013.

2. Key facts, necessary for the adjudication of this petition are that the respondent-plaintiff (hereinafter referred to as the plaintiff) has instituted a suit against the petitioner-defendant (hereinafter referred to as the defendant), to the effect that he was owner-in-possession over the suit land comprised in Khata No. 188, Khatauni No. 261, Kh. No. 952, total measuring area 00-00-46 Hects. and land comprised in Khata No. 195, Khatauni No. 268, Kh. No. 1961/953, total measuring area 00-06-23 hect., both situated in Mohal and Mauza Shahpur, Tehsil Shahpur, Distt. Kangra, H.P., as per jamabandi for the year 2009-10. However, the defendant who is the owner-in-possession of adjacent land comprised in Khata No. 201, Khatauni No. 274, Kh. No. 1962/953, total measuring area 00-01-26, situated in Mohal and Mauza Shahpur, Tehsil Shahpur, Distt. Kangra, H.P, as per jamabandi for the year 2009-10, has no right and title to interfere and encroach the suit land and construct septic tank under the ground level and also to construct the building. The suit was also filed for permanent prohibitory injunction restraining the defendant from interfering and taking forcible possession of the suit land.

3. The written statement was filed by the defendant. The case came up before the trial Court on 12.5.2014. The next date was fixed for 13.6.2014. Since the plaintiff did not appear, the suit was dismissed for default. An application under Order 9 Rule 9 CPC was filed for setting aside the order dated 13.6.2014. The application was contested by the defendant. According to the averments made in the application, the matter was listed on 12.5.2014 and the Advocate on his behalf appeared and noted the next date of hearing as 15.6.2014. The Advocate came to the Court on 15.6.2014 and then he came to know that the suit was dismissed in default on 13.6.2014. According to the defendant, the next date of hearing was fixed for 13.6.2014 and not 15.6.2014. The application was allowed by the learned trial Court on 25.2.2015, hence this petition.

4. I have heard Mr. Sanjay Jaswal Advocate for the petitioner and gone through the impugned order dated 25.2.2015, carefully.

5. The plaintiff-applicant has shown sufficient cause for his absence on 13.6.2014 since his Advocate had noted the next date as 15.6.2014. The plaintiff cannot suffer due to the negligence of his Advocate. In fact, his Advocate had appeared on 15.6.2014 and this fact has been admitted by the defendant in the reply filed to the application under Order 9 Rule 9 CPC. In such matters, liberal approach should be adopted to advance the cause of justice.

6. The learned Single Judge of the Delhi High Court, in the case of ***Sunder Kukreja and others vrs. Mohan Lal Kukreja and ors.,*** reported in ***(2003(1) RCR 426,*** has held as follows:

"[7] It transpires from the records that the records were inspected by the counsel engaged by the petitioners on 14.11.2000. The next date which was fixed for the suit was 22.11.2000. It is, however, stated in the application filed under Order 9 Rule 9 of the Code of Civil Procedure that on inspection of the said records, the courted noted the date as 27.11.2000 instead of 22.11.2000. Therefore, when the matter was called out 22.11.2000 none was present on behalf of the petitioners and accordingly the suit was dismissed for default in appearance. The application seeking for setting aside the order dt.22.11.2000 and restoration of the suit/petition to its original number was filed immediately thereafter i.e. on 29.11.2000. The said application was supported by the affidavit of the counsel of the petitioners, As. an objection was taken by the counsel for. the respondents that the said application was not supported by an affidavit of a duly authorised person, namely, any of the petitioners or their authorised agents, an affidavit has since been placed on records which is sworn by the petitioner No.1. Counsel Mr.Amit Chadha is also a counsels who is engaged by the petitioners. It is true that earlier the application was not supported by an affidavit filed on behalf of the petitioners but the same was supported by an affidavit filed by the counsel, who has taken the responsibility on his shoulder for his non-appearance on behalf of the Petitioners.

[8] Taking the entire facts and circumstances into consideration and also the fact that now the application is supported by an affidavit sworn by the petitioner No. 1 I am satisfied that there was sufficient cause and reason for non-appearance and that the petitioners cannot be allowed to suffer tor laches or lapses, even if there be any, on the part of the lawyer of the petitioners. I am, therefore, of the considered opinion that this application should be allowed in the interest of justice, which I hereby do subject, however to payments of costs of Rs.5,000/- payable by the petitioners to the respondent, through counsel, within six weeks. The order dt. 22.11.2000 dismissing the petition for default in appearance stands set aside and recalled and the suit is restored to its original number."

7. There is no illegality or perversity in the order dated 25.2.2015, passed by the learned Civil Judge (Jr. Divn.) (II), Kangra at Dharamshala. H.P.

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

****

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

Cr.Appeal No.242 of 2012 With
Cr. Appeal No. 294 of 2012.
Reserved on: 16.04.2015.
Decided on: 21st April, 2015.

1. Criminal Appeal No.242 of 2012.

Bhupender Chauhan ...Appellant.

Versus

State of H.P. ...Respondent.

2. <u>Criminal Appeal No.294 of 2012</u>:

Anil Kumar ...Appellant.

Versus

State of H.P. ...Respondent.

N.D.P.S. Act, 1985- Sections 20 and 29- Accused 'A' was apprehended by the police and on his search 4 kg. 800 grams of charas and 300 grams of opium were recovered- he made a disclosure statement that 'G' had given charas to him- visiting card of accused 'B' was recovered from the possession of 'A'- accused 'A' also identified the house and shop of accused 'B'- testimonies of police officials were consistent- there were no contradictions in their testimonies- however, no independent witness was associated by the police which shows that the investigation at the spot were conducted to conceal the truth and were 'intransparent'- hence, accused acquitted. (Para-11 to 16)

For the Appellants: Mr. Anup Chitkara, Advocate for appellant in Cr. Appeal No.242 of 2012 and Mr. Yadvinder Gupta and Mr. Bhupinder Ahuja, Advocates for the appellant in Cr. Appeal No.294 of 2012.

For the Respondent: Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

<u>Sureshwar Thakur, Judge.</u>

Both these appeals arise from a common judgment hence are being disposed of by a common judgment. The aforesaid appeals have been preferred by the appellants/accused against the judgment, rendered on 24.05.2012 by the learned Special Judge (FTC), Kullu, District Kullu, H.P. in Sessions Trial No. 62 of 2010, whereby appellant/accused Anil Kumar has been convicted and sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs.1,00,000/- for his having committed offence punishable under Section 20 (b) (ii) (C) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein-after referred to as 'NDPS Act'). In default of payment of fine, he has been sentenced to further undergo rigorous imprisonment for one year. Whereas, accused/appellant Bhupender Chauhan has been convicted and sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs.1,00,000/- for his having committed offence punishable under Section 29 read with Section 20(b)(ii)(C) of the Narcotic Drugs & Psychotropic Substances Act, 1985. In default of payment of fine, he has been sentenced to further undergo rigorous imprisonment for one year.

2. Brief facts of the case are that on 26.07.2010 at 6.00 PM, a police party consisting of SI Krishan Chand, LHC Hans Raj and C. Sohan Lal, PW-1 of PP, Sainj in Vehicle Tata Sumo No. HP-01K-2095 driven by C. Bhushan Kumar proceeded towards Bihali, Lajri, Chor Nallah for patrolling vide rapat Ext. PW6/A. At about 7.15 P.M when the police party was present at Chor Nallah, the accused (Anil Kumar) was noticed coming from Banjar Side and on sighting the police party, he turned back and tried to escape, but he was nabbed on suspicion by the police. Name and address of the accused were ascertained. The site of occurrence was isolated, therefore, the investigating officer associated C. Sohan Lal and LHC Hans Raj as witnesses in the proceedings relating to search, seizure and recovery. SI Krishan Chand apprised accused Anil Kumar that he was possessing some narcotic substance and asked for his option qua search either before Magistrate or Gazetted Officer, upon which he consented to give search to the police. The Investigating Officer gave his personal search to accused Anil Kumar vide memo Ex.PW1/A but nothing incriminating

was found. Thereafter, the Investigating Officer conducted search of the dark-green rucksack, upon which word 'SOVERS' was written, which was found containing a shirt with sticker ZX and trousers with sticker "KHAN NEAR GAUSHALA SONIPAT". The Investigating Officer also found one khaki carry bag in the rucksack upon which words "Raja Garments" were inscribed. On opening the khakhi carry bag two packets were found kept therein and in one packet charas in the shape of marble, sticks and pancake was found and in other packet opium in liquid form was found. The charas on weighment was found to be 4 Kg, 800 grams and opium was found to be 300 grams. The Investigating Officer packed the charas and the opium so recovered in the same manner and put the same in separate parcels and the shirt and trousers were also packed in separate parcel. All the three parcels were sealed with seal "H" at three places and sample of seal "H" was prepared. The NCB forms in triplicate Ex.PW10/D were filled by the Investigating Officer. The case property was taken into possession vide memo Ex.PW1/D and copy of the seizure memo was supplied to the accused free of costs. The Investigating Officer prepared ruqua Ex.PW14/A and the same was sent to Police Station, Banjar through PW-1 C. Sohan Lal for registration of FIR. PW-13, SI Surender Pathak on receipt of ruqua registered FIR Ex.PW13/A, and made endorsement. The Investigating Officer thereafter prepared spot map Ex.PW14/B and recorded the statements of witnesses as per their versions. The accused was arrested vide memo Ex.PW1/E. On receipt of the case file, the IO filled FIR number in the documents. Thereafter, the Investigating Officer, produced the case property before PW-13 SI/SHO Surender Pathak, who resealed the parcels with seal "A" at three places and facsimile of seal "A" was drawn on cloth pieces. He also filled columns of NCB-1 in triplicate Ex.PW10/D and deposited the case property with MHC, P.S. Banjar. PW-10 MHC Shesh Raj entered case property in Malkhana register, the abstract of which is Ex.PW10/A. The Investigating Officer prepared special report Ex.PW2/A and submitted the same before Dy. S.P., who after making endorsement thereon handed over it to PW-2 HC Harbans Kumar, who entered the same at Sr. No.50 in the relevant register, the abstract of which is Ex.PW2/B.

3. During the course of investigation, accused Anil Kumar made a disclosure statement Ex.PW1/G to the effect that he met Gopal alias Bangali on 25.7.2010, who arranged for his stay in house near Bus Stand Banjar. On 26.7.2010 opium and charas in a bag was given to him by said Gopal alias Bangali. Thereafter, accused Anil Kumar identified the house of Bhupender Chauhan and the Investigating Officer prepared identification memo Ex.PW13/C and site plan Ex.PW13/G. Accused Anil Kumar also identified the place where charas and opium were given to him. The Investigating Officer prepared identification memo Ex.PW1/H and spot map Ex.PW14/D. SHO Surender Pathak also took in to possession certificate Ex.PW13/D, learner's licence Ex.PW13/E and a diary of Bhupender Chauhan from his house. During the personal search of accused Anil Kumar visiting card of accused Bhupender Chauhan was recovered and thereafter pursuant to E-Mail Ex.PW9/a CALL DETAILS Ex.PW9/B1 to Ex.PW9/B-13 of conversation between both the accused persons were taken in to possession by the police. The investigating officer also moved an application Ex.PW8/A to PNB, Banjar to verify the account details of accused Bhupender Chauhan and took in to possession details Ex.PW8/B and accused Anil Kumar also identified the shop of accused Bhupender Chauhan vide memo Ex.PW14/C. On 28.7.2010, PW-10 MHC Shesh Raj handed over parcels containing charas and opium along with NCB forms, sample seals "H" and "A", reference letter Ex.PW10/C and other documents to C. Om Chand vide RC Ext. PW10/B with the direction to deposit the same in FSL, Junga for chemical analysis and before handing over the case property, the MHC filled relevant columns of NCB forms in triplicate. C. Om Chand after depositing the case property at FSL, Junga deposited the R.C. containing receipt of FSL, with PW-10 HC Shesh Raj. On receipt of FSL report Ex.PW13/F, it was found that the contraband recovered from the accused were found to be charas and opium.

4. After completion of the necessary investigation, into the offences, allegedly committed by the accused/appellants, challan was filed under Section 173 of the Code of Criminal Procedure.

5. The accused/appellant Anil Kumar was charged for his having committed offences punishable under Section 20 (b)(ii)(C) and Section 18 of the NDPS Act and accused/appellant Bhupender Chauhan was charged for his having committed offences punishable under Section 29 read with Sections 20(b)(ii)(C) and 18 of the NDPS Act, by the learned trial Court, to which they pleaded not guilty and claimed trial.

6. In proof of the prosecution case, the prosecution examined as many as 14 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C., were recorded by the learned trial Court, in which they claimed false implication and pleaded innocence. In defence, the appellants/accused have examined one witness.

7. On appraisal of the evidence on record, the learned trial Court convicted the accused for the offences charged.

8. The appellants/accused are aggrieved by the judgment of conviction, recorded by the learned trial Court. The learned counsel for the accused, have 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, they contend that the findings of conviction be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

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

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

11. 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 of the contraband till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, hence, portraying proof of unbroken and unsevered links, in the entire chain of the circumstances, therefore, it is argued that when the prosecution case stands established, it would be legally unwise for this Court to acquit the accused. Besides, it is canvassed that 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.

12. The factum of parcel, Ex. P-1 containing charas, Ex.P6 and parcel, Ex.P-2 containing opium, Ex.P-9, weighing respectively 4 Kg, 800 grams and 300 grams having been recovered from the exclusive and conscious possession of the accused at the site of occurrence under recovery memo Ex.PW1/D has been clinchingly proved by the testimonies of the official witnesses. The testimonies of the official witnesses, when they have deposed in tandem, harmony and in unison qua the apposite proceedings relating to search, recovery and seizure of items of contraband having commenced and concluded at the site of occurrence besides when their testimonies are bereft of any intra se or inter se

contradictions, as such inspire the confidence of this Court, to hence, prod it to record findings of conviction against the accused. Nonetheless, even when a clinching conclusion is sproutable from the testimonies of the official witnesses qua the factum probandum deposed in consistency by each of them, yet the firmness of the conclusion drawable by this Court qua the guilt of the accused gets weakened and shaky in the face of evidence existing on record portraying that despite availability, the Investigating Officer had omitted to associate independent witnesses in the proceedings relating to search, seizure and recovery of items of contraband under recovery memo Ex.PW1/D from the exclusive and conscious possession of the accused, at the site of occurrence. The non association of independent witnesses in the apposite proceedings by the Investigating Officer would not have either rendered flawed not would it have imbued the genesis of the prosecution case with fatality, yet when despite availability, the Investigating Officer omitted to or did not concert to make arduous efforts to mobilize or elicit their participation in the apposite proceedings at the site of occurrence, marshals an inference that his lack of concert to solicit the participation of the independent witnesses in the apposite proceedings at the site of occurrence, was prodded by an oblique motive on the part of the Investigation Officer to conceal the truth or also gives leeway to an inference that the proceedings as conducted at the site of occurrence are imbued with intransparency, hence, vitiated.

13. Now for discerning from the evidence on record, for rendering an apt conclusion that the Investigating Officer despite availability of independent witnesses had omitted to endeavour to elicit their participation in the apposite proceedings, at the site of occurrence, for hence rendering them to be flawed as well as vitiated, an advertence to the testimony of PW-1 is required to be made. The testimony of PW-1 C. Sohan Lal as existing in his cross-examination portrays an admission on the part of this witness that the house of Ex-President of Panchyat Kotla is located between Larji Mour and Village Thuari. Moreover, there also exists an admission in his cross-examination qua the existence of three houses near the house of Dola Singh, whose house is located at a distance of 100 meters from Chour Nallah (site of occurrence). Apart from the fact that this witness has deposed qua the existence of habitation in close proximity and vicinity of the site of occurrence, the association of whose inhabitants could have been, hence, elicited by the Investigating Officer in the apposite proceedings at the site of occurrence, this witness in his cross-examination has further deposed that the Investigating Officer had not made any arduous efforts to solicit the participation of independent witnesses in the apposite proceedings. The aforesaid evidence renders open or gives leeway to an inference that the Investigating Officer despite existence of habitation in the proximity and vicinity of the site of occurrence had willfully not made either arduous or assiduous efforts to solicit the participation of the independent witnesses in the apposite proceedings. Lack of sincere efforts on the part of the Investigating Officer to solicit the participation of independent witnesses in the apposite proceedings at the site of occurrence, sequels an apt deduction that the Investigating officer was goaded by an oblique motive to do so or he intended to smother or hide the truth qua the genesis of the prosecution version which hence stands flawed as well as vitiated.

14. Reinforcing strength to the aforesaid inference as derived from the factum deposed by PW-1 that despite existence of habitation in close proximity or vicinity of the site of occurrence, the Investigating Officer having willfully omitted to join inhabitants thereof in the apposite proceedings at the site of occurrence as such rendering the genesis of the prosecution version emaciated, is lent by the further factum as exists in the cross-examination of the Investigating Officer of his omitting to join independent witnesses in the apposite proceedings at the site of occurrence despite existence of a village in close vicinity to the site of occurrence. As a sequitur the inference as has hereinabove ensued on a discerning appraisal of the evidence of PW-1 C. Sohan Lal and the evidence existing in the

cross-examination of the Investigating Officer, obviously then tilts the scale of justice in favour of the accused, besides shreds apart the evidentiary value of the testimonies of the officials witnesses even though they have deposed in unison and in consistency qua the factum of the apposite proceedings having been with legal aptness concluded at the site of occurrence.

15. The learned trial Court in having discarded the effect of or the impact of the testimony of the PW-1 and the testimony of the Investigating Officer which rather eroded the efficacy of the testimonies of the other official witnesses qua the factum as deposed by them has led its judgment to be ingrained with a legal fallibility of non appreciation of a valuable piece of evidence. Such non appreciation of a valuable piece of evidence by the learned trial Court has occasioned gross miscarriage of justice. In the exercise of its appellate jurisdiction, such gross miscarriage of justice is to be undone by this Court. As such, findings of conviction recorded by the learned trial Court necessitate interference.

16. On a formation of the aforesaid conclusion, the concomitant deduction is that the prosecution has been unable to prove the guilt of both the accused.

17. In view of above, we find that the findings of conviction, recorded by the learned trial Court below, are not based on a mature and balanced appreciation of evidence on record. Hence, the findings necessitate irreverence. Accordingly, both the appeals are allowed and the judgment rendered by the learned trial Court is set aside. Both the accused/appellants are acquitted of the offences charged. Fine amount, if any, deposited by the accused/appellants be refunded to them. They be set at liberty forthwith, if not required in any other offence. Records of the learned trial Court be sent down forthwith.

****

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

Ms. Shweta Sadyal ..... Petitioner

Vs.

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

CWP No. 4435 of 2013
Date of decision: 21.4.2015.

Constitution of India, 1950- Article 226- Petitioner applied for the post of Assistant District Attorney on contract basis- a final select list was prepared in which name of the petitioner was not mentioned- she applied under RTI it was revealed that respondent No. 3 who had obtained equal marks was appointed on the basis of his having obtained higher marks in the screening test- held, that as per rule of business firmed by Public Service Commission, in case of two candidates scoring equal marks in the interview, a candidate scoring more marks in the screening test will be placed above the candidate scoring less marks in the interview - those Rules of Business are binding upon the petitioner, therefore, petitioner was rightly denied appointment- petition dismissed. (Para-6 to 12)

For the petitioner : Mr. K.S. Banyal, Advocate.
For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Rupinder Singh, Additional Advocate General, for respondent No.1.

Mr. Shrawan Dogra, Senior Advocate with Mr. D.K. Khanna, Advocate, for respondent No.2.
Ms. Uma Manta, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner has prayed for the following substantive relief:-

(i) That the respondent No. 2 may very kindly be directed to re-draw/ recast the select list for the post of ADAs, the result of which was declared on 29.4.2013 by directing the respondent No. 2-HP Public service Commission to recommend the name of the petitioner against fifth post in general category, the petitioner and respondent No. 3 being barracked in merit of the interview, but being elder to respondent No. 3 by setting aside the selection/ recommendation of respondent No. 3.

2. Minimal but necessary facts which require mention are given below.

3. The petitioner is a post law graduate and pursuant to advertisement issued by the H.P. Public Service Commission (respondent No. 2) on 1.9.2012 applied for the post of Assistant District Attorney on contract basis.

4. The respondent No. 2 conducted a screening test for short-listing the candidates, whereafter only the qualified candidates were called for interview. The final select list was declared on 29.4.2013 wherein the name of the petitioner did not find place. The petitioner, therefore, sought information under the Right to Information Act (for short, RTI).

5. As per information received, it revealed that the respondent No. 3, who had obtained equal marks was ordered to be appointed on the basis of his having obtained higher marks in the screening test.

6. It is contended by the petitioner that the eligibility test was only for the purpose of short-listing the candidates and in the event of the marks being equal in the interview; it was the petitioner who was required to be selected as she was senior in age. In support of his contention the petitioner has relied upon the following provision of the advertisement: -

(i) In cases where the number of eligible candidates is inordinately large in proportion to the number of posts, the Commission may restrict the number of candidates to be called for interview by subjecting all the eligible candidates to a screening test. Since the purpose of holding screening test is only to shortlist the number of candidates, marks obtained in screening test shall not be counted for deciding the merit of a candidate. Final selection of a candidate will be made solely on the basis of his/her performance in the viva-vice test/ interview, which will be of maximum 100 marks.; The minimum pass marks in interview are 45 for the candidates of general category and 35 marks for the candidates of reserved categories.

7. The respondent No. 2 has contested the petition, wherein preliminary submission has been raised to the effect that in the event of a tie in interview the rules of

business of the Commission provide for counting of marks of screening test and this action of the respondent has already been upheld by this court in ***CWP No. 5764 of 2013 titled Manish Kumar*** vs. ***Himachal Pradesh Public Service Commission decided on 13.6.2013***. Various other objections have been raised, which necessarily need not be gone into in view of limited controversy involved in the present case.

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

8. The Rules known as Himachal Pradesh Public Service Commission (Procedure & Transaction of Business and Procedure for the conduct of Examinations, Screening Tests & Interviews Etc.) Rules, 2007 (as amended up to 31st March, 2012) have been annexed with the reply as Annexure R-2/2. Rule 7 contained in Chapter V deals with the Selection of the candidates to be made as per procedure prescribed in the respective notified rules/ regulations. Chapter –C thereunder relates to Interview and the clause relevant for determination of this petition is reproduced hereinunder:-

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

9. Now what would be the relevance of these rules has been dealt with in detail by a learned Division Bench of this Court in ***Manish Kumar*** vs. ***Himachal Pradesh Public Service Commission*** (supra), wherein the aforesaid provision was considered alongwith a circular issued by the State Government, which provided that the final order of merit of the candidates in the event of tie of marks would be determined on the basis of the fact that the candidate higher in age will be ranked senior. If there is still a tie, the candidate who has scored more marks in written or screening test, as the case may be shall be ranked senior to the one who got lesser marks. This Court then held:-

> *"Notice was confined to respondent No.1 in response to order dated 27.7.2012. It appears that for selection of 27 posts of Assistant Engineer (Electrical), Class-I, (Gazetted), advertisement was made and screening test was to be conducted. Thereafter, on the basis of the outcome of the screening test, the candidates were interviewed. Noticeably the number in screening test was not added with the interview for making final selection. It appears that the petitioner has secured 44 marks in screening test in comparison to 45 marks secured by respondent No.3, whereas in the interview both the petitioner and respondent No.3 had secured equal marks. The relevant provision of the Rules of Business of the Himachal Pradesh Public Service Commission, 2007, reads as below:*

> *"Where selection is made by the interview of candidates qualified in the screening test, the candidate scoring more marks in the interview shall be placed above the candidates scoring less marks in the interview. If candidate score equal marks in interview, then the candidate scoring more marks in screening test will be placed above the candidate securing less marks in the screening test. In case the marks of screening test are equal then the candidate who is senior in age will be placed above the candidate junior in age."*

2. In view of above provision, the person who has secured higher marks in screening test was to be selected in case there is tie of marks in interview. In that condition, the age shall not be given preference.

3. On the other hand, learned counsel for the petitioner, has invited our attention to the Circular letter dated 11th July, 2005 issued by the Principal Secretary (Personnel) to the Government of Himachal Pradesh to the Secretary, Himachal Pradesh Subordinate Services Selection Board (Annexure P-6). The main contents of the observations are written here as below:

> *".....the final order of merit of candidates in the event of tie of marks shall be determined on the basis of the fact that the candidate higher in age will be ranked senior. If there is still a tie, the candidate who had secured more marks in written or screening test, as the case may be, shall be ranked senior to the one who got lesser marks."*

"4. It has been submitted on behalf of respondent No.1 that the said Circular is only applicable to the services/posts recruited under the Himachal Pradesh Subordinate Services Selection Board and is not guiding factor in respect of the selection being conducted by the Himachal Pradesh Public Service Commission. Learned counsel for the petitioner has also invited our attention to the judgment of the Supreme Court in State of Punjab and Others vs. Manjit Singh and Others (2003) 11 SCC 559, paragraph 11, which reads as below:

> *"11. In the case in hand, it was not for the Commission to have fixed any cut off marks in respect of reserved category candidates. The result has evidently been that candidates otherwise qualified for interview stand rejected on the basis of merit say, they do not have up-to-the mark merit, as prescribed by the Commission. The selection was by interview of the eligible candidates. It is certainly the responsibility of the Commission to make the selection of efficient people amongst those who are eligible for consideration. The unsuitable candidates could well be rejected in the selection by interview. It is not the question of subservience but there are certain matters of policies, on which the decision is to be taken by the Government. The Commission derives its powers under Article 320 of the Constitution as well as its limits too. Independent and fair working of the Commission is of utmost importance. It is also not supposed to function under any pressure of the Government, as submitted on behalf of the appellant-Commission. But at the same time it has to conform to the provisions of the law and has also to abide by the rules and regulations on the subject and to take into account the policy decisions which are with in*

the domain of the State Government. It cannot impose it s own policy decision in a matter beyond its purview."

5. We have heard learned counsel for the parties and also gone through the criteria and Rules of Business. In our considered view, also the Rules of Business prescribed by the Himachal Pradesh Public Service Commission shall carry force over the Circular issued by the State Government which is specifically not in respect of the selection to be made by the Himachal Pradesh Public Service Commission. Paragraph 11 referred by the learned counsel for the petitioner in Manjit Singh (supra) is rather helpful to protect the cause of the respondent No.3. Undisputedly, the respondent No.3 has secured higher marks in the screening test and equal marks in interview, as such, he has rightly been selected as Assistant Engineer in comparison to the petitioner. In the facts and circumstances, the writ petition is without any merit and is dismissed."

10. Yet again, a similar controversy came up for consideration before another learned Division Bench of this court in ***CWP No. 5260 of 2013 Dr. Ashish Guleria*** *vs.* ***H.P. Public Service Commission & others decided on 2.8.2013*** and it was observed as under:-

"2. We find from the record that the petitioner and respondents No.2 to 3 are scoring equal marks in the interview. In this view of the matter, the Public Service Commission considered the marks of the candidates obtained in the screening test to break the tie where the respondents No.2 to 3 have scored higher marks than the petitioner. Learned counsel appearing for the petitioner submits that the marks obtained in the screening test cannot form the basis for breaking the tie. We are unable to accept this submission as this controversy already stands decided by this Court in CWP 5764 of 2012-G, titled as Manish Kumar versus H.P. Public Service Commission and others, decided on 13th June, 2013holding that the Rules of Business of the H.P. Public Service Commission provide that in case of a tie in the written test/interview, it is the marks in the screening test which will be considered for breaking the tie. We are also unable to accept this submission that Article 320 of the constitution does not provide/vest any power in the Himachal Pradesh Public Service Commission to frame any Rules of Business for the purpose of breaking the tie as envisaged. Petition is dismissed."

11. Now a perusal of the aforesaid judgements would clearly that the issue raised in this petition is no longer *res-integra* as the learned Division Bench has categorically held that rules of business prescribed by the Himachal Pradesh Public Service Commission shall carry force over the circular issued by the State Government, which is specifically not in respect of the selection to be made by the Himachal Pradesh Public Service Commission.

12. In view of the exposition of law as enunciated by the learned Division Bench(s), which otherwise is binding on this court, there is no scope for interference.

13. In view of the aforesaid discussion, I find no merit in this petition and the same is dismissed, leaving the parties to bear their own costs.

****

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

Anurag son of late Sh.Mohinder Prakash Awasthi
and others. ....Petitioners.

Versus

State of H.P. and another. ...Non-petitioners.

Cr.MMO No. 10 of 2015.
Order reserved on:9.4.2015.
Date of Order: April 22,2015.

Code of Criminal Procedure, 1973- Section 482- Predecessor-in-interest of the petitioner was an accused under Prevention of Corruption Act- Indira Vikas Patra worth Rs.1,55,000/- were taken into possession – petitioners applied for the release of Indira Vikas Patra but same were not released by the Court- held, that Courts are under obligation to pass the order regarding the case property at the time of conclusion of the trial- however, in the present case, there was abatement due to the death of the accused – further, petitioners had not obtained the succession certificate from the Court to establish their status as legal heirs of the deceased – mere legal heir certificate is not sufficient to entitle them to claim the Indira Vikas Patra- a direction issued to release Indira Vikas Patra on the production of succession certificate. (Para-2 to 7)

For the petitioners: Mr.Vivek Singh Thakur,Advocate.
For Non-petitioners: Mr.M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 482 of the Code of Criminal Procedure 1973. It is pleaded that father of petitioners No. 1 and 2 and husband of petitioner No.3 namely late Sh Mohinder Prakash Awasthi was in Forest Department of State of H.P. and superannuated in March 2001. It is further pleaded that FIR No.31 of 1996 under Sections 420, 409, 467, 468, 471, 109, 120B IPC read with Section 13 (2) of the Prevention of Corruption Act was registered against late Sh. Mohinder Prakash Awasthi in Police Station Enforcement North Zone Dharmshala on dated 11.12.1996 on the basis of some information revealing that late Mohinder Prakash Awasthi was in possession of disproportionate assets. It is further pleaded that during investigation 57 Indira Vikas Patra valuing Rs.1,55,000/- (One lac fifty five thousand) were took into possession by Investigating Officer vide seizure memo dated 13.12.1996 and copy of seizure memo dated 13.12.1996 is Annexure P1 and P1/T. It is further pleaded that during investigation it was concluded in investigation that against income of Rs.11,35,690/- (Eleven lac thirty five thousand six hundred ninety) late Mohinder Prakash Awasthi was in possession of property of Rs.14,81,191/- (Fourteen lac eighty one thousand one hundred ninety one) and challan was filed before learned Special Judge Chamba. It is further pleaded that charge was also framed. It is further pleaded that during pendency of criminal proceedings late Mohinder Prakash Awasthi died on dated 25.8.2008. It is further pleaded that after the death of Mohinder Prakash Awasthi learned Special Judge Chamba vide order dated 22.9.2008 abated the proceedings. It is further pleaded that petitioners are legally entitled for the release of Indira Vikas Patras valuing Rs.1,55,000/- (One lac fifty five thousand) which were took into possession vide seizure

memo dated 13.12.1996 in FIR No. 31 of 1996. It is further pleaded that on dated 14.6.2010 petitioners filed application before learned Special Judge Chamba for release of Indira Vikas Patras valuing Rs.1,55,000/- (One lac fifty five thousand). It is further pleaded that learned trial court at the time of abatement order did not pass any order relating to case property of criminal case. It is further pleaded that learned Special Judge Chamba held that unless competent Court did not give finding the case property could not be released in favour of the petitioners. It is further pleaded that learned trial Court did not comply the provision of Section 452 of the Code of Criminal Procedure 1973 at the time of passing of order of abatement. It is further pleaded that petitioners are legally entitled for the release of FDR valuing Rs.1,55,000/- (One lac fifty five thousand) in their favour. Prayer for acceptance of petition sought.

2. Per contra reply filed on behalf of non-petitioners pleaded therein that FIR No. 31 of 1996 relating to possession of disproportionate assets was registered against late Mohinder Parkash Awasthi. It is admitted that during the course of investigation 57 Indira Vikas Patras valuing Rs.1,55,000/- (One lac fifty five thousand) were took into possession by Investigating Officer. It is further pleaded that the order of release could be passed by learned trial Court as per provision of Section XXXIV of the Code of Criminal Procedure 1973. It is further pleaded that petitioners could file fresh application before learned trial Court. It is further pleaded that appropriate order be passed by the Court.

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

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

(1) Whether petition filed under Section 482 of the Code of Criminal Procedure is liable to be accepted as mentioned in memorandum of grounds of petition.

(2) Final Order.

Finding upon point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioners that order of learned Special Judge Chamba dated 1.10.2010 is contrary to law is rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that the proceedings against the accused were dropped on the concept of abatement. It is held that Courts are under legal obligation to pass the order relating to case property at the time of conclusion of the trial. In the present case there is no conclusion of the trial but there is only abatement of the criminal proceedings due to death of accused. It is held that learned trial Court had rightly held that some finding of competent Civil Court ought to have come relating to succession certificate. It is held that succession certificate is essential from competent civil court of law. In the present case petitioners have placed on record legal heir certificate issued by Executive Magistrate Chamba. It is held that certificate issued by Executive Magistrate Chamba is not sufficient to release Indira Vikas Patras valuing Rs.1,55,000/- (One lac fifty five thousand) because Executive Magistrate is not civil Court.

6. Submission of learned Advocate appearing on behalf of the petitioners that legal heir certificate has been issued by Executive Magistrate placed on record and on this ground petition filed under Section 482 of the Code of Criminal Procedure be allowed is also rejected being devoid of any force for the reason hereinafter mentioned. It is held that Executive Magistrate is not legally competent to grant succession certificate under Indian

Succession Act 1925. As per Section 371 of Indian Succession Act 1925 the competent court to grant succession certificate is District Judge. Hence it is held that release order cannot be passed in favour of the petitioners solely on the ground that legal heir certificate was issued by Executive Magistrate Chamba. It is further held that in abatement proceedings obtaining of succession certificate under Indian Succession Act 1925 is essential for release of Indira Vikas Patras valuing Rs.1,55,000/- (One lac fifty five thousand) in the ends of justice. It is held that it is not expedient in the ends of justice to release Indira Vikas Patras in favour of the petitioners until succession certificate is not obtained by the petitioners from concerned learned District Judge. Hence point No.1 is answered in negative.

Point No.2 (Final Order).

7. In view of my findings upon point No.1 petition is dismissed with direction that amount of Rs. 1,55,000/- (One lac fifty five thousand) will be released by learned Special Judge Chamba as per succession certificate issued by concerned learned District Judge as per Part X of Indian Succession Act 1925. Petition is disposed of. All pending application(s) if any are also disposed of.

****

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

Ashok Kumar Tyagi .....Petitioner.

Vs.

State of H.P. and others .....Respondents/Performa respondents.

Cr.MMO No. 29 of 2014
Reserved on : 17.04.2015
Decided on : 22.4.2015.

Code of Criminal Procedure 1973- Section 482- Petitioner is a partner in the firm manufacturing drugs under the license issued by the Drug Controller – Drug Inspector visited the premises of respondent No. 7 and took the sample of 13 drugs- two samples were not found to be a standard quality- complaint was lodged against the petitioner and other partners- petitioner contended that his prosecution is in violation of the provisions of Section 34 of Drugs and Cosmetic Act, 1940- there was no plea that petitioner was in-charge and was responsible for the conduct of the business of the firm and he could not be prosecuted simply on the ground that he happens to be a partner- held, that in order to prosecute a partner, it is necessary to assert that he is in-charge and responsible for the conduct of the business of the firm- mere fact that one is a partner of firm is not sufficient to make him liable- petitioner has placed on record the certificate of renewal of license to manufacture bearing the details of the persons who are responsible for manufacturing the drug have been given and these names are other than those who are partners of the firm- petitioner has annexed copy of authorization in favour of 'M' which shows that 'M' would be responsible for the conduct of the business- copy of the letter issued by Drug Licensing Authority to the company acknowledging 'M' to be the holder of the manufacturing drug license was also placed on record- letter dated 9.12.2005 approving the names of certain persons other than the names of the petitioner was also placed on record- In these circumstances, forcing the petitioner to stand trial would be an abuse of process of Court- hence, complaint quashed. (Para-7 to 31)

Cases referred:
Abdul Moid and others Vs. The State 1977 Cri. L.J. 1325
State of Karnataka Vs. Pratap Chand and others Drugs Cases 1981-1
Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and others AIR 1983 Supreme Court 67(1)
D. K. Javer and others Vs. The State 1985 Cri. L. J. 1572
Adarsh Marwah and another Vs. Nehar Ranjan Bhattacharya and another 1990 EFR 387
State of Haryana Vs. Brij Lal Mittal and others AIR 1998 Supreme Court 2327
State of Maharashtra Vs. R.A. Chandawarkar and others 1999 Drugs Cases 94
Pannalal Sunderlal Choksi and others Vs. State of Maharashtra and another 2001 Drugs Cases 7
Aravind Babu Vs. State of Kerala 2002 (1) Criminal Court Cases 375 (Kerala)
Umesh Sharma and another Vs. S.G. Bhakta and others 2002 Cri L.J. 4843
Deepak Kumar Vs. State of Haryana EFR 2003(1) 523
N. Dandapani and another Vs. State of A.P. 2005 Drugs Cases (DC) 339
Rachna Kapoor Etc. Etc. Vs. State (N.C.T. of Delhi) & Ors. 2006 Cri. L.J. (NOC) 70 (DEL)
Desh Raj and others Vs. Meena 2007(3) Shim LC 1
Murari Lal Arora Vs. State of H.P. 2010(2) Him. L.R. 742
Aneeta Hada Vs. Godfather Travels and Tours Private Limited (2012) 5 SCC 661
Gunmala Sales Private Limited Vs. Anu Mehta and others (2015) 1 SCC 103
Monaben Ketanbhai Shah and another Vs. State of Gujarat and others (2004) 7 SCC 15
S.M.S. Pharmaceuticals Ltd. Vs. Neeeta Bhalla and another (2005) 8 SCC 89
National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and another (2010) 3 Supreme Court Cases 330
Gunmala Sales Private Limited and others Vs. Anu Mehta and others (2015)1 Supreme Court Cases 103

For the petitioner :	Mr. Anand Sharma, Advocate.
For the respondent :	Mr. Rupinder Singh Thakur & Ms. Meenakshi Sharma, Additional Advocate Generals, with Ms. Parul Negi, Deputy Advocate General and Mr. J.S. Rana, Assistant Advocate General, for respondent No. 1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J.

By way of this petition under Section 482 of the Code of Criminal Procedure read with Article 227 of the Constitution of India, the petitioner has sought quashing of complaint pending against him before the learned Chief Judicial Magistrate, Nahan, Sirmaur, H.P., under Section 18(a)(i) read with Section 27(d) of the Drugs and Cosmetic Act, 1940 (for short 'the Act').

2. It is averred that the prosecution has been launched against the petitioner alongwith other partners of the firm, who have been arrayed as performa respondents in this petition. The petitioner is one of the partners of respondent No. 7, which is manufacturing drugs under licence issued by the Drug Controller.

3. On 18.10.2011, the Drug Inspector visited the premises of respondent No. 7 and took samples of 13 drugs. Out of these, 11 samples were found to be of Standard

Quality, whereas 2 samples were not found to be of Standard Quality, for which prosecution was launched against the petitioner and the other partners including the Company.

4. Petitioner has sought quashing of the proceedings on the ground that no cause of action survives against him because of the illegalities and irregularities committed during the analysis by the Analyst at Government Laboratory at Kandaghat, who did not have proper storage condition, as drug was required to be preserved in a temperature ranging from 8°C to 25°C. It is further contended that the prosecution of the petitioner is in violation of the provisions of Section 34 of the Act.

5. In the reply filed by the respondents No. 1 and 2, preliminary submissions have been made to the effect that there has been due compliance of the provisions of Section 34 of the Act and that the samples had been preserved and thereafter tested as per the procedure.

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

7. During the course of hearing, the learned counsel for the petitioner has confined his arguments to the provisions of Section 34 of the Act, which reads thus:

> *"34. Offences by Companies.-(1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*
>
> *Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.*
>
> *(2) Notwithstanding anything contained in sub- by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.*
>
> *Explanation.-For the purposes of this section-*
>
> *(a) "company" means a body corporate, and includes a firm or other association of individuals; and*
>
> *(b) "director" in relation to a firm means a partner in the firm."*

8. It is contended that there is no whisper in the entire complaint either against the petitioner or the performa respondents as to who was in fact "*incharge of and was responsible"* for the conduct of the business of the firm at the time of the commission of the offence and the mere fact that the petitioner happens to be one of the partners, does not entitle the respondents to prosecute him. In support of his arguments, the learned counsel for the petitioner has placed reliance on the following judgments:

1. Abdul Moid and others Vs. The State 1977 Cri. L.J. 1325.

2. State of Karnataka Vs. Pratap Chand and others Drugs Cases 1981-1.

3. Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and others AIR 1983 Supreme Court 67(1)

4. D. K. Javer and others Vs. The State 1985 Cri. L. J. 1572.

5. Adarsh Marwah and another Vs. Nehar Ranjan Bhattacharya and another 1990 EFR 387.

6. State of Haryana Vs. Brij Lal Mittal and others AIR 1998 Supreme Court 2327

7. State of Maharashtra Vs. R.A. Chandawarkar and others 1999 Drugs Cases 94.

8. Pannalal Sunderlal Choksi and others Vs. State of Maharashtra and another 2001 Drugs Cases 7.

9. Aravind Babu Vs. State of Kerala 2002 (1) Criminal Court Cases 375 (Kerala).

10. Umesh Sharma and another Vs. S.G. Bhakta and others 2002 Cri L.J. 4843.

11. Deepak Kumar Vs. State of Haryana EFR 2003(1) 523.

12. N. Dandapani and another Vs. State of A.P. 2005 Drugs Cases (DC) 339.

13. Rachna Kapoor Etc. Etc. Vs. State (N.C.T. of Delhi) & Ors. 2006 Cri. L.J. (NOC) 70 (DEL).

14. Desh Raj and others Vs. Meena 2007(3) Shim LC 1.

15. Murari Lal Arora Vs. State of H.P. 2010(2) Him. L.R. 742

16. Aneeta Hada Vs. Godfather Travels and Tours Private Limited (2012) 5 Supreme Court Cases 661.

17. Gunmala Sales Private Limited Vs. Anu Mehta and others (2015) 1 Supreme Court Cases 103.

18. Ashish Mittal Vs. Shri Anil Chand and others, Cr.MMO No. 111 of 2013, decided on 16th September, 2013, by the High Court of Himahcal Pradesh.

9. On the other hand, Mr. J.S. Rana, learned Assistant Advocate General would contend that all the contentions as have been raised by the petitioner, have to be considered during the trial and it is not the stage where this Court should throttle the prosecution and quash the proceedings. He too has placed reliance on the judgment of Hon'ble Supreme Court in **State of Haryana** Vs**. Brij Lal Mittal and others** (1998) 5 Supreme Court Cases 343.

10. I weighed the arguments of both the parties.

11. If one goes through the complaint, the only allegation with regard to compliance of Section 34 is contained in paragraph No. 9 of the complaint which reads thus:

> *"9. That on dated 24.12.2012, the complainant visited the premises of the firm to enquire about the person who at the time of offence was in charge of and was responsible to the company for the conduct of the business of the*

company, where accused No. 1 & 5 were present. It was disclosed by the accused No. 1 & 5 that they were the partners of the firm alongwith other four partners. A spot memo in this regard was prepared on the spot (attached as annexure P88). A photocopy of the partnership-cum-induction deed (attached as annexure-P89 to 94) signed by both the accused present was also handed over by the accused to the complainant. It is, therefore, clear that all the five accused were in charge of and was responsible to the company for the conduct of the business of the company at the time of the manufacturing both the batches of the drug in question"

12. Now, the question therefore arises as to whether the aforesaid allegations can be said to be in due compliance of the provisions of Section 34 of the Act?

13. At this stage, in order to be fair to the learned Assistant Advocate General, it may be relevant to make mention of the spot memo prepared by the Drug Inspector on 24.12.2012, which reads thus:

"SPOT MEMO

The premises of M/s August Remedies, Village Ogli

Kala Amb District Sirmaur, H.P. was visited by me today on 24.12.2012 regarding the verification of the constitution of the firm as on November, 2011 at the time of the manufacturing of syrup B-ZyME Batch No. 366 & 365.

Sh. Ashok Kumar Tyagi and Shri Arvind Kumar are present at the time of visit. It was disclosed by them that the firm is a partnership firm and during Nov, 2011 there were five partners including both of them. The other three partners were

1) Sh. I.N. Gandhi.
2) Sh. Sanjay Taneja.
3) Sh. Daljeet Singh.

A scanned copy of the partnership deed dated 08.09.2011 is also handed over to the undersigned by the partners present duly signed by both of them.

Sd/-
24/12/2012
(SUNNY KAUSHAL)
Drugs Inspector, HQ Nahan."

Apart there from, there appears to be a hand written note of the petitioner which reads thus:

"Recd. Copy of the above mentioned
5 persons including myself were the equal
partners as on Nov.2011 to till date and
are equally responsible for the day
to day business.
Signed 24/12/12."

14. It is on the strength of the said note coupled with the averments made in paragraph No. 9 of the complaint that the respondents claim that the complaint as launched, is in strict conformity with the provisions of Section 34 of the Act.

15. Now, can the endorsement made on the spot memo be made the basis for holding the petitioner alongwith the co-partners liable for prosecution under the Act?

16. It cannot be disputed in so far as the offence by a partnership firm is concerned, the wordings of various other Statutes are virtually *pari materia* with those contained in section 34 of the Drugs and Cosmetics Act, 1940. For example Section 33 of the Insecticides Act, 1968, Section 141 of the Negotiable Instruments Act, 1881 and Section 34 of the Prevention of Food Adulteration Act etc. So, one has necessarily to fall back to the *pari materia* provisions mentioned above so as to conclude as to whether the petitioner on the strength of the allegations made in paragraph No. 9 of the complaint coupled with the fact that he is one of the partners can be prosecuted, or does the complaint deserve to be quashed.

17. In **Monaben Ketanbhai Shah and another** Vs. **State of Gujarat and others** (2004) 7 Supreme Court Cases 15, the Hon'ble Supreme Court while considering the *pari materia* provisions of Section 141 of the Negotiable Instruments Act, 1881 held that the primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable for fastening the criminal liability. There is no presumption that every partner knows about the transaction. The obligation of the accused to prove that at the time the offence was committed they were not incharge and were not responsible to the firm for the conduct of the business of the firm, would arise only when firstly the complainant makes necessary averments in the complaint and establish that fact.

18. In **S.M.S. Pharmaceuticals Ltd**. Vs. **Neeeta Bhalla and another** (2005) 8 Supreme Court Cases 89, a three Judge Bench of the Hon'ble Supreme Court was dealing with a matter which has arisen from a reference made by a two Judge Bench of the Hon'ble Supreme Court on the following questions:

> *"(a) whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfill the requirements of the said section and it is not necessary to specifically state in the complaint that the persons accused was in charge of, or responsible for, the conduct of the business of the company.*
>
> *(b) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.*
>
> *(c) even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the Managing Directors of Joint Managing Director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against. "*
>
> The Hon'ble Supreme Court has held as under:
>
> "*4. In the present case, we are concerned with criminal liability on account of dishonour of cheque. It primarily falls on the drawer company and is extended to officers of the Company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a Company, extends criminal liability for dishonour of cheque to officers of the Company. Section 141 contains conditions which have to be satisfied before the liability*

can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the Company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persons who had nothing to do with the matter need not be roped in. A company being a juristic person, all its deeds and functions are result of acts of others. Therefore, officers of a Company who are responsible for acts done in the name of the Company are sought to be made personally liable for acts which result in criminal action being taken against the Company. It makes every person who, at the time the offence was committed, was incharge of, and was responsible to the Company for the conduct of business of the Company, as well as the Company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence

5. Section 203 of the Code empowers a Magistrate to dismiss a complaint without even issuing a process. It uses the words "after considering" and "the Magistrate is of opinion that there is no sufficient ground for proceeding". These words suggest that the Magistrate has to apply his mind to a complaint at the initial stage itself and see whether a case is made out against the accused persons before issuing process to them on the basis of the complaint. For applying his mind and forming an opinion as to whether there is sufficient ground for proceeding, a complaint must make out a prima facie case to proceed. This, in other words, means that a complaint must contain material to enable the Magistrate to make up his mind for issuing process. If this were not the requirement, consequences could be far reaching. If a Magistrate had to issue process in every case, the burden of work before Magistrates as well as harassment caused to the respondents to whom process is issued would be tremendous. Even Section 204 of the Code starts with the words "if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding....." The words "sufficient ground for proceeding" again suggest that ground should be made out in the complaint for proceeding against the respondent. It is settled law that at the time of issuing of the process the Magistrate is required to see only the allegations in the complaint and where allegations in the complaint or the charge sheet do not constitute an offence against a person, the complaint is liable to be dismissed.

6. As the points of reference will show, the question for consideration is what should be the averments in a complaint under Sections 138 and 141. Process on a complaint under Section 138 starts normally on basis of a written complaint which is placed before a Magistrate. The Magistrate considers the complaint as per provisions of Sections 200 to 204 of the Code of Criminal Procedure. The question of requirement of averments in a complaint has to be considered on the basis of provisions contained in Sections 138 and 141 of the Negotiable Instruments Act read in the light of powers of a Magistrate referred to in Sections 200 to 204 of the Code of Criminal Procedure. The fact that a Magistrate has to consider the complaint before issuing process and he has power to reject it at the threshold, suggests that a complaint should make out a case for issue of process.

7. As to what should be the averments in a complaint, assumes importance in view of the fact that, at the stage of issuance of process, the Magistrate will have before him only the complaint and the accompanying documents. A person who is sought to be made accused has no right to produce any documents or evidence in defence at that stage. Even at the stage of framing of charge the accused has no such right and a Magistrate cannot be asked to look into the documents produced by an accused at that stage, State of Orissa vs. Debendra Nath Padhi [2005 (1) SCC 568].

8. The officers responsible for conducting affairs of companies are generally referred to as Directors, Managers, Secretaries, Managing Directors etc. What is required to be considered is: is it sufficient to simply state in a complaint that a particular person was a director of the Company at the time the offence was committed and nothing more is required to be said? For this, it may be worthwhile to notice the role of a director in a company. The word 'director' is defined in Section 2 (13) of the Companies Act, 1956 as under:

> *"2. (13) "director" includes any person occupying the position of director, by whatever name called";*

There is a whole chapter in the Companies Act on directors, which is Chapter II. Sections 291 to 293 refer to powers of Board of Directors. A perusal of these provisions shows that what a Board of Directors is empowered to do in relation to a particular company depend upon the role and functions assigned to Directors as per the Memorandum and Articles of Association of the company. There is nothing which suggests that simply by being a director in a Company, one is supposed to discharge particular functions on behalf of a company. It happens that a person may be a director in a company but he may not know anything about day-to-day functioning of the company. As a director he may be attending meetings of the Board of Directors of the Company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two directors out of the Board of the Company who may be made responsible for day-to-day functions of the Company. These are matters which form part of resolutions of Board of Directors of a Company. Nothing is oral. What emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a Director in a company in order to illustrate the point that there is no magic as such in a particular word, be it Director, Manager or Secretary. It all depends upon respective roles assigned to the officers in a company. A company may have Managers or Secretaries for different departments, which means, it may have more than one Manager or Secretary. These officers may also be authorised to issue cheques under their signatures with respect to affairs of their respective departments. Will it be possible to prosecute a Secretary of Department-B regarding a cheque issued by the Secretary of Department-A which is dishonoured? The Secretary of Department-B may not be knowing anything about issuance of the cheque in question. Therefore, mere use of a particular designation of an officer without more, may not be enough by way of an averment in a complaint. When the requirement in Section 141, which extends the liability to officers of a company, is that such a person should be in charge of and responsible to the

company for conduct of business of the company, how can a person be subjected to liability of criminal prosecution without it being averred in the complaint that he satisfies those requirements ? Not every person connected with a Company is made liable under Section 141. Liability is cast on persons who may have something to do with the transaction complained of. A person who is in charge of and responsible for conduct of business of a Company would naturally know why the cheque in question was issued and why it got dishonoured.

9. The position of a Managing Director or a Joint Managing Director in a company may be different. These persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141 (1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence.

10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words

> *" who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence etc."*

What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable'….etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

11. A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any Director, Manager, Secretary or other officer of a company in commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for Directors, Managers, Secretaries and other officers of a company to cover them in cases of their proved involvement.

12. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable.

13. The question of what should be averments in a criminal complaint has come up for consideration before various High Courts in the country as also before this Court. Secunderabad Health Care Ltd. and others v. Secunderabad Hospitals Pvt. Ltd. and others [1999 (96) C.C. (AP) 106] was a case under the Negotiable Instruments Act specifically dealing with Sections 138 and 141 thereof. The Andhra Pradesh High Court held that every Director of a company is not automatically vicariously liable for the offence committed by the company. Only such Directors or Director who were in charge of or responsible to the company for the conduct of business of the company at the material time when the offence was committed alone shall be deemed to be guilty of the offence. Further it was observed that the requirement of law is that(Comp Gas p.112)

> *"There must be clear, unambiguous and specific allegations against the persons who are impleaded as accused that they were in charge of and responsible to the company in the conduct of its business in the material time when the offence was committed."*

14. The same High Court in v. Sudheer Reddy v. State of Andhra Pradesh and others [2000 (99) CC (AP) 107] held that (Comp Cas p. 110):

> *"The purpose of Section 141 of the Negotiable Instruments Act would appear to be that a person who appears to be merely a director of the Company cannot be fastened with criminal liability for an offence under Section 138 of the Negotiable Instruments Act unless it is shown that he was involved in the day-today affairs of the company and was responsible to the company."*

Further, it was held that allegations in this behalf have to be made in a complaint before process can be issued against a person in a complaint. To same effect is the judgment of the Madras High Court in R. Kannan v. Kotak Mahindra Finance Ltd. 2003 (115) CC (Mad) 321. In Lok Housing and Constructions Ltd. v. Raghupati Leasing and Finance Ltd. and another [2003 (115) CC (Del) 957], the Delhi High Court noticed that there were clear averments about the fact that accused No.2 to 12 were officers in charge of and responsible to the company in the conduct of day-to-day business at the time of commission of offence. Therefore, the Court refused to quash the

complaint. In Sunil Kumar Chhaparia v. Dakka Eshwaraiah and another [2002 (108) CC (AP) 687, the Andhra Pradesh High Court noted that there was a consensus of judicial opinion that: (Comp Cas p. 691)

> *" a director of a company cannot be prosecuted for an offence under Section 138 of the Act in the absence of a specific allegation in the complaint that he was in charge of and responsible to the company in the conduct of its business at the relevant time or that the offence was committed with his consent or connivance."*

The Court has quoted several judgments of various High Courts in support of this proposition. We do not feel it necessary to recount them all.

15. Cases have arisen under other Acts where similar provisions are contained creating vicarious liability for officers of a company in cases where primary liability is that of a company. State of Karnataka v. Pratap Chand and others 1981 (2) SCC 335 was a case under the Drugs and Cosmetics Act, 1940. Section 34 contains a similar provision making every person in charge of and responsible to the company for conduct of its business liable for offence committed by a company. It was held that a person liable for criminal action under that provision should be a person in overall control of day-to-day affairs of the company or a firm. This was a case of a partner in a firm and it was held that a partner who was not in such overall control of the firm could not be held liable. In Municipal Corporation of Delhi v. Ram Kishan Rohtagi and others [1983 (1) SCC 1], the case was under the Prevention of Food Adulteration Act. It was first noticed that under Section 482 of the Criminal Procedure Code in a complaint, the order of a Magistrate issuing process against the accused can be quashed or set aside in a case where the allegation made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is arrived at against accused. This emphasises the need for proper averments in a complaint before a person can be tried for the offence alleged in the complaint.

16. In State of Haryana v. Brij Lal Mittal and others 1998 (5) SCC 343 it was held that vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of a company, it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business.

17. K.P.G. Nair v. Jindal Menthol India Ltd. [2001 (10) SCC 218] was a case under the Negotiable Instruments Act. It was found that the allegations in the complaint did not in express words or with reference to the allegations contained therein make out a case that at the time of commission of the offence, the appellant was in charge of and was responsible to the company for the conduct of its business. It was held that requirement of Section 141 was not met and the complaint against the accused was quashed. Similar was the position in Katta Sujatha v. Fertilizers & Chemiucals Travancore Ltd. and another [2002 (7 SCC 655]. This was a case of a partnership. It was found

that no allegations were contained in the complaint regarding the fact that the accused was a partner in charge of and was responsible to the firm for the conduct of business of the firm nor was there any allegation that the offence was made with the consent and connivance or that it was attributable to any neglect on the part of the accused. It was held that no case was made out against the accused who was a partner and the complaint was quashed. The latest in the line is the judgment of this Court in Monaben Ketanbhai Shah and another v. State of Gujarat and others [2004 (7) SCC 15]. It was observed as under: (SCC p.17, para 4)

> *"4. It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfill the requirements of Section 141, the complaint has to proceed and is required to be tried with. It is also true that in construing a complaint a hyper-technical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been laid in the complaint, it should not be quashed. All the same, it is also to be remembered that it is the duty of the court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking. The present case falls in this category as would be evident from the facts noticed hereinafter."*

It was further observed: (SCC pp.18019, para 6)

> *"6 The criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint."*

18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That respondent falls within parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141 he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

19 .In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-Para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141".

19. In **National Small Industries Corporation Limited** Vs. **Harmeet Singh Paintal and another** (2010) 3 Supreme Court Cases 330 after reviewing all its earlier judgements, the Hon'ble Supreme Court summarized the legal position as follows:

"22. Therefore, this Court has distinguished the case of persons who are in-charge of and responsible for the conduct of the business of the company at the time of the offence and the persons who are merely holding the post in a company and are not in-charge of and responsible for the conduct of the business of the company. Further, in order to fasten the vicarious liability in accordance with Section 141, the averment as to the role of the concerned Directors should be specific. The description should be clear and there should be some unambiguous allegations as to how the concerned Directors were alleged to be in- charge of and was responsible for the conduct and affairs of the company."

"39. From the above discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.

(vii) The person sought to be made liable should be in- charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

20. On the strength of the aforesaid judgments of the Hon'ble Supreme Court, it can safely be concluded that it is the prime responsibility of the complainant to make specific averments with respect to the accused being at the relevant time incharge as also responsible for the conduct of the business. But then, the mere fact that one happens to be a partner of the firm would not in itself be sufficient to make him liable, because there is no deemed liability of such partner. The averment assumes importance because it is the basis and essential averment which persuades the Magistrate to issue the process against the

partner. Thus, if this basic averment is missing, the Magistrate is legally justified in not issuing process.

21. Here the court is concerned with the question as to what should be the approach of this Court when it deals with the petition filed under Section 482 of the Code of Criminal Procedure read with Article 227 of the Constitution of India for quashing such a complaint against the partner. If the necessary averment is there, must this Court dismiss the petition as a rule observing that the trial must go on. Is this Court precluded from looking into further circumstances if any?

22. Inherent power under Section 482 of the Code of Criminal Procedure is to be invoked to prevent the abuse of process of any Court or otherwise to secure the ends of justice. Can such fetters be put on the inherent powers? The answer is obviously no. In taking this view, I am fortified by the observations made by the Hon'ble Supreme Court in **Gunmala Sales Private Limited and others** Vs. **Anu Mehta and others** (2015)1 Supreme Court Cases 103, wherein the Hon'ble Supreme Court has observed as under:

> *"28. We are concerned in this case with Directors who are not signatories to the cheques. So far as Directors who are not signatories to the cheques or who are not Managing Directors or Joint Managing Directors are concerned, it is clear from the conclusions drawn in the above- mentioned cases that it is necessary to aver in the complaint filed under Section 138 read with Section 141 of the NI Act that at the relevant time when the offence was committed, the Directors were in charge of and were responsible for the conduct of the business of the company. This is a basic requirement. There is no deemed liability of such Directors. This averment assumes importance because it is the basic and essential averment which persuades the Magistrate to issue process against the Director. That is why this Court in SMS Pharma-(1) observed that the question of requirement of averments in a complaint has to be considered on the basis of provisions contained in Sections 138 and 141 of the NI Act read in the light of the powers of a Magistrate referred to in Sections 200 to 204 of the Code which recognize the Magistrate's discretion to reject the complaint at the threshold if he finds that there is no sufficient ground for proceeding. Thus, if this basic averment is missing the Magistrate is legally justified in not issuing process. But here we are concerned with the question as to what should be the approach of a High Court when it is dealing with a petition filed under Section 482 of the Code for quashing such a complaint against a Director. If this averment is there, must the High Court dismiss the petition as a rule observing that the trial must go on? Is the High Court precluded from looking into other circumstances if any? Inherent power under Section 482 of the Code is to be invoked to prevent abuse of the process of any court or otherwise to secure ends of justice. Can such fetters be put on the High Court's inherent powers? We do not think so.*
>
> *29. SMS Pharma-(1), undoubtedly, says that it is necessary to specifically aver in the complaint that the Director was in charge of and responsible for the conduct of the company's business at the relevant time when the offence was committed. It says that this is a basic requirement. And as we have already noted, this averment is for the purpose of persuading the Magistrate to issue process. If we revisit SMS Pharma-(1), we find that after referring to the various provisions of the Companies Act it is observed that those provisions show that what a Board of Directors is empowered to do in relation to a particular company depends upon the roles and functions*

assigned to Directors as per the memorandum and articles of association of the company. There is nothing which suggests that simply by being a Director in a company, one is supposed to discharge particular functions on behalf of a company. As a Director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two Directors out of the Board of the company who may be made responsible for the day-to-day functions of the company. This Court further observed that what emerges from this is that the role of a Director in a company is a question of fact depending on the peculiar facts in each case and that there is no universal rule that a Director of a company is in charge of its everyday affairs. What follows from this is that it cannot be concluded from SMS Pharma-(1) that the basic requirement stated therein is sufficient in all cases and whenever such an averment is there, the High Court must dismiss the petition filed praying for quashing the process. It must be remembered that the core of a criminal case are its facts and in factual matters there are no fixed formulae required to be followed by a court unless it is dealing with an entirely procedural matter. We do not want to discuss 'the doctrine of Indoor Management' on which submissions have been advanced. Suffice it to say, that just as the complainant is entitled to presume in view of provisions of the Companies Act that the Director was concerned with the issuance of the cheque, the Director is entitled to contend that he was not concerned with the issuance of cheque for a variety of reasons. It is for the High Court to consider these submissions. The High Court may in a given case on an overall reading of a complaint and having come across some unimpeachable evidence or glaring circumstances come to a conclusion that the petition deserves to be allowed despite the presence of the basic averment. That is the reason why in some cases, after referring to SMS Pharma-(1), but considering overall circumstances of the case, this Court has found that the basic averment was insufficient, that something more was needed and has quashed the complaint.

30. When a petition is filed for quashing the process, in a given case, on an overall reading of the complaint, the High Court may find that the basic averment is sufficient, that it makes out a case against the Director; that there is nothing to suggest that the substratum of the allegation against the Director is destroyed rendering the basic averment insufficient and that since offence is made out against him, his further role can be brought out in the trial. In another case, the High Court may quash the complaint despite the basic averment. It may come across some unimpeachable evidence or acceptable circumstances which may in its opinion lead to a conclusion that the Director could never have been in charge of and responsible for the conduct of the business of the company at the relevant time and therefore making him stand the trial would be abuse of the process of court as no offence is made out against him.

31. When in view of the basic averment process is issued the complaint must proceed against the Directors. But, if any Director wants the process to be quashed by filing a petition under Section 482 of the Code on the ground that only a bald averment is made in the complaint and that he is really not concerned with the issuance of the cheque, he must in order to persuade the High Court to quash the process either furnish some sterling

uncontrovertible material or acceptable circumstances to substantiate his contention. He must make out a case that making him stand the trial would be abuse of the process of court. He cannot get the complaint quashed merely on the ground that apart from the basic averment no particulars are given in the complaint about his role, because ordinarily the basic averment would be sufficient to send him to trial and it could be argued that his further role could be brought out in the trial. Quashing of a complaint is a serious matter. Complaint cannot be quashed for the asking. For quashing of a complaint it must be shown that no offence is made out at all against the Director.

32. In this connection, it would be advantageous to refer to Harshendra Kumar D v. Rebatilata Koley & Ors.,[22] where process was issued by the Magistrate on a complaint filed under Section 138 read with Section 141 of the NI Act. The appellant therein challenged the proceeding by filing revision application under Section 397 read with Section 401 of the Code. The case of the appellant-Director was that he had resigned from Directorship. His resignation was accepted and notified to the Registrar of Companies. It was averred in the complaint that the appellant was responsible for the day-to-day affairs of the company and it was on his and other Directors assurance those demand drafts were issued. Despite this averment, this Court quashed the complaint taking into account resolution passed by the company, wherein it was reflected that the appellant had resigned from the post of Director much prior to the issuance of cheque and the fact that the company had submitted Form-32. It was argued before this Court that the documents furnished by the accused could not have been taken into account. Repelling this submission this Court observed as under:

"24. In Awadh Kishore Gupta this Court while dealing with the scope of power under Section 482 of the Code observed: (SCC p. 701, para 13) "13. It is to be noted that the investigation was not complete and at that stage it was impermissible for the High Court to look into materials, the acceptability of which is essentially a matter for trial. While exercising jurisdiction under Section 482 of the Code, it is not permissible for the court to act as if it was a trial Judge."

25. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which [pic]are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents — which are beyond suspicion or doubt — placed by the accused, the accusations against him cannot stand, it would be travesty of justice if the accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or

abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

26. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to the appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company."

33. As already noted in Anita Malhotra, relying on Harshendra Kumar, this Court quashed the complaint filed under Section 138 read with Section 141 of the NI Act relying on the certified copy of the annual return which was a public document as per the Companies Act read with Section 74(2) of the Evidence Act, which established that the appellant/Director therein had resigned from the Directorship much prior to the issuance of cheques. This was done despite the fact that the complaint contained the necessary averments. In our opinion, therefore, there could be a case where the High Court may feel that filing of the complaint against all Directors is abuse of the process of court. The High Court would be justified in such cases in quashing the complaint after looking into the material furnished by the accused. At that stage there cannot be a mini trial or a roving inquiry. The material on the face of it must be convincing or uncontrovered or there must be some totally acceptable circumstances requiring no trial to establish the innocence of the Directors.

34. We may summarize our conclusions as follows:

34.1. Once in a complaint filed under Section 138 read with Section 141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director;

34.2. If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director.

34.3. In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a

Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed;

34.4. No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director."

23. Now, reverting to the facts of the case, it would be seen that no doubt in paragraph No. 9 of the complaint it has been averred that the petitioner alongwith other partners was incharge and responsible to the firm for the conduct of the business and the complainant has also placed on record a copy of an endorsement made by the petitioner himself acknowledging the fact that he alongwith the other petitioners is equally responsible for day to day business, but does this meet the requirement of Section 34 of the Act?

24. The law does not presume that every partner is incharge of and responsible to the firm. A perusal of Section 34 as a whole would show that there is a presumption of being guilty against a person, who is incharge of and responsible to the firm, and such a person is liable to be punished unless he proves that offence was committed without his knowledge or inspite of exercise of due diligence to prevent the commission of offence. By virtue of Sub-section (2), by a non obstante clause in its opening part, the prosecution is obliged to prove that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, Manager, Secretary or other officer of the company and in this case, partner or any other officer of the partnership firm/partnership before drawing a presumption of being guilty against such individual.

25. Taking into consideration the overriding effect given to Sub-section(2), it will be responsibility of the prosecution to first indicate and prove that objectionable drug was manufactured with the consent or in connivance of the partner or production of the said drug is attributable to any neglect on the part of the partner, only thereafter he would be presumed to be the person incharge of and responsible to the firm for the conduct of business and will be obliged to establish absence of knowledge or exercise of due diligence in order to seek exoneration.

26. The cases cited by the learned counsel for the petitioner and the respondents are mainly those cases wherein there was no whisper in the complaint as to whether the accused therein at the relevant time, was incharge and was responsible to the firm for the conduct of the business of the firm. But, in this case there is some averment regarding the complexity and involvement of the petitioner, therefore, in such a situation, we essentially have to fall back to the observations as contained in ***Gunmala's*** case (supra). In case the judgment is minutely analyzed, it clearly lays down that simply being a partner of a firm,

one is supposed to discharge a particular function on behalf of the partnership firm. As a partner, he may be attending meetings of the firm, which usually decides policy matters and guides the course of business of the firm. It may be that the partners may appoint a sub committee consisting of one or two partners, who may be made responsible for the day today functions of the firm.

27. The role of a partner in a firm is a question of fact depending upon the peculiar facts in each case and there is no universal rule that a partner of a firm is incharge of its every day affairs. It also follows that the mere fact that some allegations have been made in the complaint by itself would not mean that this Court must dismiss the petition, because it has to be remembered that the core of a criminal case are its facts and in factual matters there are no fixed formulae required to be followed by the Court unless it is dealing with an entirely procedural matter.

28. It is more than settled that in case of a partner, the complaint should specifically spell out how and in what manner the partner was incharge of or was responsible to the firm for the conduct of its business and mere bald and cursory statement that he was the incharge of and was responsible to the firm for the conduct of its business is not sufficient.

29. At this stage, I may notice that the petitioner has placed on record the certificate of renewal of licence to manufacture, wherein the details of the persons who are responsible for manufacturing the drug have been set out and these names are other than those of the partners of the firm. The petitioner has placed certain other documents which, prima facie, establish that it is not he who at the relevant time was incharge and responsible to the firm for the conduct of the business of the firm. The petitioner has annexed copy of authorization in favour of one Manu Kumar, which was passed on 25th August 2006, which prima facie shows that from the said date onwards it was Manu Kumar who would be responsible for the conduct of business with respect to the manufacturing and its quality. It is further specifically mentioned that the authorization was being given with the consent of all the partners, who have introduced his name unanimously. That apart the petitioner has placed on record a copy of letter issued by the Drug Licensing Authority, Himachal Pradesh to the company acknowledging Sh. Manu Kumar to be the holder of the manufacturing drug licence. There is yet again another communication dated 9.12.2005 issued by the Drug Controller approving the names of certain persons to be the Manufacturing Chemist, which does not include the name of the petitioner or the other partners.

30. Notably, the respondents in their reply have not disputed the authenticity, veracity or correctness of these documents. Therefore, this Court can take into consideration this sterling incontrovertible material and acceptable circumstance which lends credence to the version put forth by the petitioner.

31. On the basis of the aforesaid discussions, I am of the considered opinion that in case the petitioner is made to stand a trial, the same would be an abuse of process of Court. The complaint qua the petitioner deserves to be quashed because of absence of more particulars about the role of the petitioner in the complaint.

32. Resultantly, the present petition is allowed and accordingly the Complaint Case No. 05/3 of 2013, titled as State of Himachal Pradesh Vs. Ashok Kumar Tyagi and others, pending before the learned Chief Judicial Magistrate, District Sirmaur at Nahan, H.P., in so far as the petitioner is concerned, is hereby quashed. The petition stands disposed of leaving the parties to bear their own costs.

****

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

Gurpreet Singh son of Gurbachan Singh ....Petitioner.
Versus
State of H.P. ....Non-petitioner.

Cr.MP(M) No. 300 of 2015.
Order reserved on: 9.4.2015
Date of Order: April 22,2015.

N.D.P.S. Act, 1985- Section 37- An FIR was registered against the petitioner for the commission of offences punishable under Sections 20 and 29 of N.D.P.S. Act- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- FIR was registered against the petitioner for criminal conspiracy - at the stage of bail, it cannot be said whether petitioner had committed criminal conspiracy or not- trial of the case will be adversely affected by releasing the petitioner on bail- in these circumstances, it is not expedient to release the petitioner on bail at this stage – hence, petition dismissed.

(Para-5 to 7)

Cases referred:
Chandrakant Vs. State of Maharashtra AIR 1999 SC 1557
Sanjeev Kumar Vs. State of HP.AIR 1999 SC 782
Vijayan Vs. State of Kerala AIR 1999 SC 1086

For the petitioner: Mr. Pawan Gautam, Advocate.
For Non-petitioner: Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present petition filed under Section 439 of the Code of Criminal Procedure for grant of bail relating to FIR No. 307 of 2014 dated 10.12.2014 registered under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substance Act. It is pleaded that petitioner is resident of House No. 173 Sector No.4 Ward No.2 Thana Mandi Govindgarh Tehsil Amloh District Phatehgarh Sahib. It is further pleaded that petitioner has passed matriculation examination in the year 2008 conducted by Punjab School Education Board. It is further pleaded that the age of the petitioner is 23 years and petitioner is a student of B.Tech from RIMT Polytechnic College Mandi Govindgarh. It is further pleaded that petitioner is innocent and he has been falsely implicated in the present case. It is further pleaded that petitioner was driving vehicle in question at the relevant time and contraband was not in the knowledge of the petitioner. It is further pleaded that petitioner undertake to abide by the terms and conditions imposed by the Court. Prayer for acceptance of bail petition filed under Section 439 Cr.P.C sought.

2. Per contra police report filed. As per police report FIR No. 307 of 2014 dated 10.12.2014 has been registered against the petitioner under Sections 20 and 29 of the

Narcotic Drugs and Psychotropic Substance Act at Police Station Sunder Nagar District Mandi HP. There is recital in police report that on dated 10.12.2014 at about 9.45 AM at place NH No.21 Pungh a car having registration No.PB-10 DB-7081 came and same was checked. There is recital in police report that after checking of bag 1.710 grams of cannabis was found. There is recital in police report that NCB form in triplicate was filled up and vehicle took into possession along with documents and key. There is recital in police report that photographs also obtained and site plan was also prepared. There is recital in police report that as per chemical analysis report the contraband was extract of cannabis which is a sample of charas. There is recital in police report that investigation is completed and challan stood filed in the Court of Special Judge Mandi on dated 11.3.2015.

3. Following points arise for determination in present bail petition:

(1) Whether petition filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of bail petition?.

(2) Final Order.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of non-petitioner and also perused entire records carefully.

Finding upon Point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioner that petitioner is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

6. Another submission of learned Advocate appearing on behalf of the petitioner that any condition imposed by the Court will be binding upon the petitioner and on this ground bail petition be allowed is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors are to be considered (i) Nature and seriousness of offence (ii) Character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It is prima facie proved on record that 1.710 grams charas was recovered from the possession of petitioner and case has been registered under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substance Act 1925. Section 29 of the Narcotic Drugs and Psychotropic Substance Act 1985 attracted upon a person who was in a criminal conspiracy relating to commission of offence under Narcotic Drugs and Psychotropic Substance. Whether petitioner has committed criminal conspiracy or not is a evidence of fact and same fact could not be decided at this stage of the case. The same fact will be decided when the case shall be disposed of on merits after giving due opportunity of hearing to both parties to lead their evidence in support of their case. In criminal conspiracy a criminal act is committed in furtherence of common intention. See AIR 1999 SC 1557 titled Chandrakant Vs. State of Maharashtra. It is well settled law that criminal conspiracy is an agreement between the parties to do a particular criminal act. See AIR 1999 SC 782 titled Sanjeev Kumar Vs. State of HP. Also see AIR 1999 SC 1086 titled Vijayan Vs. State of Kerala. It is well settled law that Narcotic Drugs and Psychotropic

Substance Act 1985 is a special Act. It is well settled law that when there is conflict between special law and general law then special law always prevails. As per Section 37 of the Narcotic Drugs and Psychotropic Substance Act 1985 there are additional limitations for grant of bail in Narcotic Drugs and Psychotropic Substance cases. As per Section 37 of the Narcotic Drugs and Psychotropic Substance Act 1985 bail is prohibited when the offence under Narcotic Drugs and Psychotropic Substance Act 1985 involve commercial quantity. As per schedule annexed with the ND&PS Act 1985 1 Kg of charas falls in the category of commercial quantity. In the present case at this stage finding cannot be given that petitioner is not guilty of offence punishable under Section 29 of the Narcotic Drugs and Psychotropic Substance Act 1985. It is held that if the petitioner is released on bail at this stage then trial of the case will be adversely effected. It is held that if the petitioner is released on bail at this stage then interest of State and general public will also be adversely effected.

7. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if the petitioner is released on bail then petitioner will induce and threat the prosecution witness and on this ground bail petition filed by petitioner be rejected is accepted for the reason hereinafter mentioned. There is apprehension in the mind of the Court that if the petitioner is released on bail at this stage then petitioner will induce and threat the prosecution witness. Court is of the opinion that it is not expedient in the ends of justice to release the petitioner on bail at this stage. Hence point No.1 is answered in negative.

Point No.2 (Final order).

8. In view of the above stated facts bail petition filed under Section 439 of the Code of Criminal Procedure 1973 is rejected. However learned trial Court will dispose of the case expeditiously because petitioner is in judicial custody. Observation made hereinabove is strictly for the purpose of deciding the present bail petition and it shall not effect merits of the case in any manner. Bail petition is disposed of. All pending application(s) if any are also disposed of.

****

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

Hari Nand son of late Sh. Ishwar Dass ....Petitioner

Versus

State of H.P. and others ....Non-petitioners

CWP No. 6355 of 2014
Order Reserved on 10th April, 2015
Date of Order 22nd April, 2015

Constitution of India, 1950- Article 226- Petitioner is owner in possession of the land in which is old house is located- land was granted to the petitioner on 14.8.1986 – all the four brothers had relinquished their share in favour of petitioner and the petitioner is residing in the house for more than 40 years- petitioner applied for attestation of the mutation but the mutation was not sanctioned- respondent contended that petitioner had filed an application after the lapse of 28 years- held, that the Collector had ordered that the land bearing Khasra No. 77/2 measuring 6 biswas be granted to the petitioner on payment of the market price- no appeal was preferred against this order- therefore, respondents are under an obligation to grant ownership right to the petitioner and to attest the mutation in favour of the petitioner regarding Khasra No. 77/2. (Para-5)

For the Petitioner: Mr. O.P. Sharma, Sr. Advocate with Mr. N.K. Dass, Advocate.

For the Non-petitioners: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India pleaded therein that petitioner is owner in possession of land comprised in field No. 771/1 and 77/2 measuring 9 biswas situated in mauja Thund Pargana Kaunili Kalan Tehsil and District Shimla in which old house of petitioner is situated. It is pleaded that land was granted to petitioner on dated 14.8.1986. It is further pleaded that all four brothers have relinquished their share in favour of petitioner and petitioner is residing in the house for the last more than forty years after the death of his father late Shri Ishwar Dass. It is pleaded that petitioner is a retired employee for more than three years. It is pleaded that petitioner filed an application for attestation of mutation before A.C. 2nd Grade but non-petitioner No. 3 refused to attest the mutation on the ground that area falls under territorial jurisdiction of another revenue officer. It is pleaded that non-petitioners are duty bound to attest the mutation in accordance with law. It is further pleaded that field revenue agency did not comply the directions of Deputy Commissioner. Prayer for acceptance of civil writ petition sought.

2. Per contra reply filed on behalf of non-petitioners pleaded therein that petitioner has no cause of action and petitioner has no locus standi to file the present writ petition. It is pleaded that petitioner is estopped from filing present petition due to his own act and conduct. It is pleaded that petitioner has not approached the Court within stipulated period. It is also pleaded that ownership of land comprised in Khasra No. 77/2 measuring 6 biswas situated in mauja Thund Pargana Kaunili Kalan Tehsil and District Shimla H.P. was granted in favour of petitioner and thereafter file was sent to concerned authority for further action with regard to grant of ownership right of field No. 77/2 measuring 0-6 biswas on market price. It is pleaded that petitioner had filed the application for attestation of mutation after a period of twenty eight years. It is pleaded that petitioner did not produce the order for attestation of mutation in revenue record. It is pleaded that petitioner has no cause of action to file civil writ petition. Prayer for dismissal of petition sought.

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

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

1. Whether petition filed by petitioner is liable to be accepted as mentioned in memorandum of grounds of petition?
2. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing for the petitioner that revenue staff was under legal obligation to comply with the order of Collector Shimla Sub Division

Shimla (Rural) announced in case No. 20-VIII/85-86 decided on dated 14.8.1986 is accepted for the reasons hereinafter mentioned. Court has carefully perused the order passed by Collector Shimla Sub Division Shimla (Rural) (H.P.) dated 14.8.1986. Collector Shimla Sub Division Shimla (Rural) has specifically directed that field No. 77/1 measuring 3 biswas could not be given to petitioner because petitioner is encroacher and learned Collector Shimla Sub Division Shimla (Rural) ordered that petitioner be ejected from land comprised in field No. 77/1 measuring 3 biswas. It is also proved on record that learned Collector further directed that in filed No. 77/2 measuring 6 biswas there is an old house of petitioner and same could not be demolished. Learned Collector further directed that petitioner would be granted the land on market price which comes to Rs. 150/-. Thereafter learned Collector sent the file to revenue agency for further action with regard to grant of ownership right in field No. 77/2 measuring 0.6 biswas on market price. It is proved on record that market price was deposited by petitioner. It is also proved on record that thereafter copy of order of learned Collector Shimla Sub Division Shimla (Rural) H.P. announced in case No. 20-VIII/85/86 dated 14.8.1986 was sent to Tehsildar Shimla vide No. 4568 dated 16.8.1986 for compliance. It is also proved on record that order passed by Collector in case No. 20-VIII/85/86 dated 14.8.1986 titled Hari Nand and others vs. State of H.P. had attained the stage of finality. There is no oral or documentary evidence on record in order to prove that order passed by Collector Shimla Sub Division Shimla (Rural) H.P. in case No. 20-VIII/86/96 decided on dated 14.8.1986 was set aside or modified by any competent authority of law. It is held that nothing was to be done on the part of petitioner. Age of petitioner is more than 61 years and petitioner is retired personnel. Court is of the view that non-petitioners are under legal obligation to grant ownership right in favour of petitioner qua Khasra No. 77/2 measuring 6 biswas situated in mauja Thund Pargana Kaunili Kalan Tehsil and District Shimla. H.P. in view of the order of Collector Shimla Sub Division Shimla (Rural) which attained the stage of finality. It is also proved on record that copy of order of Collector Shimla Sub Division Shimla (Rural) announced in case No. 20-VIII/85-86 dated 14.8.1986 along with file of A.C. 2nd Grade Shimla was sent to Tehsildar Shimla vide 4568 dated 16.8.1986 and there is no evidence on record that what compliance steps were took by Tehsildar after receipt of case file No. 20-VIII/85-86. Point No. 1 is answered in affirmative.

Point No.2 (Final Order)

6. In view of findings in point No. 1 petition is allowed and it is ordered that non-petitioners would grant ownership rights in favour of petitioner qua Khasra No. 77/2 measuring 0-6 biswas and would also attest the mutation in favour of petitioner qua Khasra No. 77/2 measuring 6 biswas within one month from today. Petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

****

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

Lt.Col. Sheilesh Jung (Retd.) & Ors. ...Plaintiffs.

VERSUS

Rakesh Jung & Ors. ...Defendants.

OMP No.13 of 2015 In
Civil Suit No.3 of 2002.
Decided on: 22nd April, 2015.

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed on the ground that applicant was a legal representative of the deceased and, therefore, should be brought on record- applicant was also found to be a legal representative of the deceased in the proceedings under Order 22 Rule 4 of CPC by the Court of Sub Judge 1st Class, Paonta Sahib which order had attained finality – it would not be proper for the Court to force the applicant to institute a separate suit – Court should avoid multiplicity of the proceedings- hence, application allowed and the applicant permitted to be brought on record as a legal representative. (Para-2 to 4)

For the Plaintiffs: Mr.G.D.Verma, Sr.Advocate with Mr.B.C.Verma, Advocate.
For the Defendants: Mr.Karan Singh Kanwar, Advocate for defendants No.1 and 3 to 6.
Mr.Neeraj Gupta, Advocate for defendant No.12.
Mr.Satyen Vaidya, Advocate for defendant No.25.
Mr.Anand Sharma, Advocate for applicant Varinder Jung.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge. (Oral)

The parties at contest are the successors-in-interest of Chaudhary Sher Jung. By way of the instant suit the estate of Chaudhary Sher Jung is sought to be partitioned. The defendants No. 1 to 12 herein executed certain sale deeds with their vendees qua the suit property, which is claimed in the plaint to be in its entirety ancestral and coparcenary suit property in which the plaintiffs had an indefeasible right at the time of their birth, as such the sale deeds executed qua the purported ancestral and coparcenary property by defendants No. 1 to 12 in favour of defendants No. 13 to 23 are sought to be declared to be a nullity. Consequently, the suit property on a declaratory decree when may come to be hence afforded in favour of the plaintiffs qua sales aforesaid hence ingrained with an illegality would sequel the effect of the entire suit property constituting ancestral/coparcenary property, hence liable to be partitioned interse the plaintiffs and defendants No. 1 to 12. After evidence having been led by the plaintiffs, Mr. Anand Sharma, Advocate, instituted an application before this Court under the provisions of Order 1 Rule 10 CPC on behalf of one of the legal heirs of deceased Sher Jang, for hence while his being a just and essential party, as such, his impleadment in the array of defendants being imperative. The application filed by Shri Anand Sharma, Advocate, seeking impleadment of Varinder Jung in the array of defendants has been hotly and vociferously contended to be oustable by the learned counsel for the plaintiffs on the score of his having no right in the suit property with his being not the legal heir of deceased Sher Jung. Besides, he contends that his claim to entitlement to the estate of deceased Sher Jung is by his instituting a separate suit against the plaintiffs. Moreover, he contends that the application is belated and that the plaintiffs being the dominus litis they are not

enjoined to be guided by the proposed defendant for impleading or not impleading him in the array of defendants.

2. The counsel have been heard at length. The factum of Varinder Jung being the legal heir of deceased Sher Jung is fortifyingly established by Annexure A-5 existing at page 326 of the paper book, which is an order rendered by the learned Sub Judge Ist Class, Court No.1, Paonta Sahib on an application instituted under Order 22 Rule 4 CPC by the plaintiffs for bringing on record the LRs of deceased Sher Jung, who therein were recited to be comprising only of Sheilesh Jung, plaintiff and Nirmla Sher Jung, his widow. However, the Court which rendered Annexure A-5 has also in paragraph 5 of the orders held on a consideration of the material as existed before it that Varinder Jung, who is now proposed to be impleaded in the array of defendants, was also the LR of deceased Sher Jung. The said orders comprised in Annexure A-5 qua Varinder Jung, concluded therein to be one of the LRs of deceased Sher Jung have not been portrayed to have been challenged nor obviously they have been demonstrated to have suffered reversal. Consequently, the factum as recorded in Annexure A-5 of Varinder Jung being the LR of Sher Jung has now attained finality. In sequel, it is apt to conclude that hence Varinder Jung, who is proposed to be impleaded in the array of defendants is one of the legal representatives of deceased Sher Jung. Consequently, he has a right in the estate of deceased Sher Jung. In the eventuality of the suit of the plaintiffs succeeding and the suit property hence being construed to be ancestral and coparcenary property, as such, facilitating its partition interse the plaintiffs and defendants No. 1 to 12 who also are the legal representatives of Sher Jung, the exclusion of Varinder Jung from the array of defendants while his being also the legal representative of Sher Jung would unjustifiably, to his prejudice deprive him of the benefits of a decree of partition if rendered qua the suit property. Even though the counsel for the plaintiffs/non applicants contest that the defendant who is proposed to be impleaded in the array of defendants can claim his entitlement to the suit property by instituting a separate suit. Nonetheless, the said argument is legally frail, as the entire lis interse the parties, who are the legal representatives of deceased Sher Jung and whose property is claimed to be liable to be partitioned interse the plaintiffs and defendants No. 1 to 12 in the event of sale deeds executed by defendants No. 1 to 12 in favour of defendants No. 13 to 23 being set-aside, necessitates an adjudication with Varinder Jung being arrayed in the array of defendants especially when he has a right in his capacity as legal representative of Sher Jung, rather than driving him to the legally inappropriate measure of his instituting a separate suit for proving his entitlement, which would only lead to multiplicity of litigation and which is to be obviated. Moreover, even if the plaintiff is the dominus litis and has the right to choose the parties to be arrayed as defendants, nonetheless, the said factum cannot derogate the provisions of Order 1 Rule 10 CPC which are specifically engrafted for meeting the eventuality of causing impleadment of a just and necessary party as the proposed defendant is.

3. The learned counsel for the plaintiffs has also submitted that since the demise of Sher Jung, Varinder Jung has not asserted or staked any right to the property of his predecessor in interest and hence he is presumed to have abandoned or waived his right in the estate of Sher Jung. However, the said argument is of no legal worth inasmuch as mere fact of his not claiming at any stage any right to the estate of the deceased Sher Jung would not render him to be deprived to claim a right in the estate of deceased Sher Jung, in his capacity as his legal representative, more especially when in the event of suit property being declared to be ancestral and coparcenary suit property his entitlement thereto would naturally ensue in his favour. Consequently, he cannot be forestalled from his being permitted to be impleaded in the array of defendants as it would

deprive him of the benefits of a decree of partition in the event of the suit property being declared to be bearing an ancestral and coparcenary nature/character.

4. Accordingly, the instant application is allowed and Mr. Varinder Jung is ordered to be impleaded as a defendant in the array of defendants and is also permitted to file written statement within four weeks. No notice is required to be issued to the newly impleaded LR of the deceased as he stands represented by Shri Anand Sharma, Advocate.

****

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

Rishi Chandel ...Petitioner.

Versus

Hon'ble High Court of H.P. ...Respondent.

C.W.P. No. 5030 of 2014.
Reserved on : 16.04.2015.
Date of decision : April 22, 2015.

Constitution of India, 1950- Article 226- Respondent issued an advertisement inviting applications for 21 clear cut vacancies of clerk and few anticipated vacancies- petitioner was placed at serial No. 6- some of the appointed person resigned and the persons at serial Nos. 1 to 5 in waiting list were appointed in their place – another person resigned but the post was not offered to petitioner and was advertised again- held, that Administrative Authority is bound to record reasons for rejecting the representation- no reason was recorded by the respondent for rejecting the representation of the petitioner- petitioner possessed same merit as the candidates at the place of at serial No. 1 to 5 and he was placed at serial No. 6 due to his age – when the persons of equal merit were appointed, there must be a justification for denying appointment to a similarly situated person - a selected person has no indefeasible right to appointment but the employer has to assign cogent reason for denying appointment to him- order of rejection set aside and the respondent directed to consider the case of the petitioner afresh for appointment to the post of clerk.

(Para-7 to 17)

Cases referred:

Kranti Associates Private Limited and another versus Masood Ahmed Khan and others (2010)9 SCC 496

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

Director, Horticulture, Punjab and others versus Jagjivan Parshad (2008) 5 SCC 539,

Maya Devi (dead) through LRs. Versus Raj Kumari Batra (dead) through LRs and others (2010) 9 SCC 486

Harpal Singh and others Vs. H.R.T.C. and another 2013 (3) Shim. L.C. 1222

For the Petitioner : Mrs. Ranjana Parmar, Advocate

For the Respondent: Mr. Ajay Mohan Goel, Advocate

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By way of this writ petition, the petitioner has prayed for the following substantive reliefs:-

> "i) That the petitioner may be held entitled for the post of Clerk against the vacancy available with the Hon'ble High Court of Himachal Pradesh on the acceptance of resignation of Mr. Saurav Banyal, in the month of October, 2013, with all consequential benefits.
>
> A(i) That rejection conveyed to the petitioner vide rejection dated 2.4.2014 supplied to the petitioner on 2nd December, 2014 may kindly be quashed and set aside with all consequential benefits."

The facts in brief may be noticed.

2. The respondent issued an advertisement on 11.5.2012, inviting applications for 21 clear-cut vacancies of clerks and few anticipated vacancies. The petitioner, after clearing the test, was placed at Sr. No. 6 of the waiting list. Vide order, dated 5th December, 2012, 25 persons came to be appointed as clerks. Few of the appointed persons thereafter resigned and persons from Sr. No.1 to 5 of the waiting list came to be appointed in their place.

3. One vacancy of clerk became available on 15.10.2013 with resignation of one of the appointed candidates. The petitioner, who was next in the waiting list, was not offered appointment and the post was sought to be filled up by way of fresh selection, for which an advertisement was issued in the daily newspaper. It is this action of the respondent that is being challenged by the petitioner as being illegal, unjust and against Article 14 of the Constitution of India. It is claimed that the petitioner has an indefeasible right of being appointed and cannot be deprived of the same by giving an arbitrary and step-motherly treatment.

4. The respondent has contested the claim of the petitioner by filing a reply, wherein preliminary objections regarding maintainability of the petition, the same being bad for non-joinder of necessary parties, the petitioner having no right and the vacancies having been exhausted, have been raised. On merits, these preliminary objections have been elaborated and it is stated that merely because name of the petitioner found mentioned at Sr. No. 6 of the waiting list, would not in itself confer any right upon the petitioner, more particularly when the panel prepared had already exhausted on 5/6th December, 2012. It is further stated that the respondent had taken a conscious decision for inviting fresh applications for the post of clerks instead of filling up these posts from the waiting list.

5. I have heard learned counsel for the parties and have gone through the record of the case.

6. Mrs. Ranjana Parmar, learned counsel for the petitioner has strenuously argued that in absence of reasons, the impugned order is not sustainable. On the other hand, Mr.Ajay Mohan Goel, learned counsel for the respondent has vehemently argued that in such like cases, there is no duty cast upon the respondent to give reasons and the same can be gathered from the records.

7. There can be no dispute that there is no rule or administrative order for recording reasons for rejecting the representation, but then the competent authority cannot act arbitrarily and is required to act in a fair and just manner. If the representation is rejected after its consideration in a fair and just manner, the order of rejection would not be rendered illegal merely on the ground of absence of reasons. In the absence of any statutory and administrative instructions requiring the competent authority to record reasons or to communicate reasons, no exception can be taken to the order rejecting representation merely on the ground of absence of reasons. Therefore, no order of an

administrative authority communicating its decision is rendered illegal on the ground of absence of reasons ex-facie and it is not open to the Court to interfere with such orders merely on the ground of absence of such reasons. However, it does not mean that the administrative authority is at liberty to pass orders without there being any reasons for the same, more particularly, when the matter like in the present case is considered at various levels and the reasons and opinions are contained in the notings of the file. The reasons contained in the file would otherwise enable the competent authority to formulate its opinion. But, when the competent authority passes an order bereft and devoid of any reasons and contrary to the recommendations made on the file, then the position would definitely be different. In all other cases where such an order is challenged in a Court of law, it is always open to the competent authority to place reasons before the Court which may lead to the rejection of the representation. It is always open to the administrative authority to produce evidence aliunde before the Court to justify its action, but as observed earlier, this course would only be open in case the records support such a conclusion. But, in the present case not only the respondent has failed to place reasons before this Court, there is no contemporaneous official records or notings which may show what reasons prevailed in passing the impugned orders. The reasons are not only forthcoming but are also not discernible from the records produced before the Court. The records produced by the respondent before the Court for perusal would show that the name of the petitioner was recommended by all the officials concerned, but was turned down by the respondent holding that no appointment of Clerks could be made from the waiting list.

8. It cannot be disputed that rejection of the representation of the petitioner has affected his right. Therefore, in such a situation, it was imperative upon the respondent to have rejected his claim by passing a speaking order. In taking this view, I am supported by the decision of the Hon'ble Supreme Court in **Kranti Associates Private Limited and another** versus **Masood Ahmed Khan and others (2010)9 SCC 496** wherein it has been held as under:-

> ***"12. The necessity of giving reason by a body or authority in support of its decision came up for consideration before this Court in several cases. Initially this Court recognized a sort of demarcation between administrative orders and quasi- judicial orders but with the passage of time the distinction between the two got blurred and thinned out and virtually reached a vanishing point in the judgment of this Court in*** *A.K. Kraipak and others vs. Union of India and others* ***AIR 1970 SC 150.***
>
> ***13. In Keshav Mills Co. Ltd. and another vs. Union of India and others AIR 1973 SC 389, this Court approvingly referred to the opinion of Lord Denning in R. vs. Gaming Board for Great Britain ex p Benaim (1970) 2 WLR 1009 and quoted him as saying "that heresy was scotched in Ridge v. Boldwin, 1964 AC 40".***
>
> ***14. The expression `speaking order' was first coined by Lord Chancellor Earl Cairns in a rather strange context. The Lord Chancellor, while explaining the ambit of Writ of Certiorari, referred to orders with errors on the face of the record and pointed out that an order with errors on its face, is a speaking order. (See pp.1878-97 Vol. 4 Appeal Cases 30 at 40 of the report)***

15. This Court always opined that the face of an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak. It must not be like the "inscrutable face of a Sphinx".

16. In Harinagar Sugar Mills Ltd. vs. Shyam Sunder Jhunjhunwala and others, AIR 1961 SC 1669, the question of recording reasons came up for consideration in the context of a refusal by Harinagar to transfer, without giving reasons, shares held by Shyam Sunder. Challenging such refusal, the transferee moved the High Court contending, inter alia, that the refusal is mala fide, arbitrary and capricious. The High Court rejected such pleas and the transferee was asked to file a suit. The transferee filed an appeal to the Central Government under Section 111 (3) of Indian Companies Act, 1956 which was dismissed. Thereafter, the son of the original transferee filed another application for transfer of his shares which was similarly refused by the Company. On appeal, the Central Government quashed the resolution passed by the Company and directed the Company to register the transfer. However, in passing the said order, Government did not give any reason. The company challenged the said decision before this Court.

17. The other question which arose in Harinagar was whether the Central Government, in passing the appellate order acted as a tribunal and is amenable to Article 136 jurisdiction of this Court.

18. Even though in Harinagar the decision was administrative, this Court insisted on the requirement of recording reason and further held that in exercising appellate powers, the Central Government acted as a tribunal in exercising judicial powers of the State and such exercise is subject to Article 136 jurisdiction of this Court. Such powers, this Court held, cannot be effectively exercised if reasons are not given by the Central Government in support of the order (AIR pp 1678-79, para 23).

19. Again in Bhagat Raja vs. Union of India and others, AIR 1967 SC 1606, the Constitution Bench of this Court examined the question whether the Central Government was bound to pass a speaking order while dismissing a revision and confirming the order of the State Government in the context of Mines and Minerals (Regulation and Development) Act, 1957, and having regard to the provision of Rule 55 of Mineral and Concessions Rules. The Constitution Bench held that in exercising its power of revision under the aforesaid Rule the Central Government acts in a quasi-judicial capacity (AIR para 8 p. 1610). Where the State Government gives a number of reasons some of which are good and some are not, and the Central Government merely endorses the order of the State Government without specifying any reason, this Court, exercising its jurisdiction under Article 136, may find it difficult to ascertain which are the grounds on which Central Government upheld the order of the State

Government (See AIR para 9 page 1610). Therefore, this Court insisted on reasons being given for the order.

20. In Mahabir Prasad Santosh Kumar vs. State of U.P AIR 1970 SC 1302, while dealing with U.P. Sugar Dealers License Order under which the license was cancelled, this Court held that such an order of cancellation is quasi-judicial and must be a speaking one. This Court further held that merely giving an opportunity of hearing is not enough and further pointed out where the order is subject to appeal, the necessity to record reason is even greater. The learned Judges held that the recording of reasons in support of a decision on a disputed claim ensures that the decision is not a result of caprice, whim or fancy but was arrived at after considering the relevant law and that the decision was just. (See AIR para 7 page 1304).

21. In Travancore Rayons Ltd. vs. The Union of India , AIR 1971 SC 862, the Court, dealing with the revisional jurisdiction of the Central Government under the then Section 36 of the Central Excise and Salt Act, 1944, held that the Central Government was actually exercising judicial power of the State and in exercising judicial power reasons in support of the order must be disclosed on two grounds. The first is that the person aggrieved gets an opportunity to demonstrate that the reasons are erroneous and secondly, the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power (See AIR para 11 page 865-866).

22. In Woolcombers of India Ltd. vs. Woolcombers Workers Union, AIR 1973 SC 2758, this Court while considering an award under Section 11 of Industrial Disputes Act insisted on the need of giving reasons in support of conclusions in the Award. The Court held that the very requirement of giving reason is to prevent unfairness or arbitrariness in reaching conclusions. The second principle is based on the jurisprudential doctrine that justice should not only be done, it should also appear to be done as well. The learned Judges said that a just but unreasoned conclusion does not appear to be just to those who read the same. Reasoned and just conclusion on the other hand will also have the appearance of justice. The third ground is that such awards are subject to Article 136 jurisdiction of this Court and in the absence of reasons, it is difficult for this Court to ascertain whether the decision is right or wrong (See AIR para 5 page 2761).

23. In Union of India vs. Mohan Lal Capoor, AIR 1974 SC 87, this Court while dealing with the question of selection under Indian Administrative Service/Indian Police Service (Appointment by Promotion) Regulations held that the expression "reasons for the proposed supersession" should not be mere rubber stamp reasons. Such reasons must disclose how mind was applied to the subject matter for a decision regardless of the fact whether

such a decision is purely administrative or quasi-judicial. This Court held that the reasons in such context would mean the link between materials which are considered and the conclusions which are reached. Reasons must reveal a rational nexus between the two (See AIR paras 27- 28 page 97- 98).

24. *In Siemens Engineering and Manufacturing Co. of India Ltd. vs. The Union of India* ***, AIR 1976 SC 1785, this Court held that it is far too well settled that an authority in making an order in exercise of its quasi-judicial function, must record reasons in support of the order it makes. The learned Judges emphatically said that every quasi- judicial order must be supported by reasons. The rule requiring reasons in support of a quasi-judicial order is, this Court held, as basic as following the principles of natural justice. And the rule must be observed in its proper spirit. A mere pretence of compliance would not satisfy the requirement of law (See AIR para 6 page 1789).***

25. *In Maneka Gandhi vs. Union of India., AIR* ***1978 SC 597, which is a decision of great jurisprudence significance in our Constitutional law, Chief Justice Beg, in a concurring but different opinion held that an order impounding a passport is a quasi-judicial decision (AIR Para 34, page 612). The learned Chief Justice also held when an administrative action involving any deprivation of or restriction on fundamental rights is taken, the authorities must see that justice is not only done but manifestly appears to be done as well. This principle would obviously demand disclosure of reasons for the decision.***

26. Y.V. Chandrachud, J. (as His Lordship then was) in a concurring but a separate opinion also held that refusal to disclose reasons for impounding a passport is an exercise of an exceptional nature and is to be done very sparingly and only when it is fully justified by the exigencies of an uncommon situation. The learned Judge further held that law cannot permit any exercise of power by an executive to keep the reasons undisclosed if the only motive for doing so is to keep the reasons away from judicial scrutiny. (See AIR para 39 page 613).

27. *In Rama Varma Bharathan Thampuran vs. State of Kerala AIR* ***1979 SC 1918, V.R. Krishna Iyer, J. speaking for a three-Judge Bench held that the functioning of the Board was quasi-judicial in character. One of the attributes of quasi- judicial functioning is the recording of reasons in support of decisions taken and the other requirement is following the principles of natural justice. Learned Judge held that natural justice requires reasons to be written for the conclusions made (See AIR para 14 page 1922).***

28. *In Gurdial Singh Fijji vs. State of Punjab ,* ***(1979) 2 SCC 368, this Court, dealing with a service matter, relying on the ratio in Capoor (supra), held that "rubber-stamp reason" is not enough***

and virtually quoted the observation in Capoor (supra) to the extent that: (Capoor Case, SCC p. 854, para 28)

> ***"28....Reasons are the links between the materials on which certain conclusions are based and the actual conclusions" (See AIR para 18 page 377).***

29. In a Constitution Bench decision of this Court in Shri Swamiji of Shri Admar Mutt etc. etc. vs. The Commissioner, Hindu Religious and Charitable Endowments Dept. and Ors., AIR 1980 SC 1, while giving the majority judgment Y.V. Chandrachud, CJ, referred to(SCC p.658, 29) Broom's Legal Maxims (1939 Edition, page 97) where the principle in Latin runs as follows:

> ***"Cessante Ratione Legis Cessat Ipsa Lex"***

30. The English version of the said principle given by the Chief Justice is that:(H.H. Shri Swamiji case, SCC p.658, para 29)

> ***"29..... 'reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself'." (See AIR para 29 page 11)***

31. *In Bombay Oil Industries Pvt. Ltd. vs. Union of India , AIR* ***1984 SC 160, this Court held that while disposing of applications under Monopolies and Restrictive Trade Practices Act the duty of the Government is to give reasons for its order. This court made it very clear that the faith of the people in administrative tribunals can be sustained only if the tribunals act fairly and dispose of the matters before them by well considered orders. In saying so, this Court relied on its previous decisions in Capoor (supra) and Siemens Engineering (supra), discussed above.***

32. *In Ram Chander vs. Union of India*, ***AIR 1986 SC 1173, this Court was dealing with the appellate provisions under the Railway Servants (Discipline and Appeal) Rules, 1968 condemned the mechanical way of dismissal of appeal in the context of requirement of Rule 22(2) of the aforesaid Rule. This Court held that the word "consider" occurring to the Rule 22(2) must mean the Railway Board shall duly apply its mind and give reasons for its decision. The learned Judges held that the duty to give reason is an incident of the judicial process and emphasized that in discharging quasi-judicial functions the appellate authority must act in accordance with natural justice and give reasons for its decision (AIR Para 4, page 1176).***

33. *In Star Enterprises and others vs. City and Industrial Development Corporation of Maharashtra Ltd.*, ***(1990) 3 SCC 280, a three-Judge Bench of this Court held that in the present day set up judicial review of administrative action has become expansive and is becoming wider day by day and the State has to justify its action in various field of public law. All these necessitate***

recording of reason for executive actions including the rejection of the highest offer. This Court held that disclosure of reasons in matters of such rejection provides an opportunity for an objective review both by superior administrative heads and for judicial process and opined that such reasons should be communicated unless there are specific justification for not doing so (see SCC Para 10, page 284-85).

34. *In Maharashtra State Board of Secondary and Higher Secondary Education vs. K.S. Gandhi*, ***(1991) 2 SCC 716, this Court held that even in domestic enquiry if the facts are not in dispute non-recording of reason may not be violative of the principles of natural justice but where facts are disputed necessarily the authority or the enquiry officer, on consideration of the materials on record, should record reasons in support of the conclusion reached (see SCC para 22, pages 738-39)***

35. In *M.L. Jaggi vs.MTNL* ***(1996) 3 SCC 119, this Court dealt with an award under Section 7 of the Telegraph Act and held that since the said award affects public interest, reasons must be recorded in the award. It was also held that such reasons are to be recorded so that it enables the High Court to exercise its power of judicial review on the validity of the award. (see SCC para 8, page 123).***

36. *In Charan Singh vs. Healing Touch Hospital*, ***AIR 2000 SC 3138, a three-Judge Bench of this Court, dealing with a grievance under CP Act, held that the authorities under the Act exercise quasi-judicial powers for redressal of consumer disputes and it is, therefore, imperative that such a body should arrive at conclusions based on reasons. This Court held that the said Act, being one of the benevolent pieces of legislation, is intended to protect a large body of consumers from exploitation as the said Act provides for an alternative mode for consumer justice by the process of a summary trial. The powers which are exercised are definitely quasi-judicial in nature and in such a situation the conclusions must be based on reasons and held that requirement of recording reasons is "too obvious to be reiterated and needs no emphasizing". (See AIR Para 11, page 3141 of the report)***

37. Only in cases of Court Martial, this Court struck a different note in two of its Constitution Bench decisions, the first of which was rendered in the case of *Som Datt Datta vs. Union of India*, ***AIR 1969 SC 414, where Ramaswami, J. delivering the judgment for the unanimous Constitution Bench held that provisions of Sections 164 and 165 of the Army Act do not require an order confirming proceedings of Court Martial to be supported by reasons. The Court held that an order confirming such proceedings does not become illegal if it does not record reasons. (AIR Para 10, pageS 421- 22 of the report).***

38. About two decades thereafter, a similar question cropped up before this Court in the case of S.N. Mukherjee vs. Union of India, AIR 1990 SC 1984. A unanimous Constitution Bench speaking through S.C. Agrawal, J. confirmed its earlier decision in Som Datt in S.N.Mukherjee case, SCC p.619,para 47 of the report and held reasons are not required to be recorded for an order confirming the finding and sentence recorded by the Court Martial.

39. It must be remembered in this connection that the Court Martial as a proceeding is sui generis in nature and the Court of Court Martial is different, being called a Court of Honour and the proceeding therein are slightly different from other proceedings. About the nature of Court Martial and its proceedings the observations of Winthrop in Military Law and Precedents are very pertinent and are extracted herein below:

> ***"Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."***

40. Our Constitution also deals with Court Martial proceedings differently as is clear from Articles 33, 136(2) and 227(4) of the Constitution.

41. In England there was no common law duty of recording of reasons. In Marta Stefan vs. General Medical Council, (1999) 1 WLR 1293, it has been held (WLR page 1300)

> ***the established position of the common law is that there is no general duty imposed on our decision makers to record reasons.***

It has been acknowledged in the Justice Report, Administration Under Law (1971) at page 23 that

> ***"No single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions".***

42. Even then in R. vs. Civil Service Appeal Board, ex p Cunningham (1991) 4 All ER 310, Lord Donaldson, Master of Rolls, opined very strongly in favour of disclosing of reasons in a case where the Court is acting in its discretion. The learned Master of Rolls said: (All ER page 317)

> ***"... '.... It is a corollary of the discretion conferred upon the board that it is their duty to set out their reasoning***

> ***in sufficient form to show the principles on which they have proceeded. Adopting Lord Lane CJ's observations (in R vs. Immigration Appeal Tribunal, ex p Khan (Mahmud) [1983] 2 All ER 420 at 423, (1983) QB 790 at 794-795), the reasons for the lower amount is not obvious. Mr. Cunningham is entitled to know, either expressly or inferentially stated, what it was to which the board were addressing their mind in arriving at their conclusion. It must be obvious to the board that Mr. Cunningham is left with a burning sense of grievance. They should be sensitive to the fact that he is left with a real feeling of injustice, that having been found to have been unfairly dismissed, he has been deprived of his just desserts (as he sees them).' "***

43. The learned Master of Rolls further clarified by saying: (Civil Service Appeal Board Case, All ER 317)

> ***"..... '....Thus, in the particular circumstances of this case, and without wishing to establish any precedent whatsoever, I am prepared to spell out an obligation on this board to give succinct reasons, if only to put the mind of Mr. Cunningham at rest. I would therefore allow this application.' "***

44. But, however, the present trend of the law has been towards an increasing recognition of the duty of Court to give reasons (See North Range Shipping Limited vs. Seatrans Shipping Corporation, (2002) 1 WLR 2397). It has been acknowledged that this trend is consistent with the development towards openness in Government and judicial administration.

45. In English vs. Emery Reimbold and Strick Limited, (2002) 1 WLR 2409, it has been held that justice will not be done if it is not apparent to the parties why one has won and the other has lost. The House of Lords in Cullen vs. Chief Constable of the Royal Ulster Constabulary, (2003) 1 WLR 1763, Lord Bingham of Cornhill and Lord Steyn, on the requirement of reason held:(WLR p.1769, para 7)

> ***"7.....First, they impose a discipline ... which may contribute to such decisions being considered with care. Secondly, reasons encourage transparency ... Thirdly, they assist the Courts in performing their supervisory function if judicial review proceedings are launched."***

46. The position in the United States has been indicated by this Court in S.N. Mukherjee in SCC p.602, para 11 of the judgment. This Court held that in the United States the Courts have always insisted on the recording of reasons by administrative authorities in exercise of their powers. It was further held that such recording of reasons is required as "the Court cannot exercise their duty of review unless they are advised of the

considerations underlying the action under review". In S.N. Mukherjee this court relied on the decisions of the U.S. Court in Securities and Exchange Commission vs. Chenery Corporation, (1942) 87 Law Ed 626 and Dunlop vs. Bachowski, (1975) 44 Law Ed 377 in support of its opinion discussed above.

47. Summarizing the above discussion, this Court holds:

> ***(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.***
>
> ***(b) A quasi-judicial authority must record reasons in support of its conclusions.***
>
> ***(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.***
>
> ***(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.***
>
> ***(e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.***
>
> ***(f) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.***
>
> ***(g) Reasons facilitate the process of judicial review by superior Courts.***
>
> ***(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.***
>
> ***(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.***
>
> ***(j) Insistence on reason is a requirement for both judicial accountability and transparency.***
>
> ***(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is***

faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-37).

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v.Spain (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

9. The necessity of recording reasons by the administrative authority was re-empahsised by the Hon'ble Supreme Court in **Ravi Yashwant Bhoir** Vs. **District Collector, Raigad and others (2012) 4 SCC 407** wherein it has been held as under:-

"38. It is a settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order.

39. In Shrilekha Vidyarthi Vs. U.P.* (1991) 1 SCC 212 *this Court has observed as under: (SCC p. 243, para 36).

"36.....Every State action may be informed by reason and it follows that an act uninformed by reason, is arbitrary. The rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is the trite law that 'be you ever so high, the laws are above you'.

> ***This is what men in power must remember, always."***

40. In LIC Vs. Consumer Education and Research Centre (1995) 5 SCC 482 this Court observed that the State or its instrumentality must not take any irrelevant or irrational factor into consideration or appear arbitrary in its decision. "Duty to act fairly" is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty must be received and guided by the public interest. A similar view has been reiterated by this Court in Union of India Vs. Mohan Lal Capoor (1973) 2 SCC 836 and Mahesh Chandra Vs. U.P. Financial Corpn.(1993) 2 SCC 279.

41. In State of W.B. Vs. Atul Krishna Shaw 1991 Supp (1) SCC 414, this Court observed that : (SCC p. 421, para 7)

> ***"7....Giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review."***

42. In S.N. Mukherjee Vs. Union of India(1990) 4 SCC 594, it has been held that the object underlying the rules of natural justice is to prevent miscarriage of justice and secure fair play in action. The expanding horizon of the principles of natural justice provides for requirement to record reasons as to it is now regarded as one of the principles of natural justice, and it was held in the above case that except in cases where the requirement to record reasons is expressly or by necessary implication dispensed with, the authority must record reasons for its decision.

43. In Krishna Swami Vs. Union of India (1992) 4 SCC 605, this Court observed that the rule of law requires that any action or decision of a statutory or public authority must be founded on the reason stated in the order or borne out from the record. The Court further observed: (SCC p. 637, para 47).

> ***"47.....Reasons are the links between the material, the foundation for their erection and the actual conclusions. They would also demonstrate how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusions reached. Lest it would be arbitrary, unfair and unjust, violating Article 14 or unfair procedure offending Article 21".***

44. This Court while deciding the issue in Sant Lal Gupta Vs. Modern Coop. Group Housing Society Ltd.(2010) 13 SCC 336, placing reliance on its various earlier judgments held as under: (SCC pp. 345-46, para 27).

> ***"27. It is a settled legal proposition that not only administrative but also judicial orders must be supported by reasons recorded in it. Thus, while deciding an issue, the court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice delivery system, to make it known that there had been proper and due application of mind to the issue before the court and also as an essential requisite of the principles of natural justice.***
>
> > ***'3....The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the court concerned had really applied its mind'.***
>
> ***The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before the higher forum. Recording of reasons is the principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected."***

45. In Institute of Chartered Accountants of India Vs. L.K. Ratna (1986) 4 SCC 537, this Court held that on charge of misconduct the authority holding the inquiry must record reasons for reaching its conclusion and record clear findings. The Court further held: (SCC p. 558, para 30).

> ***"30.....In fairness and justice, the member is entitled to know why he has been found guilty. The case can be so serious that it can attract the harsh penalties provided by the Act. Moreover, the member has been given a right of appeal to the High Court under Section 22-A of the Act. To exercise his right of appeal effectively he must know the basis on which the Council has found him guilty. We have already pointed out that a finding by the Council is the first determinative finding on the guilty of the member. It is a finding by a Tribunal of first instance. The conclusion of the Disciplinary Committee does not enjoy the status of a 'finding'. Moreover, the reasons contained in the report by the Disciplinary Committee for its conclusion may or may not constitute the basis of the finding rendered by the Council. The Council must, therefore, state the reasons for its finding."***
>
> ***46. The emphasis on recording reason is that if the decision reveals the "inscrutable face of the sphinx", it can by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind of the authority before the court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out the reasons for the order made, in other words, a speaking out. The inscrutable face of the sphinx is ordinarily incongruous with a judicial or quasi-judicial performance."***

10. The emphasis on recording reasons is that, if the decision reveals the inscrutable face of the sphinx, it can, by its silence, render it virtually impossible for the Courts to exercise powers of judicial review in adjudging the validity of the decision. This was so held by the Hon'ble Supreme Court in **Director, Horticulture, Punjab and others** versus **Jagjivan Parshad (2008) 5 SCC 539,** the relevant paragraphs read thus:-

> "7. ***Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court's judgment not sustainable.***
>
> ***8. We find that the writ petition involved disputed issues regarding eligibility. The manner in which the High Court has disposed of the writ petition shows that the basic requirement of indicating reasons was not kept in view and***

is a classic case of non-application of mind. This Court in several cases has indicated the necessity for recording reasons.

9. "15.....Even in respect of administrative orders Lord Denning, M.R. in Breen v. Amalgamated Engg. Union (1971) 1 All ER 1148 observed: (All ER p. 1154h) 'The giving of reasons is one of the fundamentals of good administration.' In Alexander Machinery (Dudley) Ltd. v. Crabtree (1974 1 CR 120) it was observed:

> ***"Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at."***

Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking-out. The 'inscrutable face of the sphinx' is ordinarily incongruous with a judicial or quasi- judicial performance (See: Chairman and Managing Director, United Commercial Bank v. P.C. Kakkar (2003) 4 SCC 364 (SCC p.377, para 15)."

11. The juristic basis underlying the requirement that the Courts and indeed all such authorities as exercise the power to determine the rights and obligations of individuals must give reasons in support of their orders has been examined in detail by the Hon'ble Supreme Court in **Maya Devi (dead) through LRs.** Versus **Raj Kumari Batra (dead) through LRs and others (2010) 9 SCC 486** wherein it has been held as under:-

"22..... In Hindustan Times Limited v. Union of India & Ors. 1998 (2) SCC 242 the need to give reasons has been held to arise out of the need to minimize chances of arbitrariness and induce clarity.

23. In Arun v. Inspector General of Police 1986 (3) SCC 696 the recording of reasons in support of the order passed by the High Court has been held to inspire public confidence in administration of justice, and help the Apex Court to dispose of appeals filed against such orders.

24. In Union of India . v. Jai Prakash Singh 2007 (10) SCC 712, reasons were held to be live links between the mind of the decision maker and the controversy in question as also the decision or conclusion arrived at.

25. In Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity 2010 (3) SCC 732, reasons were held to be the heartbeat of every conclusion, apart from being an essential feature of the principles of natural justice, that ensure transparency and fairness, in the decision making process.

26. In Ram Phal v. State of Haryana 2009 (3) SCC 258, giving of satisfactory reasons was held to be a requirement arising out of an ordinary man's sense of justice and a healthy discipline for all those who exercise power over others.

27. In Director, Horticulture Punjab & Ors. v. Jagjivan Parshad 2008 (5) SCC 539, the recording of reasons was held to be indicative of application of mind specially when the order is amenable to further avenues of challenge.

28. It is in the light of the above pronouncements unnecessary to say anything beyond what has been so eloquently said in support of the need to give reasons for orders made by Courts and statutory or other authorities exercising quasi judicial functions. All that we may mention is that in a system governed by the rule of law, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the repository of such power. There is nothing like a power without any limits or constraints. That is so even when a Court or other authority may be vested with wide discretionary power, for even discretion has to be exercised only along well recognized and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity.

29. What then are the safeguards against an arbitrary exercise of power? The first and the most effective check against any such exercise is the well recognized legal principle that orders can be made only after due and proper application of mind. Application of mind brings reasonableness not only to the exercise of power but to the ultimate conclusion also. Application of mind in turn is best demonstrated by disclosure of the mind. And disclosure is best demonstrated by recording reasons in support of the order or conclusion.

30. Recording of reasons in cases where the order is subject to further appeal is very important from yet another angle. An appellate Court or the authority ought to have the advantage of examining the reasons that prevailed with the Court or the authority making the order. Conversely, absence of reasons in an appealable order deprives the appellate Court or the authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own. An appellate Court or authority may in a given case decline to undertake any

> ***such exercise and remit the matter back to the lower Court or authority for a fresh and reasoned order. That, however, is not an inflexible rule, for an appellate Court may notwithstanding the absence of reasons in support of the order under appeal before it examine the matter on merits and finally decide the same at the appellate stage. Whether or not the appellate Court should remit the matter is discretionary with the appellate Court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. Remands are usually avoided if the appellate Court is of the view that it will prolong the litigation."***

12. Reverting to the facts, it would be noticed that the petitioner possessed the same merit as the candidate placed at Sr.No.5 and the petitioner was placed lower in merit only on the basis of his being younger in age. Now when a person of equal merit is appointed, there must be cogent reason as to why a similarly situated person is being denied appointment.

13. The contention of the respondent that the life of the panel had come to an end is contradicted by the record. As per the decision of the administrative committee dated 4th December, 2012, the merit list was ordered to be prepared on the basis of the marks obtained in the preliminary examination and main examination combined and the vacancies were ordered to be filled up as per the merit list. The merit list of all candidates, who appeared in the main examination, was ordered to be kept waited till 31st December, 2014. No doubt, the waiting list is not a recruitment list, but then once a person with a equal merit has been appointed from this very waiting list, I see no reason why the petitioner should be denied appointment especially when the life of the panel had not come to an end.

14. A similar question came up for consideration before a learned Division Bench of this Court in **LPA No. 10 of 2011,** titled as **Smt. Suman Thakur** Vs. **State of Himachal Pradesh and others**, decided on 12.10.2011, wherein it was held as under:-

> ***"4. The suitability of the petitioner was adjudged by a duly constituted Selection Committee and her name was included in the panel. Petitioner's case was recommended by the Director of Primary Education to the Block Primary Education Officer for appointment to the post of Primary Assistant Teacher on 17.11.2006. Thereafter, it was incumbent upon respondent No.4 to issue appointment letter to the petitioner to the post of Primary Assistant Teacher in Government Primary School, Nahan. Learned Single Judge while dismissing the petition has referred to the scheme under which the appointments are made to the post of Primary Assistant Teacher called "Himachal Pradesh Prathmik Sahayak Adhyapak/ Primary Assistant Teacher (PAT) Scheme, 2003". According to learned Single Judge, there was no provision for making panel. It is settled law under the service jurisprudence that when the appointments are made, panel is also made. Generally, life of the panel***

depends on the service rules. It is not the case of the respondent-State that fresh selection process was initiated after Mr. Sandeep Thakur left the job on 29.8.2006. It is true that a person, who has been selected, has no indefeasible right to appointment. However, it is also well settled by now that the employer has to assign cogent and convincing reasons while denying the appointment to the selected candidate. In the case in hand, no convincing reasons have been given by respondent No.4 why the petitioner, who was at Sr. No.1 in panel, has not been offered appointment after Mr. Sandeep Thakur has left the job."

15. Yet again a similar question came up for consideration before a learned Division Bench of this Court in **Harpal Singh and others** Vs. **H.R.T.C. and another 2013 (3) Shim. L.C. 1222** wherein it was held as under:-

"12. In this backdrop the action of the respondent-Corporation now to issue an advertisement to fill up 600 vacant posts of drivers on contract basis, by initiating fresh selection process cannot be said to be reasonable or in consonance with the settled position of law. The action smacks of arbitrariness and unreasonableness apart from being illegal. Persistently, this Court, in the aforesaid decisions, has directed the respondent-Corporation to first exhaust the panel of selected candidates and only thereafter initiate the process for fresh recruitment.

13. In the teeth of such directions, the action of the respondent-Corporation can only be held to be illegal, arbitrary, capricious and without due and proper application of mind. Not only that, once having taken the decision in its 121st meeting of Board of Directors to exhaust the panel, with respect to the years in question, in the subsequent 122nd meeting, the respondent-Corporation could not be decided to issue an advertisement for filling up the vacant posts by initiating fresh selection process.

14. Noticeably, respondents have placed on record communication dated 11th April, 2013 seeking approval of the State Government to give employment to 340 candidates, who have successfully completed their 15 days training. The respondents in the very said communication have admitted that 392 vacancies of drivers, to be filled upon contract basis, exist as on 31.12.2012. As such, without giving appointment to the successful candidates, out of the panel so prepared by the respondent-Corporation, the action of the respondents in issuing a fresh advertisement can only held to be illegal and is accordingly quashed and set aside."

16. A perusal of the aforesaid decisions would show that though a person, who has been selected, has no indefeasible right to appointment. However, it is equally well

settled that the employer has to assign cogent and convincing reasons for denying appointment to such a candidate, more particularly, when the candidate of equal merit has already been appointed only on the ground of his being elder in age to the present petitioner.

17. In view of the aforesaid discussion, this writ petition is allowed and the rejection conveyed to the petitioner vide rejection dated 02.04.2014, supplied to the petitioner on 02.12.2014, is quashed and set aside and the respondent is directed to consider afresh the case of the petitioner for appointment to the post of Clerk in accordance with law.

18. With these observations, the writ petition is disposed of, so also the pending application(s), if any, leaving the parties to bear their own costs.

****

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

Sandeep Malachi son of Shri L.D. Malachi & others ....Petitioners
Versus
State of H.P. and another ....Non-petitioners

Cr.MMO No. 185 of 2014
Order Reserved on 10th April, 2015
Date of Order 22nd April, 2015

Code of Criminal Procedure, 1973- Section 482- Parties had settled their dispute and wanted to reconcile- hence, it was prayed that FIR registered at the instance of wife be quashed- held, that criminal offence which are not against the society can be compounded- since, dispute between husband and wife is not related to the society, therefore, it can be compounded- consequently, FIR got registered by the wife ordered to be quashed.

(Para-6 to 8)

Cases referred:

Ravinder Singh @ Laddi and others vs. State of H.P. and another, Latest HLJ 2014 H.P. 1248
Narinder Singh and others vs. State of Punjab and another, JT 2014(4) SC 573
B.S. Joshi and others vs. State of Haryana and another, JT 2003(3) SC 277
Gian Singh vs. State of Punjab and another, JT 2012(9) SC 426

For the Petitioners: Mr. Lalit K. Sharma, Advocate.
For Non-petitioner No.1: Mr. M.L. Chauhan, Additional Advocate General.
For Non-petitioner No.2: Mr. Naresh Sharma, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 Cr.P.C. for quashing of FIR No.196 of 2006 dated 4.4.2007 registered under Sections 498-A/34 IPC at P.S. (East) Shimla H.P. with further prayer for quashing the proceedings of criminal case No. 41-2 of 2007 titled State of H.P. vs. Sandeep and others pending disposal before learned CJM Shimla. It is pleaded that petitioner No. 1 and non-petitioner No. 2 solemnized their marriage on dated

15.4.2005 at Shimla in accordance with Christian rites. It is pleaded that out of wedlock no issue was born and both parties resided together as husband and wife at Chandigarh upto 21.4.2006 when non-petitioner No. 2 left the matrimonial house and both parties are residing separately from each other after 21.4.2006. It is pleaded that thereafter non-petitioner No. 2 filed complaint against petitioner No.1 and further pleaded that thereafter criminal case under Section 498-A read with Section 34 IPC was registered in P.S. (East) Shimla vide FIR No. 196/2006 on dated 4.4.2007. It is pleaded that thereafter challan was filed before learned CJM Shimla and case No. 41-2 of 2007 is pending for disposal. It is further pleaded that thereafter petitioner No.1 and non-petitioner No. 2 settled their differences amicably and both have filed divorce petition under Section 10-A of Indian Divorce Act 1869 as amended up to date for dissolution of marriage by mutual consent. It is pleaded that case is pending before learned District Judge UT Chandigarh which was registered as petition 3587/14. It is pleaded that thereafter said petition was transferred to learned ADJ UT Chandigarh who on dated 31.7.2014 recorded the joint statements of both the parties. It is pleaded that petitioner No. 1 had agreed to pay Rs.6,75,000/- (Rupees six lacs seventy five thousand only) as permanent alimony to non-petitioner No.2. It is pleaded that petitioner No. 1 has paid a sum of Rs.2 lac to non-petitioner No. 2 by way of demand draft No. 901519 dated 30.7.2014 payable at Punjab National Bank at Shimla on dated 31.7.2014. It is pleaded that remaining amount would be paid at the time when statements of parties shall be recorded. It is pleaded that both parties have settled their disputes amicably. Prayer for acceptance of petition sought.

2. Per contra reply filed on behalf of the State of H.P. pleaded therein that FIR No. 196 of 2006 dated 4.4.2007 was registered. It is pleaded that challan also filed before learned CJM Shimla. It is pleaded that parties be directed to prove the averments mentioned in the petition. It is pleaded that Court may pass any order which deems fit.

3. Statement of non-petitioner No. 2 Smt. Meenakashi was recorded on dated 29.10.2014. Smt. Meenakashi has stated that she has no objection if petition filed by petitioner under Section 482 Cr.P.C. is allowed. Statement of petitioner Sandeep also recorded. Sandeep has also stated that compromise has been executed inter se the parties and matrimonial disputes have been amicably settled and petition filed under Section 482 Cr.P.C. be allowed. Learned counsel appearing for the petitioners Nos. 2 to 5 had also given similar statements placed on record.

4. Court heard learned counsel appearing for the petitioner and learned Additional Advocate General appearing on behalf of non-petitioner No.1 and learned counsel appearing on behalf of non-petitioner No.2 at length and also perused the entire record carefully.

5. Following points arise for determination in this petition:-

1. Whether petition filed under Section 482Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of petition?

2. Final Order.

Findings upon Point No.1

6. Submission of learned Advocate appearing on behalf of petitioners that dispute interse the parties is matrimonial dispute and same stood amicably settled and petition filed under Section 482 Cr.P.C. be allowed is accepted for the reasons hereinafter mentioned. In present case non-petitioner No.2 Meenakashi has specifically stated that she has no objection if petition filed by petitioners is allowed. Court is satisfied that

matrimonial dispute stood amicably settled inter se the parties. It is well settled law that under Section 482 Cr.P.C. Court has inherent powers to quash the criminal proceedings even in those criminal cases which are not compoundable. It is also well settled law that power under Section 482 Cr.P.C. should be exercised sparingly and with cautiously and it is also well settled law that only those criminal offences are allowed to be compounded which are not against the society. It is well settled law that criminal offence of personal nature should be allowed to be settled interse the parties. It is well settled law that proceedings of criminal cases which are (1) Murder (2) Rape (3) Dacoity (4) Prevention of Corruption Act (5) Criminal offence under Section 307 IPC should not be quashed under Section 482 Cr.P.C. It is well settled law that dispute which arises out of commercial transaction, matrimonial dispute and family dispute should be allowed to be compounded by the Court in the ends of justice. ***(See Latest HLJ 2014 H.P. 1248 titled Ravinder Singh @ Laddi and others vs. State of H.P. and another, See JT 2014(4) SC 573 titled Narinder Singh and others vs. State of Punjab and another, See: JT 2003(3) SC 277 titled B.S. Joshi and others vs. State of Haryana and another, See JT 2012(9) SC 426 titled Gian Singh vs. State of Punjab and another)*** In view of above stated facts it is held that it would be expedient in the ends of justice to allow the petition filed under Section 482 Cr.P.C. Point No.1 is answered in affirmative.

Point No. 2(Final order)

7. In view of my findings upon point No. 1 petition filed under Section 482 Cr.P.C. is allowed and FIR No. 196 of 1996 dated 4.4.2007 registered under Sections 498-A read with Section 34 IPC at P.S(East) Shimla H.P. and consequential criminal proceedings of case No. 41-2 of 2007 titled State of H.P. vs. Sandeep and others pending before learned CJM Shimla are ordered to be quashed with immediate effect in the ends of justice. Statements of parties recorded before Hon'ble High Court of H.P. shall form part and parcel of order. Petition stands disposed of accordingly. All pending miscellaneous application(s) if any also stands disposed of.

****

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

Budh Ram .....Appellant.

Versus

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

Cr. Appeal No. 321 of 2012
Reserved on: April 22, 2015.
Decided on: April 23, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 4kg. of charas in a handbag being carried by him- there was contradiction regarding the time at which police left the spot- time of the deposit was mentioned in malkhana as 3:30 P.M, whereas, PW-7 stated that police party remained at the spot till 3:30 P.M- PW-4 stated that case property was produced before him at 3:00 P.M- further, the person carrying the case property to FSL, Junga stated that he had handed over the case property on the same day and returned but the receipt showed the next day as the date of deposit - no independent witness was associated- held, that in these circumstances, prosecution version was not proved.

(Para-17 to 20)

For the appellant: Mr. Dibender Ghosh, Advocate.
For the respondent: Mr. M.A.Khan, Addl. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 20.8.2011/26.8.2011, rendered by the learned Special Judge, Kullu, Distt. Kullu, H.P, in Sessions Trial No. 30 of 2008, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 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 imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 21.3.2008, the police party headed by Addl. SHO Tensin alongwith his team was present at Sharabai on NH-21 at 5:00 AM. At about 5:30 AM, the police party spotted the accused coming from Bhunter side who was going towards Bajaura side, carrying a black and light green coloured bag in his hand. On seeing the police party, the accused tried to flee away. He was nabbed by the police. The name and address of the accused was ascertained. The I.O. opened the bag being carried by the accused. It was found containing a synthetic blanket and wearing apparels and beneath it three polythene envelopes containing charas were found. The same were weighed. It weighed 4.00 Kg. The I.O. separated two samples of 25 gms. each from the recovered charas and put the same in separate cloth parcels. The remaining charas was also put in cloth parcel separately. All the parcels were sealed with seal impression "H" at four places each. The case property was taken into possession vide seizure memo Ext. PW-5/B and other articles were taken into possession vide memo Ext. PW-5/C. The personal search of the accused was also carried out. The I.O. found matchbox Ext. P-7, upon which words "Mangaldeep" were printed, in which stick shaped charas was found besides few match sticks. The same was weighed and it was found to be 10 gms. Thereafter, the I.O. has drawn a sample of 4 gms. from it. The sample and bulk charas were put in a separate parcels, which were sealed with seal "H" at two places each and taken into possession vide memo Ext. PW-5/G. Specimen of seal "H" was also taken on a piece of cloth. The I.O. thereafter, filled in the NCB-1 form in triplicate. The special report was prepared. The case property alongwith the requisite documents were sent to FSL on 23.3.2008 through PW-6 Tikam Ram. Const. Tikam Ram deposited the case property alongwith the requisite documents at FSL, Junga on 24.3.2008 and copy of receipt Ext. PW-1/C was deposited with the MHC on his return. The reports of FSL, Junga are Ext. PA and PB. 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 15 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case. The learned trial Court convicted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Dibender Ghosh, 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. Advocate General for the State has supported the judgment of the learned trial Court dated 20.8.2011/26.8.2011.

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

6. PW-1 HC Manoj Kumari, testified that she was posted as MHC in PS Kullu from August, 2007. On 21.3.2008, SHO Partap Singh handed over to her the case property of case FIR No. 179 of 2008, which she duly deposited in the malkhana after making its entry in the malkhana register against Sr. No. 119/08 dated 21.3.2008. The description of the case property was given in the register of the malkhana vide Ext. PW-1/A. On 23.3.2008, she sent two sealed samples of this case through Const. Tikam Ram. One sample was containing charas sealed with seal impressions "H" and "R" and another sample in which two grams of charas was there, again reiterated four grams of charas was having impression "H" and "R" was also sent. Along with the two sealed samples two sets of sample seals of "H" and "R", two sets of NCB forms and other documents were also sent through RC 18/08 vide Ext. PW-1/B. The samples were deposited by the Constable in the laboratory on 24.3.2008 and RC was handed over to her alongwith the receipt. The photocopy of the receipt is Ext. PW-1/C.

7. PW-4 Insp. Partap Singh, deposed that he made endorsement over Ext. PW-4/A and recorded the FIR Ext. PW-4/B on 21.3.2008. On the same day at 3:00 PM, SI Tenzin, I.O. produced before him the case property consisting of five parcels, sample seal and NCB form. The parcels were duly sealed. He also filled in the relevant columns of NCB form. Thereafter, five pulindas, NCB forms and case property was deposited with MHC Manoj Kumari of PS Kullu. In his cross-examination, he deposed that Pritam Singh brought the rukka at 11:30 AM during day time.

8. HC Pyare Lal, deposed that on 21.3.2008, he alongwith the police party comprising of SI Tenzin, ASI Ram Sarup, Const. Pritam, Const. Tikam Ram were on patrol duty in official vehicle. At about 5:30 AM, the police party reached at place known as Sharabai. The police party put a picketing at that place. At the same time, a person came there from Bhuntar side with bag in his hand. On seeing the police party, he turned back and tried to flee away. He was nabbed by the police. Thereafter, his whereabouts were ascertained. The Incharge of the police party checked the bag. The I.O. found some wearing apparels, blanket and three polythene envelopes under the said articles. All the three envelopes were opened and the same were found containing charas. The same were weighed. It weighed 4.00 Kgs. The samples of 25 gms each were separated from it. The bulk and the sample parcels were sealed with four seals each on each parcel with seal "H". Specimen seal impression was also taken. The I.O. filled in the relevant columns of the NCB forms. The other articles were taken in possession vide separate memo. The specimen seal impression of "H" is Ext. PW-5/A. The case property, bulk as well as sample parcels were taken into possession vide recovery memo Ext. PW-5/B. The personal search of the accused was also carried out. The I.O. found a matchbox bearing words "Mangaldeep" from the left pocket of the jacket worn by the accused. On opening the same, it was found containing some match sticks and charas. The pieces of charas were weighed and were found to be 10 gms. Out of the said charas, some pieces weighing about 4 gms. were separated as sample and were put in polythene envelope. The bulk as well as the sample parcel were put in cloth parcel and sealed with seal "H" by affixing two seals of each parcel. The specimen seal impression of "H" was also taken on the piece of cloth. The specimen seal impression is Ext. PW-5/F. The case property was taken into possession vide memo Ext. PW-5/G. In his cross-examination, he deposed that where the police party was standing, no abadi was there near the said place. The abadi was situated at a distance of about 200 meters from the place where the police was standing.

9. PW-6 Const. Tikam Ram, deposed that on 23.3.2008, MHC Manoj Kumari, handed over to him two sealed parcels sealed with seal "H" and "R" alongwith the NCB form and relevant papers vide RC No. 88/08 Ext. PW-1/B for depositing the same with FSL, Junga. He deposited the same with FSL, Junga on the same day and returned the RC to MHC, PS Kullu on 24.3.2008. The receipt of the case property is Ext. PW-1/C. In his cross-examination, he admitted that the document Ext. PW-1/C bears the date of 24.3.2008. Voluntarily stated that he deposited the case property on 23.3.2008 and receipt was given to him on 24.3.2008. The case property was handed over to the dealing clerk in FSL Junga on 23.3.2008 in the evening in the office.

10. PW-7 Const. Rakesh Kumar, deposed the manner in which the accused was apprehended, search was carried out, contraband was taken into possession and codal formalities were completed.

11. PW-8 Const. Pritam Singh, also reiterated the manner in which the accused was apprehended, search was carried out, contraband was taken into possession and codal formalities were completed on the spot. Rukka was handed over to him at about 10:00 AM. He could reach the Police Station at about 11:30 AM, due to Holi festival.

12. PW-9 ASI Ram Sarup, was also member of the patrolling party, in whose presence the accused was nabbed, search was carried out, contraband was taken into possession and codal formalities were completed. In his cross-examination, he deposed that the police party remained at the spot up to 3:30 PM.

13. PW-10 Tenzin, is the I.O. He also narrated the manner in which the accused was apprehended, search was carried out, contraband was taken into possession and codal formalities were completed on the spot. He had asked the accused whether he would like to give his personal search to the Gazetted Officer, to the Magistrate or to the Police, upon which, he opted to be searched by the police on the spot. As far as the recovery of 10 gms of charas is concerned, in his cross-examination, he has admitted that the police party from 5:00 AM to 5:30 AM had not checked any vehicle on the spot. He admitted that usually there remains great rush on the National Highway but that day was Holi festival and as such no traffic was there on the road. The distance between Sharabai and Bhuntar is approximately 2 kms. The picketing was done by the police party at a place two kms. from Bhuntar towards Sharabai. He also admitted that number of houses were situated at a place known as Sharabai. He had not tried to send any of his colleagues to bring any independent witness.

14. PW-11 HC Ram Krishan, deposed that he was posted as MHC, PS Kullu. On 25.5.2010, he sent the case property i.e. one bulk parcel and one sample parcel of case FIR No. 179 of 2008 alongwith specimen seal impressions of D& SJ, "H" and "R" and docket to FSL, Junga through Const. Inder Dev vide RC No. 134 of 2010 vide Ext. PW-11/A.

15. PW-13 DSP Sanjiv Chohan, deposed that on 25.5.2010, after obtaining specimen seal impression from the Court, he sent the bulk parcel and a sample parcel alongwith sample seals affixed on the bulk as well as on the sample parcel to FSL, Junga through Const. Inder Singh. The case property was sent to FSL vide RC No. 134/10.

16. PW-14/15 Kapil Sharma, has proved the chemical reports.

17. Mr. Dibender Ghosh, Advocate, for the accused has drawn the attention of the Court to NCB from Ext. PW-1/D. The time of deposit of the case property in the malkhana is 3:30 PM at PS Kullu. However, PW-9 ASI Ram Sarup, who was member of the patrolling party, in his cross-examination, has categorically deposed that the police party

remained on the spot up to 3:30 PM. PW-4 Insp. Partap Singh, in his examination-in-chief, has deposed that at 3:00 PM, SI Tenzin has produced before him case property. In case, the police party has remained on the spot up to 3:30 PM, the case property could not be produced initially before Insp. Partap Singh at 3:00 PM and the same could not be deposited at 3:30 PM, as per Ext. PW-4/D in the malkhana.

18. The case property was handed over to PW-6 Const. Tikam Ram by PW-1 Manoj Kumari, for taking it to FSL, Junga on 23.3.2008. PW-6 Tikam Ram, deposited the same at FSL, Junga on the same date and returned the RC to MHC PS Kullu on 24.3.2008. He has proved receipt Ext. PW-1/C. We have gone through Ext. PW-1/C. The date of receipt of the case property is 24.3.2008. In case the case property had been deposited by PW-6 Const. Tikam Ram on 23.3.2008, it was to be received on 23.3.2008. The version of PW-6 Const. Tikam Ram that though he has deposited the case property on 23.3.2008 but receipt was handed over to him on 24.3.2008 is not believable. The Forensic Science Laboratory, being a professional organization, issues the receipts immediately when the case property is handed over to it for analysis. If, PW-6 Const. Tikam Ram was informed that receipt would be issued next morning, he should not have deposited the case property with the FSL, Junga.

19. There is another flaw in the case of the prosecution. PW-10 Insp. Tenzin had asked the accused at the time of his personal search as to whether he would like to give his personal search to the Gazetted Officer, to the Magistrate or to the Police, upon which, the accused opted to be searched by the police on the spot. PW-10 Insp. Tenzin should have only asked whether accused wanted to be searched before the Gazetted Officer or the nearest Magistrate and not before the Police Officer. The authorities contemplated under Section 50 of the ND & PS Act are nearest Magistrate or Gazetted officer and not the Police Officer.

20. The naka was laid on National Highway No. 21 on 21.3.2008. It is a busy National Highway. PW-10 Insp. Tenzin, has admitted that he has not sent any official to bring any independent witnesses. It has come in his statement that the picketing was done by the police at a place two kilometers from Bhuntar towards Sharabai. He also admitted that number of houses were situated at a place known as Sharabai. But, despite that he has not associated any independent witnesses at the time of nabbing the accused and when the proceedings were completed on the spot. The accused has not been nabbed at a secluded and isolated place. He was nabbed on the National Highway No. 21. As it was very busy road, the police could easily associate any person travelling on the highway.

21. The prosecution has failed to prove that the contraband was recovered from the exclusive and conscious possession of the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt 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 20.8.2011/26.8.2011, rendered by the learned Special Judge, Kullu, Distt. Kullu, H.P, in Sessions Trial No. 30 of 2008, is set aside. Accused is acquitted of the charges framed against him 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.

****

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

Chaman Negi. .....Petitioner.

Versus:

State of H.P. and others. ....Non-petitioners.

CWP No.11252 of 2011.
Order reserved on: 9.4.2015.
Date of Order: April 23, 2015

Constitution of India, 1950- Article 226- Petitioner claimed that non-petitioner No. 5 had misappropriated amount which was confirmed in an inquiry conducted by SDM, Aani- Deputy Commissioner, Kullu ordered the registration of FIR, however, no FIR was registered despite the direction of Deputy Commissioner- respondents pleaded that complaint filed by the petitioner was referred to Director Panchayati Raj – respondents No. 3 and 4 claimed that forged entry was recorded in the muster roll which was also accepted by the petitioner- SHO Police Station Nirmand stated that no case was made out for the registration of the FIR- recovery proceedings of Rs.1,930/- were initiated against the non-petitioner No. 5 and the amount was deposited by him with the Treasury- held, that forgery in the muster roll and embezzlement of Rs.1,930/- were cognizable offences- SHO was under obligation to register the FIR in a cognizable case- mere deposit of money is not sufficient to exonerate the non-petitioner No.5. (Para-7 and 8)

Case referred:
Lalita Kumari Vs. State of UP and others, AIR 2014 SC 187

For the petitioner: Mr.Sandeep Chauhan, Advocate.
For Non-petitioners No.1 to 4: Mr.M.L.Chauhan, Addl. Advocate General.
For non-petitioners 5&6: Mr.Umesh Kanwar, Advocate.

The following judgment of the Court was delivered:

P.S.Rana Judge.

Present Writ Petition is filed under Article 226 of the Constitution of India. It is pleaded that petitioner filed a criminal complaint to the Director General of Police Vigilance Department Khalini Shimla against non-petitioner No.5 Puran Lal ex up-pradhan Gram Panchayat Nishani Tehsil Nirmand District Kullu HP relating to misappropriation of public fund. It is further pleaded that thereafter petitioner filed complaint on dated 11.10.2010 regarding misappropriation of public fund in the gram panchayat Nishani Tehsil Nirmand District Kullu HP to the Hon'ble High Court of HP. It is further pleaded that non-petitioner No.5 Puran Lal ex up-pradhan Gram Panchayat Nishani Tehsil Nirmand District Kullu HP had submitted two bills of Rs.50,000/- (Fifty thousand) and Rs.2,30,000/- (Two lac thirty thousand) respectively but in fact no work was done and false bills were prepared by non-petitioner No.5 Puran Lal ex up-pradhan Gram Panchayat Nishani. It is further

pleaded that Hon'ble High Court of HP vide letter No. HHC/PIL/F-1/11-2010 forwarded complaint of the petitioner to Deputy Commissioner Kullu HP for necessary action in accordance with law under intimation to the petitioner. It is further pleaded that non-petitioner No.3 Deputy Commissioner Kullu ordered Sub Divisional Magistrate Anni to conduct inquiry on the complaint of petitioner. It is further pleaded that thereafter learned Sub Divisional Magistrate conducted inquiry and submitted report that fraud entry was committed in the muster roll by non-petitioner No.5 Puran Lal Ex up-Pradhan Gram Panchyat Nishani Tehsil Nirmand District Kullu HP. It is further pleaded that non-petitioner No.3 Deputy Commissioner Kullu directed non-petitioner No.4 Block Development Officer Nirmand to register FIR against non-petitioner No.5 Puran Lal ex up-pradhan of Gram Panchayat Nishani. It is further pleaded that despite direction of Deputy Commissioner Kullu till date no FIR registered against non-petitioner No.5 Puran Lal. Prayer for acceptance of writ petition sought as mentioned in relief clause.

2. Per contra reply filed on behalf of respondents No.1 and 2 pleaded therein that complaint dated 19.5.2010 filed by petitioner was received in SV&AC Bureau vide diary No.6232 dated 21.5.2010 and after examination the same was referred to Director Panchayati Raj HP Shimla vide reference No. 11213 dated 10.6.2010. Prayer for dismissal of petition sought.

3. Per contra separate reply filed on behalf of respondents No.3 and 4 pleaded therein that one complaint dated 11.10.2010 was received in the office of non-petitioner No.3 Deputy Commissioner Kullu through Registrar General-cum-Principal Secretary to HCJ High Court of HP vide letter No. HHC/PIL/F-1/11-2010 dated 3.11.2010 against non-petitioner No.5 Puran Lal ex up-Pradhan Gram Panchayat Nishani regarding misappropriation of sanctioned amount allotted for development works in Gram Panchayat Nishani Tehsil Nirmand District Kullu HP. It is further pleaded that thereafter the matter was entrusted to Sub Divisional Magistrate Anni vide letter dated 27.11.2010. It is further pleaded that after completion of inquiry it was prima facie found that non-petitioner No.5 Puran Lal has forged muster roll and drawn money and misappropriated it. It is further pleaded that non-petitioner No.5 Puran Lal had also admitted vide statement dated 16.10.2010 that fraud entries were recorded in the muster roll. It is also admitted that Rs.50,000/- (Fifty thousand) and Rs.2,30,000/- (Two lac thirty thousand) were released by non-petitioner No.4 i.e. Block Development Officer to Government Primary School Nishani. It is further pleaded that Rs.50,000/- (Fifty thousand) were issued for the repair of Government Primary School and Rs.2,30,000/- (Two lac thirty thousand) were issued for the construction of breast wall Government Primary School Nishani. It is further pleaded that as per inquiry report submitted by Sub Divisional Magistrate Anni forged entries were recorded in the muster roll. It is further pleaded that non-petitioner No.4 Block Development Officer had received direction from non-petitioner No.3 Deputy Commissioner Kullu vide letter No.1796 dated 13.10.2011 to register FIR on the basis of inquiry conducted by Sub Divisional Magistrate Anni. It is further pleaded that in compliance to the direction of Deputy Commissioner Kullu vide letter No. 2511 dated 24.10.2011 BDO requested the Station House Officer Police Station Nirmand to register FIR against non-petitioner No.5 Puran Lal Ex up-pradhan Gram Panchayat Nishani. It is further pleaded that thereafter Station House Officer Police Station Nirmand vide letter No. 3624/5-A dated 5.11.2011wrote a letter to non-petitioner No.4 Block Development Officer that no case was made against non-petitioner No.5 Puran Lal. It is further pleaded that recovery proceedings of Rs.1930/- were initiated against non-petitioner No.5 Puran Lal and non-petitioner No.5 had deposited the amount with the Secretary Gram Panchayat Nishani on dated 5.1.2012. It is further pleaded that Sub Divisional Magistrate Anni had conducted fair and impartial inquiry. Prayer for dismissal of petition sought.

4. Per contra separate reply filed on behalf of respondents No.5 and 6 pleaded therein that non-petitioner No.5 Puran Lal was elected in Gram Panchayat Nishani. It is pleaded that there are many developmental schemes financed by different agencies which are executed by gram panchayat. It is further pleaded that schemes are executed as required under execution of the said work. It is further pleaded that non-petitioner No.5 Puran Lal had sincerely executed the work assigned to him. It is further pleaded that there was discrepancy of Rs. 1930/- (One thousand thirty) and same amount was deposited by non-petitioner No.5 Puran Lal. Prayer for dismissal of petition sought. Petitioner also filed rejoinder and re-asserted the allegation mentioned in the petition.

5. Court heard learned counsel appearing on behalf of the petitioner and learned counsel appearing on behalf of non-petitioners and also perused entire record carefully

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

(1) Whether registration of FIR in forgery cognizable criminal offences under Sections 468 and 471 IPC is mandatory?

(2) Final order.

Finding upon Point No.1.

7. Submission of learned Advocate appearing on behalf of the petitioner that registration of FIR in cognizable criminal offences is mandatory is accepted for the reason hereinafter mentioned. It is proved on record that criminal complaint was filed against non-petitioner No.5 Puran Lal and thereafter same was referred to District Magistrate Kullu for necessary action in accordance with law. It is proved on record that thereafter District Magistrate Kullu entrusted inquiry to Sub Divisional Magistrate Anni District Kullu HP. It is proved on record that thereafter Sub Divisional Officer (Civil) Anni District Kullu HP submitted inquiry report and held in the inquiry report that non-petitioner No.5 Puran Lal Ex up-Pradhan had committed fraud entries in the muster roll. It is well settled law that muster roll is a public document and muster roll is prepared by public servant while discharging public official duty. It is prima facie proved on record that non-petitioner No.5 Puran Lal had committed fraud to the tune of Rs.1930/- (One thousand nine hundred thirty) in the muster roll. It is proved on record that thereafter recovery of Rs.1930/- (One thousand nine hundred thirty) was deposited by non-petitioner No.5 Puran Lal. It is prima facie proved that up-Pradhan had acted as a public servant and had recorded fraud entries in the muster roll as a public servant. In the present case matter of public exchequer is involved. It is well settled law that no public servant can be allowed to enter fraud entries in the muster roll relating to public exchequer. There is no evidence on record in order to prove that non-petitioner No.5 Puran Lal had challenged inquiry report before any competent authority of law. There is no evidence on record in order to prove that inquiry conducted by Sub Divisional Officer (Civil) Anni was set aside by any competent authority of law. It is proved on record that thereafter Block Development Officer had submitted complaint to Station House Officer Police Station Nirmand. Unfortunately in the present case Station House Officer Police Station who is not party in the present writ petition did not register FIR against non-petitioner No.5 Puran Lal relating to cognizable criminal offence punishable under Sections 468 and 471 IPC. It is well settled law that in cognizable criminal offence concerned Station House Officer was under legal obligation to register FIR in a cognizable case. In the present case Station House Officer did not record FIR in cognizable criminal offence and over ruled the inquiry report submitted by Sub Divisional Officer Anni. It is well settled law that Station House Officer is not legally competent to override inquiry report

submitted by Sub Divisional Officer (Civil) Anni. It was held in case reported in AIR 2014 SC 187 titled Lalita Kumari Vs. State of UP and others that recording of FIR in cognizable criminal offence is mandatory.

8. Submission of learned Advocate appearing on behalf of non-petitioner No.5 Puran Lal that since non-petitioner No.5 Puran Lal had already deposited the amount to the tune of Rs.1930/- (One thousand nine hundred thirty) and on this ground petition be dismissed is rejected being devoid of any force for the reason hereinafter mentioned. It is held that deposit of amount to the tune of Rs.1930/- (One thousand nine hundred thirty) by non-petitioner No.5 Puran Lal will not exonerate him from cognizable criminal offence which he had committed earlier. In view of above stated facts point No.1 is answered in affirmative.

Point No.2(Final order)

9. In view of my findings upon point No.1 petition filed by petitioner under section 226 of the Constitution of India is allowed and Station House Officer Nirmand is directed to register criminal FIR under Sections 154 of the Code of criminal Procedure 1973 qua cognizable offence punishable under Sections 468 and 471 IPC against non-petitioner No.5 Puran Lal Ex up-pradhan resident of village and Post office Nishani, Tehsil Nirmand District Kullu HP and thereafter file report under Section 173 of the Code of Criminal procedure 1973 before Court of competent jurisdiction. Certified copy of the inquiry report submitted by Sub Divisional Officer (Civil) Anni will be transmitted to Station House Officer along with certified copy of order dated 23.04.2015 forthwith for compliance. Observation made hereinabove is strictly for the purpose of deciding the present petition and it shall not effect merits of the case in any manner and will be confined simply for the registration of criminal case in cognizable offence. Petition disposed of. Pending application(s) if any also disposed of.

****

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

Charan Dass son of Sh. Biptu Ram ....Appellant/Plaintiff

Versus

The Secretary (Revenue) to Govt. of H.P. and another ....Respondents/Defendants

RSA No. 150 of 2003
Judgment Reserved on 9th April, 2015
Date of Judgment 23rd April, 2015

Specific Relief Act, 1963- Section 36- Plaintiff pleaded that he had purchased Khasra No.1078/310 from one 'R' of Rs.2,800/-- mutation was attested and revenue staff only recorded gair mumkin room on 0-2-0 bighas of land but vacant courtyard was not recorded- area was also reduced from 0-2-10 to 0-2-0- it was pleaded that Revenue Officer had no power to reduce the ownership- respondent pleaded that 'R' was allotted 0-2-0 bighas of land- inadvertently land was recorded to be 0-2-10 which was later on corrected- plaintiff had encroached upon the land of the defendant on which the proceedings under Section 163 were initiated- plaintiff was ejected from the land legally occupied by him- now plaintiff had encroached upon the land of the defendant- proceedings under Section 163 are pending against him- held, that 0-2-0 bighas of land was allotted to 'R', however, land was recorded as 0-2-10 bighas in the jamabandi- this was rectified in the year 1989-90- a vendor cannot alienate the land, which is not owned by him- therefore, 'R' could have only alienated 0-2-0

bighas of land- entries in jamabandi are not proof of the title but is merely made for fiscal purposes- mutation does not confer any right. (Para12 to 17)

Cases referred:

Kartar Kaur vs. Amarjit Singh and others 1994(2) S.L.J. 1735 (Punjab & Haryana)
Guru Amarjeet Singh vs. Rattan Chand and others AIR 1994 SC 227.
Jattu Ram vs. Hakam Singh, SLJ 1994(1) page 68 SC
Mohammad Iqbal vs. Government of Indian and others 1996(4) SLJ 2982 HP
Mohar Singh vs. Manjoo 1997(1) SLJ 304 H.P.
Naval Shankar Ishwar Lal Dave and another vs. State of Gujarat AIR 1994 SC 1496
Gappulal vs. Thakurji Shriji Dwarkadheeshji and another AIR 1969 SC 1291
Krishna Mohan Kul alias Nani Charan Kul and another vs. Pratima Maity and others AIR 2003 SC 4351
R.V. E. Venkatachala Gounder vs. Arulmigu Veswesaraswami & V.P. Temple and another AIR 2003 SC 4548

For the Appellant: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.
For the Respondents: Mr. M.L.Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure by the appellant against the judgment and decree passed by learned Additional District Judge Mandi in Civil Appeal No. 54 of 2001 titled Charan Dass vs. The Secretary (Revenue) to Government of H.P. whereby learned Additional District Judge Mandi had affirmed the judgment and decree passed by learned trial Court announced in Civil Suit No. 91 of 1999 titled Charan Dass vs. The Secretary (Revenue).

2. Brief facts of the case as pleaded are that plaintiff Charan Dass filed suit for declaration and permanent prohibitory injunction pleaded therein that land comprised in Khata No. 34 Khatauni No. 79, Khasra No. 1078/310 measuring 0-2-10 bighas was in ownership of Swami Ramji and adjoining land is owned by Government of Himachal Pradesh. It is pleaded that plaintiff vide sale deed No. 160 dated 11.3.1987 purchased Khasra No. 1078/310 measuring 0-2-10 bighas from Swami Ramji for consideration amount of Rs. 2800/- (Rupees two thousand eight hundred only) and mutation No. 215 dated 19.3.1991 was sanctioned. It is pleaded that revenue staff while preparing jamabandi for the year 1994-95 only recorded gair mumkin room on land measuring 0-2-0 biswas of land and courtyard which was vacant was not recorded. It is pleaded that revenue officer has no power to reduce the ownership of plaintiff by way of arbitrary decision. It is pleaded that no notice was issued to plaintiff. Prayer for decree the suit as mentioned in relief clause of plaint sought.

3. Per contra written statement filed on behalf of defendants pleaded therein that suit is not maintainable in present form and plaintiff has no locus standi to file the present suit. It is also pleaded that plaintiff has no cause of action to file the present suit and no valid notice under Section 80 CPC was served upon the defendants. It is further pleaded that Civil Court has no jurisdiction to entertain and try the suit as barred by Section 171 of H.P. Land Revenue Act. It is further pleaded that land adjoining to Khasra No. 1078/310 belongs to State of H.P. It is pleaded that Swami Ramji was allotted the land

measuring 0-2-0 bighas in Khasra No. 310/2. It is pleaded that thereafter plaintiff purchased the land vide sale deed No. 160 dated 11.3.1987 from Swami Ramji. It is pleaded that inadvertently entry of this land has been shown as 0-2-10 bighas instead of 0-2-0 bighas which was later on corrected. It is pleaded that plaintiff had constructed a Spring View Guest House over Khasra No. 1079/310. It is pleaded that plaintiff had encroached upon the government land by way of raising unauthorized construction which was detected by revenue agency and encroachment case was made against the plaintiff. It is pleaded that plaintiff was given due opportunity to defend the case as per Section 163 of Land Revenue Act. It is pleaded that thereafter plaintiff put his appearance before A.C. 1st Grade and he willfully did not appear before A.C. 1st Grade Karsog and was proceeded ex-parte and ejectment order was passed by Assistant Collector 1st Grade Karsog. It is pleaded that thereafter plaintiff did not file any appeal and order of A.C. 1st Grade attained the stage of finality. It is pleaded that thereafter on dated 26.10.1997 Naib Tehsildar Karsog with the help of police ejected the plaintiff from unauthorized possession by demolishing the unauthorized construction vide rapat roznamcha No. 108 dated 26.10.1997. It is pleaded that now the plaintiff has again encroached upon Khasra No. 21/3 measuring 0-2-15 bigha and Khasra No.1079/310/2 by constructing bathroom and latrine and encroachment proceedings against the plaintiff are pending. It is pleaded that only 0-2-0 bighas of land was allotted to Swami Ramji as Nautor which was later on purchased by plaintiff. It is pleaded that revenue entries have been corrected as per law and further pleaded that plaintiff has no cause of action to file the civil suit. Prayer for dismissal of suit sought.

4. As per the pleadings of parties learned trial Court framed following issues on dated 23.6.2000:-

1. Whether plaintiff is owner in possession of land comprised in Khata No. 34 Khatauni No. 79 Khasra No. 1078/310 measuring 0-2-10 bighas? OPP
2. In case issue No.1 is proved in affirmative whether the plaintiff is entitled to the relief of injunction as prayed? OPP
3. Whether the suit is not maintainable in present form?OPD
4. Whether plaintiff has no locus standi to file the present suit? OPD
5. Whether plaintiff has no enforceable cause of action? OPD
6. Whether no valid notice under Section 80 CPC served upon the defendants as alleged? OPD
7. Whether this Court has no jurisdiction? OPD
8. Whether Swami Ramji had been allotted land comprised in Khasra No. 310/2 measuring 0-2-0 bighas for construction of Goddess temple if so its effect? OPD
9. Relief.

5. Findings on learned trial Court on issues were as follow:-

Issue No.1	Partly yes. Plaintiff was held owner in possession qua Khasra No. 1078/310 measuring 0-2-0 bighas.
Issue No. 2	Yes. Defendants restrained from interfering in land measuring 0-2-0 bighas. Relief of injunction also granted in favour of plaintiff and against defendants that defendants will not interfere in the land measuring 0-0-10 bighas except in due course of law.
Issue No. 3	Partly yes qua land measuring 0-0-10 bighas.

Issue No. 4	Partly yes qua land measuring 0-0-10 bighas.
Issue No. 5	Partly yes qua land measuring 0-0-10 bighas
Issue No. 6	No. It was held that permission under Section 80(2) CPC sought.
Issue No. 7	No. It was held that controversy inter se parties is relating to civil rights and Court has jurisdiction.
Issue No. 8	Yes.
Relief	The suit of plaintiff was partly decreed with costs as per operative portion of judgment.

6. Feeling aggrieved against the judgment and decree passed by learned trial Court appellant filed civil appeal No. 54 of 2001 titled Charan Dass vs. The Secretary (Revenue) and learned first Appellate Court affirmed the impugned judgment and decree passed by learned trial Court and dismissed the appeal filed by appellant.

7. Parties examined following oral witnesses in supported of their case:-

Sr. No.	Name of witness
PW1	Charan Dass
PW2	Nand Lal
DW1	N.L. Verdhan
DW2	Krishan Kumar
DW3	Devi Singh
DW4	Tek Chand

8. Parties produced following documentary evidence in support of their case:-

Sr. No.	Description
Ext.DW2/A	Copy of order of nautor land
Ext.DW2/B	Copy of form of patta
Ext.DW3/A	Copy of report
Ext.DW3/B	Copy of report
Ext.DW4/A	Copy of report
Ext.DW4/B	Copy of jamabandi for the year 1989-90
Ext.DW4/C	Copy of Nakal Jamabandi

9. Thereafter feeling aggrieved by judgments and decrees passed by learned trial Court and affirmed by learned first Appellate Court appellant has filed present Regular

Second Appeal No. 150 of 2003 titled Charan Dass vs. State of H.P. Hon'ble High Court admitted the present appeal on the following substantial questions of law on dated 24.4.2003:

1. Whether findings as recorded against appellant are vitiated on account of misreading and mis-appreciation of pleadings of the parties and material on record including pleadings and evidence?

2. Whether inferences and conclusions as drawn are neither supported by material on record nor by any provisions of law and the sale deed pertaining to sale in favour of appellant, as admitted by respondent has been misconstrued and mis-interpreted?

3. Whether entries in revenue record pertaining to suit land on the basis of which sale deed was executed in favour of appellant as per sale deed No. 160 registered in office of Sub Registrar Karsog dated 11.3.1987 is legal and valid?

10. Court heard learned Advocate appearing on behalf of appellant and learned Additional Advocate General and also perused the entire record carefully.

11. Oral Evidence adduced by parties

11.1 PW1 Charan Dass has stated that he has purchased the suit land from Swami Ramji measuring 2 biswas 10 biswansi for consideration amount of ` 2800/- (Rupees Two thousand eight hundred only). He has stated that possession was also given to him and mutation was also sanctioned in his favour. He has stated that no notice was given to him by revenue department when area was reduced. He has stated that copy of sale deed is mark X and copy of mutation is mark Y. In his cross examination he has admitted that he has purchased Khasra No. 1078/310. He has stated that he does not know that only two biswas of land was allotted to Swami Ramji by SDO Collector Sundernagar District Mandi in the year 1972. He has admitted that Khasra No. 21/1, 21/2, 21/3, 1079/1, 1079/2, 1079/3 and 1079/4 were encroached by way of raising wall. He has admitted that bathroom and latrine have been constructed. He has admitted that encroachment case was instituted against him and he used to appear in the encroachment case. He has admitted that ejectment orders were passed against him. He has admitted that Naib Tehsildar had ordered that bathroom would be demolished. He has admitted that again in Khasra No. 1079/310/2 latrine and bathroom have been constructed and he has also admitted that in Khasra No. 1078/310 Spring View hotel has been constructed. He has denied suggestion that he has encroached 15 biswansi of land. He has admitted that fresh encroachment case is also pending against him. He has denied suggestion that he has filed a civil suit just to grab 10 biswansi of land owned by State of H.P.

11.2 PW2 Nand Lal has stated that 2½ biswas of land was purchased for consideration amount of ` 2800/- (Rupees two thousand eight hundred only) and further stated that mutation was also sanctioned. He has stated that he does not know how the vendor had purchased the land. He has denied suggestion that only two biswas of land was alienated to the vendee.

11.3 DW1 N.L. Verdhan Tehsildar Sarkaghat has stated that he remained Tehsildar w.e.f. September 1995 to January 1998. He has stated that report was submitted by halqua patwari that Charan Dass appellant had purchased two biswas of land but due to bonafide mistake the ownership was recorded to the extent of 0-2-10 bighas. He has stated that halqua patwari had recommended that correction was essential. He has further stated

that thereafter report of Patwari was verified by field Kanungo. He has stated that thereafter he has approved the correction. He has stated that he does not know when nautor land was allotted to Charan Dass.

11.4 DW2 Krishan Kumar record keeper in SDM Office Karsog has stated that he is posted as record keeper in SDM office since August 2000 and he has brought the original record. He has stated that application for allotment of nautor land was filed on which order Ext.DW2/A was passed which is correct as per original record. He has stated that copy of allotment order is Ext.DW2/B.

11.5 DW3 Devi Singh field Kanungo has stated that he was posted as Kanungo since June 1994 and further stated that Tattapani Patwar Circle was under his control. He has stated that he had seen the suit property where he found that Charan Dass had encroached the government land and thereafter halqua Patwari had prepared the encroachment file and he visited the spot for verification. He has stated that his report is Ext.DW3/A which is in his hand writing and is correct as per original record. He has stated that ejectment orders were passed against the appellant and report is Ext.DW3/B. He has stated that appellant has encroached 0-0-19 bighas of land. He has admitted that nautor land which was allotted to Swami Ramji was adjoining to government land which was grazing land.

11.6 DW4 Tek Chand Patwari has stated that he was posted as Patwari at Tattapani w.e.f. October 1995 and further stated that encroachment on the part of appellant was found upon the government land. He has stated that earlier also ejectment orders were passed against the appellant. He has further stated that after passing of ejectment order appellant had again encroached the government land. He has stated that report is Ext.DW4/A which is in his hand and is correct as per original record. He has proved documents Ext.DW4/B and Ext.DW4/C. He has stated that nautor land was allotted to Swami Ramji. He has stated that he does not know that in case of any correction in revenue record permission of District Collector or decision of civil Court is essential. Self stated that matter was reported to A.C. II Grade and thereafter order of Assistant Collector was complied. He has stated that report of correction is submitted by Halqua Patwari and thereafter same was verified by Field Kanungo and thereafter permission was granted by A.C. II Grade. Plaintiff did not lead any rebuttal evidence.

Findings upon Point No. 1 of Substantial Question of law framed by Hon'ble High Court:-

12. Submission of learned Advocate appearing on behalf of the appellant that findings recorded against the appellant are vitiated on account of misreading and mis-appreciation of pleadings of the parties and material on record including pleadings and evidence is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the pleadings of parties and Court has also carefully perused the oral as well as documentary evidence adduced by parties. It is proved on record that Swami Ramji filed an application No. 46 dated 30.4.1970 for allotment of Nautor land for construction of Goddess temple. It is proved on record that thereafter on dated 9.6.1972 Sub Divisional Officer (Civil) Sundernagar District Mandi H.P. had granted 0-2-0 bighas of land situated in Muhal Tattapani, Tehsil Karsog District Mandi in favour of Swami Ramji. It is also proved on record that thereafter grant of nautor land measuring 0-2-0 bighas was issued in favour of Swami Ramji subject to conditions. It is also proved on record that due to clerical mistake in jamabandi for the year 1984-85 the area of nautor granted was mentioned as 0-2-10 bighas instead of 0-2-0 bighas in the name of Swami Ramji. It is also proved on record that thereafter in the year 1989-90 the mistake was detected and same

was rectified and it was ordered that area 0-2-0 would be recorded instead of 0-2-10. It is also proved on record that thereafter sale deed was executed by Swami Ramji in favour of appellant Charan Dass in consideration amount of ` 2800/- (Rupees two thousand eight hundred only) and there is recital in sale deed that area measuring 0-2-10 was alienated by vendor in favour of vendee. It is also proved on record that thereafter ejectment orders were passed against the appellant by revenue officer. It is well settled law that vendor cannot alienate the land more than his ownership right. It is proved on record that Swami Ramji acquired title of 0-2-0 bighas of land only in Mohal Tattapani Tehsil Karsog District Mandi as per order of Sub Divisional Officer (Civil) Sundernagar District Mandi H.P. passed on dated 9.6.1972. It is proved on record that nautor land was granted in favour of Swami Ramji measuring 0-2-0 bighas by Sub Divisional Officer (Civil) Sundernagar District Mandi H.P. It is held that title of only 0-2-0 bighas acquired by Swami Ramji in nautor land vide order dated 9.6.1972 passed by Sub Divisional Officer (Civil) Sundernagar District Mandi H.P. It is held that in revenue record also the title of Swami Ramji should have been recorded as 0-2-0 bighas. It is proved on record that thereafter in jamabandis the title of Swami Ramji was recorded as 0-2-10 bighas instead of 0-2-0 bighas. It was held in case reported in ***1994(2) S.L.J. 1735 (Punjab & Haryana) titled Kartar Kaur vs. Amarjit Singh and others*** that vendor could not pass a better title to vendee than he himself has.

13. Submission of learned Advocate appearing on behalf of appellant that in jamabandi for the year 1984-85 area in ownership of Swami Ramji was to the extent of 0-2-10 and on the basis of jamabandi for the year 1984-85 Swami Ramji was owner of 0-2-10 bighas of land and thereafter he was legally competent to alienate 0-2-10 bighas of land by way of sale deed in favour of appellant is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that entries in jamabandis are not proof of title. It is well settled law that jamabandi's entries are only prepared for fiscal purpose and they create no title. ***See AIR 1994 SC 227 titled Guru Amarjeet Singh vs. Rattan Chand and others. See: SLJ 1994(1) page 68 SC titled Jattu Ram vs. Hakam Singh.***

14. Another submission of learned Advocate appearing on behalf of appellant that mutation was sanctioned in favour of appellant to the extent of 0-2-10 bighas of land and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that mutation does not confer or extinguish any title in suit property. ***See 1996(4) SLJ 2982 HP titled Mohammad Iqbal vs. Government of Indian and others. Also see 1997(1) SLJ 304 H.P. titled Mohar Singh vs. Manjoo. See AIR 1994 SC 1496 titled Naval Shankar Ishwar Lal Dave and another vs. State of Gujarat.*** It is held that Swami Ramji was legally competent to execute sale deed in favour of appellant to the extent of 0-2-0 bighas of land. It is further held that Swami Ramji was not legally entitled to execute sale deed in favour of appellant to the extent of 0-2-10 bighas. It is also held that sale deed to the extent of 10 biswansi in favour of appellant is illegal, null and void abinitio. It is held that only 0-2-0 bighas of land was allotted to Swami Ramji vendor by way of nautor by Sub Divisional Officer (Civil) Sundernagar District Mandi H.P. vide order dated 9.6.1972 Ext.DW2/A placed on record and it is further held that Swami Ramji was legally competent to execute sale deed in favour of appellant to the extent of 0-2-0 bighas only. It is held that learned trial Court has properly appreciated the oral as well as documentary evidence placed on record. Even DW1Tehsildar N.K. Verdhan, DW2 Krishan Chand record keeper, DW3 Devi Singh Field Kanungo and DW4 Tek Chand Patwari have stated in positive manner that only 0-2-0 bighas of land was allotted to Swami Ramji by way of nautor allotment. Testimonies of DW1, DW2, DW3 and DW3 are trustworthy reliable and inspire confidence of Court. There is no reason to disbelieve the testimonies of DW1, DW2, DW3 and DW4. It is held that testimonies of PW1 Charan Dass and PW2 Nand Lal are not sufficient to disbelieve the testimonies of DW1,

DW2, DW3 and DW4 because PW1 Charan Dass vendee and PW2 Nand Lal were not present when 0-2-0 bighas of land was allotted in favour of Swami Ramji by Sub Divisional Officer (Civil) Sundernagar District Mandi on dated 9.6.1972. Appellant did not adduce any positive cogent and reliable evidence on record in order to prove that 0-2-10 bighas of land was allotted to Swami Ramji by any competent authority of law by way of nautor land. On the contrary it is proved by way of positive evidence that only 0-2-0 bighas of land situated in Mohal Tattapani Tehsil Karsog District Mandi was allotted to Swami Ramji by Sub Divisional Officer (Civil) Sundernagar District Mandi H.P. on dated 9.6.1972. Hence point No. 1 of substantial question of law is decided against the appellant.

Findings on point No. 2 of substantial question of law framed by Hon'ble High Court

15. Submission of learned Advocate appearing on behalf of appellant that sale deed in favour of appellant has been misconstrued and misinterpreted by learned trial Court and learned first Appellate Court is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that only 0-2-0 bighas of land was allotted to Swami Ramji by Sub Divisional Officer (Civil) Sundernagar District Mandi vide document Ext.DW2/A on dated 9.6.1972 and it is proved on record that thereafter allotment letter was issued in favour of Swami Ramji Ext.DW2/B wherein only 0-2-0 bighas of land was allotted to Swami Ramji in nautor. It is proved on record that Swami Ramji was owner of 0-2-0 bighas of land only. It is held that Swami Ramji was only competent to execute the sale deed to the extent of 0-2-0 bighas of land and it is further held that sale deed exceeding allotment area is illegal and void abinitio. It is held that appellant has acquired title in suit property to the extent of 0-2-0 bighas of land and it is further held that through sale deed dated 11.3.1987 appellant acquired the title to the extent of 0-2-0 bighas only and it is held that appellant did not acquire title to the extent of 0-2-10 bighas of land. It is held that learned trial Court and learned Appellate Court have rightly interpreted the area of nautor land allotted by Sub Divisional Officer (Civil) Sundernagar District Mandi (H.P.) and it is held that learned trial Court and learned first Appellate Court have rightly interpreted the sale deed in accordance with law and in accordance with proved facts. It is well settled law that concurrent findings of fact is conclusive unless it is arrived at by committing an error of law or of procedure. ***See AIR 1969 SC 1291 titled Gappulal vs. Thakurji Shriji Dwarkadheeshji and another. See AIR 2003 SC 4351 titled Krishna Mohan Kul alias Nani Charan Kul and another vs. Pratima Maity and others. See AIR 2003 SC 4548 titled R.V. E. Venkatachala Gounder vs. Arulmigu Veswesaraswami & V.P. Temple and another.*** Point No.2 of substantial question of law is decided against the appellant.

Findings on point No. 3 of substantial question of law framed by Hon'ble High Court.

16. Submission of learned Advocate appearing on behalf of the appellant that entry in revenue record pertaining to suit land on the basis of sale deed No. 160 dated 11.03.1987 is legal and valid is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that appellant had purchased the land from Swami Ramji. It is proved on record that Swami Ramji was owner of suit land to the extent of 0-2-0 bighas of land as per grant of nautor land granted by Sub Divisional Officer (Civil) Sundernagar District Mandi for construction of Goddess temple. It is held that Swami Ramji was legally competent to execute the sale deed after the expiry of 15 years from the date of allotment in favour of appellant to the extent of 0-2-0 bighas only. It is held that sale deed to the extent of 10 biswansi in favour of appellant is illegal null and void. It is held that only sale deed in favour of appellant to the extent of 0-2-0 bighas is valid operative and binding upon defendants on the concept that vendor could not pass a better title in favour of vendee than he himself possessed. It is held that Swami Ramji had acquired the title to the extent of 0-2-0 bighas of suit land only situated in Mohal Tattapani Tehsil Karsog District Mandi H.P. and

it is further held that Swami Ramji was competent to execute the sale deed in favour of appellant to the extent of 0-2-0 bighas only. It is held that sale deed to the extent of 0-2-0 bighas in favour of appellant is valid operative and binding upon the defendants.

17. Another submission of learned Advocate appearing on behalf of appellant that no notice was given to appellant by A.C. 2nd Grade when correction was ordered and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned because learned trial Court and learned first Appellate Court have passed the decree of injunction in favour of appellant Charan Dass and against the defendants to the effect that defendants would not interfere in excess land measuring 0-0-10 bighas except in due course of law. Point No.3 of substantial question of law is decided accordingly.

18. In view of above findings it is held that judgments and decrees passed by learned trial Court and affirmed by learned first Appellate Court are in accordance with law and in accordance with proved facts. Appeal filed by appellant is dismissed with no order as to costs. The Registrar (Judicial) will prepare decree sheet as required under Section 100 of Code of Civil Procedure 1908. File of learned trial Court and learned first Appellate Court be sent back forthwith along with certified copy of this judgment and decree. Appeal stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

****

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

ITA No.43 of 2009 alongwith ITAs No.44, 45,46, 49 and 51 of 2009.
Judgment reserved on : 07.04.2015.
Date of decision: April 23, 2015.

1. ITA No.43 of 2009.
Commissioner of Income Tax .....Appellant.
Versus
M/s Shree Triveni Foods .....Respondent.

2. ITA No.44 of 2009.
Commissioner of Income Tax .....Appellant.
Versus
M/s Shree Triveni Foods .....Respondent.

3. ITA No.45 of 2009.
Commissioner of Income Tax .....Appellant.
Versus
M/s Shree Triveni Foods .....Respondent.

4. ITA No.46 of 2009.
Commissioner of Income Tax .....Appellant.
Versus
M/s Shree Triveni Foods .....Respondent.

5. ITA No.49 of 2009.
Commissioner of Income Tax .....Appellant.
Versus
M/s Shree Triveni Foods .....Respondent.

6. ITA No.51 of 2009.

Commissioner of Income Tax .....Appellant.

Versus

M/s Shree Triveni Foods .....Respondent.

Income Tax Act, 1961- Section 80IB(4)- Assessee is engaged in the manufacturing of various products- assessee claimed deduction under Section 80 IB which was disallowed on the ground that process of making daliya and besan did not amount to manufacture- assessee filed an appeal before ITAT which was allowed and it was held that necessary conditions for grant of deduction under Section 80 IB were satisfied- held, that gram Dal loses its shape and identification when it is converted into flour- product can be said to be different from gram dal – gram dal and besan are treated as different commercial products- process of converting gram dal into besan amounts to manufacture and assessee is entitled to deduction under Section 80IB(4). (Para- 2 to 16)

Income Tax Act, 1961- Section 80IB (2)(iv)- Assessing Officer held that assessee had not employed 10 or more workers in the manufacturing process though at a given time the assessee had more than 10 workers out of whom 4 workers were engaged in two trucks owned by assessee- held, that once it was established that assessee had not employed 10 or more workers during the substantial part of year, assessee is not entitled for the benefit of deduction under Section 80IB (2)(iv). (Para-22 to 26)

Cases referred:

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

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

Commissioner of Income Tax versus Pawan Aggarwal 2014 (3) HLR 1981

Idandas versus Anant Ram Chandra Phadke (dead) by L.Rs., AIR 1982 SC 127

Commissioner of Income Tax versus Sree Senha Valli Textiles P. Ltd., [2003] 259 I.T.R. 77

For the Appellant : Mr. Vinay Kuthiala, Senior Advocate with Ms.Vandana Kuthiala, Advocate, in all the appeals.

For the Respondent : Mr.Vishal Mohan, Advocate and Mr.Aditya Sood, Advocate, in all the appeals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The following substantial questions of law are common in all the appeals:-

"1. Whether the conversion of gram Dal into Besan powder, by a process of mere roasting and grinding, amounts to manufacture and consequently, whether the profits derived from this process are eligible for deduction under Section 80IB(4) of the Income Tax Act?

2. Whether the profits eligible for deduction under Section 80IB (4) of the Income Tax Act are necessarily to be computed after allowing depreciation under Section 32?

Whereas, the following question of law is common in ITA No.49 and 51 of 2009:-

ITA No.49 of 2009.

"3. Whether the condition of ten or more workers to be employed in the manufacturing process, as specified in section 80IB(2)(iv) could be said to be complied with, especially when ten or more workers were actually engaged on only 73 days during the entire year."

Though the same question arises for determination in ITA No.51 of 2009, however, the same has been framed differently and reads thus:-

ITA No.51 of 2009.

"Whether the mandate of section 80IB(2)(iv) is complied with even if 10 or more workers are employed for only 73 days in a year?"

The aforesaid substantial questions of law would hereinafter be referred to as questions No.1 to 3.

Question No.1.

2. The assessee is engaged in manufacturing of various food products like soya nuggests, besan, vermicelli and instant daliya. It commenced commercial production on 19.03.1999 as per the certificate granted by the Department of Industries.

3. For the assessment year 2000-01 to 2004-05, the assessee filed returns of income claiming the entire profits as deduction under Section 80IB of the Income Tax Act, 1961, (for short the 'Act'). For the assessment year 2003-04, the assessee filed return of income declaring total income at nil after claiming deduction under Section 80IB at `33.11 lacs. Subsequently, the assessment made for the assessment year 2001-02 was set aside by the CIT vide order dated 04.03.2005 under Section 263 of the Act in which the CIT held that the Assessing Officer had wrongly allowed deduction under Section 80IB. While regular assessment proceedings for assessment year 2001-02 were started, assessment proceedings under Section 147 were initiated for assessment year 2000-01 and 2002-03. Regular assessment was also made for assessment year 2003-04 and 2004-05. Assessment for the assessment year 2003-04 in this case was completed under Section 143(3) on 30.03.2006. In all these five assessments the claim of deduction under Section 80IB was disallowed on various grounds including the ground that the process of making daliya and besan did not amount to manufacture.

4. The Assessing Officer also held in the assessment that though the assessee had not claimed depreciation in assessment year 2000-01 and 2001-02, the same should be allowed while computing the eligible profits and the depreciation allowable alongwith WDV to be carried forward in each of the years was recomputed in the assessments made.

5. Appeal filed by the assessee before the CIT (A) was dismissed vide order dated 17.10.2007 passed in Appeal No.IT/81/2006-07/SML. The CIT (A) held that in all the years the making of daliya and besan did not amount to manufacture and it also held that the assessee should be allowed depreciation even if it had not claimed the same.

6. The assessee filed appeal before the ITAT, who allowed the same by holding that all the necessary conditions for grant of deduction under Section 80IB were satisfied. On the issue of manufacturing, the ITAT relied its own decision in the case of Indus Cosmeceuticals which related to manufacture of herbal heena powder from heena leaves and was held to be a manufacturing activity. This decision in turn has already been upheld by this Court in a bunch of appeals, the lead case being ITA No.28 of 2009, titled as Commissioner of Income Tax, Shimla versus M/s Indus Cosmeceuticals, decided on 18.11.2014.

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

7. The learned counsel for the revenue has vehemently argued that unlike heena which undergoes various processes like drying, mixing and grinding etc., no such process is undertaken for converting gram Dal into Besan except the process of grinding. Therefore, these activities do not amount to manufacture and the assessee, therefore, is not entitled to the deduction under Section 80IB.

8. In support of his contention, he has relied upon judgment of Madras High Court in **Commissioner of Income-Tax** vs. **Sacs Eagles Chicory [2000] 241 I.T.R. 319** as affirmed by the Hon'ble Supreme Court vide judgment reported in **[2002] 255 I.T.R. 178** titled **Sacs Eagles Chicory** vs. **Commissioner of Income Tax** and a judgment of this Court in **ITA No. 27 of 2005** titled **Mrs. Poonam Arora** vs. **Income Tax Officer and others,** decided on 14.10.2009.

9. In **Sacs Eagles Chicory** case (supra), the Madras High Court was dealing with the case, wherein chicory roots were being converted into chicory powder by simply grinding them and on such basis it was held that there was no manufacturing activity. Notably the judgment of the Madras High Court was challenged by the assessee before the Hon'ble Supreme Court in case reported as **Sacs Eagles Chicory** (supra), wherein the Hon'ble Supreme Court observed as under:-

> ***"The question to be considered reads thus (see [2000] 241 ITR 319, 320):***
>
> ***Whether, on the facts and in the circumstances of the case, the assessee- firm is an industrial undertaking eligible for deduction under Sections 80HH, 80-I and 80-J of the Income Tax Act, 1961? "***
>
> ***All that is on record in regard to the "process" that the assessee carries on is stated in the order of the Appellate Assistant Commissioner of Income Tax thus:***
>
> ***"But if an analysis of the activity of making powder from the chicory roots is made, it will be found out that there are only two processes in making the powder from chicory roots: (i) roots are roasted, and (ii) after that they are powdered."***
>
> ***We have asked learned counsel for the assessee whether there is anything else that describes the process. There is apparently nothing else. If that is the only process, it does not satisfy the test laid down by this Court in Aspinwall and Co. Ltd. v. CIT [2001] 251 ITR 323."***

10. In so far as **Poonam Arora** case (supra) is concerned, this Court had categorically come to the conclusion that mere process of roasting of raw groundnut seeds into groundnut did not amount to manufacture as no new and distinct product came into existence.

11. Now, in case the facts of the present case are seen, the ITAT after considering its own observations in the case of M/s Indus Cosmeceuticals held the activity of converting Besan from gram Dal amounted to manufacture by according the following reasons:-

"If the facts of the aforesaid case, cases relied upon therein are kept in juxtaposition with the facts of the present appeal, we have found that for manufacturing the end products, the assessee is doing a systemic activity with the help of manpower and machine. The raw product like soya atta, besan are mixed in pre determined quantity, and after mixing with other items these are mixed with the help of manpower and machine, thereafter mixed with liquid & different shapes are given and thereafter after drying process, it is packed, the end product is commercially known differently. Similar is the situation for vermicelli. For producing instant dalia, the whole process is well known. There is no denying the fact that use of end product is altogether different and it is known differently in commercial world. Even otherwise, the shape and size and use is altogether different from its raw material and also known differently in the commercial world, therefore, it can be said that it is an manufacturing activity."

12. Indisputably, the word 'manufacture' was not defined under the Act and came to be introduced, for the first time, by insertion of Section 2 (29BA) of the Finance (No.2) Act, 2009, introduced with effect from 01.04.2009 which reads as follows:-

"***29BA – "manufacture", with its grammatical variations, means a change in a non-living physical object or article or thing, -***

(a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or

(b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure."

Though, this amendment was introduced only with effect from 01.04.2009 while we are dealing with the assessments prior to 01.04.2009, yet the same would be of relevance since the definition itself apart from being based on the dictionary meaning has embodied in itself the meaning as had been assigned to the word by various judicial pronouncements.

13. What amounts to manufacture has been dealt with in detail by this Court in **Commissioner of Income Tax** versus **Pawan Aggarwal 2014 (3) HLR 1981** and thereafter elaborately discussed in **ITA No.28 of 2009** titled **Commissioner of Income Tax** versus **M/s Indus Cosmeceuticals**. However, we need not fall back only upon these decisions to answer the question in view of the judgment of the Hon'ble Supreme Court in **Idandas** *versus* **Anant Ram Chandra Phadke (dead) by L.Rs., AIR 1982 SC 127** which is far more closer to the issue involved in this lis. Therein the question before the Hon'ble Supreme Court related to a lease under Section 106 of the Transfer of Property Act and the precise question was as to whether the lease was for a manufacturing process. The following tests for determining whether a lease for running flour mill had been granted for the purpose of manufacturing process were culled out:-

"1. That it must be proved that a certain commodity was produced;

2. That the process of production must involve either labour or machinery;

3. That the end product which comes into existence after the manufacturing process is complete, should have a different name and should be put to different use. In other words, the commodity should be so transformed so as to lose its original character."

14. It was thereafter held that wheat was transformed into flour by the manufacturing process which involved both labour and machinery. The commodity before manufacture was wheat which could not be consumed by any human being but would be used only for cattle or medicines or similar other purposes. Thereafter, in order to come to the conclusion that the conversion of wheat into wheat flour amounted to manufacturing process, the Hon'ble Supreme Court recorded following reasons:-

"11. In the instant case what happened was that wheat was transformed, by the manufacturing process which involved both labour and machinery, into flour. The commodity before manufacture was wheat which could not be consumed by any human being but would be used only for cattle or medicine or other similar purposes. The end product would be flour which was fit for human consumption and is used by all persons and its complexion has been completely changed. The name of the commodity after the product came into existence is Atta and not Gehun (wheat). Thus in the instant case all the three tests have been fully satisfied. This being the position the irresistible inference and the inescapable conclusion would be that the present lease was one for manufacturing purposes. In this view of the matter, the notice of one month must be held to be invalid and suit for ejectment should have failed on that ground."

15. Applying the aforesaid tests to the instant case, it can conveniently be held that converting gram Dal into Besan will amount to manufacturing process because:

i) gram Dal loses its shape and identification as in the case of wheat which is converted into flour;

ii) the end product i.e. Besan can be said to be different from that of gram Dal. It is through process of labour and machinery that Besan is produced;

iii) Gram Dal and Besan are treated as different commercial products.

16. Indisputably, gram Dal also undergoes same process for being converted into Besan which is undergone by the wheat for manufacturing wheat flour. In view of the aforesaid, it can safely be concluded that conversion of gram Dal into Besan amounts to manufacture and consequently the assessee is entitled to the deduction under Section 80IB(4) of the Income Tax Act.

Question No.2.

17. Section 80IB (4) of the Act reads thus:-

"Deduction in respect of profits and gains from certain industrial undertaking other than infrastructure development undertaking.

80-IB. (1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-section (3)

to [(11), (11A) and (11B)] (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section.

(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely:-

(i).....

(ii).....

(iii).....

(iv).....

(3).....

(i).....

(ii).....

(4) The amount of deduction in the case of an industrial undertaking in an industrially backward State specified in the Eighth Schedule shall be hundred per cent of the profits and gains derived from such industrial undertaking for five assessment years beginning with the initial assessment year and thereafter twenty-five per cent (or thirty percent where the assessee is a company) of the profits and gains derived from such industrial undertaking:

Provided that the total period of deduction does not exceed ten consecutive assessment years (or twelve consecutive assessment years where the assessee is a co-operative society) subject to fulfilment of the condition that it begins to manufacture or produce articles or things or to operate its cold storage plant or plants during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March [2004].

Provided further that in the case of such industries in the North-Eastern Region, as may be notified by the Central Government, the amount of deduction shall be hundred per cent of profits and gains for a period of ten assessment years, and the total period of deduction shall in such a case not exceed ten assessment years:

Provided also that no deduction under this sub-section shall be allowed for the assessment year beginning on the 1st day of April, 2004 or any subsequent year to any undertaking or enterprise referred to in sub-section(2) of section 80-IC:]

Provided also that in the case of an industrial undertaking in the State of Jammu and Kashmir, the provisions of the first proviso shall have effect as if for the figures, letters and words "31st day of March, 2004", the figures, letters and words "31st day of March, [2012) had been substituted:

Provided also that no deduction under this sub-section shall be allowed to an industrial undertaking in the State of Jammu and Kashmir which is engaged in the manufacture or production of any article or thing specified in Part C of the Thirteenth Schedule.]"

18. It is vehemently argued by learned counsel for the revenue that, no doubt, the allowance of depreciation was made mandatory under explanation 5 to Section 32(i) (ii) with effect from the assessment year 2002-03. However, the profits eligible for deduction under Chapter VIA including Section 80IB can only be computed after allowing all deductions under Sections 29 to 43A as all these Sections in this Chapter comprise of independent codes of computation. Therefore, the eligible profits in the instant cases were required to be computed yearwise after deducting depreciation and the written down value of assets carried forward in the subsequent years would then change accordingly. The net result would then be that when profits of assessee become taxable in a subsequent year, the claim of depreciation in those years would stand reduced.

19. It is not in dispute that the allowance of depreciation was made mandatory only with effect from the assessment year 2002-03 and it is the case of the revenue that assessee has not established its business for the other assessment years. The contention on behalf of the assessee is that the assessee had not claimed any deprecation on fixed assets in the books of accounts so as to claim higher deduction under Section 80IB. The revenue never disputed this claim of the assessee and failed to establish that the interest of the revenue has been adversely affected.

20. As per the admitted case of the revenue itself, the assessee was entitled to depreciation allowance only from April 1, 2002 and, therefore, amendment did not apply to the earlier years. For coming to such conclusion, we may conveniently rely upon the Division Bench judgment of the Madras High Court in **Commissioner of Income Tax** versus **Sree Senha Valli Textiles P. Ltd., [2003] 259 I.T.R. 77** wherein it was held as under:-

"The question referred to us at the instance of the revenue is,

"Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in upholding the order of the Commissioner (Appeals) holding that the depreciation should not be allowed to the assessee since he has specifically withdrawn the claim for depreciation by filing revised return?"

The assessment year is 1988-89.

The Supreme Court in the case of CIT v. Mahendra Mills (2000) 243 ITR 56, has held that if the revised return filed by the assessee is a valid return and the assessee has withdrawn the claim for depreciation that it had made in the original return, then the assessment based on the revised return without considering the claim for depreciation would be a proper assessment. The court observed that the privilege of claiming depreciation cannot be converted into a disadvantage, and the option cannot become an obligation.

Though after that judgment was rendered by the Apex Court, Explanation 5 was inserted in section 32(1) of the Income Tax Act, 1961, by the Finance Act 2001, with effect from April 1, 2002, declaring that "for the removal of doubts" the provisions of sub-section (1) will apply whether or not the assessee claims deduction in respect of depreciation

in computing his total income, that Explanation cannot be regarded as taking away the effect of the judgment of the Supreme Court for the years prior to the date of introduction of the Explanation. The law declared by the Supreme Court cannot be regarded as having merely raised doubts. The interpretation of the relevant provisions of the Act by the Apex Court settles the law, and unless the subsequent amendment to the statute is expressly given retrospective effect, the law laid down by the Apex Court will remain the binding law for the period prior to the amendment. The newly added Explanation takes effect only on and from April 1, 2002, and will not be applicable for prior years."

21. In view of the aforesaid discussion, it is held that the profits eligible for deduction under Section 80IB (4) of the Act though are necessarily to be computed after allowing depreciation under Section 32 of the Act, but the same would apply only from April 1, 2002, when the amendment came into force and will not apply to earlier years.

Question No.3.

22. Section 80IB (2) (iv) of the Act reads thus:-

"Deduction in respect of profits and gains from certain industrial undertaking other than infrastructure development undertaking.

80-IB. (1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-section (3) to [(11), (11A) and (11B)] (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section.

(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely:-

(i).....

(ii).....

(iii).....

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

23. A bare perusal of Section 80IB (2) (iv) would show that for claiming deduction under this sub-section an industrial undertaking is required to employ 10 or more workers in a manufacturing process carried on with the aid of power. The Assessing Officer came to the conclusion that the assessee had not employed 10 or more workers in the manufacturing process though at a given time the assessee was having more than 10 workers out of whom four employees had been engaged in the two trucks owned by the assessee i.e. two drivers, two cleaners and in case these four workers were excluded, then the assessee at all given times had employed 6 to 9 workers. Though in the reply, the assessee disputed the fact that the

drivers and cleaners were not included in the employees list, but then this reply was not found acceptable by the Assessing Officer because the assessee did not deny having two trucks which were used to transport the goods to the premises of customers. Moreover, no receipts have been shown in P & L Account. It was concluded that obviously the trucks could not run without the drivers/conductors/helpers and in absence of any separate driver/cleaner, only inference that could be drawn was that it was the employees shown to be engaged in the manufacturing process who had infact been employed as drivers/conductors/helpers with the trucks. These findings were arrived at after perusing the records which had been produced before the Assessing Officer.

24. The Commissioner of Income Tax affirmed these findings, however, when the matter reached in ITAT, the findings recorded by both the learned authorities below were set aside on the ground that for getting relief under Section 80IB, there must be substantial compliance whereby an undertaking must have employed 10 or more workers substantially during the period for which the claim was made and further that there was no hard and fast rule by which one could determine whether there has been substantial compliance because it is for the authority and the Court to decide based on the facts before it.

25. Similar question regarding substantial compliance fell for consideration before this Bench in **ITA No.28 of 2009** in case titled **Commissioner of Income Tax** versus **M/s Indus Cosmeceuticals** (supra) wherein this Court held as under:-

> ***"7.....Further even the finding that there was substantial compliance when there were 13 employees entered in the attendance register is absolutely erroneous in teeth of the findings recorded by A.O. against which findings there was no contradiction or rebuttal on behalf of the assessee.***
>
> ***8. In M/s Amrit Rubber Industries vs. Commissioner of Income Tax, ITA Nos. 32 of 2004 and 33 of 2004 decided on 30.9.2010, this court was dealing with the interpretation of section 80IA(2) (v), which reads as follows:-***
>
> > ***"(v) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power."***
>
> ***Therein, in one of the appeals, the assessee had employed ten or more workers only for two months, while in the other case only for six months and this court held that this could not be deemed to fulfill the requirements of section as the employment had to be for a substantial part of a year. It was held as follows:-***
>
> > ***"3. It is not disputed before us that in one of the appeal, ten or more workers were employed only for two months and in the other, only for six months. This cannot be deemed to fulfill the requirements of the aforesaid clause of Section 80-IA. The employment has to be for a substantial part of a year and employment for two months and six months cannot be termed to be employment for a substantial part of the year.***

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

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

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

26. Once, it is established that the assessee had not employed 10 or more workers during the substantial part of the year, we are left with no other option but to answer the question in favour of the revenue and against the assessee.

27. Resultantly, questions No.1 and 2 are answered in favour of the assessee while question No.3 is answered in favour of the revenue. Accordingly, all the appeals are disposed of in the aforesaid terms leaving the parties to bear their own costs. The Registry is directed to place a copy of this judgment on the files of connected matters.

****

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

Deu Bhan Buda .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 231 of 2012
Reserved on: April 22, 2015.
Decided on: April 23, 2015.

N.D.P.S. Act, 1985- Section 20- Petitioner was apprehended with a bag- the bag was opened and was found to be containing 4 kg. of charas- register No. 19 regarding the deposit and taking out of the case property was not paginated which casts doubt, whether the case property was ever deposited in the malkhana and was taken out for chemical analysis- PW-7 was sent to bring independent witness but he could not find any person which was highly unbelievable - no passengers of the vehicle was associated- held, that in these circumstances, prosecution version was not proved. (Para-13 to 18)

For the appellant: Mr. Malay Kaushal, Advocate.

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

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 26.3.2012/28.3.2012, rendered by the learned Special Judge, Kullu, Distt. Kullu, H.P, in Sessions Trial No. 22 of 2011, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 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 24.2.2011, the police party was present at village Suma Chalon in connection with patrolling and Nakabandi vide rapat No. PW-1/A at about 6:30 AM. The police party saw the accused coming from Manikaran side who was going towards Jari side. The accused on seeing the police party, turned back and tried to escape. He was apprehended. PW-8 ASI Dhiraj Kumar asked about the antecedents of the accused. The police officials asked him as to what was he carrying on his back. The accused put the bag on the road. PW-7 Const. Kuldeep Singh was sent to nearby place to search for independent witnesses, but he returned to the spot without independent witnesses. PW-5 Const. Pritam Singh and Const. Munish were associated as witnesses. The bag was searched. It contained charas weighing 4.00 Kgs. The charas was again put in the same polythene bag and thereafter in red colour carry bag and again put in the backpack. The parcel containing backpack was sealed with seal "T" at ten places. Specimen of seal "T" Ext. PW-5/B was also taken. The sealed parcel was taken into possession vide memo Ext. PW-5/C. The I.O. prepared rukka Ext. PW-8/A and sent the same to the Police Station Kullu through PW-7 Const. Kuldeep Kumar. On receipt of the rukka Ext. PW-8/A, PW-2 SHO Sher Singh registered FIR Ext. PW-2/A. The I.O. produced the case property before PW-2 SHO Sher Singh, PS Sadar, who resealed the same. SHO Sher Singh deposited the case property alongwith the relevant documents with PW-3 MHC Ram Krishan of PS Kullu. PW-3 Ram Krishan entered the case property in malkhana register at Sr. No. 13. The abstract of the register is Ext. PW-4/A. The special report was also sent. The case property was sent for chemical analysis, vide RC Ext. PW-4/B. The report of the FSL is Ext. PW-2/D. 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 8 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case. He produced three defence witnesses. The learned trial Court convicted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Malay Kaushal, 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. Advocate General for the State has supported the judgment of the learned trial Court dated 26.3.2012.

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

6. PW-1 Const. Inder Singh has proved rapat Ext. PW-1/A.

7. PW-2 SHO Sher Singh, deposed that he received rukka from ASI Dhiraj Singh through Const. Kuldeep Singh. He registered FIR Ext. PW-2/A. He also prepared the case file. On the same day, i.e. on 24.2.2011 at 1:30 PM, ASI Dhiraj Kumar produced the case property before him including a parcel containing seals of impression "T". He resealed the parcel by affixing four seal impressions of seal "S". He filled in the relevant columns of NCB I form Ext. PW-2/B. He also prepared samples of seal "S" and one such sample is Ext. PW-2/C. He handed over the case property to MHC with the direction to deposit the same in the malkhana. After the receipt of the report of the Chemical Examiner Ext. PW-2/D, he prepared the challan and presented the same in the Court. In his cross-examination, he admitted that Ext. PW-2/C was not having any FIR number.

8. PW-4 MHC Ram Krishan, deposed that Inspector SHO Sher Singh handed over a parcel to him. It was containing charas sealed with ten impressions of seal "T" and four impressions of seal "S" alongwith sample seal, NCB I form, photo copy of seizure memo etc. He deposited the case property and relevant documents after making entry in the relevant register at Sr. No. 13. He proved extract of the register Ext. PW-4/A. He handed over the case property to Const. Vishwanath vide RC No. 60 of 2011 Ext. PW-4/B on 25.2.2011 for depositing the same at FSL, Junga. The Constable after depositing the same at FSL, Junga returned the receipt to him. In his cross-examination, he admitted that on the front page of the register, it is written as Zila Malkhana Register. Volunteered that all the entries in this register pertain to PS Kullu and not District Malkhana. He also admitted that nine pages were left blank in this register after closing the entries in respect of 2010 in the month of October. He also admitted that the register was not paginated and there was no certificate regarding page numbers in the register. He also admitted that in column No. 3, the name of the person who deposited the case property, his name was to be incorporated. The name of the I.O. has been mentioned in column No. 3 against entry No. 13.

9. PW-5 Const. Pritam Singh deposed the manner in which the accused was apprehended, contraband was seized and sealing process was completed. According to him, the accused was apprehended at an isolated place. There was no vehicular traffic on the road and Const. Kuldeep Singh was sent to nearby place in search of independent witnesses. The Constable returned to the spot after 15-20 minutes without independent witness. Thus, I.O. associated him and Const. Munish Kumar as witnesses. In his cross-examination, he deposed that there was no house at Suma Chalon. Volunteered that Suma Chalon is forest area and actual village name is Suma Ropa. Village Suma Ropa is about 300 meters away from Suma Chalon. He also admitted that at Suma Ropa, there is one open shed of NHPC Project and there are 5-6 houses behind that shed. He also admitted that those houses are inhabited. Volunteered that the place was far away from Suma Chalon. Const. Kuldeep Kumar was sent towards village Suma Ropa by the I.O. He was not given any written directions to bring the Panch witnesses to the spot. One big hotel called Sanjha Chula is about ½ km. from Jari. There are early hour bus services from Manikaran to various places of different transport services. Volunteered that at that time, no vehicular traffic was there. He also admitted that Manikaran is a big pilgrimage spot and many pilgrims uses to visit that place. He also admitted that there is big construction work of hydel project at Barshaini going on day and night. He also admitted that trucks and tipper carrying the construction material used to go to Barshaini day and night.

10. PW-6 Const. Vishwanath deposed that MHC Ram Krishan handed over the case property i.e. pulinda sealed with ten impressions of seal "T" and five impressions of seal "S" containing 4 Kg of charas including docket No. 1126 to him with direction to deposit the same at FSL, Junga. He deposited the case property and other documents at FSL, Junga on

26.2.2011 and obtained the receipt from the concerned official. On his return from FSL, Junga, he handed over the receipt to MHC of the Police Station.

11. PW-7 Const. Kuldeep Singh, also deposed the manner in which the accused was apprehended, searched and contraband was seized on 24.2.2011. In his examination-in-chief, he deposed that there was no vehicular traffic at that time, nor any villagers or other person were passing through that road so, ASI Dhiraj directed him to search for independent witnesses towards village Suma Ropa. He remained at village for 15 minutes, but could not find any person there. He then returned back. He told ASI that he could not find any person at the village. The I.O. associated Const. Pritam Singh and Const. Munish Kumar as witnesses. In his cross-examination, he admitted that Sanjha Chulha Resort is about 300 meters away from PP Jari. Suma Challon is about 700 meters from Sanjha Chulha. Suma Ropa is about 1 km away from the place Suma Challon. He did not go towards village Suma Ropa of his own but he went to that village as per the directions of the ASI. There were about 4-5 houses at village Suma Ropa.

12. PW-8 ASI Dhiraj Singh, is the I.O. He also deposed the manner in which the accused was apprehended, searched and contraband weighing 4 kg. was seized and sealing process was completed on the spot on 24.2.2011. The backpack was taken into possession vide recovery memo Ext. PW-5/C. He prepared rukka Ext. PW-8/A. it was handed over to Const. Kuldeep Kumar with direction to go to the Police Station. The accused was arrested. He submitted the case property before the SHO Sher Singh. He resealed the pulinda and handed over the same and other relevant documents to MHC. He prepared special report Ext. PW-3/B. In his cross-examination, he admitted that Suma Chalon starts 200 meters away from Sanjha Chulha complex and ends at the start of the village Suma Ropa. He sent Const. Kuldeep to search for independent witnesses, but did not give any specific instruction to go to particular village for the search of the witnesses. He only instructed Constable Kuldeep to search for independent witnesses.

13. Mr. Malay Kaushal, Advocate, for the accused has drawn the attention of the Court to malkhana register Ext. PW-4/A. It has no pagination and there is also no certificate regarding page numbers in the register. PW-4 MHC Ram Krishan has categorically admitted in his cross-examination that nine pages were left blank in the register after closing the entries in respect of 2010 in the month of October. He also admitted that the register was not paginated and there was no certificate regarding page numbers in the register.

14. PW-2 Sher Singh, has resealed the case property. He has admitted in his cross-examination that Ext. PW-2/C was not having any FIR number. It was necessary to mention the FIR number on Ext. PW-2/C since seal impression “S” was taken upon it. The malkhana register should always be paginated to ensure the safe deposit of the case property. The case property is required to be deposited in the malkhana by the SHO concerned and thereafter it is taken out and sent to FSL. It is again required to be put back in the malkhana by making appropriate entries after receiving the case property from FSL. The case property at the time of production before the Court is also required to be taken out from the malkhana and corresponding entry is required to be made and when the case property is returned back after producing the same before the Court, it is to be deposited again in the malkhana. The malkhana register is very important document and there is no evidentiary value of the extract of the malkhana register Ext. PW-4/A, since it has not been paginated and no certificate regarding page numbers is there in the register.

15. Para 22.70 of the Punjab Police Rules, 1934, as applicable to the State of H.P. reads as under:

"22.70. Register No. XIX- This register shall be maintained in Form 22.70.

With the exception of articles already included in register No. XVI every article placed in the store-room shall be entered in this register and the removal of any such article shall be noted in the appropriate column.

The register may be destroyed three years after the date of the last entry."

16. The register is to be maintained in Form 22.70. It reads as under.

"**FORM NO. 22.70.**

POLICE STATION_____ ____DISTRICT

Register No. XIX.-Store-Room Register (Part-I)

Column 1.- Serial No.

2. No. of first information report (if any), from whom taken (if taken from a person), and from what place.
3. Date of deposit and name of depositor.
4. Description of property.
5. Reference to report asking for order regarding disposal of property.
6. How disposed of and date.
7. Signature of recipient (including person by whom dispatched).
8. Remarks.

(To be prepared on a quarter sheet of native paper)."

17. In the instant case, there is no register No. XIX on Ext. PW-4/A nor it is in the prescribed form. Ext. PW-4/A could easily be fabricated and manipulated. It casts doubt whether the case property was ever deposited in the malkhana register and taken out for its chemical analysis. The accused has definitely been prejudiced. Since the malkhana register is not in accordance with law, it cannot be said definitely that the case property which was seized from the accused was deposited in the malkhana and sent to the FSL and received back as such.

18. The accused was apprehended on 24.2.2011 at 6:30 AM. The case of the prosecution, in a nut shell, is that the place where the accused was apprehended was a secluded and isolated place and no independent witness was available at the time of search and sealing operation. PW-5 Const. Pritam Singh, in his examination-in-chief, has deposed that there was no vehicular traffic on the road and the accused was apprehended at an isolated place. Const. Kuldeep Singh was sent to nearby place in search of independent witnesses. The Constable returned to the spot after 15-20 minutes. In his cross-examination, he has admitted that at place Suma Ropa, there is one open shed of NHPC Project and there are 5-6 houses behind it. Those houses were inhabited. PW-7 Const. Kuldeep Singh, was sent to bring independent witnesses by PW-8 ASI Dhiraj Singh. According to PW-7 Const. Kuldeep Singh, ASI Dhiraj Singh directed him to search for independent witnesses towards village Suma Ropa. He remained at village for 15 minutes but could not find any person there. It is not believable that there was no person available in village Soma Ropa. The police party had gone to check the vehicles. The very purpose for which the police had laid Naka presupposes that there was heavy vehicular traffic on the road. Surprisingly, the police has not associated any independent witnesses. PW-5 Const. Pritam Singh, in his cross-examination has admitted that there were early hour bus services from Manikaran to various places of different transport services. He also admitted that Manikaran is a big pilgrimage spot and many pilgrims visit that place. He also admitted

that there is big construction work of hydel project at Barshaini going on, day and night. It is not one of those cases where the independent witnesses were not available but in the instant case, independent witnesses could be associated from the nearby village Suma Ropa. In Suma Ropa, there were 5-6 inhabited houses situated, as per the statement of PW-7 Const. Kuldeep Singh. PW-7 Const. Kuldeep Singh has categorically admitted in his cross-examination that he remained in village for 15 minutes but could not find any person. This version of PW-7 Const. Kuldeep Singh cannot be believed.

19. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 20 of the N.D & P.S., Act.

20. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 26.3.2012/28.3.2012, rendered by the learned Special Judge, Kullu, H.P., in Sessions trial No. 22 of 2011, is set aside. Accused is acquitted of the charges framed against him by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

****

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

Indian Technomac Company Ltd. ....Petitioner
versus
State of H.P. & others ....Non-Petitioners.

Cr.MMO No. 287 of 2014
Decided on: 23.4.2015.

Code of Criminal Procedure, 1973- Section 482- Matter stands compromised between the parties- therefore, petition dismissed as withdrawn.

For the petitioner : Mr. H.S. Rana, Advocate.
For the non-petitioner: Mr. J.S. Rana, Assistant Advocate General, for respondent No.1.
Mr. Ramakant Sharma, Advocate, vice counsel, for respondents No. 3 and 4.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocate appearing on behalf of the petitioner submitted that compromise already stood executed inter-se the parties and now petitioner does not want to continue the present petition and same be dismissed as withdrawn. In view of the above

stated facts present petition is dismissed as withdrawn. Petition filed under Section 482 Code of Criminal Procedure 1973 disposed of. Pending applications if any also disposed of.

****

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

Rajbir Singh ..... Petitioner.
Vs.
State of H.P. & ors. ..... Respondenst

Cr.MMO No. 75 of 2015.
Date of decision: 23.4.2015.

Code of Criminal Procedure, 1973- Section 482- Applicant sought permission to go abroad on the ground that his son was working in Australia and the applicant and his wife intended to visit him- application was opposed on the ground that investigation against the applicant was continuing and in case, applicant is permitted to go to abroad, he would not return and the investigation would be hampered- held, that right of travel and go outside the country is a fundamental right- petitioner is working as ticket verifier in Haryana Roadways- he has roots in India- therefore, petitioner permitted to go to abroad subject to certain conditions.

(Para-6 and 7)

Case referred:
Meneka Gandhi vs. Union of India and another (1978) 1 SCC 248

For the petitioner : Mr. Ashok Kumar Tyagi, Advocate.
For the respondents : Mr. Virender Kumar Verma and Mr. Rupinder Singh, Addl. A.Gs. with Ms. Parul Negi, Dy.A.G.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

By medium of this application, preferred under section 482 of the Code of Criminal Procedure, the petitioner has sought permission to go abroad.

2. The petitioner is an accused in FIR No. 43 of 2013 registered against him on 27.9.2013, under sections 407 and 120-B IPC at Police Station, Kotkhai. Vide orders dated 17.5.2014, this court directed the release of the petitioner on bail subject to certain conditions.

3. It is stated by the petitioner that his younger son Samay Deep is working in Australia and he alongwith his wife intended to visit him there. In support of his submission, he has annexed the statutory declaration as also copy of the pass-port.

4. Upon notice to the respondents, this application has been opposed only on the ground that investigation has not been completed and the main accused Girish Diwakar is yet to be arrested. It is further contended that at present there is no sufficient evidence to file the challan against the petitioner, but final decision can only be taken once the main accused is arrested. Lastly, it is contended that in case the petitioner is permitted to leave the country, he may not return, which may hamper the investigation.

5. I have heard the learned counsel for the parties and given my thoughtful consideration to the rival contentions of the parties.

6. Even as per the respondents, it is not in dispute that the main accused in this case is one Girish Diwakar, who still is at large. It is also not in dispute that petitioner is working as TVF (Ticket verifier) in Haryana Roadways, which is a government undertaking. It is also not in dispute that the trial of the case is yet to commence for want of submission of charge-sheet, which can only be filed after the main accused is apprehended. But then, can the travel of the petitioner be withheld indefinitely? The answer is obviously in the negative as the same would otherwise be violative of his Fundamental Right. The Hon'ble Supreme Court in **Meneka Gandhi** vs. **Union of India and another (1978) 1 SCC 248,** has held as follows:

> *"193. It seems to me that there can be little doubt that the right to travel and to go outside the country, which orders regulating issue, suspension or impounding, and cancellation of passports directly affect, must be included in rights to "personal liberty" on the strength of decisions of this Court giving a very wide ambit to the right to personal liberty (see: Satwant Singh Sawhney v. D. Ramarathnam, Assistant Passport Officer, Government of India, New Delni, AIR 1967 SC 1836; Kharak Singh vs. State of V.P. AIR 1963 SC 1295)."*

7. The other apprehension of the prosecution that petitioner may not return back, if permitted to go abroad appears to be equally unfounded. The petitioner has roots in India. His other son is working in India.

8. Accordingly, the present petition is allowed and the petitioner is permitted to travel abroad for two months subject to the following conditions:

i) that the petitioner shall furnish additional personal bond in the sum of Rs.1,00,000/- with two sureties of the like amount in the trial court;

ii) that he shall furnish his address during stay in abroad;

iii) that he shall not seek extension of his stay abroad on any ground including medical ground;

iv) that he shall produce his sureties in the trial court to give statement(s) that they have no objection in case he is allowed to go abroad;

v) that he shall file a detailed affidavit disclosing his detailed programme including his stay at various stations at abroad, telephone numbers and residential address;

vi) that he shall furnish the details of persons to receive any process from the court during his stay in abroad on his behalf;

vii) that he shall surrender back his pass-port on his return from abroad.

9. The petition is allowed in the aforesaid terms. Copy dasti.

****

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

State of HP and others. ....Appellants.

Vs.

Roshan Lal and others. ....Respondents.

RFA No. 19 of 2007.
Judgment reserved on: 9.4.2015.
Date of Judgment: April 23, 2015.

Land Acquisition Act, 1894- Section 18- Land of the petitioner was acquired for construction of the road- Land Acquisition Collector assessed the market value of acquired land at the rate of Rs. 3,500/- per bigha which was enhanced to Rs.3 lacs per bigha by the Reference Court- held, that when the land is acquired for construction of the road, the classification of the land loses its significance and the compensation has to be awarded uniformly. (Para-7)

Indian Evidence Act, 1872- Section 35- District Judge had relied upon the average value for one year- held, that average value is prepared by public official in discharge of his official duty and is relevant under Section 35- there was no infirmity in placing reliance upon average value by District Judge. (Para-9)

Cases referred:

HP Housing Board Vs. Ram Lal and others, 2003 (3) Shim L.C 64
R.L.Jain Vs. DDA and others, 2004 (4) SCC 79
Ravinder Narain and anothers Vs. Union of India, 2003 (4) SCC 481
Union of India Vs. Harinder Pal Singh and others 2005 (12) SCC 564.
Chiman Lal Hargovinddass Vs. Special Land Acquisition Officer, AIR 1988 SC 1952

For the appellants: Mr. M.L.Chauhan, Addl. Advocate General.
For respondents 1 to 4. Ms.Shashi Kiran, Advocate vice Mr.Dibender Ghosh, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed under Section 54 of the Land Acquisition Act 1894 against the award passed by learned District Judge Sirmour at Nahan on dated 31.10.2006 in land reference case No.20-LAC/4 of 2005 titled State of HP Vs. Roshan Lal and others. It is pleaded that appellants for the construction of Dhamkri-Ki-Johri Bagthan road proposed to acquire land situated at two villages Thakron and Takahan measuring 5.6 bighas in Tehsil Pachhad District Sirmour HP and notification under Section 4 of the Land Acquisition Act 1894 was published in Rajpatra on dated 3.1.2004. It is further pleaded that award No.09/2004 was announced by Land Acquisition Collector on dated 30.6.2004 after assessing the market rate of acquired land at the rate of Rs.3500/- (Three thousand five hundred) per bigha for all categories of land. It is further pleaded that land owners demanded Rs.3,00,000/- (Three lac) per bigha as market value of the land and being aggrieved and dissatisfied with the award land owners preferred reference petition under Section 18 of the Land Acquisition Act 1894 before learned District Judge Sirmour at Nahan. It is further pleaded that learned District Judge framed issues and after recording

evidence and after hearing both parties re-determined the market value of the land vide award dated 31.10.2006 and enhanced the market rate of land by holding that land owners are entitled for market rate of acquired land to the tune of Rs.1,80,000/- (One lac eighty thousand) irrespective of its kind and category. It is further pleaded that other benefits were also given to the land owners. It is further pleaded that award passed by learned District Judge Sirmour at Nahan dated 31.10.2006 is against facts and law. It is further pleaded that learned District Judge had mis-construed the evidence placed on record and entire award is based upon conjectures and surmises. It is further pleaded that award should have been awarded as per classification of land. It is further pleaded that learned District Judge had relied upon sale deed Ext PW1/A and copy of one year average Ext PW1/B. It is further pleaded that learned District Judge had enhanced the award abnormally. Prayer for acceptance of appeal sought.

2. I have heard learned Additional Advocate General appearing on behalf of the State and learned Advocate appearing on behalf of respondents at length and also perused entire record carefully.

3. Point for determination in present appeal is whether land owners are not entitled for award at uniform rate irrespective of nature and quality of land and whether learned District Judge had committed mis-carriage of justice to the State of HP by way of not appreciating oral as well documentary evidence properly.

4. Parties produced following witnesses in support of their case.

PW1	Sh.Roshan Lal.
PW2	Sh.Shamsher Singh
PW3	Sh. Dinesh Sharma
PW4	Sh. Yashvir Singh
RW1	Sh Kulbhushan Verma

5. Parties also produced following pieces of documentary evidence in support of their case.

Sr.No.	Description of document	Exhibit
1.	Sale Deed	Ext PW1/A
2.	Copy of one year average cost.	Ext PW1/B.
3.	Attested copy of sale deed No.109	Ext R1
4.	Attested copy of sale deed No.247.	Ext R2
5.	Statement of Kulbhushan Verma	Ext RW1/A

6. Oral evidence adduced by the parties.

6.1 PW1 Roshan Lal has stated that work for the construction of road was started in the year 1960 and Public Works Department had acquired the land in the year 1968. He has stated that no compensation was given to the land owners qua acquired land. He has stated that thereafter some of land owners filed writ petition in Hon'ble High Court of HP for acquisition of land under Land Acquisition Act 1894. He has stated that thereafter Hon'ble High Court of HP had directed the State to acquire the land. He has stated that thereafter acquisition proceedings were initiated by the Land Acquisition Officer and thereafter land owners were called for payment on dated 23.6.2004. He has stated that land owners used to earn Rs.50,000/- to Rs.60,000/- in six months from crops of potato and tomato etc. He has stated that land owners also used to earn Rs.50,000/- to Rs.60,000/- from crops of ginger. He has stated that the land is situated adjoining Nahan-Shimla road and head quarter Sarahan is also situated adjoining the acquired land. He has stated that there are government offices, schools, telephone exchange and office of Block Development Officer. He has stated that value of the land was Rs.5,00,000/- (Five lac) per bigha. He has stated that sale deed Ext PW1/A was executed by Sh Shamsher Singh of village Banar at the rate of Rs.15,000/- (Fifteen thousand) per biswa. He has stated that village Chalkana is at a distance of 3 Kms. from the acquired land. He has stated that compensation at the rate of Rs.5,00,000/- (Five lac) be granted. He has stated that he also tendered in evidence sale deed Ext PW1/A placed on record. He has stated that boundary of village Shyampur and village Thakrow are adjoining to each other.

6.2 PW2 Shamsher Singh has stated that he has alienated his land vide sale deed Ext PW1/A to Sh Rajinder Singh son of Sh Bhagwan Singh. He has stated that copy of sale deed Ext PW1/A is correct as per original record. He has stated that nature of his land and nature of acquired land are similar. He has stated that boundary of village Thakrow is also situated nearby the acquired land.

6.3. PW3 Dinesh Sharma has stated that he has tendered in evidence document Ext PW1/B placed on record. He has stated that boundary of village Thakrow and boundary of village Banar are adjoining to each other.

6.4 PW4 Sh Yashbir Singh Patwari has stated that he has brought summoned record. He has stated that average sale w.e.f. 25.5.2003 to 24.5.2004 is Ext PW1/B which is correct as per original record.

6.5 Statement of RW1 Kulbhushan Verma Additional Assistant Engineer HP PWD recorded in the form of affidavit Ext RW1/A. There is recital in the affidavit that Kulbhushan Verma was working as AAE in HP PWD Bagthan since 2000 and he is well conversant with road which leads from Dhamkari Ki Johri Bagthan and passes through Baghar Shekra Takahan Kamah Bhanjan Bannar, Chalog, Shampur Chandrog and Thakrow villages. There is recital in affidavit that LAC Award No.9 of 2004 was passed on dated 22.4.2004. There is recital in affidavit that land owners filed land reference petition. There is recital in affidavit that land in dispute is situated in villages Thakrow and Takahan and the road Dhamkeri Ki Johri Bagthan road passes through these villages. There is recital in affidavit that land in question is barren and there is no project, hospital School, Gram Panchayat Head Quarter, community health Centre, Dispensary, Post office and Bank etc. There is recital in affidavit that there is no business activities. There is recital in affidavit that at the time of construction of road there were some fruit bearing trees in the land in question and most of the land was barren and grassy land. There is recital in affidavit that land was used for growing wheat and maize. There is recital in affidavit that there was no irrigation scheme and the entire land is un-irrigated. There is recital in affidavit that some of

the trees were felled during construction of road and land owners were duly compensated by supplementary award No.29 of 2005 dated 1.1.2005. There is recital in affidavit that at the time of construction of road the land owners were not growing ginger, tomato and garlic etc. in the land in question. There is recital in affidavit that land owners have been compensated adequately by way of award passed by Land Acquisition Collector and they are not entitled for any enhancement of compensation.

7. Submission of learned Additional Advocate General that learned District Judge had enhanced the award and granted uniform rate irrespective of nature and quality of land and on this ground appeal filed by State be accepted is rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that land was acquired by the State Government for the construction of Damaka-Ki-Johadi-Bagthan road. It is held that classification completely loses its significance when acquired land is to be used as single unit for the construction of road. See 2003 (3) Shim L.C 64 titled HP Housing Board Vs. Ram Lal and others**.** Also see 2004 (4) SCC 79 titled R.L.Jain Vs. DDA and others. Also see 2003 (4) SCC 481 titled Ravinder Narain and anothers Vs. Union of India. Also see 2005 (12) SCC 564 titled Union of India Vs. Harinder Pal Singh and others. Also see AIR 1988 SC 1952 titled Chiman Lal Hargovinddass Vs. Special Land Acquisition Officer.

8. Another submission of learned Additional Advocate General appearing on behalf of the State that learned District Judge has illegally relied upon sale deed Ext PW1/A and on this ground appeal filed by State be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Court has carefully perused sale deed Ext PW1/A placed on record. Sale deed Ext PW1/A was executed between Shamsher Singh son of Sh Bahadur Singh on dated 30.6.2003 and purchaser Rajender Singh son of Sh Bhagwan Singh. It is proved on record that 0-3 bighas of land situated in village Banar Tehsil Pachhad District Sirmour was alienated in consideration amount of Rs.45,000/- (Forty five thousand). Sale deed Ext PW1/A is proved as per testimony of PW2 Shamsher Singh. Hence it is held that learned District Judge has relied upon the sale deed Ext PW1/A placed on record in accordance with law. Although the road was acquired in the year 1968 but no compensation was granted to the land owners and thereafter land owners have approached Hon'ble High Court of HP for necessary direction and thereafter High Court of HP directed State Government to acquire land in accordance with law owned by land owners.

9. Another submission of learned Additional Advocate General appearing on behalf of State that learned District Judge has illegally relied upon the average of one year Ext PW1/B placed on record is also rejected being devoid of any force for the reason hereinafter mentioned. Document Ext PW1/B is proved as per testimony of PW3 Dinesh Sharma Patwari. Document Ext PW1/B has been prepared by public official in discharge of his official duty and is relevant fact under Section 35 of the Indian Evidence Act. State of HP did not adduce any evidence on record in order to rebut document Ext PW1/B placed on record.

10. In view of above stated facts it is held that learned District Judge Sirmour at Nahan had passed the award in Land Reference No. 20-LAC/4 of 2005 decided on 31.10.2006 titled Roshan Lal and others Vs. State of HP and others strictly in accordance with law and strictly in accordance with proved facts and it is held that learned District Judge had properly appreciated oral as well as documentary evidence placed on record. It is held that there is no infirmity in the award and the award passed by learned District Judge Sirmour at Nahan in Land Reference No.20-LAC/4 of 2005 decided on 31.10.2006 titled Roshan Lal and others Vs. State of HP and others is affirmed. Appeal filed by the State is dismissed. No order as to costs. Learned Registrar Judicial will prepare decree of High Court

as mentioned under Section 54 of Land Acquisition Act 1894 forthwith. Pending applications if any are also disposed of.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Surender Singh Chauhan .....Appellant
Versus
State of H.P and others. ...Respondents.

LPA No. 392 of 2011
Judgment Reserved on 26.03. 2015
Decided on: 23rd April, 2015

Constitution of India, 1950- Article 226- Petitioner was appointed as Gram Vidya Upasak - he was deputed to join five days' Training w.e.f. 2.6.2009 till 6.6.2009- it was a holiday on 7.6.2009- he was to join his duty on 8.6.2009 but his daughter fell ill and he took her to Community Health Centre- a raid was conducted by a team of State Vigilance and Anti Corruption Bureau who found petitioner to be absent and one Inder Singh teaching the students- Inder Singh was stated to be hired by the petitioner- a show cause notice was issued against the petitioner- Inquiry was conducted and the agreement of the petitioner was cancelled- he filed a Writ Petition which was dismissed- held, that petitioner is an employee of Gram Panchayat- remuneration for his services is being paid by the Gram Panchayat out of funds granted by State Government- release of funds will not authorize the Government to initiate the disciplinary action against a Gram Vidya Upasak, if he commits misconduct and fails to maintain discipline in discharge of his duties- petitioner was served with a show cause notice by second respondent- disciplinary proceedings were ordered to be initiated against him and the second respondent imposed the penalty of cancellation of the agreement- first and second respondent could have recommended the action to be taken against the petitioner to Gram Panchayat- hence, order passed by the second respondent was not sustainable- further, it was not proved that services of Inder Singh were hired by petitioner on payment basis- Inder Singh was working as education volunteer in the Village under an NGO, named 'Adhaar' – absence of the petitioner on 8.6.2009 was due to the illness of his daughter which was a circumstance beyond the control of petitioner- Writ Petition allowed and the petitioner ordered to be reinstated. (Para-4 to 19)

For the appellant: Mr. Dilip Sharma, Senior Advocate with Ms. Nishi Goel, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General for respondents No. 1 and 2.
Mr. Vinod Thakur, Advocate for respondent No. 3.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge

Writ-petitioner Surender Singh Chauhan is in appeal before us. He is aggrieved by the judgment dated 13.06.2011 passed in Civil Writ Petition No. 3461 of 2010,

whereby learned Single Judge while dismissing the writ petition has refused to quash the impugned order Annexure P-12.

2. The writ-petitioner was appointed as Gram Vidya Upasak on 01.08.2002 in Government Primary School, Kuraya, Tehsil Shillai, District Sirmour by the 3rd respondent, Gram Panchayat Kiari Gundhah, Tehsil Shillai, District Sirmour under the Policy, Annexure P-1, framed by the respondent-State. He was deputed to attend five days' Teachers Training Programme w.e.f. 02.06.2009 to 06.06.2009 under 'Sarva Shiksha Abhiyan' in Government Primary School, Bakras, District Sirmour. He attended the said programme, as is apparent from Annexure P-3 to the writ petition. There being holiday on account of Sunday on 07.06.2009, he had to join duty on 08.06.2009. On that day, his daughter fell ill and he had taken her to Community Health Centre, Shillai. She was given medical treatment vide OPD ticket Annexure P-4. On the same day, a team of State Vigilance and Anti Corruption Bureau raided some schools including Government Primary School, Kuraya in District Sirmour, allegedly on the complaints that some teachers are not attending to their duties and rather hired other persons on payment basis to teach the students studying in the schools by way of their replacement. The police party amongst others also found the petitioner absent from the school and in his place one Inder Singh allegedly hired by him on payment basis was teaching the students. The Director General of State Vigilance and Anti Corruption Bureau Himachal Pradesh had informed the 1st respondent vide letter dated 10.6.2009, Annexure R-1 about the outcome of the raid so conducted for further action in the matter. Consequently, show cause notice Annexure P-6 came to be issued to the petitioner by the office of the 2nd respondent and accordingly, inquiry was ordered to be conducted against him on the following charges:

Article-I

That the said Sh. Surender Singh, GVU, now Primary Assistant Teacher was found absent form his duties on 8th June, 2009, which is totally misconduct or mis behaviour and Sheer violation of clause 4(iii) of the agreement executed by his under Gramin Vidya Upasak Yojana, 2001 & clause 5/j(iii) of the H.P. Prathmik Sahayak Adhyapak/Primary Assistant Teacher (PAT) scheme, 2003.

Article-II

That the said Sh. Surender Singh, GVU, GPS, Kuraya has been running a private shop at his place has not taught in the school for quite some time past and employed one local Sh. Inder Singh a student of 10th class for teaching work over one years and he was being paid Rs. 1000/- per month. Which tantamount to breach of trust and misconduct on the part of said Sh. Surender Singh and violation of various clauses of Gramin Vidya Upasak Yojna, 2001.

3. Pending inquiry, the petitioner was not allowed to attend the school from 10th June, 2009, the day when memo Annexure P-7 was issued against him. The inquiry was conducted and the report Annexure P-10 (Colly.) submitted to the 2nd respondent. A copy of the inquiry report was supplied to the petitioner vide memo Annexure P-10 and he was called upon to make representation, if any, before the same is considered for imposition of penalty upon him. The petitioner made representation Annexure P-11, which was considered along with the inquiry report by the 2nd respondent and vide impugned order Annexure P-12, the 3rd respondent was directed to cancel the agreement executed by the petitioner at the time of his appointment as Gram Vidya Upasak. The 3rd respondent was

further directed to report compliance to the 2nd respondent within a month. However, when the compliance was not reported, the Deputy Director, Elementary Education, Sirmour advised the 3rd respondent to cancel the contract agreement under intimation to his office vide letter dated 23.04.2010 Annexure P-12 (Colly.). The 3rd respondent instead of cancellation of the agreement, expressed its readiness and willingness to extend the same even for the academic session 2010-11, as resolved vide Resolution No. 5 Annexure P-12/A in its meeting held on 10.06.2010. It is in this backdrop, the writ petition came to be filed with the following prayers:

> 1) For issuing a writ of Certiorari or any other appropriate writ for quashing the order at annexure P-7, show cause notice annexure P-6, charge sheet annexure P-8, inquiry report enclosed with annexure P-10 being illegal, void and having been passed without jurisdiction and also without any merits whatsoever.
>
> 2) The directions issued to the Gram Panchayat by the State vide annexure P-12 w.r.t. cancelling the agreement executed with the petitioner and also for not renewing its any further, may kindly be held to be illegal and not binding upon the Gram Panchayat.
>
> 3) The respondents may kindly be directed to re-engage the petitioner as Gram Vidya Upasak in Government Primary School Kuraya Tehsil Shillai District Sirmour.
>
> 4) The respondents may kindly be directed to pay admissible salary to the petitioner for the period 1.6.2009 till date along with interest."

4. The 1st and 2nd respondents while making a mention to the complaints qua hiring the services of other persons by the Teachers of some of the schools in District Sirmour for teaching the students in their place and conducting of raid/surprise checking of various schools including GPS Kuraya by the staff of State Vigilance and Anti Corruption Bureau, Himachal Pradesh, amongst others, the petitioner was also found absent from duty and allegedly hired the services of one Inder Singh to teach the students in the School in his place on payment basis. A reference of FIR 05/09 registered against the petitioner and others has also been made. The stand of the said respondents, therefore, is that the inquiry was conducted into the charges against the petitioner and on finding that the same stand proved, 3rd respondent was directed to cancel the agreement, he executed.

5. The 3rd respondent in separate reply filed on its behalf has supported the case of the petitioner and also pleaded that to initiate the disciplinary action against the petitioner under the policy was within its sole domain and the respondent-State had no authority to hold any inquiry against him. Also that, the petitioner was absent from school only on 08.06.2009 and that too, on account of ailment of his daughter. The 2nd respondent, therefore, stated to have wrongly directed the 3rd respondent to cancel the agreement. The penalty so imposed upon the petitioner is also stated to be harsh and disproportionate. Also that, the 3rd respondent is satisfied with the work of the petitioner and has no objection in case he is allowed to continue as Gram Vidya Upasak in the school.

6. Learned Single Judge on appreciation of the material available on record has concluded as under:

> "7. It is notoriously well known fact that in certain remote areas the teachers appointed do not function in the schools and they in turn engage students or other teachers to teach in the schools. On 8th June, 2009 the petitioner was not found present in the school and it was observed that he had engaged some other person in his place. Thereafter, the Director issued a notice to the petitioner and an inquiry was got conducted. Two charges were leveled against the petitioner firstly that he was willfully absent on 8th June, 2009 and secondly that he was running a private shop and had not taught in the school for a long time and that one Inder Singh, a student of 10th Class, had been teaching in the school and the petitioner was paying him Rs.1000/- per month. Inder Singh obviously supported the petitioner. The Inquiry Officer examined witnesses and gave a finding that the petitioner had remained willfully absent from duty. Thereafter, the Deputy Director (Elementary Education) directed the Gram Panchayat to cancel the agreement entered into with the petitioner.
>
> 8. The Gram Panchayat has passed a Resolution stating that it has no objection to continuing the agreement with the petitioner but till no objection is received from the State the Pradhan could not enter into the agreement. The stand of the Panchayat even in its reply is that the Gram Panchayat was satisfied with the work of the petitioner and it has no objection to continue the petitioner in service."

The writ petition has, therefore, been dismissed.

7. Complaint is that the charge qua engagement of Shri Inder Singh to teach the students in the school at the behest of the petitioner on payment basis is not at all proved. The petitioner was on leave only for a day i.e. 08.06.2009 that too on account of ailment of his daughter, hence the present is not a case of willful absence from duty. However, irrespective of it, learned Single Judge has erroneously dismissed the writ petition and swayed only by the allegations set out in the FIR and passed the impugned order only on suspicion and not on proof.

8. Additionally, the appellant-writ/petitioner has placed on record the statements of prosecution witnesses and also the judgment passed by learned Special Judge, Sirmour in Corruption Case No. 63-CC/7 of 2011, arising out of FIR No. 5/09 acquitting thereby the petitioner and others from the charge under Section 13(2) of the Prevention of Corruption Act, 33 of HP PSCP Act and 420, 467, 468, 471, 120B of the Indian Penal Code.

9. Shri Dilip Sharma, learned Senior Advocate assisted by Mrs. Nishi Goel, Advocate has vehemently argued that without there being any proof of the petitioner having not attended the school and taught the students and that rather hired the services of one Inder Singh on payment basis, learned Single Judge has wrongly upheld the order Annexure P-12 under challenge in the writ petition. According to Mr. Sharma, the present at the most is a case of absence of one day from duty and the penalty imposed is not only harsh but disproportionate also. The writ-petitioner is attending the school regularly w.e.f. 11.07.2011, however, without payment of any remuneration. The writ-petitioner was not allowed to attend the school w.e.f. 11.06.2009 on the direction of the 2nd respondent. It has thus been urged that the period w.e.f. 11.06.2009 to 10.07.2011 may be ordered to be

regularized by treating the writ-petitioner on duty notionally and from 11.07.2011, the respondents may be directed to pay him due and admissible remuneration.

10. On the other hand, learned Advocate General while repelling the arguments so addressed on behalf of the writ-petitioner has contended that the charges framed against the writ-petitioner were duly proved. Providing good education to the students is the paramount consideration of the respondent-State and a Teacher being paid from the grant released, the respondent-State has every control on him and even competent to initiate disciplinary action also. It has, therefore, been emphasized that when the charges against the writ-petitioner stand proved, he has rightly been removed from service.

11. The writ-petitioner is admittedly an employee of the 3rd respondent. Of course, he was being paid out of the grant released by the respondent-State in favour of the said respondent. The Policy Annexure P-1 framed by the State for recruitment of the Gram Vidya Upasaks has been discussed in detail by learned Single Judge in the judgment under challenge, therefore, there is no need of its elaboration here. Para 10 of the scheme makes it crystal clear that it is the Gram Panchayat concerned, the employer of Gram Vidya Upasaks and also the disciplinary authority. True it is that the remuneration to Gram Vidya Upasaks under the scheme is being paid by the Gram Panchayat out of the funds granted by the State Government. The release of funds, however, not authorize the Government to initiate the disciplinary action against a Gram Vidya Upasak, if he is found to have mis-conducted and failed to maintain discipline in discharge of his duties. Since the writ-petitioner has been served with show cause notice by the 2nd respondent and even it is at the behest of the said respondent, disciplinary proceedings were ordered to be initiated against him and it is the said respondent, imposed upon the petitioner the penalty of cancellation of the agreement, he executed at the time of his appointment as Gram Vidya Upasak. In our considered opinion, such a course of action is dehors the provisions under the scheme, because as per the same appointing and disciplinary authority of the writ-petitioner is the Gram Panchayat. The 1st and 2nd respondents at the most could have recommended the action to be taken against the writ-petitioner by the Gram Panchayat.

12. Otherwise also, from the inquiry report Annexure P-10 (Colly.), it is only absence of the writ-petitioner from duty on 08.06.2009 is proved and nothing beyond that. It is not proved nor Inquiry Officer concluded that the services of Shri Inder Singh were hired by the writ-petitioner to teach the students in his place on payment basis. Shri Inder Singh as per report rather was teaching the students in the school regularly for two hours w.e.f. September, 2008. The certificates Annexures A-2 and A-3 to the present appeal make it crystal clear that said Shri Inder Singh was working as an "Education Volunteer" in the village. He while appearing as PW-21 during the course of trial of Corruption Case No. 63-CC/7 of 2011, tells us that when Kumari Phulma, an Education Volunteer appointed in Government Primary School, Kuraya left the school, it is he who started imparting education to the students under an NGO, namely 'Adhaar'. Thus, the services of Inder Singh were not hired by the petitioner to teach the students in his place and rather he was teaching the students in the school being "volunteer" of an NGO. The observations in the impugned judgment that said Shri Inder Singh during the course of disciplinary inquiry and trial supported the petitioner, seem to be factually incorrect.

13. The writ-petitioner, no doubt, was found absent form duties on 08.06.2009. The OPD ticket of Community Health Centre, Shillai Annexure P-4, however, reveals that his daughter was ill and medically checked up on that day. The writ-petitioner can reasonably be believed to have accompanied his daughter to the hospital. Although, the application he allegedly sent to the school for sanction of one day's leave has not been produced on record and Shri Netar Singh, JBT, Incharge of the school during the course of disciplinary

proceedings has stated that the writ-petitioner was not on duty on that day, however, for his absence that too only for a day, such a harsh and deterrent penalty should have been imposed is a question which heavily weigh with us. The alleged misconduct was not of such a nature warranting the punishment of cancellation of the agreement and ultimately removal from service. When the charge that the writ-petitioner was not attending the school and rather hired the services of Shri Inder Singh to teach the students in his place is not at all proved, a lenient view of the matter could have also been taken.

14. The criminal case registered against the writ-petitioner and others stands decided by leaned Special Judge, Sirmour vide judgment dated 31.08.2013, a copy whereof has been placed on record of the present appeal. The charge has not been proved against either of the accused and they including the petitioner now stand acquitted. This development having taken place during the pendency of the present appeal also weigh with us and in our considered opinion, the writ-petitioner never hired the service of Shri Inder Singh on payment basis to teach the students in the school in his place.

15. The 3rd respondent is satisfied with the work and conduct of the writ-petitioner as Gram Vidya Upasak and even ready and willing to extend the contract entered upon with him further. A Resolution Annexure P-12/A to the writ petition has also been passed by the said respondent in this regard. In reply to the writ petition the said respondent has supported the case of the writ-petitioner. As a matter of fact, it is the 2nd respondent, who has directed the 3rd respondent to cancel the agreement executed with the writ-petitioner so that he can be removed from the school. Reference in this regard can be made to the letters dated 16.03.2010 and 23.04.2010, Annexure P-12 to the writ petition. We have already said at the outset that the 1st and 2nd respondents being not the appointing or disciplinary authority of the writ-petitioner could have not initiated disciplinary proceedings against him nor to impose any penalty including the penalty of cancellation of the agreement he executed and ultimately removal from service.

16. True it is that Article 21-A of the Constitution casts a duty upon the State to provide education to all children below 14 years of age. Thus, it is also the duty of the State to ensure that adequate infrastructure is provided and efficient, dedicated and sincere faculty is deployed in the schools. It is to fulfill such constitutional goal; the respondent-State has framed the scheme for deployment of Gram Vidya Upasaks in primary schools. Under the scheme, it is the duty of the State to grant funds for payment of remuneration etc., to the Gram Vidya Upasaks and as regards their appointment, supervisory control and disciplinary action, if found to have mis-conducted, is a task assigned to the concerned Gram Panchayat under the scheme. Therefore, as already said, at the most, the respondent-department could have only asked the Gram Panchayat to hold inquiry against the writ-petitioner so that if found guilty, punished that too by the Gram Panchayat.

17. We feel that learned Single Judge having own notions that in remote areas, the teachers did not function in the schools and rather used to engage the students or other teachers to teach in their place as well as swayed by the allegations leveled in the FIR against the writ-petitioner, which ultimately turned to be false and that it is the respondent-State which provides funds by way of grant to the Gram Panchyat for engagement of Gram Vidya Upasaks has concluded that the respondent-State is competent to exercise supervisory control on them and to direct the Gram Panchayat concerned to terminate their services. But, our views are at variance with that of learned Single Judge, because in the case in hand, as we already said, the State Government at the most could have asked the Gram Panchayat to initiate disciplinary action against the petitioner, but could not have initiated the disciplinary action itself as well as by way of penalty and issued a direction to the 3rd respondent to cancel the agreement entered upon with him. The impugned

communication Annexure P-12 demonstrates that the respondent-State has not left any option with the 3rd respondent except for resorting to the cancellation of the agreement and ultimately removal of the writ-petitioner from the school. It is a separate matter that the 3rd respondent has not yet cancelled the agreement as nothing to this effect has come on record.

18. We are, however, not in agreement with Mr. Dilip Sharma, learned Senior Advocate that from 11.07.2011, the writ-petitioner is regularly attending the school or teaching the students because nothing to this effect has come on record. Had it been so, the writ-petitioner could have produced on record some contemporaneous record including certificate from the teacher incharge of the school in this regard. The bald assertions that too made during the course of arguments are not sufficient to hold that the writ-petitioner is regularly attending the school and teaching the students from 11.07.2011 onwards, hence entitled to the payment of remuneration.

19. The facts, therefore, remain that the writ-petitioner was ordered not to attend the school vide letter dated 10th June, 2009 Annexure P-7. Therefore, it would not be improper to conclude that he is not on duty w.e.f. 11.06.2009 till date. Since the judgment under challenge, according to us, is not legally and factually sustainable and as such deserves to be quashed, therefore, the impugned order Annexure P-12 and also a direction issued to the petitioner vide letter dated 10th June, 2009 Annexure P-7 not to attend his duties in the school being illegal and unsustainable deserves to be quashed. However, the writ-petitioner is only entitled to regularization of the period w.e.f 11.06.2009 till joining of duties by him consequent upon this judgment notionally i.e. without payment of any remuneration. We, however, hold him entitled for reinstatement as Gram Vidya Upasak with all consequential benefits with immediate effect i.e. the day he joins his duties in the school.

20. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, the judgment passed by learned Single Judge in Civil Writ Petition No. 3461/2010 is ordered to be quashed and set aside. The period w.e.f. 11.06.2009 till reinstatement of the writ-petitioner, consequent upon this judgment will be regularized by treating him in service notionally. The writ-petitioner will stand re-instated as Gram Vidya Upasak in Government Primary School, Kuraya, Tehsil Shillai, District Sirmour with all consequential benefits on the day he produces a certified copy of this judgment before the 3rd respondent. The 2nd respondent shall ensure that the grant-in-aid is released regularly to the 3rd respondent for defraying the due and admissible remuneration to the writ-petitioner under the Scheme.

21. The appeal stands disposed of accordingly. Pending application(s), if any, shall also stand disposed of.

****

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

FAO Nos.418, 419, 420, 421, 422, 423,
424 of 2007, 68, 69 and 70 of 2009
Decided on: April 24, 2015.

---

1. FAO No.418 of 2007:

Chamel Singh (since deceased) through LRs Rajeshwar Pathania and others. .....Appellants.

Versus

Raj Kumar (since deceased) through LRs Kamlesh Kumari and others .....Respondents.

2. FAO No.419 of 2007:
M/s The Kangra Ex Servicemen T.P.T. Kangra, ...Appellant.
Versus
Leela Devi and others .....Respondents.
3. FAO No.420 of 2007:
M/s The Kangra Ex Servicemen T.P.T. Kangra .....Appellant.
Versus
Dropati Devi and others .....Respondents.
4. FAO No.421 of 2007:
Chamel Singh (since deceased) through LRs Rajeshwar Pathania and others.
.....Appellants.
Versus
Lal Singh and others .....Respondents.
5. FAO No.422 of 2007:
M/s The Kangra Ex Servicemen T.P.T. Kangra .....Appellant.
Versus
Reeta Devi and others .....Respondents.
6. FAO No.423 of 2007:
M/s The Kangra Ex Servicemen T.P.T. Kangra .....Appellant.
Versus
Milkhi Ram and others .....Respondents.
7. FAO No.424 of 2007:
Chamel Singh (since deceased) through LRs Rajeshwar Pathania and others.
.....Appellants.
Versus
Kesar Chand and others .....Respondents.

8. FAO No.68 of 2009:
Oriental Insurance Company Ltd. .....Appellant.
Versus
Satish Kumar and others .....Respondents.
9. FAO No.69 of 2009:
Oriental Insurance Company Ltd. .....Appellant.
Versus
Satish Kumar and others .....Respondents**.**
10. FAO No.70 of 2009:
Oriental Insurance Company Ltd. .....Appellant.
Versus
Satish Kumar and others .....Respondents.

Motor Vehicle Act, 1988- Section 149- Employer claimed that petitions were filed as a result of accident- appeals were preferred against some of the awards which were dismissed by the High Court- held, that Insurer had failed to prove the insured had committed breach of condition- no appeal was preferred- therefore, Insurance Company is directed to indemnify the insured. (Para-4 to 7)

For the appellant(s): Mr.Neeraj Gupta, Advocate, for the appellant/insured in FAO Nos.418 to 424 of 2007.

Mr.G.C. Gupta, Senior Advocate, with Ms.Meera Devi, Advocate, for the appellant/insurer in FAO Nos.68 to 70 of 2009.

For the respondents: Mr.G.C. Gupta, Senior Advocate, with Ms.Meera Devi, Advocate, for the insurer/respondent.

Mr.Neeraj Gupta, Advocate, for the insured-owner/respondent.

Mr.Bhuvnesh Sharma, Advocate, for the claimants in FAO No.68 to 70 of 2009.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral):

The awards, impugned in these appeals, are the outcome of one accident caused by respondent/driver Satish Kumar, while driving bus bearing No.HP-40-5537 rashly and negligently, on 28.1.2004, as a result of which the offending bus rolled down the road in the area of Lakhwan on Kalkhar-Ner Chowk highway. Therefore, all the appeals are being disposed of by this common judgment.

FAO Nos.68 of 2009, 69 of 2009 and 70 of 2009

2. By the medium of these appeals, the insurer/appellant has challenged the awards, passed by the Motor Accident Claims Tribunal(I), Kangra at Dharamshala, whereby compensation was awarded in favour of the claimants and the insurer was saddled with the liability.

FAO Nos.418 of 2007, 419 of 2007, 420 of 2007, 421 of 2007, 422 of 2007, 423 of 2007 and 424 of 2007:

3. These appeals have been preferred by the owner/insured against the awards passed by Motor Accident Claims Tribunal, Mandi, H.P., vide which the claim petitions filed by the claimants were allowed and the insurer was saddled with the liability, with a right of recovery.

4. At the very threshold, it is apt to place on record that the insurer had filed the appeals, being FAO Nos.77 of 2012, 75 of 2012 and 78 of 2012, against the awards made by the Tribunal, which were also the outcome of the same accident. The said appeals were dismissed by this Court by holding that the insurer has failed to prove that the insured had committed any breach and that the insurer was rightly saddled with the liability.

5. During the course of hearing, it was stated by the learned counsel for the parties that till today, the judgment of this Court, dated 1st August, 2014, passed in FAO No.77 of 2012 and connected matters, has not been challenged, and thus, the same has attained finality.

6. Accordingly, the appeals filed by the insurer i.e. FAO Nos.68 of 2009, 69 of 2009 and 70 of 2009 are liable to be dismissed in view of the judgment of this Court, referred to above. The Registry is directed to release the compensation amount in favour of the claimants strictly in terms of the impugned awards.

7. In view of the above, FAO Nos.418 of 2007, 419 of 2007, 420 of 2007, 421 of 2007, 422 of 2007, 423 of 2007 and 424 of 2007 are to be allowed and the impugned awards are to be modified with the direction that the insurer has to be saddled with the

liability and has to indemnify the compensation. Ordered accordingly. The insurer is directed to deposit the amount of compensation within a period of eight weeks from today and thereafter, the same be released in favour of the claimants strictly in terms of the impugned awards.

8. The Registry is directed to release the amount, if any, deposited by the insured/owner, in his favour, through his payee's account cheque.

9. All the appeals stand disposed of accordingly, alongwith pending CMPs, if any.

10. The Registry is directed to place a copy of this judgment on the record of each file.

****

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

Mohd. Afzal (died) through his LRs. ...Appellants.

Versus

Rehman Khan (died) through LRs and others. ...Respondents.

RSA No. 126 of 2002
Reserved on: 22.4.2015
Decided on: 24.4.2015

Code of Civil Procedure, 1908- Order 19 Rules 1 and 2- the affidavits are not included in the definition of evidence and can be used as evidence only if for Court passes an order for their admission. (Para-13)

Indian Registration Act, 1908- Section 17- Partition may be effected orally, but if it is reduced into a writing, it will be necessary to register it - Same cannot be used as evidence in absence of registration in view of bar contained in Section 49. (Para-14)

Cases referred:

Sudha Devi vs. M.P. Narayanan and others, AIR 1988 SC 1381

Roshan Singh and others vs. Zile Singh and others, AIR 1988 SC 881

For the Appellants : Mr. Karan Singh Kanwar, Advocate.

For the Respondents : Mr. Sanjeev Kuthiala, Advocate for respondent 3.
Mr. Janesh Gupta, Advocate for respondents No.1 (b) to 1 (d), (g) and 1(f).

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 4.3.2002 rendered by the Addl. District Judge, Sirmaur Distrct at Nahan in Civil Appeal No. 60-N/13 of 2001.

2. "Key facts" necessary for the adjudication of this appeal are that predecessor-in-interest of respondents No.1-a to 1-g, Sh. Rehman Khan (hereinafter referred to as the "plaintiff" for convenience sake) instituted a suit for partition against the

predecessor-in-interest of the appellants i.e. defendant No.1 Mohd. Afzal, respondent-defendant No.2 Mohd. Aslam and respondent-defendant No.3 Sehnaz Begum. According to the plaintiff, property comprised in Khewat Khatauni No. 293 min/541, Khasra Nos. 129, 130, 132 to 135 and 3509/136 measuring 169-20 square meters situated in Amarpur Mohalla of Nahan Town, District Sirmaur is co-owned and jointly possessed by the parties. The same has not been partitioned so far. Plaintiff was working as Driver at Dharampur. When he came on 20.5.2000 to Nahan, he found that some pillars were raised on the valuable property abutting Nahan-Shimla road. These pillars were raised by defendant No.1 Mohd. Afzal. He prayed for preliminary decree of partition.

3. The suit was contested by defendants No.1 and 2. According to them, father of the plaintiff and defendants No.1 and 2, namely, Mohd. Afzal and Mohd. Aslam were co-owners in the suit land as well as the property situated at Muhal Kacha Tank. On 26.3.1978, a family partition took place between the father of the plaintiff and defendants No.1 and 2. According to this document, defendants surrendered their shares in the property situated at Kacha Tank, Nahan in favour of the plaintiff and the contesting defendants were allotted the suit land and thereafter raised residential houses and shop over the suit land with the consent and knowledge of the father of the plaintiff.

4. Plaintiff filed replication. Issues were framed by the Senior Sub Judge on 13.7.2000. He dismissed the suit on 24.3.2001. Plaintiff filed an appeal before the Additional District Judge, Sirmaur. He decreed the suit on 4.3.2002. Hence, the present appeal. It was admitted on the following substantial questions of law:

> 1. "Whether the suit property was settled earlier vide writing dated 26.3.1978 and whether this writing is not admissible in evidence for want of registration?
>
> 2. Whether plaintiff is estopped from questioning earlier settlement, partition among defendants No.1, 2 and Iman Ulla father of the plaintiff in view of his acceptance of writing dated 26.3.1978 by way of his affidavit Ex.DA as well as his own conduct and conduct of his father Iman Ulla?
>
> 3. Whether the learned Additional District Judge has misconstrued, misinterpreted and misapplied the oral and documentary evidence on record in reversing the judgment, decree dated 24.3.2001 of learned Senior Sub Judge?

5. Appellant-defendant No.1 died during the pendency of this appeal and his legal heirs were brought on record vide order dated 4.9.2006. The legal heirs of respondent-plaintiff were also brought on record vide order dated 3.3.2014.

6. Mr. Karan Singh Kanwar, learned counsel for the appellant, has vehemently argued that writing dated 26.3.1978 was not required to be registered. He then contended that Ex.DA could not be ignored by the learned first appellate court. He lastly contended that the first appellate court has misread and mis-appreciated the oral as well as documentary evidence led by the parties.

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

8. Since all substantial questions of law are interlinked, they are being discussed together to avoid repetition of discussion of evidence.

9. Case of the appellant-defendants No.1 and 2, respectively is that the suit land was alongwith Kacha Tank property was partitioned between three brothers Mohd. Afzal-defendant No.1, Mohd. Aslam-defendant No.2 and Imanulla Khan, father of plaintiff, by way of family settlement on 26.3.1978. Admittedly, document dated 24.3.1978 has not been registered. The document, as per recital contained therein, is not a memorandum of partition. In fact, it is an instrument of partition.

10. Mr. Karan Singh Kanwar has also contended that mark 'X' dated 26.3.1978 has been acted upon by the parties. However, there is no revenue entry in support of his contention. Fact of the matter is that even after the execution of this document, Kacha Johar property and some part of the suit land was jointly sold by the three brothers. PW-1 Rehman Khan has testified that the suit property was jointly sold by his father and defendants No.1 and 2. Similarly, Kacha Tank property was sold by them jointly and they received the money accordingly. Defendants in their statements have admitted that Kacha Johar property was jointly sold by the three brothers. DW-1 Mohd. Afzal, in his cross-examination, has admitted that after execution of mark 'X', Kacha Johar property and some portion of the suit property was sold on 15.7.1987 and 15.10.1986. He has also admitted that sale proceeds of Kacha Johar property were received by the three brothers by way of cheques in presence of the Registrar. They have opened their accounts in the Punjab National Bank. In the Jamabandi for the year 1996-97 Ex.PA, the suit property is shown to be co-owned by the plaintiff's father Imanullah Khan, Mohd. Afzal-defendnat No.1 and Mohd. Aslam-defendnt No.2 in equal shares. The three brothers have received the money separately. Thus, mark 'X' dated 26.3.1978 was never acted upon.

11. Mr. Karan Singh Kanwar has placed strong reliance on Ex. DA affidavit. This document was not attested. The document Ex.DA was scribed by DW-4 Fiaz Ali. Plaintiff has explained the manner in which he was made to sign Ex.DA when he was in dire need of money.

12. Mr. Karan Singh Kanwar has further argued that in fact the partition has taken place on 26.3.1978 and it is in these circumstances document Ex.DA was prepared. There is no mention in Ex.DA about the share of each of three co-sharers. The relinquishment made in para 6 of the Ex.DA is in the present form. Plaintiff has objected to the construction raised by defendants No.1 and 2. Plaintiff in his statement has deposed that he has raised objection as and when defendants raised the construction. The document mark X' dated 26.3.1978 was required to be registered being an instrument of partition. Ex. DA affidavit has rightly been discarded by the learned first appellate court.

13. Their Lordships of the Hon'ble Supreme Court in ***Smt. Sudha Devi*** vs. ***M.P. Narayanan and others***, AIR 1988 SC 1381 have held that affidavits are not included in the definition of evidence in section 3 of the Evidence Act and can be used as evidence only if for sufficient reason court passes an order under order XIX rule 1 or 2 of the Code of Civil Procedure. Their Lordships have held as under:

> "4. The fact that the plaintiff obtained an ex parte decree in the earlier suit against the defendants Nos. 1 and 2 is established by the copy of the decree exhibited in the case. The allegation in the plaint so far as the third defendant is concerned, is in paragraph 7 in the following words:
>
> > "7. Subsequent to the said Decree on a date or dates which the plaintiff is unable to specify until after disclosure by the defendants, the first and/or second defendants wrongfully

> permitted and allowed the third defendant to occupy the said demised flat. The first and/or second defendants by themselves and/or by the third defendant are still in wrongful possession of the said demised flat."
>
> The only evidence relevant to this part of the case is to be found in the oral evidence of the palintiff's sole witness Nand Kumar Tibrewal. The High Court (in appeal) has declined to rely on his evidence mainly on the ground that the witness has not disclosed his concern with the suit property or his relationship with the plaintiff. He has been rejected as incompetent. The learned counsel for the appellant contended that the witness (now deceased) was the husband of the plaintiff-appellant and thus he was fully conversant with the relevant facts. The criticism by the High Court that the witness did not state anything in his evidence which could connect him with the plaintiff or the property and thus make him competent was attempted to be met before us by relying on an affidavit filed in this Court. We are afraid, the plaintiff cannot be allowed to fill up the lacuna in the evidence belatedly at the Supreme Court stage. Besides, affidavits are not included in the definition of 'evidence' in S. 3 of the Evidence Act and can be used as evidence only it for sufficient reason court passes an order under O. XIX, Rule 1 or 2 of the Code of Civil Procedure. This part of the argument of Mr. Tapas Ray must, therefore, be rejected."

14. Their Lordships of the Hon'ble Supreme Court in ***Roshan Singh and others*** vs. ***Zile Singh and others***, AIR 1988 SC 881 have held that a partition may be effected orally, but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it is not registered, section 49 of the Act will prevent its being admitted in evidence. Their Lordships have held as under:

> "9. It is well-settled that while an instrument of partition which operates or is intended to operate as a declared volition constituting or severing ownership and causes a change of legal relation to the property divided amongst the parties to it, requires registration under S. 17(1)(b) of the Act, a writing which merely recites that there has in time past been a partition, is not a declaration of will, but a mere statement of fact, and it does not require registration. The essence of the matter is whether the deed is a part of the partition transaction or contains merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well-settled that a mere list of properties allotted at a partition is not an instrument of partition and does, not require registration. Section 17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right and there would be no necessity of registering such a document. Two propositions must therefore flow : (1) A partition may be effected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it be

not registered, S. 49 of the Act will prevent its being admitted in evidence. Secondly evidence of the factum of partition will not be admissible by reason of S. 91 of the Evidence Act, 1872. (2) Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered to prove the fact of partition : See Mulla's, Registration Act, 8th Edn., pp. 54-57."

15. In the case in hand, affidavit Ex.DA, was not even attested.

16. Learned First Appellate court has correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgment and decree passed by the first appellate court.

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 Regular Second Appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

****

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

Oriental Insurance Company Ltd. ...Appellant.
Versus
Smt. Veena Devi & others ...Respondents.

FAO No. 449 of 2007
Decided on: 24.04.2015

Motor Vehicle Act, 1988- Section 157- Predecessor-in-interest of the petitioner died in a motor vehicle accident involving a three wheeler- insurer claimed that registered owner had sold his vehicle to one 'A' without intimating the insurer- held, that transfer of a vehicle cannot absolve insurer from third party liability and the insurer has to satisfy the award- therefore, insurer was rightly held liable to pay compensation. (Para-10 to 19)

Cases referred:

G. Govindan versus New India Assurance Company Ltd. and others, AIR 1999 SC 1398

Rikhi Ram and another versus Smt. Sukhrania and others, AIR 2003 SC 1446

United India Insurance Co. Ltd., Shimla versus Tilak Singh and others, (2006) 4 SCC 404

S. Iyyapan versus United India Insurance Company Limited and another, (2013) 7 Supreme Court Cases 62

For the appellant: Mr. Ashwani sharma, Advocate.

For the respondents: Mr. Dinesh Thakur, Advocate, vice Mr. N.S. Chandel, Advocte, for respondents No. 1 to 3.
Nemo for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is award, dated 17th August, 2007, made by the Motor Accident Claims Tribunal (I), Kangra Division at Dharamshala (hereinafter referred to

as “the Tribunal”) in M.A.C.P. No. 37-K/II-2005, titled as Smt. Veena Devi and others versus Arun Kumar Joshi and others, whereby compensation to the tune of Rs. 3,30,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization came to be awarded in favour of the claimants and the insurer came to be saddled with liability (hereinafter referred to as “the impugned award), on the grounds taken in the memo of appeal.

2. It is necessary to give a flashback of the case, the womb of which has given birth to this case.

Brief facts:

3. The claimants have 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.10,00,000/-, as per the break-ups given in the claim petition, on the ground that their sole bread earner, Shri Ramesh Chand, became victim of the a motor vehicular accident, which was allegedly caused by driver, namely Shri Arun Kumar Joshi, while driving three wheeler No. HP-04-0451, rashly and negligently, on 06.03.2005 near flour-mill on Kangra-Tanda road, deceased-Ramesh Chand sustained injuries and succumbed to the injuries.

4. The claimants have specifically averred in the claim petition that they are the dependents of the deceased. Claimant No. 1 is the widow and claimants No. 2 & 3 are minor daughter and minor son of the deceased.

5. The respondents in the claim petition resisted the claim petition on the grounds taken in the respective memo of objections.

6. Following issues came to be framed by the Tribunal on 10th November, 2006:

> *“1. Whether on 6.3.2005, respondent No. 1 was driving vehicle No. HP-04-0451 rashly and negligently and met with an accident, causing injuries to Ramesh Chand, who lateron died on the way to Hospital? OPP*
>
> *2. If issue No. 1 is proved, whether the petitioners are entitled for compensation, if so, how much and from whom? OPParties*
>
> *3. Whether the respondent No. 1 was not holding a valid and effective DL at the time of alleged accident? OPR*
>
> *4. Whether the vehicle in question was not insured with respondent No. 2 as alleged? OPR*
>
> *5. Whether the vehicle was being plied without RC and fitness certificate as alleged? OPR*
>
> *6. Relief."*

7. Parties have led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation to the tune of Rs.3,30,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization in favour of the claimants and the insurer came to be saddled with liability.

8. The insurer has questioned the impugned award on the ground that the original registered owner was not the owner of the offending vehicle at the time of the accident and the vehicle was sold by the owner, namely Shri Kuldip Kumar, in the name of Shri Arun Kumar Joshi without intimating the insurer. The sale was effected before the insurance agreement was executed.

9. The facts and the quantum of compensation are not in dispute. Thus, the only question, which needs to be determined in this appeal, is - whether the Tribunal has rightly saddled the insurer with liability?

10. It was for the insurer to plead and prove that the vehicle was sold and the owner-insured has committed a willful breach, has not led any evidence, thus, has failed to discharge the onus.

11. I deem it proper to reproduce Section 157 of the MV Act herein:

> *"*Section 157 of the Act reads as under:
>
> ***Transfer of certificate of insurance.***
>
> *(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.*
>
> *[Explanation.—For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.]*
>
> *(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."*

12. While going through the aforesaid provision, one comes to an inescapable conclusion that transfer of a vehicle cannot absolve insurer from third party liability and the insurer has to satisfy the award.

13. My this view is fortified by the Apex Court Judgment in case titled as **G. Govindan versus New India Assurance Company Ltd. and others,** reported in **AIR 1999 SC 1398**. It is apt to reproduce paras 10, 13 & 15 of the aforesaid judgment herein:

> *"10. This Court in the said judgment held that the provisions under the new Act and the old Act are substantially the same in relation to liability in regard to third party. This Court also recognised the view taken in the separate judgment in Kondaiah's case that the transferee-insured could not be said to be a third party qua the vehicle in question. In other words, a victim or the legal representatives of the victim cannot be denied the compensation by the insurer on the ground that the policy was not transferred in the name of the transferee.*
>
> *11. .....*
>
> *12. .....*
>
> *13. In our opinion that both under the old Act and under the new Act the Legislature was anxious to protect the third party (victim) interest. It appears that what was implicit in the provisions of the old Act is now made explicit, presumably in view of the conflicting decisions on this aspect among the various High Courts.*
>
> *14. .....*
>
> *15. As between the two conflicting views of the Full Bench judgments noticed above, we prefer to approve the ratio laid down by the Andhra Pradesh High Court in Kondaiah's case (AIR 1986 Andh Pra 62) as it advances the object of the Legislature to protect the third party interest. We hasten to add that the third party here will not include a transferee whose transferor has not followed procedure for transfer of policy. In other words in accord with the well-settled rule of interpretation of statutes we are inclined to hold that the view taken by the Andhra Pradesh High Court in Kondaiah's case is preferable to the contrary views taken by the Karnataka and Delhi High Courts (supra) even assuming that two views are possible on the interpretation of relevant sections as it promotes the object of the Legislature in protecting the third party (victim) interest. The ratio laid down in the judgment of Karnataka and Delhi High Courts (AIR 1990 Kant 166 (FB) and AIR 1989 Delhi 88) (FB) (supra) differing from Andhra Pradesh High Court is not the correct one."*

14. The Apex Court in case titled as **Rikhi Ram and another versus Smt. Sukhrania and others**, reported in **AIR 2003 SC 1446** held that in absence of intimation of transfer to Insurance Company, the liability of Insurance Company does not cease. It is apt to reproduce paras 5, 6 & 7 of the judgment, supra, herein:-

> *"5. The aforesaid provision shows that it was intended to cover two legal objectives. Firstly, that no one who was not a party to a contract would bring an action on a contract; and secondly, that a person who has no interest in the subject matter of an insurance can claim the benefit of an insurance. Thus, once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 94 does not provide that any person who will use the vehicle shall insure the vehicle in respect of his separate use.*
>
> *6. On an analysis of Ss. 94 and 95, we further find that there are two third parties when a vehicle is transferred by the owner to a purchaser. The purchaser is one of the third parties to the contract and other third party is for whose benefit the vehicle was insured. So far, the transferee who is the third party in the contract, cannot get any personal benefit under the policy unless there is a compliance of the provisions of the Act. However, so far as third party injured or victim is concerned, he can enforce liability undertaken by the insurer.*
>
> *7. For the aforesaid reasons, we hold that whenever a vehicle which is covered by the insurance policy is transferred to a transferee, the liability of insurer does not ceases so far as the third party/victim is concerned, even if the owner or purchaser does not give any intimation as required under the provisions of the Act."*

15. The Apex Court in latest judgment titled as **United India Insurance Co. Ltd., Shimla versus Tilak Singh and others**, reported in **(2006) 4 SCC 404** has held the same principle. It is apt to reproduce paras- 12 & 13 of the said judgment herein:

> *"12. In Rikhi Ram v. Sukhrania [(2003) 3 SCC 97 : 2003 SCC (Cri) 735] a Bench of three learned Judges of this Court had occasion to consider Section 103-A of the 1939 Act. This Court reaffirmed the decision in G. Govindan case and added that the liability of an insurer does not cease even if the owner or purchaser fails to give intimation of transfer to the Insurance Company, as the purpose of the legislation was to protect the rights and interests of the third party.*
>
> *13. Thus, in our view, the situation in law which arises from the failure of the transferor to notify the insurer of the fact of transfer of ownership of the insured vehicle is no different, whether under Section 103-A of the 1939 Act or under Section 157 of the 1988 Act insofar as the liability towards a third party is concerned. Thus, whether the old Act applies to the facts before*

> *us, or the new Act applies, as far as the deceased third party was concerned, the result would not be different. Hence, the contention of the appellant on the second issue must fail, either way, making a decision on the first contention unnecessary, for deciding the second issue. However, it may be necessary to decide which Act applies for deciding the third contention. In our view, it is not the transfer of the vehicle but the accident which furnishes the cause of action for the application before the Tribunal. Undoubtedly, the accident took place after the 1988 Act had come into force. Hence it is the 1988 Act which would govern the situation."*

16. The same principle has been laid down by this Court in **FAO No. 7 of 2007,** titled as **Ashok Kumar & another versus Smt. Kamla Devi & others,** decided on 05.09.2014, **FAO No. 164 of 2007,** titled as **Sh. Vipan Kumar versus Naushad Ahmed and another,** decided on 28.11.2014, and **FAO No. 207 of 2007,** titled as **National Insurance Company Ltd. versus Smt. Santoshi Devi & others,** decided on 13.03.2015.

17. The mandate of Sections 146, 147 and 149 of the MV Act is to protect the rights of third parties and that is why, compulsory duty has been imposed on the owners to get the vehicles insured, so that, claim of third parties cannot be defeated.

18. The same question arose before the Apex Court in a case titled as **S. Iyyapan versus United India Insurance Company Limited and another,** reported in **(2013) 7 Supreme Court Cases 62.** It is apt to reproduce para 16 of the judgment herein:

> *"16. The heading "Insurance of Motor Vehicles against Third Party Risks" given in Chapter XI of the Motor Vehicles Act, 1988 (Chapter VIII of 1939 Act) itself shows the intention of the legislature to make third party insurance compulsory and to ensure that the victims of accident arising out of use of motor vehicles would be able to get compensation for the death or injuries suffered. The provision has been inserted in order to protect the persons travelling in vehicles or using the road from the risk attendant upon the user of the motor vehicles on the road. To overcome this ugly situation, the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force."*

19. Viewed thus, the Tribunal has rightly held that the Oriental Insurance Company Limited-appellant herein has to satisfy the award.

20. Having said so, this appeal deserves to be dismissed and the impugned award is to be upheld. Ordered accordingly.

21. 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.

22. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

FAO No. 67 of 2008
a/w FAO No. 68 of 2008
Reserved on: 17.04.2015
Decided on: 24.04.2015

FAO No. 67 of 2008

Sh. Zahid Ali ...Appellant.

Versus

Sh. Shubham Chauhan & others ...Respondents.

FAO No. 68 of 2008

Sh. Zahid Ali ...Appellant.

Versus

Sh. Aditya Chauhan & others ...Respondents.

Motor Vehicle Act, 1988- Section 149- Claimant 'A' was riding the motorcycle and claimant was a pillion rider- motorcycle was hit by a maruti van in a rash and negligent manner- claimants pleaded that the owner was driving the vehicle and he did not have a valid driving licence- criminal case was registered against 'S' in which a charge-sheet was presented but he was ultimately acquitted- held, that when claimants had pleaded that owner was driving the vehicle and owner had also admitted that he was driving the vehicle, it was not permissible to say that 'S' was driving the vehicle- Insurance Company had not impleaded 'S' or had not examined him - as per evidence led by Insurance Company, 'S' had a valid driving licence at the time of accident- insurer had failed to prove that owner had committed the breach of the terms and conditions of the policy- hence, Insurance Company is liable to indemnify the insured. (Para-10 to 40)

Cases referred:

Dulcina Fernandes and others versus Joaquim Xavier Cruz and another, (2013) 10 SCC 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

Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627

Vinobabai and others versus K.S.R.T.C. and another, 1979 ACJ 282

Himachal Road Transport Corporation and another versus Jarnail Singh and others, Latest HLJ 2009 (HP) 174

For the appellant(s): Mr. Deepak Kaushal, Advocate.

For the respondents: Respondent No. 1 ex-parte.
Mr. Inder Sharma, Advocate, for respondent No. 2.
Mr. J.S. Bagga, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Both these appeals are outcome of a vehicular accident allegedly caused by the driver, namely Shri Shokat Ali, while driving Maruti Van, bearing registration No. HP-18-5045, rashly and negligently, on 03.02.2005 at about 7.00 p.m. near JBT School, Nahan,

and hit a motorcycle, bearing registration No. HP-39 A-5987, which was being driven by Aditya Chauhan and Shubham Chauhan was the pillion rider; both of them sustained injuries, were taken to Zonal Hospital, Nahan, where they remained admitted.

2. Shubham Chauhan filed claim petition, i.e. MAC Petition No. 16-N/2 of 2005, titled as Shumbam Chauhan versus Zahid Ali & others, and claimed compensation to the tune of Rs.4,00,000/-, as per the break-ups given in the claim petition.

3. Aditya Chauhan also filed claim petition, i.e. MAC Petition No. 15-N/2 of 2005, titled as Aditya Chauhan versus Zahid Ali & others, and claimed compensation to the tune of Rs.2,00,000/-, as per the break-ups given in the claim petition.

4. The respondents, i.e. the driver, the owner-insured and the insurer contested the claim petitions on the grounds taken in the respective memo of objections.

5. Identical issues came to be framed in both the claim petitions. I deem it proper to reproduce the issues framed only in MAC Petition No. 16-N/2 of 2005 herein:

> *"1. Whether the petitioner sustained injuries due to the rash and negligent driving of Maruti Van No. HP-18-5045, being driven by Shokat Ali (respondent No. 2), as alleged? ...OPP*
>
> *2. If issue No. 1 is proved, to what amount of compensation, the petitioner is entitled to and from whom? ...OPP*
>
> *3. Whether this petition is not maintainable as alleged in preliminary objection ? ...OPR-3*
>
> *4. Whether the driver of the offending Maruti Van was not having a valid and effective driving licence at the relevant time? ...OPR-3*
>
> *5. Whether this petition has been filed in collusion with the owner and driver of the offending Maruti Van? ...OPR-3*
>
> *6. Relief."*

6. Parties led evidence. The Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, H.P. (for short "the Tribunal"), after scanning the evidence, oral as well as documentary, held that the claimants entitled to compensation and awarded compensation to the tune of Rs. 85,000/- in favour of injured-Shubham Chauhan and Rs.12,000/- in favour of injured-Aditya Chauhan, with interest @ 7.5% per annum from the date of filing of the claim petitions till deposition of the amount, vide two separate awards, dated 02.11.2007 (for short "the impugned awards").

7. The claimants, the insurer and the driver have not questioned the impugned awards on any count, thus, have attained finality so far it relate to them.

8. The owner-insured, Zahid Ali, has questioned both the impugned awards by the medium of these appeals on the ground that the Tribunal has fallen in an error in discharging the insurer and saddling him with liability.

9. This judgment shall govern both these appeals for the reason that these are outcome of the same accident and similar questions of facts and law are involved.

10. The points to be determined in these appeals are - (1) who was driving the offending vehicle, whether Shokat Ali or Shyam Singh Thapa? (2) who is to be saddled with liability?

Issues No. 1 and 3 to 5:

11. The claimants have pleaded in para 21 of both the claim petitions that Shokat Ali was driving the offending vehicle. The owner-insured and the driver-Shokat Ali have admitted the said fact. But, the insurer, i.e. Oriental Insurance Company Limited has denied the said factum and has taken defence in its reply that one Shyam Singh Thapa was driving the offending vehicle, who was not having a valid and effective driving licence. Further, it has pleaded in its reply that the claimants, in connivance with the owner-insured and the driver, have pleaded that Shokat Ali was the driver of the offending vehicles.

12. The claimants have led evidence to the effect that Shokat Ali was driving the offending vehicle despite the fact that the claimants were not required to lead evidence to prove the said factum and to discharge the onus.

13. Zahid Ali, the owner-insured of the offending vehicle has appeared in the witness box as RW-3 in both the claim petitions and has specifically stated that Shokat Ali was driving the vehicle at the time of the accident.

14. The insurer has examined Shri N.K. Barwal as RW-1, HC Ram Gopal as RW-2 and Shri Satender Singh as RW-4 in both the claim petitions.

15. RW-1, Shri N.K. Barwal is Record Keeper from General Record Room, Nahan, who has proved the Notice of Accusation, Ext. RW-1/A, which was framed against Shyam Singh in the criminal trial, which he was facing before the Chief Judicial Magistrate, Nahan, and stated that the charge was not proved and Shyam Singh was acquitted.

16. RW-2, HC Ram Gopal, deposed that he has conducted the investigation in FIR No. 25 of 2005, registered at Police Station Nahan and submitted the final report in terms of Section 173 of the Code of Criminal Procedure (for short "CrPC") before the Court of competent jurisdiction.

17. RW-4, Shri Satender Singh, deposed that Shyam Singh was having the licence to drive a light transport vehicle, which was issued in his name under licence No. 2257/71 on 18.08.1971, was renewed from time to time, was not renewed from 10.12.2003 to 07.02.2005 and was lastly renewed on 07.02.2005 which was valid up to 06.02.2008. He has also stated that penalty was imposed upon Shyam Singh for the delay which had crept-in in getting the licence renewed. Further stated that the licence was not cancelled and the licence was deemed to be valid in view of the renewal by the Licensing Authority.

18. It is not disputed that Shokat Ali was not having the licence. The claimants in both the claim petitions have pleaded and proved that Shokat Ali was driving the offending vehicle at the relevant point of time. At the cost of repetition, the owner-insured and the driver-Shokat Ali have also admitted the said fact. Thus, how can it be said that the vehicle was being driven by Shyam Singh.

19. The aim and object of the MV Act is to provide speedy compensation in order to save the claimants from social evils and other sufferings. It is not an adversarial litigation and strict pleadings and proof are not required while determining the claim petition.

20. My this view is fortified by the judgment rendered by the Apex Court in a case titled as **Dulcina Fernandes and others versus Joaquim Xavier Cruz and another,**

reported in **(2013) 10 Supreme Court Cases 646.** It would be profitable to reproduce relevant portion of paras 8 and 9 of the judgment herein:

> *"8. In United India Insurance Co. Ltd. v. Shila Datta, (2011) 10 SCC 509, while considering the nature of a claim petition under the Motor Vehicles Act, 1988 a three-Judge Bench of this Court has culled out certain propositions of which Propositions (ii), (v) and (vi) would be relevant to the facts of the present case and, therefore, may be extracted hereinbelow:*
>
> *"10. (ii) The rules of the pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In*
>
> *fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal.*
>
> * * *
>
> *(v) Though the Tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation.....*
>
> *(vi) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to assist it in holding the enquiry."*
>
> *9. The following further observation available in para 10 of the Report would require specific note: (Shila Datta case, (2011) 10 SCC 509, SCC p. 519)*
>
> *"10. .....We have referred to the aforesaid provisions to show that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute." (Emphasis added)"*

21. The mystic maybes, technicalities, procedural wrangles and tangles have no role to play in determining the claim petitions. The claim petitions cannot be defeated on the said ground, that will amount to depriving the claimants from reaping the fruits of the said litigation.

22. My this view is fortified by the judgment of the Apex Court in a case titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354.** It is apt to reproduce relevant portion of para 3 of the judgment herein:

> *"3. Road accidents are one of the top killers in our country, specifically when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accident Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases,*

> *culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard. Emphasis supplied"*

23. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the MV Act is Social Welfare Legislation and the procedural technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

> *"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."*

24. It is also apt to reproduce relevant portion of para 12 of the judgment of the Apex Court in the case titled as **Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627,** herein:

> *"12. .....While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not*

> *duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."*

25. This Court in a series of cases has laid down the same principle.

26. The factum of insurance is admitted, but the insurer has taken a defence that the owner-insured has committed breach by employing driver-Shyam Singh, who was not having a valid and effective driving licence.

27. The question is - was Shyam Singh a party before the Tribunal or had the insurer made any effort to lay a motion for his impleadment or for securing his presence as a witness, which it has not done. Thus, adverse inference is to be drawn against it.

28. While scanning the evidence of the insurer, i.e. statements of RW-1, Shri N.K. Barwal, and RW-4, Shri Satender Singh, it is crystal clear that the said Shyam Singh was having the licence. RW-4 has stated that licence was issued, was renewed from time to time and penalty was also imposed upon him for renewal of the licence after delay and it was not cancelled. He has categorically stated that if the Licensing Authority renews the licence, it is deemed to be valid and was valid right from the year 1971 and was not cancelled. Meaning thereby, the licence of the said Shyam Singh was valid.

29. The statement of RW-4 nowhere supports the case of the insurer to the effect that Shyam Singh was not having licence. Thus, the Tribunal has fallen in an error in holding that Shyam Singh was not having valid and effective driving licence, though, it is not the case of the claimants that Shyam Singh was the driver.

30. RW-1 has specifically stated that Shyam Singh was facing trial in the said FIR, but he was acquitted. Meaning thereby, it was not proved that Shyam Singh was driving the offending vehicle at the relevant point of time rashly and negligently.

31. I deem it proper to record herein that the findings recorded by the Criminal Court in acquittal cannot be a ground to defeat the rights of the claimants. Even, if the driver is acquitted in the criminal proceedings, that may not be a ground for dismissal of the claim petitions.

32. My this view is fortified by the judgment rendered by the Apex Court in **N.K.V. Bros's case (supra),** wherein a bus hit an over-hanging high tension wire resulting in 26 casualties. The driver earned acquittal in the criminal case on the score that the tragedy that happened was an act of God. The Apex Court held that the plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rightly rejected by the Tribunal. It is apt to reproduce para 2 of the judgment herein:

> *"2. The Facts: A stage carriage belonging to the petitioner was on a trip when, after nightfall, the bus hit an over-hanging high tension wire resulting in 26 casualties of which*

> *8 proved instantaneously fatal. A criminal case ensued but the accused-driver was acquitted on the score that the tragedy that happened was an act of God. The Accidents Claims Tribunal which tried the claims for compensation under the Motor Vehicles Act, came to the conclusion, affirmed by the High Court, that, despite the screams of the passengers about the dangerous overhanging wire ahead, the rash driver sped towards the lethal spot. Some lost their lives instantly; several lost their limbs likewise. The High Court, after examining the materials, concluded:*
>
> > *"We therefore sustain the finding of the Tribunal that the accident had taken place due to the rashness and negligence of R. W. 1 (driver) and consequently the appellant is vicariously liable to pay compensation to the claimant."*
>
> *The plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rejected and rightly. The requirements of culpable rashness under Section 304A, I.P.C. is more drastic than negligence sufficient under the law of tort to create liability. The quantum of compensation was moderately fixed and although there was, perhaps, a case for enhancement, the High Court dismissed the cross-claims also. Being questions of fact, we are obviously unwilling to re-open the holdings on culpability and compensation."*

33. It is also profitable to reproduce relevant portion of para 8 of the judgment rendered by the High Court of Karnataka in a case titled **Vinobabai and others versus K.S.R.T.C. and another,** reported in **1979 ACJ 282:**

> *" 8. ..... Thus, the law is settled that when the driver is convicted in a regular trial before the Criminal Court, the fact that he is convicted becomes admissible in evidence in a civil proceeding and it becomes prima facie evidence that the driver was culpably negligent in causing the accident. The converse is not true ; because the driver is acquitted in a criminal case arising out of the accident, it is not established even prima facie that the driver is not negligent, as a higher degree of culpability is required to bring home an offence."*

34. Reliance is also placed on the judgment made by this Court in **Himachal Road Transport Corporation and another versus Jarnail Singh and others,** reported in **Latest HLJ 2009 (HP) 174,** wherein it has been held that acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligent or not in causing the accident. It is apt to reproduce relevant portion of para 15 of the judgment herein:

> *"15. In view of the definitive law laid down by their Lordships of the Hon'ble Supreme Court and the judgments cited hereinabove, it is now well settled law that the acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims*

Tribunal whether the driver was negligence or not in causing the accident. ....."

35. The insurer has not led any evidence to prove that the claimants, driver and the owner-insured have hatched a conspiracy and were hand in glove to get compensation from the insurer.

36. It was for the insurer to plead and prove that the owner-insured has committed a willful breach of the terms of the insurance policy read with the mandate of Section 147 and 149 of the Motor Vehicles Act, 1988 (for short "the MV Act"), which it has failed to do so.

37. Having said so, issues No. 1 and 3 to 5 are decided against the insurer and in favour of the claimants.

Issue No. 2:

38. Both the claimants, the victims of the vehicular accident, were admitted in hospital, had undergone sufferings, have lost their earnings for the said period and the injuries sustained by them have affected their career, but, unfortunately, both the claimants have not questioned the adequacy of the compensation.

39. It pains me to record herein that only a meager compensation amounting to Rs.12,000/- has been awarded in favour of injured-Aditya Chauhan. Even liability of the insurer for "no fault liability' is Rs.25,000/- and for this petty amount, injured-Aditya Chauhan has been deprived of from the year 2005 till today, is an eye-opener for the insurer, a mighty insurance company.

40. Accordingly, findings returned by the Tribunal on issue No. 2 are modified by providing that the insurer has to indemnify in terms of the insurance policy, i.e. contract. The insurer is directed to satisfy the awards in both the appeals and to deposit the same within four weeks alongwith interest in terms of the impugned awards till its deposition before the Registry.

41. Registry is directed to release the amount thereafter in favour of the claimants strictly as per the terms and conditions contained in the impugned awards after proper identification.

42. Having glance of the above discussions, the impugned awards are modified, as indicated hereinabove, and the appeals are disposed of accordingly.

43. Send down the record after placing copy of the judgment on each of the Tribunal's files.

****

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

M/s.Mukut Hotels & Resorts Pvt. Ltd. ...Plaintiff.

VERSUS

M/s.Khullar Resorts Pvt. Ltd. & Ors. ...Defendants.

OMP No.4328 of 2013 In
Civil Suit No.90 of 2010.
Decided on: 27th April, 2015.

Code of Civil Procedure, 1908 - Order 1 Rule 10 (2)- An application for deletion of the names of the defendants No. 4 to 9 was filed on the ground that they had ceased to be Directors of defendant No. 1, a Private Limited Company- reliance was placed upon the photocopy of the resignation of defendants No. 4 to 9 as well as annual returns filed before the Competent Authority, wherein, names of defendants No. 4 to 9 were not mentioned- held, that these facts are not sufficient to prove that defendants No. 4 to 9 had relinquished their share in the company and had ceased to have any interest in the share holding of the company, especially when other side had placed certain documents on record to show the transfer of the share by the defendant no. 4 to 9- further, in a decree for specific performance, Sale Consideration would be transferred to the company in which defendants would have a proportionate share and in case they are permitted to be deleted, the Sale Consideration would not pass in their favour - in these circumstances, application dismissed. (Para-2)

For the Plaintiff:	Mr.Bhupender Gupta, Sr.Advocate with Mr.Karan Singh Kanwar, Advocate.
For the Defendants:	Mr.Rajnish K.Lall, Advocate for defendants No.1 to 3. Mr.S.S.Mittal, Sr.Advocate with Mr.Surender Sharma, Advocate for defendants No.4, 5, 6, 8 and 9.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge. (Oral)

The plaintiff-applicant through this application has sought deletion of defendants No. 4 to 9 from the array of defendants. The principal ground on which the disarraying of the aforesaid defendants is sought, has been concerted to be agitated in paragraph 5 of the application. The plea is couched in the factum of defendants No. 4 to 9 extantly ceasing to be Directors of non-applicant/defendant No.1. Uncontrovertedly, the suit property is owned by a Private Limited Company, nomenclatured as M/s Khullar Resorts Private Limited. It through its managing director executed an agreement to sell the suit property to the plaintiff. Part of the sale consideration has come to be received by M/s Khullar Resorts Pvt. Ltd. and the remaining part of it has been agreed to be paid at the time of execution of the registered deed of conveyance inter se the plaintiff and defendants. The factum of defendants No. 4 to 9 ceasing to have any subsisting interest in the defendant No.1/Company has been hotly contested by the counsel for the defendant No. 4. Consequently, it has been urged by the counsel for the defendant No. 4 that the prayer made in the application for seeking their deletion is ungrantable. Rather the learned counsel in his reply to the application filed under Order 1 Rule 10(2) has contended therein that defendants No. 4, 5, 6, 8 and 9 continue to have a subsisting interest in the company, besides he denies that the defendant No. 4 has tendered his resignation as the Managing Director of defendant No.1/company.

2. The counsel for the plaintiff applicant though has relied upon the fact portrayed by the photocopy of the resignation letter of defendants No. 4, 5, 6, 8 and 9 and also upon the factum of annual returns of the Company instituted before the competent authority and theirs displaying the non occurrence of the names of defendants No. 4, 5, 6, 8 and 9 to succor his submission that hence with their ceasing to have any extant interest in the private limited company sued as defendant No.1, their retention in the array of defendants is purposeless. Nonetheless, the said fact itself would not connote that defendants No. 4, 5, 6, 8 and 9, have abdicated/relinquished their shares therein hence

ceased to have any subsisting interest in the share holding of the Company. In substantiation of the aforesaid fact the counsel for the non applicants No. 1 to 3 has adverted to the existence of certain documents portraying the transfer/alienation of shares by the defendants aforesaid in the private limited company. He then contends that the share transfer certificates per se mark the fact of abdication or relinquishment of interest by the defendants aforesaid in the share holdings of the private limited company. However, the said fact too has been contested by the learned counsel for defendants No. 4, 5, 6, 8 and 9, inasmuch, as, the said share transfer certificates have been contended to be fictitious. In the face of contest having emanated inter se the plaintiff and defendants No. 4, 5, 6, 8 and 9 qua the factum of theirs continuing to hence or conversely ceasing to have any subsisting interest in the share holdings of the company corpus whereof is agreed to be alienated in favour of the plaintiff by defendant No. 1 while acting through defendant No. 4. In sequel, when clinching proof at this stage does not emanate qua the factum of either the defendants proposed to be deleted from the array of defendants having resigned as Directors of the private limited company or theirs having abdicated their shares in the private limited company, as a corollary, it would be insagacious to proceed to hence render an invincible determination that their retention in the array of defendants is unnecessary. Moreover, when a decree for specific performance, if it comes to be rendered in favour of the plaintiff-Company, the sale consideration qua the suit property hence would be transferred only to the company in which the impleaded defendants alone would have a proportionate share in consonance with their share holdings in the assets of defendant No.1. In sequel, if the defendants No. 4, 5, 6, 8 and 9 are permitted to be disarrayed from the array of defendants then obviously the sale consideration to be paid by the plaintiff to the defendant No. 1 in case of rendition of a decree of specific performance qua the suit property would not pass to the defendants aforesaid despite the fact of theirs not having been adequately established at this stage to have lost or abdicated any part of their share in the share holdings of defendant No.1. Consequently, at this stage, it is not deemed fit that defendants No. 4, 5, 6, 8 and 9 be disarrayed from the array of defendants as their deimpleadment from the array of defendants would prejudice their interest in the suit property to the extent as enunciated hereinabove. The appropriate course in the interest of justice would be to strike an issue inter se the parties at contest qua the defendants aforesaid having come to be properly joined and evidence apposite to it being adduced.

3. Now, matter be listed before the Additional Registrar (Judicial) for admission and denial.

****

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

Stat of H.P. and others .....Appellants

Versus

Himanshu Shekhar Chaudhary and others .....Respondents.

LPA No. 32 of 2015

Date of decision: 27th April, 2015.

Constitution of India, 1950- Article 226- Writ Court directed the appellants to consider the case of the petitioner in terms of the judgment passed by the Court in ***Chaman Singh versus State of H.P. and another*** decided on 29th August, 2014- held, that Writ Court had

not determined the right of the parties – judgment is not working adversely against the appellants- hence, appeal dismissed. (Para-1 and 2)

For the appellants: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Addl. AGs, with Mr. J.K. Verma, Deputy Advocate General.

For the respondents: Nemo.

The following judgment of the Court was delivered:

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

This Letters Patent Appeal is directed against the judgment and order dated 29th December, 2014, passed the learned Single Judge of this Court in CWP No. 9427 of 2014, whereby the writ respondents/ appellants have to consider the case of the writ petitioners/respondents herein, in terms of the judgment made by this Court in ***Chaman Singh versus State of H.P. and another*** decided on 29th August, 2014.

2. We have gone through the judgment made by the Writ Court. The Writ Court, i.e., the learned Single Judge has not determined the rights of the parties on merits.

3. The impugned judgment is speaking one and is not working adversely against the appellants. Thus, we deem it proper not to issue notice in this appeal and dismiss the appeal. Accordingly, the appeal is dismissed, alongwith pending applications, if any.

****

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

Sh. Govind & ors. .....Appellants.

Versus

Sh. Jiwan Singh .....Respondent.

RSA No. 75 of 2005.
Reserved on: 27.4.2015.
Decided on: 28.4.2015.

Indian Registration Act, 1908- Section 17- Plaintiff had purchased the land on 2.3.1964 from grand-father of the defendant on payment of Rs. 800/- by way of oral sale- held, that Transfer of Property Act was not applicable and oral sale was permissible. (Para-19 to 23)

Case referred:
Dasaundhi Ram and another vrs. Hans Raj, 1985, S.L.J. 293

For the appellant(s): Mr. R.L.Chaudhary, Advocate.
For the respondents: Mr. Sanjeev Kuthiala, 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 Mandi, H.P. dated 12.1.2005, passed in Civil Appeal No.48 of 2003.

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 against the appellant defendants (hereinafter referred to as the defendants). According to the plaintiff, the land comprised in Khewat Khatauni No. 201 min/187 min, 239 min comprising Kh. No. 148 measuring 0-5-7 bighas situated in Mohal Daundhi/217, as shown in the land recorded in the ownership and possession of the defendants (referred to as the suit land). The entries of the suit land in the revenue record were incorrect because this land is owned and possessed by the plaintiff after its purchase on 2.3.1964 from grand father of the defendant, namely Himmat Ram on payment of Rs. 800/- towards the sale consideration. The revenue entries were made and plaintiff was shown as owner-in-possession over the land comprised in Kh. No. 147 min whereas he has purchased the suit land and is in possession of the same. Previously, the plaintiff had filed a suit for the land comprised in Kh. No. 147 min but during the pendency of the suit, it transpired that the land in possession of the plaintiff is the suit land and the entries showing the defendants in possession of this land are wrong and illegal. The plaintiff has constructed a commercial complex on this land. He was in possession of this land peacefully, continuously, uninterruptedly and in a manner hostile to the title of the true owner since 2.3.1964. The possession was to the knowledge of the defendants including their predecessor-in-interest.

3. The suit was contested by the defendants. According to the defendants, the entries were correct and their predecessor-in-interest had constructed a house over the suit land and the plaintiff was employed as an employee for running the machines installed in the suit land. The plaintiff started paying the electricity bills qua this building on behalf of the predecessor-in-interest of the defendants.

4. The replication was filed by the plaintiff to the written statement filed by the defendants. The learned Sub Judge Ist Class (III), Mandi, Distt. Mandi, H.P., framed the issues and dismissed the suit on 31.3.2003. The plaintiff filed an appeal against the judgment and decree dated 31.3.2003. The learned District Judge, Mandi, allowed the appeal on 12.1.2005. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 23.4.2007:

> "1. Whether the learned first appellate Court was right in giving its findings that the sale of immovable property worth Rs. 100 or more can be effected without cause of registered sale deed in the absence of any issue in this regard?
>
> 2. Whether the learned first appellate Court has given its findings in regard to Issue No. 2 in regard to adverse possession rightly or no?"

6. Mr. R.L.Chaudhary, Advocate, for the appellant has supported the judgment and decree passed by the learned trial Court. He then contended that the plaintiff has failed to prove the adverse possession. He further contended that the sale of immovable property

worth Rs. 100/- or more was required to be registered. On the other hand, Mr. Sanjeev Kuthiala, Advocate, has supported the judgment and decree passed by the learned first appellate Court.

7. I have heard the learned Advocates for the parties and gone through the records of the case carefully.

8. The case of the plaintiff, precisely, is that he has purchased the land on 2.3.1964 from the grandfather of the defendants, namely, Sh. Himmat Ram for a consideration of Rs. 800/-.

9. Sh. Mast Ram, PW-1 testified that the plaintiff has moved an application for electricity connection for his industry and his house and connection was sanctioned on 18.11.1965 in his favour. The separate connection for the house of the plaintiff was sanctioned on 25.4.1966. He had seen the industry and house of the plaintiff. The house of defendant Govind Ram was separate and separate meter was sanctioned for the house of Govind Ram.

10. PW-2 Satish Kumar deposed that as per the record, licence was issued to the Jeewan Singh on 7.11.1976 for running the industry. According to the record Jeewan Singh was owner of the industry.

11. PW-3 Mann Singh deposed that he was Kanungo of Circle Pedi and Daundhi Muhal. He had seen Kh. No. 147 and 148. According to him, on some portion of the suit land comprised in Kh. No. 148, machines of Jeewan Singh have been installed and house of the plaintiff is also situated over the suit land. However, the revenue entries in this regard have not been effected qua the suit land. He has visited the spot on 30.10.1998 and on inquiry, he came to know that plaintiff is in possession of the suit land comprised in Kh. No. 148. He prepared the report to this effect and sent the same to the Tehsildar.

12. PW-4 Dagu Ram and PW-5 Shobha Ram, deposed that the plaintiff has constructed house and has also installed thrashing machine over the suit land. He purchased the same for a consideration of Rs. 800/- from the predecessor-in-interest of the defendants.

13. The plaintiff has appeared as PW-6. According to him, he has purchased the land from Himmat for a consideration of Rs. 800/- on 2.3.1964. He has constructed the house over the suit land. He was put in possession in the year 1964. The electricity connection as well as licence of the industry was obtained by him in his name.

14. PW-7 Shamsher Singh deposed that in the year 1966-67, he was posted as Patwari in patwar circle Dhaundhi. He had seen the house of the plaintiff. The plaintiff has installed machines over the suit land.

15. PW-8 Biri Singh, deposed that the house of the plaintiff is situated over the suit land and he has also set up industry over the suit land.

16. PW-9 Jagdish deposed that the house number of plaintiff is 264. The house number of the defendants is not entered in the register.

17. The defendant No. 1 Govind has appeared as DW-1. According to him, the suit land was never sold by the predecessor-in-interest to the plaintiff. His father Nanku has kept plaintiff as servant for running the industry. His father was illiterate. The plaintiff has taken advantage of his illiteracy. The plaintiff has no right over the suit land.

18. Smt. Jeewani, has appeared as DW-2. According to her, the plaintiff was running machine and he was kept for running the machine by Nanku.

19. What emerges from the statements of the witnesses is that the land has been purchased by the plaintiff on 2.3.1964. He has constructed the house over the suit land. The house was allotted the house number. He has also set up the industry on the suit land. He has obtained the licence from the concerned department. The electricity connections were sanctioned separately for the house as well as for running the industry on 18.11.1965 and 25.4.1966, respectively. This fact has been proved by PW-1 Mast Ram. PW-2 Satish Kumar, has proved the issuance of licence.

20. The plaintiff is coming in possession of the suit land since 2.3.1964. PW-3 Mann Singh, has also visited the spot. He has noticed the possession of the plaintiff over the suit land on 30.10.1968. He has sent the report to the Tehsildar. PW-7 Shamsher Singh, Patwari in Patwar Circle Dhaundhi has deposed that the plaintiff has installed the machinery over the suit land. The learned first appellate Court has rightly come to the conclusion that since the Transfer of Property Act was not applicable in the year 1964, the sale was not required to be registered.

21. Sub-para (2) of para-8.1 of HP Land Records Manual, Revised Edition 1992, reads as under:

> **"(2) The provisions of sections 54, 107 and 123 of the Transfer of Property Act were made applicable in H.P. vide Deputy Secretary (Rev.) to the Govt. of H.P. letter No. 17-13/66 Rev. I, dated 6.1.1971 whereby registration of sale (S.54) lease (S.107) and gift (S. 123) have been made compulsory. In the case of acquisition of rights of such nature, the Patwari will enter mutation on the basis of registration memorandum or registered deed."**

22. The Division Bench of this Court in the case of ***Dasaundhi Ram and another vrs. Hans Raj,*** reported in ***1985, S.L.J. 293,*** has held that the provisions of Transfer of Property Act, were not applicable at the time when oral sale was made. It has been held as follows:

> "7. Adverting to the second contention that the plaintiffs were bonafide purchasers of the land in dispute, it may be pointed out that at the relevant time the Transfer of Property Act was not applicable and an oral sale by mutation was permissible. An entry in the 'Roznamcha-vakiaty' regarding the oral sale was reflected at the instance of the land owners on June 18, 1967. A mutation of sale was also attested in favour of the defendant in a general meeting. Simply because the subsequent sale in favour of the plaintiffs was made by a registered deed does not give a preferential right to the plaintiffs.
>
> 8. Under the circumstances, while agreeing with the view taken by the first appellate court as also by the learned Single Judge, there is no reason to doubt that the possession of the land in dispute had already been delivered to the defendant before the report 'Roznamcha-vakiaty' was made on June 18, 1967 pursuant to the oral sale. It was in the month o February, 1968, that the sale deed was executed in favour of the plaintiffs after the possession had been

already delivered to the defendant pursuant to the oral sale. As such the plaintiffs are supposed to have the knowledge of the oral sale. As pointed out earlier above, at the relevant time, it was not necessary to get a deed of sale executed and registered but an oral sale was also permissible. As such, the subsequent sale deed executed and registered in favour of the plaintiffs does not confer better rights on the plaintiffs. A sequence of events reveals that the plaintiffs were aware about the oral sale already made in favour of the defendant. The plaintiffs are also presumed to have the knowledge that the previous owners were not in possession of the land in dispute. At any rate, it was required for the plaintiffs to find out the factual position. Any deliberate omission on their part does not entitle them to any benefit."

23. The plaintiff has proved the ingredients of adverse possession by leading cogent and reliable evidence which has not been rebutted by the defendants. Rather, the defendant No. 1 Govind has stated that the plaintiff was engaged as servant to run the machinery. This cannot be believed in view of the overwhelming evidence led by the plaintiff that he has set up his house and running the industry on the suit land. The cause of action has arisen to the plaintiff when the defendants have tried to oust him from his possession. The substantial questions of law are answered accordingly.

24. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any. The judgment and decree passed by the learned first appellate Court is affirmed.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J

Sh. Parkash Singh & ors. .....Appellants.

Versus

Sh. Girdhari & ors. .....Respondents.

RSA No. 596 of 2001.
Reserved on: 20.4.2015.
Decided on: 28.4.2015.

Specific Relief Act, 1963- Section 34- Plaintiff sought declaration that sale made by defendant No. 1 in favour of defendants No. 2 to 5 was illegal- defendant No. 1 claimed that suit land was gifted to him in the year 1947 by the plaintiff- copy of roznamcha showed that gift was made by the plaintiff in favour of defendant No. 1- mutation was also attested- the entries in the roznamcha was got recorded by the plaintiff himself- suit was instituted in the year 1987 and was clearly barred by limitation- further, it cannot be said that plaintiff was not aware of these entries. (Para-10 to 14)

For the appellant(s): Mr. Bhupender Gupta, Sr. Advocate, with Mr. Ajeet Jaswal, Advocate.

For the respondents: Mr. Ajay Sharma, Advocate, for 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 Additional District Judge (I), Kangra at Dharamshala, H.P. dated 30.8.2001, passed in Civil Appeal No.86-N/99.

2. Key facts, necessary for the adjudication of this regular second appeal are that one Chatru alias Chattar Singh filed a suit for declaration to the effect that he was owner-in-possession of the land detailed in the headnote of the plaint (hereinafter referred to as the suit land) and the mutation of gift No. 118 was illegal, null and void. The sale of Kh. Nos. 145, 146, 151, 152 and 154, made by defendant No. 1 in favour of defendants No. 2 to 5 was illegal, null and void. As a consequential relief, the defendants were sought to be restrained from interference in the rights of ownership and possession over the suit land of the plaintiff. Defendant No. 1 colluded with revenue officials and managed to get his name recorded in the revenue record as his Dharamputra (adopted son). He managed to get attested mutation No. 118 in his favour.

3. The suit was contested by the defendants. Defendant No. 1 claimed himself to be owner-in-possession of the suit land. The suit land was gifted to him by Chatru in the year 1947. He was continuously coming in possession of the suit property. The sale deed effected by him in favour of defendants No. 2 to 5 was legal and valid. Defendants No. 2 to 5 claimed themselves to be owner-in-possession of the land purchased by them.

4. The replication was filed by the plaintiffs to the written statements filed by the defendants. The learned Sub Judge Ist Class (I), Nurpur, Distt. Kangra, H.P., framed the issues on 4.2.1994. The learned Sub Judge Ist Class (I), Nurpur, dismissed the suit on 13.11.1996. The legal heirs of Chatru, namely, Parkash Singh, Raghubir Singh, Dharam Singh and Sukhdev Singh, feeling aggrieved, preferred an appeal before the learned District Judge, Kangra at Dharamshala. The learned Additional District Judge, Kangra at Dharamshala, dismissed the appeal on 30.8.2001. Hence, this regular second appeal.

5. The Regular Second Appeal was admitted on the following substantial question of law on 4. 11.2003:

> "1. Whether the Courts below have wrongly held that the cause of action to file the suit was personal to Sh. Chatro and did not survive to the plaintiff-appellants who are his legal representatives, on the basis of the Will, when the Will was not disputed by the defendants?
>
> 2. Whether both the courts below have wrongly dismissed the suit of the plaintiff-appellants being barred by limitation without taking into consideration the question as to when the cause of action to file the suit arose? Are not such findings erroneous, illegal and perverse?
>
> 3. In the absence of any pleadings of custom or any other law, could the courts below presume the factum of adoption in favour of defendant No. 1 by basing their findings on inadmissible evidence/document Exhibit DW-2/A, particularly when there was no evidence produced or proved

on the record proving the necessary ingredients of the adoption ceremony?

4. Whether the findings of both the courts below that the suit land stood gifted to defendant No. 1 through Sh. Chatro are illegal, which are based on inadmissible evidence Exhibit DW-2/A and Exhibit DW-2/B which were inadmissible in evidence and also not proved in accordance with law?"

6. Since all the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

7. Mr. Bhupender Gupta, Sr. Advocate, for the appellants has vehemently argued that both the courts below have come to the wrong conclusion that the suit was barred by limitation. He then contended that the Courts below have wrongly presumed the factum of adoption in favour of defendant No.1. He also contended that the courts below have wrongly placed reliance upon Ext. DW-2/A and DW-2/B. On the other hand, Mr. Ajay Sharma, Advocate, for respondent No. 1 has supported the judgments and decrees passed by both the Courts below.

8. I have heard the learned Advocates for the parties and gone through the records of the case carefully.

9. PW-1 Parkash Chand testified that Chatru was owner-in-possession of the suit land. Chatru never adopted Girdhari nor gifted suit property to him. They were owners of the suit land on the basis of the Will executed by Chatru in their favour vide Ext. P-1. PW-2 Sh. Mangat Ram has scribed the Will Ext. P-1. He scribed the Will at the instance of Chatru. The contents were read over and explained to him who admitted it to be correct and put his thumb impression over it. PW-3 Saran Singh is the attesting witness to Will Ext. P-1. This witness also deposed that Will was executed at the instance of Chatru. PW-4 Chhajju Singh and PW-5 Roda Ram have deposed that Chatru never adopted Girdhari nor gifted the suit property to him.

10. Sh. Roshan Lal DW-1 has proved his endorsement on the application as Ext. DW-1/A. Sh. Hans Raj, DW-2 has proved copy of Roznamcha Ext. DW-2/A and copy of mutation as Ext. DW-2/B. Defendant No. 1 Girdhari Lal has appeared as DW-3. He testified that he was adopted by Chatru and suit land was gifted to him. Sh. Rattan Singh DW-4 is the Lambardar of village Dankuan. He testified that earlier, he used to collect revenue of the suit land from Chatru and later on, he started collecting it from Girdhari. Defendant No. 5 has appeared as DW-5. He testified that he purchased land from Girdhari vide sale deed dated 15.3.1986 for Rs. 15,000/-. He proved sale deed Ext. DW-3/A. The defendants have also brought on record Jamabandi of the suit land from the year 1950-51 to 1991-92.

11. According to Ext. DW-2/A, copy of Roznamcha No. 178 dated 11.12.1946, gift of the suit land was made in favour of defendant No. 1 by Chatru Chatar Singh himself. The copy of the mutation is Ext. DW-2/B. It was sanctioned in the year 1946. The defendant No. 1 has been shown to be in possession of the suit property as per Ext. D1 to D-10, jamabandi(s) beginning from the year 1950-51 up to 1991-92. The defendant No. 1 has been shown as adopted son of the Chatar Singh. The plaintiff has not led any evidence to rebut these entries.

12. Mutation was attested vide Ext. DW-2/B and the copy of the rapat roznamcha No. 178 is dated 11.12.1946. The roznamcha has been got recorded by Chatar Singh himself. The roznamcha is dated 11.12.1946 and the suit was instituted on 21.9.1987. The learned courts below have rightly come to the conclusion that the suit was barred by limitation.

13. Now, the question is whether the suit was maintainable and could be continued by the plaintiffs after the death of Chatru? Since the land has already been gifted by Chatru to defendant No. 1, they could not claim the ownership on the basis of Will Ext. P-1 dated 3.11.1987. Chatru could not execute the Will on 3.11.1987 once he has already gifted the land to defendant No. 1. Rather Chatru himself could not file the suit after executing gift deed in favour of defendant No.1, more particularly when he was no more owner-in-possession of the suit property.

14. The revenue entries were made in the year 1946. It is not believable that Chatru was not aware of these revenue entries. Chatru was required to challenge the entries got recorded by him in roznamcha on 11.12.1946 where defendant No. 1 was recorded as adopted son of Chatru alias Chattar Singh, within a reasonable period. These entries, as noticed hereinabove, existed for more than 30 years but were never challenged. It cannot be believed that Chatru and plaintiffs were not aware of these developments including the recording of entries in roznamcha dated 11.12.1946 and sale deed made by defendant No. 1 in favour of defendant Nos. 2 to 5. The learned Courts below have correctly appreciated the oral as well as documentary evidence Ext. DW-2/A and DW-2/B.

15. Mr. Bhupender Gupta, learned Senior Advocate, could not convince this Court how Ext. DW-2/A and Ext. DW-2/B were not admissible in evidence. 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. The judgments and decrees passed by both the Courts below are affirmed.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J

RSA No.162 of 2002-B a/w
RSA No. 557 of 2001
Date of Decision: 29.04.2015

1. <u>RSA No. 162 of 2002</u>	
Bhai Ashok Singh	..Appellant.
Versus	
Smt. Lalita & others	..Respondents.
2. <u>RSA No. 557 of 2001</u>	
Rani Padamjit Singh & others	..Appellants.
Versus	
Shri Ashok Singh	…Respondent.

Limitation Act, 1963- Article 63- Plaintiff filed a suit for declaration that he had become owner of the land by way of adverse possession- suit was decreed by Learned Trial Court- an appeal was preferred which was partly allowed- held that no decree for declaration regarding the title can be passed on the basis of adverse possession,

however, it was open for the person to plead in defence that he has acquired the title over the suit land by way of adverse possession. (Para-11 to 17)

Cases referred:
Gurdwara Sahib Versus Gram Panchayat Village Sirthala and another, (2014) 1 SCC 669
P.T. Munichikkanna Reddy and others Versus Revamma and others, (2007) 6 SCC 59

For the Appellant(s):	Mr. R.L. Sood, Sr. Advocate with Mr. Arjun Lall, Advocate, for the appellant in RSA No.162 of 2002 and Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashista, Advocate, for the appellant in RSA No. 557 of 2001.
For the Respondents:	Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashista, Advocate, for the respondents in RSA No. 162 of 2002 and Mr. R.L. Sood, Sr. Advocate with Mr. Arjun Lall, Advocate, for the respondent in RSA No. 557 of 2001.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral)

In these appeals, filed under Section 100 of the Code of Civil Procedure, appellant(s) (in both the appeals) have assailed the findings of fact, some of which are concurrent, so returned by the Courts below.

2. Plaintiff Ashok Singh filed a suit, seeking declaration to the effect that as owner he is in exclusive possession of the suit property, comprising of road, garage etc. built upon Khata Khatauni Nos. 13/14 min., Khasra Nos. 12 and 13, situate in Chhota Shimla. The defendants arrayed were Rani Padamjit Singh (defendant No.1), Smt. Lalita (defendant No.2), Smt. Anita (defendant No.3) and Smt. Rama (defendant No.4), all legal heirs of late Raja Padamjit Singh, original owner of the property commonly known as Strawberry Hills. Plaintiff pleaded occupation, over the suit property, for over a period of 50 years. Hence having perfected title by way of adverse possession.

3. Written statement, though filed on behalf of all the defendants but verified and signed only by Smt. Lalita Khanna, disputed the factual position, so averred by the plaintiff.

4. Plaintiff reiterated its stand in the replication.

5. With the completion of pleadings in the suit filed on 24.06.1989, trial Court framed the following issues for consideration.

> "1. Whether the plaintiff is exclusive owner in possession of suit land as alleged? If so its effect? OPP.
>
> 2. Whether the plaintiff is entitled to relief of declaration and injunction as alleged? OPP.
>
> 3. Whether the suit in present form is not competent? OPD.
>
> 4. Whether the plaintiff has no locus standi to file this suit? OPD.

5. Whether the plaintiff is estopped to file this suit as alleged? OPD.

6. Relief".

6. In order to prove its case and discharge the burden of onus, plaintiff examined himself as PW.5 and five other witnesses. Sh. Naresh Sood (PW.1), was examined to prove the factum of construction of garage and its assessment for the purpose of Municipal (House) Taxes and payment thereof. Sh. Ramesh Chand (PW.2), was examined to prove the Plan, so sanctioned by the Municipal Authorities for carrying out the alterations and additions in the garage as also the house, already in existence. Sh. Lekh Ram (PW.3), was examined to prove the record of the Municipal Corporation. Sh. Purshotam Sharma (PW.4), was examined to prove the affidavit, so filed by Rani Padamjit Singh (defendant No.1) in the proceedings before this Court. Sh. Prithpal Singh (PW.6) and Sh. Rupinder Singh (PW.7), were examined to also prove the existence of the garage and uninterrupted and peaceful possession and usage of the entire suit property.

7. On the other hand, no evidence other than the deposition of Smt. Lalita (defendant No.2) was led by the defendants.

8. Appreciating the testimonies of the witnesses and the other evidence on record trial Court, holding that predecessor-in-interest of the plaintiff, was in an uninterrupted and continuous use and occupation of the suit property including the garage, by answering the issues in favour of the plaintiff, decreed the suit as under:-

> "Thus, for the reasons recorded for deciding the aforesaid issues, the suit of the plaintiff succeeds, therefore, a decree for declaration that the plaintiff is owner of the suit property alongwith a decree for permanent injunction, restraining the defendants from interfering in the possession of the plaintiff is passed in favour of the plaintiff and against the defendants". .....

9. In an appeal preferred by the defendants, judgment and decree dated 30.03.1995, passed by Sub Judge, 1st Class, Shimla, District Shimla, in Case No. 43/1 of 90, titled as *Sh. Ashok Singh Versus Rani Padamjit Singh & others,* stands partly reversed by the Additional District Judge, Shimla, H.P., in terms of impugned judgment and decree dated 08.08.2001, in Civil Appeal No.55-S/13 of 1995, titled as *Rani Padamjit Singh & others Versus Shri Ashok Singh,* holding the plaintiff entitled only to a decree of injunction. Court set aside the findings, judgment and decree of declaration, with regard to plea of ownership by way of adverse possession.

10. Appeals stand admitted on the following substantial questions of law:-

RSA No. 162 of 2002

"1. Whether the impugned judgment and decree is liable to be set aside as the appellate court below has ignored the pleadings of the parties and has travelled beyond the same?

2. Whether the impugned judgment and decree is liable to be set aside as the trial Court has mis appreciated and ignored evidence, more particularly in the form of written documents such as PW.2/A which clearly went to the root of the case and which showed that the garage in

question has been constructed by the appellant's predecessor-in-interest some time in 1951 and whether the impugned judgment and decree of the learned appellate court has failed to record any findings on the said is garage?

3. Whether the appellate Court has erred in law in not drawing adverse inference against respondents No.1,3 and 4 for their failure to appearing the witness box or to make any statement in support of the false stand put by them?"

RSA No.557 of 2001

"1. Whether the learned Additional District Judge, Shimla, in the facts and circumstances of the case, has committed an error of law by passing a decree for permanent prohibitory injunction in respect of the suit property after having dismissed the claim of the Plaintiff-Respondent of ownership and adverse possession with respect to the suit property?"

11. Having perused the material on record and heard learned counsel for the parties, it cannot be said that the Courts below committed any error in passing a decree for Permanent Prohibitory Injunction with respect to the suit property. It also cannot be said that the lower Appellate Court ignored the pleadings of the parties or travelled beyond the same. Plaintiff's suit was not only with regard to his title of ownership, but also for the relief of injunction. There is no bar in passing a decree for injunction.

12. In the light of the decision rendered by the apex Court in *Gurdwara Sahib Versus Gram Panchayat Village Sirthala and another,* (2014) 1 SCC 669, findings returned by the lower Appellate Court, dismissing the plaintiff's suit qua relief for declaration of ownership by way of adverse possession, cannot be said to be erroneous, illegal or bad in law.

13. Reliance on paragraph 6 of earlier decision in *P.T. Munichikkanna Reddy and others Versus Revamma and others,* (2007) 6 SCC 59, is misconceived in law, in view of the subsequent decision rendered by a Coordinate Bench of the same Court.

14. From the evidence on record and more particularly that of Naresh Sood (PW.1) and Ramesh Chand (PW.2), it is evident that plaintiff alongwith others and not the defendants, was in possession of the garage. From the documentary evidence, so proved by the officials of the Municipal Corporation, it is evident that the garage, is in possession of the plaintiff and two other persons who are not party to the suit, but then defendant No.2, who stepped into the witness box, does not dispute the fact that plaintiff alone is in possession of the same. In fact she goes to corroborate the ocular evidence so led by the plaintiff, with regard to his exclusive possession over the garage as also the road exclusively leading to his house so owned and possessed by him. It has also come on record, as has been so held by the trial Court, that defendants as also the owners and the residents of the adjacent/adjoining property have their different and separate access. Thus, findings with regard to exclusive possession and user of the road by the plaintiff, so returned by the Courts below, cannot be said to be perverse, illegal or not borne out from the record. In fact, as is evident from the Municipal record, garage stood constructed from the time of predecessor-in-interest of the plaintiff.

15. Significantly, though the trial Court relied upon the affidavit (Ex.PW.4/A), so filed by Rani Padamjit Singh (defendant No.1), in a Civil Writ Petition filed before this Court, but however, lower Appellate Court, ignored the same by relying upon the provisions of Order 19 Rules 1 and 2 of CPC as also Section 3 of the Indian Evidence Act, 1872. Affidavit (Ex.PW.4/A) stands proved through the testimony of Purshotam Sharma (PW-4), a Clerk from the High Court. Provisions of Order 19 would have no application in the given facts and circumstances. Lower Appellate Court erred in holding so. The affidavit (Ex.PW.4/A) was a mere document and not an affidavit in the proceedings, filed by any of the parties to the *lis.* Affidavit, so filed by Rani Padamjit Singh, is legally admissible in evidence, for having been proved, in accordance with law, by a duly authorized and competent person. Original file from the High Court was summoned and only thereafter, its copy was taken and placed on the record and exhibited. This document, unambiguously admits the plaintiff to be in exclusive possession, uninterrupted and continuous, over the suit property, including the garage. It is perhaps for this reason that the said defendant chose neither to sign the written statement nor stepped into the witness box. Thus, findings with regard to the plaintiff's uninterrupted and continuous use, occupation and possession over the suit property, so rendered by the courts below, cannot be said to be perverse, illegal, erroneous and not borne out from the record.

16. Mr. Arjun Lall, learned counsel, invites attention to the decision rendered by a Coordinate Bench of this Court in RSA No. 489 of 2014-C, titled as *Sher Singh and others Versus Virender Singh and others,* on 31.10.2014, to the following effect:-

> *"*Though, the suit is not maintainable, it needs to be clarified that in case the plaintiffs are in possession of the suit property, they cannot be disturbed except by due process of law and it further needs to be clarified that in any future litigation it shall be open to the plaintiffs to plead in defence that they had become owners of the property by way of adverse possession. This clarification has been necessitated on the basis of the following observations of the Hon'ble Supreme Court in *Gurdwara Sahib's* case (supra) which reads thus:-
>
> > *"10. As the appellant is in possession of the suit property since 13-4-1952 and has been granted the decree of injunction, it obviously means that the possession of the appellant cannot be disturbed except by due process of law. We make it clear that though the suit of the appellant seeking relief of declaration has been dismissed, in case the respondents file suit for possession and/or ejectment of the appellant, it would be open to the appellant to plead in defence that the appellant, had become the owner of property by adverse possession. Needless to mention at this stage, the appellant shall also be at liberty to plead that findings of Issue 1 to the effect that the appellant is in possession of adverse possession since 13-4-1952 operates as res judicata. Subject to this clarification, the appeal is dismissed"".*

17. It stands clarified that even though no decree for declaration with regard to the title can be passed, on the basis of plea of adverse possession, as is so correctly held by the lower Appellate Court, however since plaintiff is in possession of the suit property, in any future litigation, it shall be open for him to plead in defence, that he has acquired the title over the suit property by way of adverse possession.

18. For the aforesaid reasons, both appeals stand disposed of and substantial questions of law answered accordingly. Pending application(s), if any, also stand disposed of.

****

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

M/s Spray Engineering Devices Limited Company .....Non-applicant/Plaintiff.
Versus
Kay Bouvet Engineering Private Limited .....Applicant/Defendant.

OMP No.447 of 2014 in Civil Suit No.4051 of 2013.
Reserved on : 23.04.2015.
Date of decision: April 29,2015.

Code of Civil Procedure, 1908- Order 7 Rule 11 read with Section 151- Parties had agreed that Court at Satara, Maharashtra will have the jurisdiction to try the dispute between them - hence, it was prayed that Court in Himachal Pradesh has no jurisdiction to hear and entertain the suit- plaintiff contended that cause of action had taken place within the territorial jurisdiction of Himachal Pradesh as plaintiff had Industrial Unit at Baddi and the devices were manufactured and shipped from Baddi – bills were issued and the payments were received and encashed at Baddi – purchase order mentions the words "subject to jurisdiction at Satara (Maharashtra) Court", while invoices mention "all disputes are subject to Solan jurisdiction"- thus, parties had never agreed to limiting the jurisdiction in the dispute and they were at liberty to institute the suit at Satara or at Solan. (Para-3 to 14)

Cases referred:

M/s Sponge Iron India Ltd., versus M/s Andhra Steel Corporation Ltd., Bangalore AIR 1989 Andhra Pradesh 206

C. Satyanarayana versus Kanumarlapudi Lakshmi Narasimham LAWS (APH)-1966-9-2

Messrs. Delux Roadlines versus National Insurance Co Ltd LAWS (MAD)-1986-9-25

Baldev Steel Limited versus Empire Dyeing and Manufacturing Company Limited LAWS(DLH)-2001-5-141

Hanil Era Textiles Ltd. versus Puromatic Filters (P) Ltd. (2004) 4 SCC 671

Rajasthan State Electricity Board versus Universal Petrol Chemicals Limited (2009) 3 SCC 107

M/S JHS Svendgaard Laboratories Limited versus M/S Procter and Gamble Home Product Limited and others 2014 (1)Shim. LC 1.

Swastik Gases Private Limited versus Indian Oil Corporation Limited (2013) 9 SCC 32

For the Non Applicant/ Plaintiff : Mr.Rahul Mahajan, Advocate.
For the Applicant/ Defendant : Mr.Y.P.Sood, Advocate.

The following judgment of the Court was delivered:

Tarlok *Singh Chauhan, Judge.*

OMP No.447 of 2014.

The defendant/applicant by moving this application under Order 7 Rule 11 readwith Section 151 of the Code of Civil Procedure has sought rejection of the plaint on the ground that this Court has no territorial jurisdiction to try the suit. It is submitted that the perusal of various purchase orders filed alongwith the plaint would show that the parties to the suit had agreed that only the Court at Satara, Maharashtra will have the jurisdiction to try the dispute between the parties. Since the parties had agreed to the jurisdiction of the Court at Satara, therefore, this Court has no jurisdiction to try the suit.

2. In reply to this application, the plaintiff/non-applicant has submitted that the cause of action had taken place within the territorial jurisdiction of this Court as the plaintiff/non-applicant was having its industrial unit at Baddi, District Solan, Himachal Pradesh and the devices were manufactured and shipped from Baddi to the destination as directed by the defendant, the bills/invoices were issued from Baddi, the payments were received at Baddi and encashed at Baddi within the territorial jurisdiction of this Court. It is further claimed that in the invoices issued by the plaintiff, it was specifically stated that all disputes would be subject to the jurisdiction of Court at Solan.

3. It is clear that there is no consensus or agreement on the question of jurisdiction of Courts while the purchase order mentions "subject to jurisdiction of Satara (Maharashtra) Courts only", the invoice of the plaintiff, on the other hand, states that "all disputes are subject to Solan jurisdiction". The acceptance by the plaintiff as indicated in the invoice clearly indicates its intention that any dispute should be settled by the Courts at Solan only as against the intention expressed by the defendant in its purchase order that it is subject to the jurisdiction of the Courts at Satara (Maharashtra) only. Thus, there is no agreement or consensus on this point.

4. In light of the aforesaid pleadings, the following question arises for determination:-

i) Whether this Court has territorial jurisdiction to try and adjudicate the suit?

5. The learned counsel for the plaintiff has relied upon the judgment of a Division Bench of the Andhra Pradesh High Court in ***M/s Sponge Iron India Ltd.,*** *versus* ***M/s Andhra Steel Corporation Ltd., Bangalore AIR 1989 Andhra Pradesh 206*** to claim that ouster of jurisdiction of the Courts cannot be readily inferred and in case the purchase orders had certain stipulations regarding jurisdiction and the invoices in turn specified the jurisdiction of another Court, then both the Courts would be having concurrent jurisdiction. The learned counsel for the plaintiff has further relied upon ***C. Satyanarayana*** *versus* ***Kanumarlapudi Lakshmi Narasimham LAWS (APH)-1966-9-2, Messrs. Delux Roadlines*** *versus* ***National Insurance Co Ltd LAWS (MAD)-1986-9-25,*** and ***Baldev Steel Limited*** *versus* ***Empire Dyeing and Manufacturing Company Limited LAWS(DLH)-2001-5-141***.

6. On the other hand, Mr.Y.P.Sood, learned counsel for the defendant has relied ***Hanil Era Textiles Ltd.*** *versus* ***Puromatic Filters (P) Ltd. (2004) 4 SCC 671, Rajasthan State Electricity Board*** *versus* ***Universal Petrol Chemicals Limited (2009) 3 SCC 107*** and ***M/S JHS Svendgaard Laboratories Limited*** *versus* ***M/S Procter and Gamble Home Product Limited and others 2014 (1)Shim. LC 1.***

7. I have heard the learned counsel for the parties and have gone through the records of the case. There is no need to make reference to the judgments cited by both the learned counsel

for the parties in view of the three Judges' judgment of the Hon'ble Supreme Court in ***Swastik Gases Private Limited*** *versus* ***Indian Oil Corporation Limited (2013) 9 SCC 32*** wherein the entire law on the subject was discussed in the following manner:-

> *"11. Hakam Singh v. Gammon (India) Ltd; (1971) 1 SCC 286 is one of the earlier cases of this Court wherein this Court highlighted that where two Courts have territorial jurisdiction to try the dispute between the parties and the parties have agreed that dispute should be tried by only one of them, the court mentioned in the agreement shall have jurisdiction. This principle has been followed in many subsequent decisions.*
>
> *12. In Globe Transport Corporation v. Triveni Engineering Works (1983) 4 SCC 707 while dealing with the jurisdiction clause which read "the Court in Jaipur City alone shall have jurisdiction in respect of all claims and matters arising (sic) under the consignment or of the goods entrusted for transportation", this Court held that the jurisdiction clause in the agreement was valid and effective and the courts at Jaipur only had jurisdiction and not the courts at Allahabad which had jurisdiction over Naini where goods were to be delivered and were in fact delivered.*
>
> *13. In A.B.C. Laminart (P) Ltd. v. A.P.Agencies (1989) 2 SCC 163, this Court was concerned with clause 11 in the agreement which read, "any dispute arising out of this sale shall be subject to Kaira jurisdiction". The disputes having arisen out of the contract between the parties, the respondents therein filed a suit for recovery of amount against the appellants therein and also claimed damages in the court of subordinate judge at Salem. The appellants, inter alia, raised the preliminary objection that the subordinate judge at Salem had no jurisdiction to entertain the suit as parties by express contract had agreed to confer exclusive jurisdiction in regard to all disputes arising out of the contract on the civil court at Kaira. When the matter reached this Court, one of the questions for consideration was whether the court at Salem had jurisdiction to entertain or try the suit. While dealing with this question, it was stated by this Court that the jurisdiction of the court in the matter of contract would depend on the situs of the contract and the cause of action arising through connecting factors. The Court referred to Sections 23 and 28 of the Indian Contract Act, 1872 (for short, 'Contract Act') and Section 20(c) of the Civil Procedure Code (for short 'Code') and also referred to Hakam Singh and in para 21 of the Report held as under: (A.B.C. Laminart case, SCC pp.175-76).*
>
> > *"21……When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim 'expressio unius est exclusio alterius' - expression of one is the exclusion of another - may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed."*

14. Then, in paragraph 22 of the report, this Court held as under: (A.B.C. Laminart case, SCC p.176).

> *"22.....We have already seen that making of the contract was a part of the cause of action and a suit on a contract therefore could be filed at the place where it was made. Thus Kaira Court would even otherwise have had jurisdiction. The bobbins of metallic yarn were delivered at the address of the respondent at Salem which, therefore, would provide the connecting factor for court at Salem to have jurisdiction. If out of the two jurisdictions one was excluded by clause 11 it would not absolutely oust the jurisdiction of the court and, therefore, would not be void against public policy and would not violate Sections 23 and 28 of the Contract Act. The question then is whether it can be construed to have excluded the jurisdiction of the court at Salem. In the clause 'any dispute arising out of this sale shall be subject to Kaira jurisdiction' ex facie we do not find exclusionary words like 'exclusive', 'alone', 'only' and the like. Can the maxim 'expressio unius est exclusio alterius' be applied under the facts and circumstances of the case? The order of confirmation is of no assistance. The other general terms and conditions are also not indicative of exclusion of other jurisdictions. Under the facts and circumstances of the case we hold that while connecting factor with Kaira jurisdiction was ensured by fixing the situs of the contract within Kaira, other jurisdictions having connecting factors were not clearly, unambiguously and explicitly excluded. That being the position it could not be said that the jurisdiction of the court at Salem which court otherwise had jurisdiction under law through connecting factor of delivery of goods thereat was expressly excluded."*

15. In R.S.D.V. Finance Co. Pvt. Ltd. v. Shree Vallabh Glass Works Ltd. (1993) 2 SCC 130 the question that fell for consideration in the appeal was, in light of the endorsement on the deposit receipt "subject to Anand jurisdiction", whether the Bombay High Court had jurisdiction to entertain the suit filed by the appellant therein. Following A.B.C. Laminart1, this Court in para 9 of the Report held as under: (R.S.D.V. Finance Case, SCC pp. 136-37).

> *"9. We may also consider the effect of the endorsement 'Subject to Anand jurisdiction' made on the deposit receipt issued by the defendant. In the facts and circumstances of this case it cannot be disputed that the cause of action had arisen at Bombay as the amount of Rs 10,00,000 itself was paid through a cheque of the bank at Bombay and the same was deposited in the bank account of the defendant in the Bank of Baroda at Nariman Point, Bombay. The five post-dated cheques were also issued by the defendant being payable to the plaintiff at Bombay. The endorsement 'Subject to Anand jurisdiction' has been made unilaterally by the defendant while issuing the deposit receipt. The endorsement 'Subject to Anand jurisdiction' does not contain the ouster clause using the words like 'alone', 'only', 'exclusive' and the like. Thus the maxim 'expressio unius est exclusio alterius' cannot be applied under the facts and circumstances of the case and it cannot be held that merely because the deposit receipt contained the endorsement 'Subject to Anand jurisdiction' it excluded*

> *the jurisdiction of all other courts who were otherwise competent to entertain the suit. The view taken by us finds support from a decision of this Court in A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies"*

16. The question under consideration in Angile Insulations v. Davy Ashmore India Ltd. (1995) 4 SCC 153 was whether the court of subordinate judge, Dhanbad possessed the jurisdiction to entertain and hear the suit filed by the appellant for recovery of certain amounts due from the first respondent. Clause 21 of the agreement therein read, "This work order is issued subject to the jurisdiction of the High Court situated in Banglaore in the State of Karnataka". This Court relied upon A.B.C. Laminart1 and held that having regard to clause 21 of the work order which was legal and valid, the parties had agreed to vest the jurisdiction of the court situated within the territorial limit of High Court of Karnataka and, therefore, the court of subordinate judge, Dhanbad in Bihar did not have jurisdiction to entertain the suit filed by the appellant therein.

17. Likewise, in Shriram City Union Finance Corporation Limited v. Rama Mishra (2002) 9 SCC 613, the legal position stated in Hakam Singh was reiterated. In that case, clause 34 of the lease agreement read "subject to the provisions of clause 32 above it is expressly agreed by and between the parties hereinabove that any suit, application and/or any other legal proceedings with regard to any matter, claims, differences and for disputes arising out of this agreement shall be filed and referred to the courts in Calcutta for the purpose of jurisdiction". This Court held that clause 34 left no room for doubt that the parties had expressly agreed between themselves that any suit, application or any other legal proceedings with regard to any matter, claim, differences and disputes arising out of this claim shall only be filed in the courts in Calcutta. Whilst drawing difference between inherent lack of jurisdiction of a court on account of some statute and the other where parties through agreement bind themselves to have their dispute decided by any one of the courts having jurisdiction, the Court said: (Shriram City Case SCC pp.616-17, para 9)

> *"9.……It is open for a party for his convenience to fix the jurisdiction of any competent court to have their dispute adjudicated by that court alone. In other words, if one or more courts have the jurisdiction to try any suit, it is open for the parties to choose any one of the two competent courts to decide their disputes. In case parties under their own agreement expressly agree that their dispute shall be tried by only one of them then the parties can only file the suit in that court alone to which they have so agreed. In the present case, as we have said, through clause 34 of the agreement, the parties have bound themselves that in any matter arising between them under the said contract, it is the courts in Calcutta alone which will have jurisdiction. Once parties bound themselves as such it is not open for them to choose a different jurisdiction as in the present case by filing the suit at Bhubaneshwar. Such a suit would be in violation of the said agreement."*

18. In Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd (2004) 4 SCC 671, this Court was concerned with the question of jurisdiction of court of District Judge, Delhi. Condition 17 in the purchase order in respect of jurisdiction read, "….. legal proceeding arising out of the order shall be subject to the jurisdiction

of the courts in Mumbai." Following Hakam Singh, A.B.C. Laminart1 and Angile Insulations, it was held in para 9 of the Report as under: (Hanil Era Textiles case, SCC p.676)

> *"9. Clause 17 says - any legal proceedings arising out of the order shall be subject to the jurisdiction of the courts in Mumbai. This clause is no doubt not qualified by the words like "alone", "only" or "exclusively". Therefore, what is to be seen is whether in the facts and circumstances of the present case, it can be inferred that the jurisdiction of all other courts except courts in Mumbai is excluded. Having regard to the fact that the order was placed by the defendant at Bombay, the said order was accepted by the branch office of the plaintiff at Bombay, the advance payment was made by the defendant at Bombay, and as per the plaintiff's case the final payment was to be made at Bombay, there was a clear intention to confine the jurisdiction of the courts in Bombay to the exclusion of all other courts. The Court of Additional District Judge, Delhi had, therefore, no territorial jurisdiction to try the suit."*

19. In New Moga Transport Co., v. United India Insurance Co. Ltd. and others; (2004) 4 SCC 677, the question that fell for consideration before this Court was whether the High Court's conclusion that the civil court at Barnala had jurisdiction to try the suit was correct or not? The clause in the consignment note read, "the court at head office city shall only be the jurisdiction in respect of all claims and matters arising under the consignment at the goods entrusted for transport." Additionally, at the top of the consignment note, the jurisdiction has been specified to be with Udaipur court. This Court considered Section 20 of the Code and following Hakam Singh and Shriram City, in para 19 of the Report held as under : (New Moga Transport case, SCC p.683)

> *"19. The intention of the parties can be culled out from use of the expressions "only", "alone", "exclusive" and the like with reference to a particular court. But the intention to exclude a court's jurisdiction should be reflected in clear, unambiguous, explicit and specific terms. In such case only the accepted notions of contract would bind the parties. The first appellate court was justified in holding that it is only the court at Udaipur which had jurisdiction to try the suit. The High Court did not keep the relevant aspects in view while reversing the judgment of the trial court. Accordingly, we set aside the judgment of the High Court and restore that of the first appellate court. The court at Barnala shall return the plaint to Plaintiff 1 (Respondent 1) with appropriate endorsement under its seal which shall present it within a period of four weeks from the date of such endorsement of return before the proper court at Udaipur."*

20. The question for consideration in Shree Subhlaxmi Fabrics (P) Ltd. v. Chand Mal Baradia (2005) 10 SCC 704, was whether city civil court at Calcutta had territorial jurisdiction to deal with the dispute though condition 6 of the contract provided that the dispute under the contract would be decided by the court of Bombay and no other courts. This Court referred to Hakam Singh3, A.B.C. Laminart1 and Angile Insulations6 and then in paras 18 and 20 of the Report held as under: (Shree Subhlaxmi Fabrics Case, SCC pp.713-14)

> *"18. In the case on hand the clause in the indent is very clear viz. "court of Bombay and no other court". The trial court on consideration of material on record held that the court at Calcutta had no jurisdiction to try the suit."*
>
> * * *
>
> *"20. In our opinion the approach of the High Court is not correct. The plea of the jurisdiction goes to the very root of the matter. The trial court having held that it had no territorial jurisdiction to try the suit, the High Court should have gone deeper into the matter and until a clear finding was recorded that the court had territorial jurisdiction to try the suit, no injunction could have been granted in favour of the plaintiff by making rather a general remark that the plaintiff has an arguable case that he did not consciously agree to the exclusion of the jurisdiction of the court."*

21. In Harshad Chiman Lal Modi v. DLF Universal Ltd. (2005) 7 SCC 791, the clause of the plot buyer agreement read, "Delhi High Court or courts subordinate to it, alone shall have jurisdiction in all matters arising out of, touching and/or concerning this transaction." This Court held that the suit related to specific performance of the contract and possession of immovable property and the only competent court to try such suit was the court where the property was situate and no other court. Since the property was not situated in Delhi, the Delhi Court had no jurisdiction though the agreement provided for jurisdiction of the court at Delhi. This Court found that the agreement conferring jurisdiction on a court not having jurisdiction was not legal, valid and enforceable.

22. In Rajasthan SEB v. Universal Petrol Chemicals Ltd.,(2009) 3 SCC 107, two clauses under consideration were clause 30 of the general conditions of the contract and clause 7 of the bank guarantee. Clause 30 of the general conditions of the contract stipulated, "the contract shall for all purposes be construed according to the laws of India and subject to jurisdiction only at Jaipur in Rajasthan courts only……" and clause 7 of the bank guarantee read, "all disputes arising in the said bank guarantee between the Bank and the Board or between the supplier or the Board pertaining to this guarantee shall be subject to the courts only at Jaipur in Rajasthan". In light of the above clauses, the question under consideration before this Court was whether Calcutta High Court where an application under Section 20 of the Arbitration Act, 1940 was made had territorial jurisdiction to entertain the petition or not. Following Hakam Singh3, A.B.C. Laminart1 and Hanil Era Textiles , this Court in paras 27 and 28 of the Report held as under: (Rajasthan SEB case, SCC pp. 114-15)

> *"27. The aforesaid legal proposition settled by this Court in respect of territorial jurisdiction and applicability of Section 20 of the Code to the Arbitration Act is clear, unambiguous and explicit. The said position is binding on both the parties who were contesting the present proceeding. Both the parties with their open eyes entered into the aforesaid purchase order and agreements thereon which categorically provide that all disputes arising between the parties out of the agreements would be adjudicated upon and decided through the*

process of arbitration and that no court other than the court at Jaipur shall have jurisdiction to entertain or try the same. In both the agreements in Clause 30 of the general conditions of the contract it was specifically mentioned that the contract shall for all purposes be construed according to the laws of India and subject to jurisdiction only at Jaipur in Rajasthan courts only and in addition in one of the purchase order the expression used was that the court at Jaipur only would have jurisdiction to entertain or try the same.

28. In the light of the aforesaid facts of the present case, the ratio of all the aforesaid decisions which are referred to hereinbefore would squarely govern and apply to the present case also. There is indeed an ouster clause used in the aforesaid stipulations stating that the courts at Jaipur alone would have jurisdiction to try and decide the said proceedings which could be initiated for adjudication and deciding the disputes arising between the parties with or in relation to the aforesaid agreements through the process of arbitration. In other words, even though otherwise the courts at Calcutta would have territorial jurisdiction to try and decide such disputes, but in view of the ouster clause it is only the courts at Jaipur which would have jurisdiction to entertain such proceeding."

23. Then, in para 35 of the Report, the Court held as under: (Rajasthan SEB case, SCC p.116)

"35. The parties have clearly stipulated and agreed that no other court, but only the court at Jaipur will have jurisdiction to try and decide the proceedings arising out of the said agreements, and therefore, it is the civil court at Jaipur which would alone have jurisdiction to try and decide such issue and that is the court which is competent to entertain such proceedings. The said court being competent to entertain such proceedings, the said court at Jaipur alone would have jurisdiction over the arbitration proceedings and all subsequent applications arising out of the reference. The arbitration proceedings have to be made at Jaipur Court and in no other court."

24. In Balaji Coke Industry (P) Ltd. v. Maa Bhagwati Coke Gujarat (P) Ltd. (2009) 9 SCC 403 the question was, notwithstanding the mutual agreement to make the high-seas sale agreement subject to Kolkata jurisdiction, whether it would be open to the respondent-company to contend that since a part of cause of action purportedly arose within the jurisdiction of Bhavnagar (Gujarat) Court, the application filed under Section 9 of the 1996 Act before the Principal Civil Judge (Senior Division), Bhavnagar (Gujarat) could still be maintainable. This question arose in light of clause 11 of the agreement which contained an arbitration clause and read as under : (Balaji Coke case, SCC p. 404, para 4)

"4…….In case of any dispute or difference arising between the parties hereto or any claim or thing herein contained or the construction thereof or as to any matter in any way connected with or arising out of these presents or the operation thereof or the rights, duties or liabilities of either party thereof, then and in every such case the matter, differences or disputes shall be referred to an arbitrator in

Kolkata, West Bengal, India in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996, or any other enactment or statutory modifications thereof for the time being in force. The place of arbitration shall be Kolkata."

(emphasis in original)

25. This Court held in para 30 of the Report, that : (Balaji Coke Case, SCC p.409)

> *30…the parties had knowingly and voluntarily agreed that the contract arising out of the high-seas sale agreement would be subject to Kolkata jurisdiction and even if the courts in Gujarat also had the jurisdiction to entertain any action arising out of the agreement, it has to be held that the agreement to have the disputes decided in Kolkata by an arbitrator in Kolkata was valid and respondent had wrongly chosen to file its application under Section 9 of the 1996 Act before the Bhavnagar court (Gujarat). …."*

26. The question in Inter Globe Aviation Ltd. v. N. Satchidanand; (2011) 7 SCC 463, inter alia, was whether the Permanent Lok Adalat at Hyderabad had territorial jurisdiction to deal with the matter. The standard terms which governed the contract between the parties provided, "all disputes shall be subject to the jurisdiction of the courts of Delhi only". The contention on behalf of the appellant before this Court was that the ticket related to travel from Delhi to Hyderabad. The complaint was in regard to delay at Delhi and, therefore, the cause of action arose at Delhi and that as contract provided that the courts at Delhi only will have jurisdiction, the jurisdiction of other courts was ousted. This Court in para 22 of the Report held as under : (SCC pp.476-77)

> *"22. As per the principle laid down in A.B.C. Laminart, any clause which ousts the jurisdiction of all courts having jurisdiction and conferring jurisdiction on a court not otherwise having jurisdiction would be invalid. It is now well settled that the parties cannot by agreement confer jurisdiction on a court which does not have jurisdiction; and that only where two or more courts have the jurisdiction to try a suit or proceeding, an agreement that the disputes shall be tried in one of such courts is not contrary to public policy. The ouster of jurisdiction of some courts is permissible so long as the court on which exclusive jurisdiction is conferred, had jurisdiction. If the clause had been made to apply only where a part of cause of action accrued in Delhi, it would have been valid. But as the clause provides that irrespective of the place of cause of action, only courts at Delhi would have jurisdiction, the said clause is invalid in law, having regard to the principle laid down in A.B.C. Laminart [(1989) 2 SCC 163]. The fact that in this case, the place of embarkation happened to be Delhi, would not validate a clause, which is invalid."*

27. In a comparatively recent decision in A.V.M. Sales Corporation v. Anuradha Chemicals Private Limited (2012) 2 SCC 315, the terms of the agreement contained the clause, "any dispute arising out of this agreement will be subject to Calcutta jurisdiction only". The respondent before this Court

had filed a suit at Vijayawada for recovery of dues from the petitioner while the petitioner had filed a suit for recovery of its alleged dues from the respondent in Calcutta High Court. One of the questions under consideration before this Court was whether the court at Vijayawada had no jurisdiction to entertain the suit on account of exclusion clause in the agreement. Having regard to the facts obtaining in the case, this Court first held that both the courts within the jurisdiction of Calcutta and Vijayawada had jurisdiction to try the suit. Then it was held that in view of the exclusion clause in the agreement, the jurisdiction of courts at Vijayawada would stand ousted."

After analyzing the various judgments, it was held as under:-

"29. When it comes to the question of territorial jurisdiction relating to the application under Section 11, besides the above legislative provisions, Section 20 of the Code is relevant. Section 20 of the Code states that subject to the limitations provided in Sections 15 to 19, every suit shall be instituted in a Court within the local limits of whose jurisdiction:

(a) the defendant, or each of the defendants where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part arises.

30. The explanation appended to Section 20 clarifies that a corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in Jaipur and, therefore, Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11(12)(b) and Section 2(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of clause 18 of the agreement, the jurisdiction of Chief Justice of the Rajasthan High Court has been excluded.

32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' have not been used but this, in our view, is

not decisive and does not make any material difference. The intention of the parties - by having clause 18 in the agreement - is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner."

8. Thus, what would be seen from the perusal of the aforesaid judgment is that the jurisdiction clause of an agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" is neither decisive nor does it make any material difference in deciding the jurisdiction of a Court. The very existence of a jurisdiction clause in an agreement would be required to be looked into to find out whether the intention of the parties to the agreement was quite clear to restrict the jurisdiction to entertain the disputes only at one place.

9. Now the question which, therefore, is required to be considered is as to whether the condition in the purchase order which has been accepted by the plaintiff would show intention of the parties to confer jurisdiction only on the Court situate at Satara, Maharashtra or would thereafter the separate condition in the invoice confining the jurisdiction to the Courts at Solan only be effective which will also have to be taken into consideration.

10. To my mind, in order to determine the jurisdiction, if the Court was required to consider only the purchase order probably the defendant would have been right that it was the Court at Satara, Maharashtra which alone would have jurisdiction to try the suit. But, once this purchase order has been accepted and sale invoice issued which in itself incorporates the clause of jurisdiction, then this condition with respect to jurisdiction cannot be ignored because the contract can only be said to have concluded once the offer is accepted. Therefore, unilateral condition in the purchase order in the teeth of terms and conditions of the invoice cannot stand and will have to be read with the conditions as envisaged in the invoice.

11. The learned counsel for the defendant/applicant would, however, contend that the conferment of jurisdiction upon one Court would specifically be to the exclusion of the jurisdiction of other Court and the conferment of jurisdiction would have to be honoured and respected and that would constitute the intention of the parties. The reason for this, according to him, was obvious because the parties would not have otherwise included the ouster clause in the agreement before it if the same was to carry no meaning at all. The very fact that the ouster clause is included in the agreement between the parties conveys the clear intention to exclude the jurisdiction of Courts other than those mentioned in the clause concerned. Conversely, if the parties had intended that all Courts where the cause of action or part thereof had arisen would continue to have jurisdiction over the dispute, the exclusion clause would not have found a place in the agreement between the parties.

12. This submission appears to be attractive, but probably, what has been missed out by the learned counsel for the defendant/applicant is the fact that the proposition canvassed by him also applies equally to the case of the plaintiff whereby the exclusion clause with respect to

jurisdiction finds mentioned in the sale invoice confining the jurisdiction of the Courts at District Solan only.

13. In view of there being no consensus or agreement on the question of jurisdiction of Courts, it can safely be concluded that the condition contained in the purchase order in regard to jurisdiction is only a unilateral condition and merely because the plaintiff started supplying the goods, cannot in itself be construed that there was acceptance by the plaintiff of all the terms and conditions specified in the purchase order, especially, when in the sale invoice separate terms and conditions including jurisdiction is in variance with what had been set out in the purchase order.

14. Once this is the position, it can safely be concluded that the parties were at liberty to have the lis instituted either at Satara, Maharashtra or before this Court. Therefore, the contention of the learned counsel for the defendant-applicant that this Court has no jurisdiction to try and entertain and adjudicate upon the suit for want of territorial jurisdiction is without merit and accordingly the present application is dismissed.

****

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

Arjun Singh .....Petitioner.
Versus
State of H.P. & anr. .....Respondents.

CWP No. 3054 of 2009.
Decided on: 30.4.2015.

Constitution of India, 1950- Article 226- The pay of the petitioner was revised- however, same was re-fixed and the recovery was ordered to be made- petitioner pleaded that he was not heard before re-fixing of his pay- held, that pay of the petitioner was re-fixed after 12 years- the recovery for a period in excess of five years should not be made in view of judgment of Hon'ble Supreme Court in the case of ***State of Punjab and others etc. versus Rafiq Masih (White Washer) etc., JT 2015 (1) SC 95***- therefore, the order for re-fixation of the pay quashed and respondent directed not to recover the amount from the petitioner.(Para-2 to 5)

Case referred:

State of Punjab and others etc. versus Rafiq Masih (White Washer) etc., JT 2015 (1) SC 95,

For the petitioner: Mr. G.R.Palsra, Advocate.

For the respondents: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner's pay was revised vide office order dated 29.4.1997. However, the same was re-fixed vide office order dated 16.5.2009 and recovery was ordered to be made vide office orders Annexure P-4 and P-5 dated 15.7.2009 and 12.8.2009, respectively. The case of the petitioner, precisely is that the petitioner has not been heard before re-fixing his pay vide office order dated 16.5.2009.

2. Mr. G.R.Palsra, Advocate, has vehemently argued that the petitioner was not afforded an opportunity of hearing before the issuance of Annexure P-2 dated 16.5.2009. He then contended that his client has neither mis-represented the facts nor concealed any information from the employer.

3. The petitioner's pay was revised vide office order dated 29.4.1997 and the same has been re-fixed vide office order dated 16.5.1997, after a gap of almost 12 years on 16.5.2009. Their lordships of the Hon'ble Supreme Court, in a recent judgment, in the case of ***State of Punjab and others etc. versus Rafiq Masih (White Washer) etc.,*** reported in ***JT 2015 (1) SC 95,*** have laid down the following principles governing the situation where recovery by the employers would be impermissible in law. It has been held as follows:

> "12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
>
> (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
>
> (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
>
> (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

4. In the instant case, the recovery is ordered to be made after a gap of about 12 years. The case is covered by the ratio of the judgment cited hereinabove.

5. Accordingly, the writ petition is allowed. Annexure P-2 dated 16.5.2009, Annexure P-4 dated 15.7.2009 and Annexure P-5 dated 12.8.2009, are quashed and set aside. The respondents are directed not to recover the amount of Rs. 41,322/- from the petitioner. Pending application(s), if any, shall stand disposed of.

****

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

Indian Technomac Company Limited. ....Petitioner
versus
State of H.P. & others. ....Non-petitioners.

Cr.MMO No. 40 of 2015
Decided on: 30.4.2015.

Code of Criminal Procedure, 1973- Section 482- Matter stands compromised between the parties- therefore, petition dismissed as withdrawn.

For the petitioner : Mr. H.S. Rana, Advocate.
For the non-petitioners: Mr. M.L. Chauhan Additional Advocate General with Mr. J.S. Rana Assistant Advocate General, for respondent No.1.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocate appearing on behalf of the petitioner submitted that a compromise already stood executed inter-se the parties and in view of the compromise he does not press the present petition and the same be dismissed as withdrawn. In view of the above states facts present petition is dismissed as withdrawn. Pending applications if any also disposed of.

****

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

Kapil Sharma. ....Petitioner
versus
Neelam Sharma ....Respondent.

CMPMO No. 53 of 2015
Decided on: 30.4.2015.

Constitution of India, 1950- Article 226- Learned District Judge had awarded maintenance @ Rs. 4,000/- p.m. to the respondent- petitioner offered to pay an amount of Rs. 3000/- p.m. from the date of application which was accepted by the respondent- therefore, the order of the Learned District Judge modified to the extent that petitioner will pay maintenance @ Rs. 3,000/- p.m. from the date of application.

For the petitioner : Mr. Yogesh Kumar Chandel, Advocate.
For the respondent : Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Present petition is filed under Article 227 of the Constitution of India against the order dated 18.2.2013 passed by the learned District Judge Mandi in HMP No. 41 of

2012 vide which interim maintenance pendentelite allowance to the tune of Rs. 4000/- (Rupees four thousand) was granted to the respondent from the date of application. Learned Advocate appearing on behalf of the petitioner offered to pay an amount of Rs. 3000/- (Rupees three thousand) from the date of application. Offer given by learned Advocate appearing on behalf of the petitioner is accepted by learned Advocate appearing on behalf of the respondent. Learned Advocate appearing on behalf of the respondent further submitted that he has no objection if maintenance pendentelite allowance is reduced to Rs. 3000/- from Rs. 4000/- per month. In view of the above stated facts order of learned District Judge is modified to the extent that petitioner will pay maintenance pendentelite to the respondent to the tune of Rs. 3000/- per month from the date of application. Order of learned District Judge is modified to this extent only. No order as to costs. Petition is disposed of. Pending applications if any also disposed of. Certified copy of this order be transmitted to learned District Judge Mandi Circuit Court at Sarkaghat for compliance.

****

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

Mehar Singh son of Shri Khubi Ram .....Appellant.
Vs.
State of Himachal Pradesh. ....Respondent.

Cr.Appeal No. 4177 of 2013
Judgment reserved on: 27th March, 2015
Date of Judgment: April 30, 2015

N.D.P.S. Act, 1985- Section 20- Accused was found carrying a polythene bag in his hand- he tried to run away on seeing the police- he was caught and his search was conducted during which 1.5 kg. of charas was recovered- prosecution version was duly proved by PW-1, PW-7 and PW-10- there was no evidence to show that they had any hostile animus against the accused- link evidence was duly proved- minor contradictions in the testimonies of the witnesses is not sufficient to discard them when the witnesses were deposing after a period of about three years from the date of incident- held, that in these circumstances, conviction recorded by Trial Court was justified. (Para-11 to 24)

Cases referred:
Nathu Singh vs. State of Madhya Pradesh, AIR 1973 SC 2783
State of Gujarat vs. Raghunath Vamanrao Baxi, AIR 1985 SC 1092
Tahir vs. State (Delhi), (1996)3 SCC 338
Govindraju alias Govinda vs. State by Sriramapuram Police Station and another, (2012)4 SCC 722
Tika Ram vs. State of M.P., (2007)15 SCC 760
Girja Prasad (dead) by LRs vs. State of M.P., (2007)7 SCC 625
Bhee Ram vs. State of Haryana, AIR 1980 SC 957
Rai singh vs. State of Haryana, AIR 1971 SC 2505
Dalbir Singh Vs. State of Punjab, AIR 1987 S.C. 1328
Jose Vs. The State of Kerla, AIR 1973 SC 944 (Full Bench)
Lallu Manjhi and another vs. State of Jharkhand, AIR 2003 SC 854

For the Appellant: Mr. Malay Kaushal, Advocate

For the Respondent: Mr. M.L. Chauhan, Additional 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 Special Judge Kinnaur Sessions Division at Rampur Bushehr in Sessions Trial No 12 of 2009 titled State vs. Mehar Singh decided on dated 30.7.2013.

Brief facts of the case as alleged by the prosecution:-

2. It is alleged that on dated 28.12.2008 ASI Jagat Singh was on patrolling duty along with C. Amar Singh, HHC Daya Ram, HHC Tilak Raj at Dawah near Bagipul and at about 2.30 PM at Jaon Bagipul road a person was seen coming from Jaon side carrying a polythene bag in his hand and when he saw police officials he tried to turn back. It is alleged by prosecution that on suspicion accused was caught and on inquiry he disclosed his name as Mehar Singh. It is alleged by prosecution that place was isolated and independent witnesses could not be associated. It is further alleged by prosecution that accused was informed that he has legal right to be searched before the Magistrate or gazetted officer and thereafter accused had given his consent that he should be searched by police officials and thereafter consent memo Ext.PW1/A was prepared. It is alleged by prosecution that thereafter police officials have given their personal search and no incriminating article was found from possession of police officials. It is alleged by prosecution that thereafter plastic bag which was in possession of accused was searched and 1 Kg. 500 grams charas was found. It is also alleged by prosecution that thereafter two samples of 25 grams each were taken for chemical analysis. It is alleged by prosecution that seal impression was obtained and NCB form Ext.PW9/A was filled. It is alleged by prosecution that recovered charas was took into possession vide recovery memo Ext.PW1/C and thereafter ruka Ext.PW10/A was sent for registration of case and on the basis of ruka FIR Ext.PW2/A was registered. It is alleged by prosecution that thereafter spot map Ext.PW10/B was prepared and grounds of arrest were informed to accused vide memo Ext.PW1/E. It is alleged by prosecution that case property along with NCB form was produced before SHO and then SHO P.S. Nirmand on dated 28.12.2008 resealed the bulk as well as sample parcels with seal 'H' and also filled column Nos. 9 to 11 of NCB form Ext.PW9/A. It is further alleged by prosecution that specimen impression of seal 'M' was obtained and thereafter special report Ext.PW4/A was prepared. It is also alleged by prosecution that charas Ext.P4 was recovered in the shape of balls and sticks. It is further alleged by prosecution that on dated 30.12.2008 one parcel of sample along with sample seal, NCB form and other relevant documents were handed over to C. Rohit Singh vide RC No. 74/2008 with direction to deposit the same in office of FSL Junga. It is also alleged by prosecution that thereafter articles were deposited in the office of FSL Junga and receipt obtained. It is alleged by prosecution that thereafter special report was presented before Bhajan Singh Negi Dy.S.P. who made his endorsement and receipt of special report was recorded in the register. It is alleged by prosecution that thereafter SI Dulo Ram on receipt of report of chemical examiner Ext.PY prepared challan. It is also alleged by prosecution that supplementary challan was also filed.

3. Learned trial Court on dated 29.11.2010 framed the charge against the accused under Section 20 of Narcotic Drugs and Psychotropic Substances Act. Accused did not plead guilty and claimed trial.

4. Prosecution examined as many as ten witnesses in support of its case and accused persons examined four witnesses as defence witness:-

Sr.No.	Name of Witness
PW1	Tilak Raj
PW2	Lal Chand
PW3	Rohit Verma
PW4	Sohan Lal
PW5	Shyam Dass
PW6	Pushap Dev
PW7	Amar Singh
PW8	Kanwar Singh
PW9	Dulo Ram
PW10	Jagat Singh
DW1	Mehar Singh
DW2	Narpat Dass
DW3	Kaul Ram
DW4	Ses Ram

4.1 Prosecution and accused also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description.*
Ext.PW1/A	*Consent memo.*
Ext.PW1/B	*Personal search memo*
Ext.PW1/C	*Recovery memo*
Ext.PW1/D	*Specimen impression of seal*
Ext.PW1/E	*Memo regarding information of arrest*
Ext.PW2/A	*FIR*
Ext.PW2/B	*Ruka*
Ext.PW2/C	*Specimen impression of seal*
Ext.PW2/D	*Extract of malkhana register*
Ext.PW2/E	*Copy of RC*
Ext.PW4/A	*Special report*
Ext.PW4/B	*Extract of dispatch register*
Ext.PW6/A	*Copy of RC*
Ext.PW6/B	*Copy of receipt*
Ext.PW6/C	*Extract of malkhana register*
Ext.PW6/D	*Copy of rapat No.6*
Ext.PW9/A	*NCB form*
Ext.PX and Ext.PY	*FSL reports*
Ext.PW10/A	*Ruka*
Ext.PW10/B	*Site plan*

Ext.PW10/C	*Copy of rapat No. 12*
Ext.DA	*Copy of FIR No. 107*
Ext.DB	*Copy of FSL report*
Ext.DC	*Copy of FSL report pertaining to FIR No. 108/2008*
Ext.DD	*Copy of FIR No. 108/2008*
Ext.DE	*Copy of FSL report in FIR No. 108/2008*
Ext.DF	*Copy of FSL report pertaining to FIR No. 107/2008*

5. Learned trial Court convicted the accused under Section 20 of ND&PS Act and sentenced the convicted to five years rigorous imprisonment and to pay fine of Rs. 50,000/- (Rupees fifty thousand only). Learned trial Court further directed that in default of payment of fine the convicted shall undergo imprisonment for six months.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court appellant filed present appeal. Court heard learned Advocate appearing on behalf of the appellant and learned Additional Advocate General appearing on behalf of the respondent-State and also perused the entire record.

7. Question that arises for determination in present appeal is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice as mentioned in memorandum of grounds of appeal.

8. ORAL EVIDENCE ADDUCED BY PROSECUTION:

8.1. PW1 Tilak Raj has stated that he was posted as HHC in P.S. Nirmand in the year 2008 and on dated 28.12.2008 he along with SI Jagat Singh, HHG Daya Ram and C. Amar Singh were on patrolling duty at Bagipul and at about 2.30 PM when they reached Dawah one person came from opposite side who was carrying one plastic bag in his hand. He has stated that on suspicion the accused was caught and on inquiry he disclosed his name as Mehar Singh. He has stated that there was suspicion that accused was carrying some contraband in carry bag and thereafter consent of accused was obtained whether accused intended to be searched before Magistrate or gazetted officer. He has stated that thereafter accused had given his consent that he was ready to be searched by police officials and thereafter police officials have given their search but nothing was recovered from police officials and thereafter bag of accused was searched. He has stated that in bag charas was found and same was weighed and found 1.500 Kg. He has stated that two samples of 25 grams each were took out and both samples were sealed in different two parcels and bulk of charas was also sealed in parcel. He has stated that NCB form in triplicate was prepared. He has stated that recovered charas was took into possession vide recovery memo Ext.PW1/C. He has stated that charas produced in Court was recovered from exclusive and conscious possession of accused.

8.2 PW2 HC Lal Chand has stated that he remained posted as MHC in P.S. Nirmand w.e.f. November 2007 to May 2010 and further stated that he has brought register Nos. 19 and 21. He has stated that on dated 28.12.2008 C. Amar Singh produced one ruka prepared by ASI Jagat Singh and on the basis of ruka he registered FIR Ext.PW2/A which bears his signatures. He has stated that ASI Jagat Singh produced three sealed packets duly sealed with seal 'H' and also produced NCB form in triplicate. He has stated that SHO Dulo

Ram resealed the above packets with seal 'N'. He has stated that thereafter one sample of parcel along with sample of seal and NCB form and other relevant documents were sent to office of Chemical examiner vide RC No. 74/2008. He has stated that case property remained intact in his custody. He has admitted that entry of arrival and departure of official is recorded in police station. He has denied suggestion that blank space was kept in register in connivance with police officials.

8.3 PW3 Rohit Verma has stated that in the year 2008-09 he was posted as constable in P.S. Nirmand and on dated 30.12.2008 MHC P.S. Nirmand Lal Singh handed over to him one sample parcel of charas duly sealed with seals 'H' and 'N' and also handed over NCB form and other relevant documents vide RC No. 74/2008. He has stated that on dated 31.12.2008 he deposited the same in office of FSL Junga and further stated that articles remained intact in his custody. He has stated that copy of RC is Ext.PW2/E. He has stated that he handed over the receipt of chemical examiner to MHC Lal Singh.

8.4 PW4 ASI Sohan Singh has stated that he remained posted as Reader to Dy.S.P. Ani w.e.f. 2007 to 2009 and on dated 29.12.2008 C. Nanak Chand handed over special report in case FIR No. 109/2008 to him which was presented by him before Dy.S.P. Bhajan Singh Negi. He has stated that thereafter Dy.S.P. had made endorsement on special report and further stated that special report is Ext.PW4/A which is correct as per original record. He has stated that endorsement made by Dy.S.P. is Ext.PW4/C. He has denied suggestion that special report was not handed over to him.

8.5 PW5 Shyam Dass has stated that he is posted as Constable on general duty in P.S. Nirmand since April 2010 and on dated 29.8.2010 MHC Pushap Dev handed over two sealed parcels sealed with seal bearing impressions 'H' and 'N' along with specimen impression of seals along with connected documents vide RC No. 102/2010 with direction to deposit the same in office of FSL Junga. He has stated that he deposited the same on dated 30.12.2008 and brought the RC. He has stated that case property remained intact during his custody. He has further stated that on dated 19.9.2010 he brought the report of chemical examiner from FSL Junga and handed over the same to MHC in intact condition. He has stated that he has kept the case property with him during night of dated 29.8.2010.

8.6 PW6 Pushap Dev has stated that he is posted as MHC P.S. Nirmand since May 2010 and on dated 29.8.2010 he handed over two sealed parcels sealed with seal H and re-sealed with seal 'N' along with sample of seal and connected documents to Shyam Dass vide RC No. 102/2010 with direction to deposit the same at FSL Junga. He has stated that copy of RC is Ext.PW6/A, receipt is Ext.PW6/B and extract of register of malkhana is Ext.PW6/C and same were correct as per original record. He has stated that copy of rapat is also correct as per original.

8.7 PW7 Amar Singh has stated that he remained posted as Constable P.S. Nirmand w.e.f. 2008 to 2009 and on dated 28.12.2008 he along with ASI Jagat Singh, HHC Tilak Raj, HHC Daya Ram were on patrolling duty at Dawah near Bagipul. He has stated that at about 2.30 PM one person came from Jaon side carrying one polythene bag in his hand and when he saw the police he tried to run away and further stated that on suspicion he caught hold the accused and on inquiry accused disclosed his name as Mehar Singh. He has stated that ASI asked the accused that police officials have suspicion that accused was carrying contraband in his bag. He has stated that thereafter accused told that accused has legal right to be searched before Magistrate or gazetted officer and further stated that memo Ext.PW1/A was prepared in this regard. He has stated that accused had given his consent that he should be searched by police officials. He has stated that thereafter ASI Jagat Singh had given his personal search to accused in his presence and in presence of Tilak Raj and

memo Ext.PW1/B was prepared. He has stated that place was isolated and no independent witness was available. He has further stated that thereafter plastic bag was searched by ASI in his presence and on search, one another plastic envelope was found and in that plastic bag charas in the shape of sticks and balls was found. He has stated that charas was weighed which was found 1.500 Kg. and two samples of 25 grams each were obtained. He has stated that both samples were sealed in two different parcels and bulk charas was also sealed in parcel. He has stated that NCB form in triplicate was filled and thereafter seal after use was handed over to him. He has stated that charas was took into possession vide recovery memo Ext.PW1/C which was signed by him and Tilak Raj. He has stated that copy of recovery memo was given to accused Mehar Singh and thereafter ruka was handed over to him and on the basis of ruka FIR Ext.PW2/A was registered. He has stated that thereafter MHC prepared case file and handed over the same to him with direction to hand over the same to I.O. at the spot. He has stated that accused was also apprised by his grounds of arrest. He has stated that bags Ext.P2 to Ext.P4 were recovered from accused. He has also proved Ext.P5, Ext.P6, Ext.P7 and Ext.P8. He has denied suggestion that charas was recovered from other persons resident of Haryana and false case was registered against the accused. He has denied suggestion that nothing incriminating was recovered from accused Mehar Singh.

8.8 PW8 Kanwar Singh has stated that he remained posted as I.O. in P.S. Nirmand w.e.f. November 2007 to July 2011 and further stated that after receipt of report of chemical examiner Ext.PX he prepared supplementary challan in this case and presented the same in Court.

8.9 PW9 SI Dulo Ram has stated that he remained posted as SHO in P.S. Nirmand w.e.f. 2007 to 2009 and on dated 28.12.2008 ASI Jagat Singh produced three sealed parcels duly sealed with seal impression 'H', bulk parcel sealed with six seals of 'H' and sample parcels sealed with three seals of 'H' along with sample of seal, NCB form in triplicate for resealing purpose. He has stated that he resealed the bulk parcel with six seals bearing impression 'N' and sample parcels with three seals with seal impression 'N' and he filled column Nos. 9 to 11 of NCB form Ext.PW9/A. He has stated that specimen impression was drawn separately and thereafter he handed over the case property to MHC along with sample of seals N and H, NCB form in triplicate and further stated that after receipt of report of Chemical examiner Ext.PY he prepared challan in this case and presented the same in Court.

8.10 PW10 ASI Jagat Singh has stated that he remained posted as ASI/IO in P.S. Nirmand w.e.f. 2007 to 2010 and on dated 28.12.2008 he along with C. Amar Singh, HHC Daya Ram, HHC Tilak Raj were on patrolling duty at Dawah near Bagipul and at about 2.30 PM on Jaon Bagipul road one person came from Jaon side carrying one polythene bag in his hand and when he saw police officials he tried to turn back. He has stated that on suspicion they caught accused and on inquiry accused disclosed his name as Mehar Singh. He has stated that place was isolated and no independent witness could be associated. He has stated that thereafter he asked the accused that he had suspicion upon accused about possession of contraband and further told the accused that he has right to be searched before Magistrate or gazetted officer and consent memo Ext.PW1/A was prepared. He has stated that accused had given consent in writing that he was ready to be searched by police officials and thereafter he had given his personal search to accused and in this regard memo Ext.PW1/B was prepared. He has stated that thereafter plastic bag which was carried by accused was searched and on search another plastic envelope was found and charas in the shape of balls and sticks found. He has stated that quantity of charas was found 1.500 Kg. and thereafter two samples of charas were took out for chemical analysis and thereafter

both samples were put in two different parcels. He has stated that sample of seal was drawn separately and seal after use was handed over to Amar Singh. He has stated that recovered charas was took into possession vide recovery memo Ext.PW1/C. He has further stated that ruka Ext.PW10/A was handed over to C. Amar Singh for registration of case and on the basis of ruka FIR Ext.PW2/A was registered. He has stated that he prepared spot map Ext.PW10/B and marginal notes are in his hand. He has stated that he also recorded statements of witnesses and accused was apprised by grounds of arrest and further stated that he produced case property along with NCB form and further stated that copy of rapat is correct as per original record. He has proved Ext.P1, Ext.P2, Ext.P3, Ext.P4, Ext.P5, Ext.P6, Ext.P7 and Ext.P8. He has stated that he has personally filled column Nos. 1 to 8 of NCB form at the spot and column Nos. 9 to 11 were filled in by SHO. He has denied suggestion that bus was available after every ten minutes. He has denied suggestion that all documents were prepared in police station. He has denied suggestion that signatures of accused were obtained on all documents in police station. He has denied suggestion that he has recorded statements of witnesses of his own. He has denied suggestion that nothing was recovered from accused and he has denied suggestion that false case has been filed against the accused.

9. Statement of accused recorded under Section 313 Cr.P.C. He has stated that false case has been filed against him. He has stated that on dated 28.12.2008 he was made to deboard the bus at bus stand Nirmand and he was took to police station where false case was planted against him under threat. He has stated that at that time Kaul Singh and Ses Ram were also deboarded from the bus. Accused also produced oral evidence in defence.

10. Defence evidence adduced by the accused

10.1. DW1 Mehar Singh has stated that on dated 28.12.2008 he was coming from Bagipul to Rampur in a government bus and when bus stooped at Nirmand 2/3 police personnel came and inquired whether Mehar Singh, Kaul Singh and Ses Ram were in bus or not. He has stated that thereafter he was taken to police station along with Kaul Ram and Ses Ram and they were questioned. He has stated that he was not carrying any contraband and police planted false case against him. He has stated that he did not file any complaint because he was arrested. He has denied suggestion that on dated 28.12.2008 he was intercepted by police and also denied suggestion that he was carrying a plastic bag containing charas. He has denied suggestion that 1.500 Kg. charas was found from his possession. He has denied suggestion that spot was lonely place.

10.2 DW2 Narpat Dass has stated that on dated 28.12.2008 he was going from Bagipul to Ani in HRTC bus and when bus stopped at Nirmand 2-3 police officials came and inquired about Mehar Singh, Kaul Singh and Ses Ram. He has stated that thereafter police officials took the aforesaid persons. He has stated that those persons were not carrying anything. He has stated that accused Mehar Singh is his neighbour. He has denied suggestion that he along with Mehar Singh were not travelling in bus. He has denied suggestion that he did not file any complaint to Pardhan G.P., superior police officer, illaqua magistrate that accused was not having any contraband with him while he was travelling in bus.

10.3 DW3 Kaul Ram has stated that on dated 28.12.2008 he was going from Bagipul to Rampur and when bus was stopped at Nirmand 2-3 police officials came in bus and inquired about him, Mehar Singh and Ses Ram. He has stated that accused was not carrying any contraband. He has further stated that Mehar Singh is from his village. He has denied suggestion that he is familiar with facts of case. He has denied suggestion that on

dated 28.12.2008 police had apprehended accused Mehar Singh carrying 1½ Kg. charas in plastic bag.

10.4 DW4 Ses Ram has stated that on dated 28.12.2008 he was going from Bagipul to Ani in HRTC bus and bus was stopped at Nirmand. He has stated that 2-3 police personnel came and inquired about him, Kaul Ram and Mehar Singh in bus. He has stated that above said persons were not carrying anything and further stated that thereafter after 3-4 minutes the bus left for its own journey. He has stated that he could not say the number of bus and he did not bring the ticket of bus. He has stated that he does not know about case. He has stated that he did not file any complaint in writing to any authority. He has stated that he did not question the police officials as to why he along with Mehar Singh was took to police station. He has stated that even his family members did not report the matter to higher authority. He has denied suggestion that he was not travelling in bus. He has denied suggestion that on dated 28.12.2008 at about 2.30 PM police officials have apprehended accused Mehar Singh when he was carrying charas weighing 1½ Kg. in plastic bag. He has denied suggestion that he has deposed falsely in order to save the accused. He has denied suggestion that he and co-accused Mehar Singh were involved in trade of charas. He has denied suggestion that charas was recovered from Mehar Singh.

11. Accused Mehar Singh also tendered in evidence copy of rapat No. 10 dated 28.12.2008, copy of rapat No. 23 dated 28.12.2008 attested copy of FSL report pertaining to FIR No. 107 dated 28.12.2008 and consent memo of Ses Ram and copy of personal search of Ses Ram and copy of recovery memo relating to FIR No. 107/08, copy of recovery memo relating to FIR No. 108/08, copy of FIR No. 108/08, copy of spot map relating to FIR No. 108/08, copy of FSL report relating to FIR No. 108/08, copy of spot map relating to FIR No. 107/08 and copy of FSL report relating to FIR No. 107/08.

12. Submission of learned Advocate appearing on behalf of appellant that finding of learned trial Court is based upon misrepresentation of oral as well as documentary evidence placed on record is rejected being devoid of any force for the reasons hereinafter mentioned. PW1 Tilak Raj has specifically stated in positive manner that 1.500 Kg. of charas was found from conscious and exclusive possession of accused in his presence. Court has perused seizure memo Ext.PW1/C placed on record. Marginal witnesses of seizure memo Ext.PW1/C are Mehar Singh and Tilak Raj. PW1 Tilak Raj has stated in positive manner when he appeared in witness box that 1.500 Kg. chara was found from conscious and exclusive possession of accused in his presence. Testimony of PW1 Tilak Raj is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW1 Tilak Raj. There is no evidence on record to prove that PW1 Tilak Raj has hostile animus against the accused at any point of time.

13. Court has also perused the testimony of another marginal witness PW7 Amar Singh who has specifically stated in positive manner that 1.500 Kg. charas was found from exclusive and conscious possession of accused in his presence. Testimony of PW7 Amar Singh is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW7 Amar Singh as there is no evidence on record in order to prove that PW7 Amar Singh has hostile animus against the accused at any point of time.

14. Even PW10 ASI Jagat Singh has stated in positive manner that 1.500 Kg. charas was found from conscious and exclusive possession of accused in his presence. Testimony of PW10 ASI Jagat Singh is also trustworthy reliable and inspires confidence of Court. There is no evidence on record to prove that PW10 Jagat Singh has hostile animus against the accused at any point of time.

15. Testimonies of PW1 Tilak Raj, PW7 Amar Singh and PW10 ASI Jagat Singh are corroborated by testimony of PW3 Rohit Verma who has specifically stated in positive manner that on dated 30.12.2008 MHC P.S. Nirmand Lal Singh handed over to him one parcel of charas along with sample of seal and NCB form and directed him to deposit the same in FSL Junga. He has stated that he deposited the articles in office of FSL Junga on dated 31.12.2008. Testimony of PW3 is also trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW3 Rohit Verma.

16. Testimonies of PW1 Tilak Raj, PW7 Amar Singh and PW10 ASI Jagat Singh are corroborated by PW4 ASI Sohan Lal who has proved special report Ext.PW4/A placed on record. Testimony of PW4 ASI Sohan Lal is also trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW4 ASI Sohan Lal.

17. Even testimonies of PW1 Tilak Raj, PW7 Amar Singh and PW10 ASI Jagat Singh are corroborated by PW5 Shyam Dass who has specifically stated in positive manner that he deposited the parcels vide RC No. 102/2010 in office of FSL Junga and he further stated that he brought the report of Chemical Examiner FSL Junga along with case property and handed over the same to MHC in intact position. Testimony of corroborated witness PW5 Shyam Dass is also trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW5 Shyam Dass. Testimonies of PW1 Tilak Raj, PW7 Amar Singh and PW10 ASI Jagat Singh are corroborated by PW8 Kanwar Singh who has stated that after receipt of report of Chemical Examiner he prepared supplementary challan and presented the same in Court. Testimonies of PW1 Tilak Raj, PW7 Amar Singh and PW10 ASI Jagat Singh are corroborated by PW9 SI Dulo Ram who has specifically stated that after receipt of chemical examiner's report he submitted the challan in Court.

18. Testimonies of PW1 Tilak Raj, PW7 Amar Singh and PW10 ASI Jagat Singh and testimonies of other corroborative witnesses are also corroborated by documentary evidence placed on record i.e. consent memo Ext.PW1/A, seizure memo Ext.PW1/C, seal impression obtained upon plain cloth Ext.PW1/D, ruka Ext.PW2/B, extract of malkhana register Ext.PW2/D, road certificate Ext.PW2/E, special report Ext.PW4/A, NCB form and site plan placed on record. Even as per FSL report Ext.PX it is proved on record that after various scientific tests such as physical identification, chemical and chromatographic analyses carried out in the laboratory testes indicated the presence of cannabinols including the presence of tetrahydrocannabinol in both the exhibits. It is further proved on record beyond reasonable doubt that extracts was of cannabis and was samples of charas.

19. Submission of learned Advocate appearing on behalf of the appellant that investigating agency did not associate any independent witness and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. PW10 ASI Jagat Singh I.O. has specifically stated in positive manner when he appeared in witness box that place was isolated and independent witness could not be associated and PW10 ASI Jagat Singh has further stated that it was a chance recovery. It was held in case reported in ***AIR 1973 SC 2783 titled Nathu Singh vs. State of Madhya Pradesh*** that mere fact that witnesses examined in support of the prosecution case were the police officials was not strong enough to discard their evidence. It is well settled law that conviction could be given on testimony of police witnesses if testimony of police witnesses is trustworthy reliable and inspires confidence of Court. ***(See: AIR 1985 SC 1092 titled State of Gujarat vs. Raghunath Vamanrao Baxi; See (1996)3 SCC 338 titled Tahir vs. State (Delhi); See: (2012)4 SCC 722 titled Govindraju alias Govinda vs. State by Sriramapuram Police Station and another; See: (2007)15 SCC 760 titled Tika Ram vs. State of M.P.; See: (2007)7 SCC 625 Girja Prasad (dead) by LRs vs. State of M.P.)***

20. Another submission of learned Advocate appearing on behalf of appellant that there is material contradiction in the testimonies of oral witnesses examined by prosecution and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Learned Advocate appearing on behalf of appellant did not point out any major contradiction in testimonies of prosecution witnesses 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 testimonies of police officials are recorded after a gap of sufficient time. In present case incident took place on dated 28.12.2008 at about 2.30 PM and statements of prosecution witnesses were recorded on dated 5.8.2011, 6.8.2011, 5.9.2011, 6.9.2011 and 19.9.2011. It is also well settled law that concept of *falsus in uno falsus in omnibus* is not applicable in criminal cases. ***(See AIR 1980 SC 957 titled Bhee Ram vs. State of Haryana. See AIR 1971 SC 2505 titled Rai singh vs. State of Haryana.)*** 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.

21. Another submission of learned Advocate appearing on behalf of appellant that factum of recovery of contraband is not proved from accused in positive cogent and reliable manner 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 no number of witnesses is required to prove the facts and it is also well settled law that conviction could be based on testimony of a single witness in the criminal case if testimony of single witness inspires confidence of Court. ***(See: AIR 1973 SC 944 Jose Vs. The State of Kerla (Full Bench)*** It was held in case reported in ***AIR 2003 SC 854 titled Lallu Manjhi and another vs. State of Jharkhand*** that law of evidence does not require any particular number of witnesses to be examined and it was held that Court may classify the oral testimony into three categories (1) Wholly reliable (2) Wholly unreliable and (3) Neither wholly reliable nor wholly unreliable. It was held that in first two categories there would be no difficulty in accepting or discarding the testimony of a single witness.

22. Another submission of learned Advocate appearing on behalf of appellant that in view of testimonies of DW1, DW2, DW3 and DW4 appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Seizure memo of contraband has been signed by accused himself and contents of seizure memo are proved by way of testimonies of PW1 Tilak Raj, PW7 Amar Singh and PW10 ASI Jagat Singh. There is no evidence on record in order to prove that PW1 Tilak Raj, PW7 Amar Singh and PW10 ASI Jagat Singh have enmity with accused prior to recovery. Recovery of contraband was chance recovery and hence it is held that testimony of DW1 is not sufficient to rebut the testimony of PW1 Tilak Raj, PW7 Amar Singh and PW10 ASI Jagat Singh. Court has carefully perused the testimony of DW2 Narpat Dass who has specifically stated that accused Mehar Singh is his neighbour. DW2 Narpat Dass did not prove the ticket of bus and even DW2 Narpat Ram did not report the matter to any competent authority that co-accused Mehar Singh was not having any contraband when he was travelling in bus and he was falsely involved in present case. In view of above stated facts testimony of DW2 Narpat Dass is not sufficient to disbelieve the testimonies of PW1 Tilak Raj, PW7 Amar Singh and PW10 ASI Jagat Singh who are eye witnesses of recovery of contraband.

23. Submission of learned Advocate appearing on behalf of appellant that on the basis of testimony of DW3 Kaul Ram appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the testimony of DW3 Kaul Ram who has specifically stated in positive manner that accused is

resident of his village and DW3 has also stated in positive manner that he did not bring the ticket of bus in order to prove that he was travelling in bus at the relevant time. DW3 Kaul Ram has also stated in positive manner that he could not state the registration number of bus. DW3 Kaul Ram has stated that he did not file any complaint to any higher authority including CM, MLA, SP, DC and Illaqua Magistrate regarding false implication of accused in present case. DW3 Kaul Ram has stated that he could not prove in evidence that on dated 28.12.2008 he was going along with accused Mehar Singh. It is held that there is no cogent and positive reasons to disbelieve testimonies of PW1 Tilak Raj, PW7 Amar Singh and PW10 ASI Jagat Singh who have specifically stated in positive manner when they appeared in witness box that contraband measuring 1.500 Kg. was found from conscious and exclusive possession of accused in their presence.

24. Another submission of learned Advocate appearing on behalf of appellant that on the testimony of DW4 Ses Ram appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused testimony of DW4 Ses Ram who has specifically stated in positive manner that he could not state the registration number of bus in which he was travelling and further stated that he did not bring the ticket of bus in order to prove that he was travelling in bus. DW4 Ses Ram has stated that he did not file complaint in writing that appellant Mehar Singh was falsely implicated in present case. DW4 Ses Ram has specifically stated that higher authorities were not informed relating to false implication of appellant in present case. It is held that appellant did not adduce any positive, cogent and reliable evidence in order to disbelieve the testimony of eye witnesses namely PW1 Tilak Raj, PW7 Amar Singh and PW10 ASI Jagat Singh. PW1 Tilak Raj, PW7 Amar Singh and PW10 ASI Jagat Singh have specifically stated in positive manner that 1.500 Kg. charas was found from conscious and exclusive possession of accused in their presence.

25. 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 had properly appreciated oral as well as documentary evidence placed on record and it is further held that no miscarriage of justice has been caused to appellant in present case. Appeal stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

****