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And

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'A'

Arbitration and Conciliation Act, 1996- Sections 2(e) and 34- Respondent No. 1 had approached appellant for grant of credit facilities for the purchase of vehicle- it was specifically provided in Clause 30 of the agreement that Courts at Mumbai alone shall have exclusive jurisdiction in respect of any matter, claims or dispute arising out of agreement- respondents defaulted in the payment of loan amount on which an Arbitrator was appointed, who announced the award- an application was filed for executing the award before the District Judge, Shimla- held, that the Courts at Mumbai and Courts at Shimla have jurisdiction to hear and entertain the dispute- parties had consciously excluded the jurisdiction of Courts at Shimla and had conferred the jurisdiction on the Courts at Bombay – therefore, Execution Petition can only be filed before the Courts at Bombay and Courts at Shimla are not competent to entertain the petition.

Title: Mahindra and Mahindra Finance Limited Vs. Surinder Panjta and another. Page-7

Arbitration and Conciliation Act, 1940- Section 39- House of the applicant was gutted in fire- he preferred a claim of Rs. 36 lacs before the Insurance Company- Surveyor assessed the loss as Rs. 26,09,668/- which was paid- the applicant demanded the remaining amount, which was not paid on which Arbitrators were appointed by the parties- Arbitrators passed separate awards and matter was referred to Umpire who allowed the claim and awarded the amount- objections were preferred under Section 34 of Arbitration and Conciliation Act which were dismissed as not maintainable holding that matter was covered by Arbitration Act, 1940- Arbitrator filed award in the Court on which notices were issued- Insurance Company preferred objections which were allowed and the award was set aside- held, that it was not stated in the notice that the appellant was coerced to give the receipt- appellant is a graduate and his plea that he had signed the blank papers was not acceptable- merely writing "WP" would not entitle the appellant to re-agitate the claim - when it was specifically written in the receipt that money was received in full and final settlement of the claim, there was no justification for invoking arbitration clause.

Title: Sanjay Madan and another Vs. National Insurance Company Page-70

'C'

Central Civil Services (Classification, Control and Appeal) Rules, 1965- Rule 11- Criminal case was registered against the petitioner for negligence which resulted in his acquittal- it was specifically held that prosecution had failed to prove the rashness and negligence on the part of the petitioner- Writ Court held that in view of the award passed by MACT, writ petitioner is guilty- held, that MACT recorded a prima facie finding to award compensation – standard of proofs in departmental inquiry, criminal case and claim petition are different- Writ Court had wrongly upheld the removal on a ground, which was not the foundation of the removal order.

Title: Hans Raj Vs. Himachal Road Transport Corporation & others Page-193

Central Civil Services (Classification, Control and Appeal) Rules, 1965- Rule 14- Disciplinary authority has to furnish copy of the inquiry report along with its findings and ask the employee to show cause - it was not mentioned in the first show cause notice that copy of final report along with report of disciplinary authority was furnished to the writ petitioner- even on remand, the disciplinary authority had not furnished the copy of inquiry

report to the writ petitioner- held that the orders passed by disciplinary authority and Appellate Authority were not sustainable-matter remanded with a direction to furnish the copy of inquiry report to the petitioner.

Title: Hans Raj Vs. Himachal Road Transport Corporation & others

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Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff filed an application seeking an amendment to the plaint- held, that the Court has a discretion to grant permission to a party to amend his pleading and Court can be exercise the discretion in two conditions- firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for determining the real controversy between the parties- no application for amendment can be allowed after the commencement of the trial unless the Court concludes that the party could not have raised the matter before the commencement of trial despite exercise of due diligence- plaintiff could not establish as to why he could not move the application for seeking the amendment of the plaint- application dismissed.

Title: Suraj Kumar Walia Vs. Smt. Punam Walia & ors. Page-83

Code of Civil Procedure, 1908- Order 21- Petitioner was held entitled to 1/3rd share and insurance amount of Rs. 3,51,474/- under Army Group Insurance Fund Scheme- judgment debtor No. 1 and 2 were held entitled to 2/3rd share- permanent injunction was granted for restraining them from withdrawing the share of the petitioner- petitioner filed an Execution Petition, which was dismissed on the ground that account number was not given in the judgment- held, that it is open to the Executing Court to construe the decree with the help of judgment and pleadings- the decree has to be enforced in such a manner that the litigation between the parties is shortened – petition allowed and the Bank directed to pay the share of the petitioner from the amount deposited by the Army Group Insurance Fund in the account of judgment debtors No. 1 and 2, and in case the amount had not been deposited in the account, Army would release the same within a period of 6 weeks.

Title: Saneh Lata Vs. Dimple and others Page-1

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the applicant for the commission of offences punishable under Sections 420 and 120-B of IPC- held, that 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- no recovery is to be effected from the accused- other accused have already been released on bail- therefore, bail application is allowed.

Title: Vinay Kumar son of late Shri Shanker Dass Vs. State of H.P.

Page-353

Code of Criminal Procedure, 1973- Section 439- Accused was arrested for the commission of offence punishable under Section 20 of N.D.P.S. Act for possessing 250 grams of charas- challan has already been filed against the accused- 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 view of the fact that investigation is complete and accused was found in possession of less than commercial quantity- applicant is entitled to be

released on bail- further, the mere fact that FIR was registered against the applicant is not sufficient for declining bail to him.

Title: Vikky son of Sh. Ramesh Chand Vs. State of H.P. Page-134

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 302, 307, 326-A, 325, 504 and 506 read with Section 34 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- allegations against the applicant are that applicant had caught hold of husband of deceased so that he could not rescue his wife when the co-accused had poured kerosene oil upon the deceased- this is a grave allegation- further, in case the applicant is released on bail, the trial would be adversely effected- mere granting of bail to female co-accused will not entitle the other accused to claim bail on the principle of parity as female has special right to be released on bail- Bail Application dismissed.

Title: Vijay Kumar son of Sh. Balak Ram Vs. State of H.P. Page-131

Code of Criminal Procedure, 1973- Section 482- An FIR was lodged against the petitioner for the commission of offences punishable under Sections 279 and 337 of IPC and Section 187 of Motor Vehicle Act- parties compromised the matter- therefore, proceedings pending before the Trial Court are quashed.

Title: Arun Bagai Vs. State of Himachal Pradesh and another Page-150

Constitution of India, 1950- Article 226- A writ petition was filed by the petitioner for quashing the order, posting him in Himachal Pradesh University Regional Centre at Dharamshala on repatriation from the Department of Public Administration, PG Centre, Shimla- writ petition was dismissed on the sole ground that similar relief was sought by the petitioner earlier in CWP No. 9231 of 2011 which was not granted and therefore, is deemed to have been declined- held, that a Co-ordinate Bench in previously instituted writ petition had directed the respondent-University to examine as to whether there is justification of two Assistant Professors at Regional Centre, Dharamshala and whether the writ petitioner can be permitted to discharge his duties in the Department of Public Administration, PG Centre, Shimla, as a special case- University after due consideration had transferred the petitioner to his place of posting- no relief was granted and only a direction was passed in the writ petition- hence, the relief claimed by the petitioner was deemed to have been declined- moreover, petitioner was appointed in Regional Centre, Dharamshala and, therefore, cannot claim the appointment at Regional Centre, Shimla contrary to his appointment order- consequently, Writ Petition dismissed.

Title: Munish Dulta Vs. Himachal Pradesh University Page-143

Constitution of India, 1950- Article 226- Central Civil Services (Classification, Control and Appeal) Rules, 1965-Petitioner, a driver with HRTC had parked his bus- bus rolled down in which seven passengers died and some passengers sustained injuries- penalty of termination was imposed upon the petitioner after an inquiry- petitioner filed an appeal, which was allowed and the disciplinary authority was asked to pass an appropriate order- disciplinary authority asked the petitioner to appear in person and thereafter imposed the same penalty- he filed an appeal, which was dismissed-held, that disciplinary authority had not recorded the reasons for passing the order of removal from the services- it was not mentioned that

copy of inquiry report was furnished to the petitioner and what factors were taken into consideration while passing the order of removal from service- disciplinary authority had passed the same order and had not discussed all aspects, which suggests that it had not complied with the direction of the Appellate Authority.

Title: Hans Raj Vs. Himachal Road Transport Corporation & others

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Constitution of India, 1950- Article 226- Electricity board issued an advertisement for appointment for various posts on contract basis for a period of two years as per marks obtained by the candidates in matriculation and I.T.I. examinations – they were offered appointment as Electrician Linemen and S.S.A. as contractual trainees on fixed monthly salary of Rs. 4,500/- in normal areas and Rs. 5,500/- in tribal/hard areas- petitioners contended that the appointment was in violation of the Recruitment and Promotion Rules as there was no mention of trainee in the rules- Board contended that the decision was taken in meeting to fill up the posts as trainee and it was mentioned in the appointment letters that appointment would be made as trainee- petitioners accepted the offer and they are estopped from challenging the same- held, that it was provided in the rules that appointment could be made either on regular basis or on contractual basis- there was no mention of the trainee in the Rules- Board had also filled up the posts of linemen through H.P. Subordinate Services Selection Board- a person appointed through H.P. Subordinate Services Selection Board would be entitled to regularization after 6 years while petitioners would be entitled to regularization after 8 years- there is no distinction between the duties discharged by the petitioners and those discharged by the persons appointed through Selection Board- Board had wrongly treated the petitioners as trainees- there cannot be any estoppel against the constitutional right- hence, petition allowed and it is directed that petitioners are deemed to be appointed on contract basis from the date of their appointment.

Title: Kehar Singh and others Vs. Himachal Pradesh State Electricity Board Limited Page-92

Constitution of India, 1950- Article 226- Petitioner came in contact with a high tension live wire known as 'Lahru-Chowari Line'-he received burn and other injuries-his both arms were amputated- he suffered 100% disability- held, that respondent had failed to maintain the electricity lines in accordance with Electricity Act and the Rules framed thereunder – electricity is dangerous commodity and it is the statutory duty of the person responsible for its supply and maintenance to abide by all the protective measures- the accident could have been avoided if the safety measures were taken - petitioner was reduced to a vegetative state- he would have started earning at least Rs. 30,000/- per month- his income would be Rs. 3,60,000/- per annum –applying multiplier of 25 – the loss of income of the petitioner would be Rs. 90,00,000/-- petitioner is entitled to standard damages of Rs. 10,00,000/- towards loss of companionship, life amenities/pleasures and loss of happiness, Rs. 10,00,000/- for pain and suffering, Rs. 10,00,000/- towards attendant/nursing expenses for his life and Rs. 5,00,000/- for securing artificial/robotic limbs and future medical expenses- thus, total amount of Rs. 1,25,00,000/- awarded as compensation to the petitioner.

Title: Naval Kumar alias Rohit Kumar Vs. State of H.P. & ors. Page-256

Constitution of India, 1950- Article 226- Petitioner is aggrieved by hiring of godown by Food Corporation of India- held, that hiring of godown by FCI is a policy decision and cannot be made a subject-matter of the writ petition,

unless there is arbitrariness in the process- public interest litigation cannot be used to challenge the financial or economic decisions taken in exercise of Administrative power.

Title: Vijay Kumar Gupta Vs. State of Himachal Pradesh & others

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Constitution of India, 1950- Article 226- Petitioner made a request for her transfer from Government Primary School, Thathal Block Matiana to a place nearby Shimla, being a couple case- her request was accepted and she was ordered to be transferred and posted nearby Shimla against the longer stay- Deputy Director informed the Director that no teacher was available at Shimla or nearby place within a within a radius of 25-30 kms to adjust the petitioner- petitioner sought information under Right to Information Act, 2005 and she was informed that six teachers had completed their tenure - Six teachers were retained on the basis of D.O. Notes "may not be disturbed" – held, that State had given special privilege to twelve teachers- all the employees are equal and should be treated equally- retaining 12 teachers who had completed their normal tenure without public interest/exigency is violative of Articles 14 and 16 of the Constitution of India - employee can neither be transferred nor retained at a particular place on the basis of D.O. Note – petition allowed and the respondent directed to post the petitioner within a radius of 30 kms and to transfer the teachers who had completed more than normal tenure within a radius of 30 kms in Shimla town to a place located beyond 30 kms.

Title: Sushma Devi Vs. State of Himachal Pradesh and others Page-146

Constitution of India, 1950- Article 226- Petitioner was found suitable for the post of Dental Doctor- she joined her duty on 17.10.2013- her services were terminated on 16.9.2014- As per para 8(d) of the scheme formulated by Union of India, maximum period of contract was two years subject of the review of the conduct and performance after 11 months- held, that conduct of the petitioner was not reviewed properly in accordance with guidelines - the action of the respondents of not renewing the contract of the petitioner is illegal, arbitrary and violative of Articles 14 & 16 of the Constitution of India- petition allowed and respondents directed to permit the petitioner to continue her services as dental doctor.

Title: Dr. Neha Mahajan Vs. Union of India and ors. Page-36

Constitution of India, 1950- Article 226- Petitioner was declared successful for the post of Sub Inspector in H.P. Police- he received a memo stating that an FIR was registered against him and his appointment was kept in abeyance- police filed a cancellation/closure report which was accepted – petitioner was appointed on 24.6.2009- date of appointment was mentioned on 24.6.2009 in the seniority list -petitioner had made a representation to the Director General of Police and requested him to consider his date of appointment as 12.12.2008 on which date other candidates were selected- held, that offence alleged in the FIR does not involve moral turpitude- respondents had not verified the correctness, truthfulness, veracity or otherwise of the allegations made in the FIR- cancellation of FIR exonerated the petitioner, which would relate to the date of his selection – consequently, petition allowed and the respondent directed to consider the petitioner as having been appointed from the date when other persons were appointed.

Title: Anil Thakur Vs. State of H.P. & others Page-29

Constitution of India, 1950- Article 226- Petitioners claiming themselves to be "public spirited persons" doing social work are aggrieved by action of the

respondents No. 1 to 6 whereby they had permitted handing over of the godown to the Food Corporation of India situated on the bank of the rivulet on the ground that rent of the new premises is more than 1600 times of the rent being paid for existing godown- there was a danger to the godown being washed away- held, that public interest litigation is meant to protect basic human rights of the weak and disadvantaged- it is to be used with great care and circumspection for delivering justice to citizens- petitioner had only made a bald statement that he is public spirited person and was doing social work- he was beneficiary of the existing godown as his weigh bridge was there- he had approached Food Corporation of India for hiring his weigh bridge which request was not considered-in these circumstances, conduct of the petitioner is not above suspicion and the petition has not been preferred to vindicate public interest- petitioner cannot be said to be acting bonafidely and has no locus standi.

Title: Vijay Kumar Gupta Vs. State of Himachal Pradesh & others

Page-329

Constitution of India, 1950- Article 226- Petitioners filed a Writ petition pleading that husband of writ petitioner No. 1 and father of writ petitioners No. 2 and 3 came in contact with a live electrical wire due to which he died- held, that Court has power to grant interim compensation – accordingly, interim compensation of Rs. 50,000/- each was awarded in favour of each of the petitioners.

Title: Roshni Devi and others Vs. Himachal Pradesh State Electricity Board Ltd. and others Page-207

Constitution of India, 1950- Article 226- Petitioners were engaged as T.G.T. (Non-Medical), P.E.T., Drawing Master and Peon- State took a decision to take over all the 95% getting grant-in-aid schools as on 1.4.2012- services of the petitioners were taken over by the State Government, however, grant-in-aid was not released towards their salary w.e.f. April, 2010 till September, 2012- State contended that strength of the children was less than the prescribed limit- however, State had taken over another school where the strength was less than prescribed limit- salary was paid through grant-in-aid- held, that State could not discriminate against the petitioner by granting the relaxation to one school and not to another- petitioners were similarly situated, therefore, they could not deprived of grant-in-aid- respondent directed to release the salary of the petitioners w.e.f. April, 2010 till September, 2012.

Title: Jaswant Singh and others Vs. State of Himachal Pradesh and others Page-141

Constitution of India, 1950- Article 309- Department was held liable to pay damages of compensation- held, that even if damages were awarded, punishment of removal is not justified.

Title: Hans Raj Vs. Himachal Road Transport Corporation & others

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'H'

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 104- Order of eviction was passed by Land Reforms Officers – there was no evidence that notice was issued to the tenant- 'R' was not present at the time of passing of the order- held, that order is required to be passed in the presence of both the parties- even the mutation did not record the presence of the plaintiff- hence, order passed by Land Revenue Officer is not sustainable.

Title: Devinder Kumar (died) through his LRs Vs. Kabul Singh and others
Page-85

Himachal Pradesh Urban Rent Control Act, 1987- Section 2(j)- Defendant claimed that he is legal heir of original tenant and is entitled to succeed to the tenancy- evidence showed that he was not residing in the premises but his children were residing – no electricity bills were produced to show the consumption of electricity- he was government servant serving at Shimla and could not have resided with his father who was residing at Garli - therefore, he cannot be called to be a tenant.

Title: Subhash Chand Sharma Vs. Shakuntla Devi (deceased)
Page-315

Hindu Succession Act, 1956 - Section 14- 'N' minor widow of 'J' succeeded to his share on his death- she re-married 'K'- plaintiff contended that she forfeited her right in the property upon her re-marriage- held, that plaintiff had failed to prove the marriage of 'N' with 'K' after the death of 'J'- she was shown to be the owner in possession in revenue record, which carried with it a presumption of truth- presumption was not rebutted by the plaintiff- interest of the husband devolved upon the widow immediately on the date of his death and she became full owner on the commencement of Hindu Succession Act- her right cannot be forfeited by her subsequent marriage.

Title: Krishan Chand & ors. Vs. Anil Kumar & others Page-52

Hindu Succession Act, 1956 - Section 14- 'N' minor widow of 'J' succeeded to his share on his death- she re-married 'K'- plaintiff contended that she forfeited her right in the property upon her re-marriege- held, that plaintiff had failed to prove the marriage of 'N' with 'K' after the death of 'J'- she was shown to be the owner in possession in revenue record, which carried with it a presumption of truth- presumption was not rebutted by the plaintiff- interest of the husband devolved upon the widow immediately on the date of his death and she became full owner on the commencement of Hindu Succession Act- her right cannot be forfeited by her subsequent marriage.

Title: Krishan Chand & ors. Vs. Anil Kumar & others Page-96

'I'

Indian Contract Act- Section 10- Corporation invited short term tenders for supply of 55,000 empty tins at Karsog depot and 6,000 empty tins at Panarsa depot- defendant participated in the tendering process- the agreement was executed between the parties- defendant supplied 29,472 tins at Karsog depot and 1045 tins at Panarsa depot – he was asked to supply remaining tins immediately- Corporation had to purchase tins at a higher rate for Karsog Depot and Panarsa depot- held, that defendant had supplied 30,000 tins to plaintiff-corporation at Karsog depot and 3200 tins at Panarsa depot- he applied for extension of time which was granted- plaintiff invited another short term tender notice -corporation entered into agreement with 'P' and 'S' at higher rate- plaintiff-corporation should have waited for the supply to be made by the defendant on the basis of extension- there was no necessity for floating short term tender notice- the short tender had raised the price of tins making it difficult for the defendant to supply tins at the quoted price- defendant had not voluntarily and intentionally infringed or breached the terms of agreement. Title: Himachal Pradesh State Forest Corporation Limited vs. Hem Raj Page-88

Indian Easement Act, 1882- Section 15- House of the plaintiff had an access by means of a path over the land of the defendant – defendant started interfering with path without any right to do so- path was also recorded in the copy of the jamabandi and in Aks Sazra- held that defendant had no right to obstruct the path- hence, the defendant restrained from obstructing the path.

Title: Rajinder Kumar & ors. Vs. Jagdish Chand & anr. Page-41

Indian Evidence Act, 1872- Section 3- Circumstantial evidence- where there is no direct evidence of crime- guilt of the accused can be proved by circumstantial evidence- circumstances from which conclusion of guilt is to be drawn should be fully proved and must be conclusive in nature to fully connect the accused with 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- Court must adopt a cautious approach while evaluating the circumstantial evidence.

Title: Simran Pal Singh Vs. State of Himachal Pradesh Page-220

Indian Evidence Act, 1872- Section 106- When the accused is last seen with the victim, it becomes his duty to explain the circumstances under which victim died- last seen theory comes into play when the time gap, between the death of the deceased and last seen, is so small that the possibility of any person other than the accused being the author of the crime becomes impossible- accused was seen with the deceased in Kufri Holiday Resort and deceased was not seen thereafter- his explanation that his wife was missing was not believable as he had not informed the parents of his wife regarding her missing and had not lodged any FIR - he had further failed to explain the circumstances appearing against him which established his guilt.

Title: Simran Pal Singh Vs. State of Himachal Pradesh Page-220

Indian Penal Code, 1860- Section 302- Accused and his wife came to Kufri for their honeymoon- accused pushed his wife below the cliff into a deep gorge near Hasan Valley- he misinformed her family members that his wife had left at Kufri and was not traceable- a missing report was lodged by the family members of the wife- accused disclosed on inquiry that he had pushed his wife down the cliff near Kufri – accused was brought to police station, Dhalli where his statement was recorded on which FIR was registered- statement of accused was recorded under Section 27 of Indian Evidence Act that he could get dead body of his wife recovered - accused led the police party to the spot and got recovered the dead body partially eaten by wild animals- mobile phone was recovered from the possession of the accused which contained recording of the conversation between the accused and his wife- voice sample of the accused was taken and was sent to FSL- it was opined by FSL that voice sample tallied with the voice in the mobile phone- prosecution witness admitted that upon being questioned by police officials from Firozpur rather strictly accused informed that while coming from Kufri he pushed his wife- he clarified that term strictly means Dabka (sternly)- held, that no pressure was put on the accused - attitude of sternness is not pressure- accused had told at Panckhula that he had pushed his wife down the cliff - subsequently, he told that he was not aware of name of the place where he had pushed his wife down the cliff yet he could get her dead body recovered by identifying the place- this kind of statement was not made by him earlier- hence, disclosure statement could not be doubted on the ground that police was aware of the place from where recovery was effected subsequently.

'L'

Limitation Act, 1965- Section 5- Application for execution was dismissed in default on 2.1.2006- an application for restoration was filed on 25.7.2006- an application under Section 5 of Limitation Act was filed for condoning the delay in filing the application- held, that the provision of Section 5 of Limitation Act is not applicable to the execution petition and the application was rightly dismissed.

Title: Capt. Padam Singh Vs. Ms. Rajni Sarin and others Page-152

Limitation Act, 1963- Section 5- Judgment was announced on 23.11.2013- Appeal was filed on 15.11.2014- it was stated that applicant had sought legal opinion to assail the judgment and the delay occurred due to this- held, that no material was placed on record to show as to how case was processed up to October, 2014- words "sufficient cause" used in section 5 of the Limitation Act should be interpreted liberally but a distinction must be made where the delay is inordinate and condonation would cause prejudice to the other side- applicant had failed to make out sufficient cause for delay- hence, application dismissed. Title: Bharat Sanchar Nigam Limited Vs. M/S Priya Raj Electronics Ltd.

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'M'

Malicious Prosecution- Defendant No. 2 filed a suit against the plaintiff which was subsequently withdrawn- defendant also filed a suit for permanent injunction against the plaintiff which was dismissed for non-prosecution- plaintiff claimed damages of Rs.1,20,000/- for the harassment- held, that suit was instituted without any reasonable cause- plaintiff had to incur expenses for defending it- when temporary injunction is sought on insufficient grounds, plaintiff can seek damages - suit for malicious prosecution would lie when the civil proceeding is instituted to harass the parties.

Title: Mohan Lal & anr. Vs. Wattan Chand Page-158

Motor Vehicle Act, 1988- Section 149- Deceased was travelling in a truck as a representative of the owner of the goods- truck met with an accident due to rash and negligent driving of the driver- Insurance Company had not led any evidence to prove that passenger was travelling in the vehicle as a gratuitous passenger – sitting capacity of the vehicle was '3'- risk of the driver was covered – no evidence was led to prove that risk of the owner of the goods was covered- held, that insurer had not committed breach of the terms of the policy and the Insurer was rightly held liable.

Title: Oriental Insurance Company Ltd. Vs. Anju and others

Page-299

Motor Vehicle Act, 1988- Section 166- Claimant was travelling from Una to Police Lines, Jhalera on a scooter which collided with a truck parked in the middle of the road- he sustained injuries and was taken to Hospital- claimant suffered 25% permanent disability and remained admitted in PGI Chandigarh from 25th January, 2004 to 6th March, 2004 – Tribunal awarded an amount of Rs. 15,000/- under the head 'pain and sufferings' and Rs. 5,000/- under the head 'loss of enjoyment and expectation of life' – held, that Tribunal had wrongly applied multiplier of 6 and had wrongly calculated the loss of earning capacity- claimant is entitled to Rs. 50,000/- for pain and sufferings undergone by him and Rs. 50,000/- for pain and suffering which he will have to undergo throughout his life- consequently, compensation was enhanced to Rs. 2,76,800/-.

Title: Gurdial Singh Vs. Hoshiar Singh & others Page-245

Motor Vehicle Act, 1988- Section 166- Deceased was a student who would have been earning not less than Rs. 3,000/- per month- claimant had lost source of dependency of Rs. 2,000/- Tribunal has rightly applied multiplier of '18'- claimant would be entitled to Rs. 4,32,000/- under the head 'loss of source of dependency', Rs. 10,000/- under the head 'funeral expenses' and Rs. 2,500/- under the head 'transportation charges' – claimant would also be entitled for interest @ 7.5 % per annum from the date of the claim petition.

Title: National Insurance Company Limited Vs. Ragi Ram & others
Page-253

Motor Vehicle Act, 1988- Section 166- Motor Accident Claims Tribunal had dismissed the award on the ground that claimant had failed to prove that driver had driven the vehicle at the time of the accident in a rash and negligent manner- Tribunal had taken into consideration the judgment of the acquittal passed by Criminal Court- held, that the acquittal in a criminal case cannot be ground to dismiss the claim petition- case remanded to the Tribunal with the direction to provide opportunity to the claimants to lead further evidence in support of their case.

Title: Virender Singh and others Vs. Himachal Road Transport Corporation and Ors. Page-147

'N'

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2 Kg. 500 grams of charas – Officials witnesses deposed in harmony and consistently with each other regarding the genesis of the prosecution version- the place where proceedings were commenced was a secluded place and no independent witness could be associated- however, PW-9 who received ruqqa stated that he had received ruqqa at 8:30 P.M whereas it was mentioned in the ruqqa that it was sent from the spot at 9:00 P.M- this discrepancy would lead to an inference that proceedings relate to search, seizure and recovery were concluded at the place other than the site of the occurrence which would make the whole of the prosecution case doubtful.

Title: Gulam Rasool Vs. State of Himachal Pradesh Page-213

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 6 Kg. 500 grams of charas- Investigating Officer had not made any efforts to associate any independent witness despite the fact that vehicles were plying on the road at the time of incident- failure to join the independent witnesses despite the opportunity would make the prosecution case doubtful- special report was also not placed on record and no reason was assigned for the same- column No. 9 to 11 of NCB form were kept blank- contraband was not re-sealed by SHO – there was a difference between the time of recovery recorded in the seizure memo and NCB forms- the person who effected the recovery conducted the investigation- original seal was not produced before the Court- held that, in these circumstances, accused was rightly acquitted.

Title: State of Himachal Pradesh Vs. Anil Kumar son of Sh Kali Ram
Page-302

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 6.5 kg of charas- prosecution witnesses had deposed in harmony about the links in the chain of circumstances starting from the search, seizure and recovery till the report- witnesses had deposed consistently about the genesis of the

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Balak Ram and another vs. State of U.P. AIR 1974 SC 2165

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

Saneh Lata. ...Petitioner.
Versus
Dimple and others. ...Respondents.

CMPMO No. : 340/2014
Decided on: 15.12.2014

Code of Civil Procedure, 1908- Order 21- Petitioner was held entitled to 1/3rd share and insurance amount of Rs. 3,51,474/- under Army Group Insurance Fund Scheme- judgment debtor No. 1 and 2 were held entitled to 2/3rd share- permanent injunction was granted for restraining them from withdrawing the share of the petitioner- petitioner filed an Execution Petition, which was dismissed on the ground that account number was not given in the judgment- held, that it is open to the Executing Court to construe the decree with the help of judgment and pleadings- the decree has to be enforced in such a manner that the litigation between the parties is shortened – petition allowed and the Bank directed to pay the share of the petitioner from the amount deposited by the Army Group Insurance Fund in the account of judgment debtors No. 1 and 2, and in case the amount had not been deposited in the account, Army would release the same within a period of 6 weeks.(Para-10 to 15)

Cases referred:
Topanmal Chhotamal vs. M/s Kundomal Gangaram and others, AIR 1960 SC 388
Bhavan Vaja and others vs. Solanki Hanuji Khodaji Masang and another, AIR 1972 SC 1371
Bhagwati Prasad vs. Babulal Bathwal, AIR (44) 1957
Mundan Raman vs. Kochukunju Narayanan, AIR 1957 Kerala 31
Brij Lal v. Roshan Lal and others, AIR 1980 HP 13

For the petitioner : Mr. K.D. Sood, Sr. Advocate with
Mr. Rajnish K. Lal, Advocate.
For the Respondents : Mr. Ajay Sharma, Advocate for respondent No.1.
Mr. Manoj Chauhan, Advocate for respondent No.4
None for other respondents.

The following judgment of the Court was delivered:

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

This petition is instituted against the order dated 21.6.2014 rendered by Civil Judge (Senior Division), Nurpur in Execution Petition No.14 of 2007.

2. "Key facts" necessary for the adjudication of this petition are that petitioner had filed a Civil Suit bearing No.134/2002 in the Court of Civil Judge (Junior Division)-1, Nurpur, District Kangra. The Civil Suit was decreed by the trial court on 28.10.2006. Operative portion of the judgment reads as under:

> **"In view of my findings on the issues above, the suit of the plaintiff succeeds and is hereby decreed. Accordingly, the plaintiff is held entitled to 1/3rd share in the insurance amount of Rs. 3,51,474/- assessed under Army Group Insurance Fund Scheme, whereas, defendants No.1 and 2 are having 2/3rd share, therein with consequential relief of permanent injunction restraining the defendants not to withdraw 1/3rd share of the plaintiff in the**

insurance amount being payable to the legal heirs of late Shri Yashbir Singh. However, in the peculiar facts and circumstances of the case, the parties are left to bear their own costs. Decree sheet be prepared accordingly and the file after its due completion be consigned to record room."

3. The petitioner was held entitled to 1/3rd share in the insurance amount of Rs. 3,51,474/- assessed under Army Group Insurance Fund Scheme. Judgment debtors No.1 and 2 were held entitled to 2/3rd share with permanent injunction restraining them not to withdraw 1/3rd share of petitioner in the insurance amount. Petitioner has also moved an application under order 39 Rule 1 and 2 read with section 151 of the Code of Civil Procedure. Judgment Debtor No.3 was restrained from releasing 1/3rd share of the petitioner in the insurance amount of Rs. 3,51,474/- on 13.8.2002.

4. Petitioner filed an Execution Petition bearing No.14/2007 for the execution of the judgment and decree dated 28.10.2006. The Execution Petition was dismissed by the Civil Judge (Senior Division) on 21.6.2014. Hence, the present petition.

5. Petitioner's son died in Kargil in the year 2000. The family of the deceased was entitled to insurance amount under the Army Group Insurance Fund Scheme. A sum of Rs. 3,51,474/- was sanctioned. Petitioner was held entitled to 1/3rd share. According to the decree, she has been held entitled to 1/3rd amount out of Rs. 3,51,474.

6. The Civil Judge (Senior Division) has framed the issues in Execution Petition on 7.9.2009. In order to prove issue No.3, Sh. Vipan Mahajan, Branch Manager, PNB Jassur has led his evidence by way of affidavit. According to him, the matter was got investigated after the receipt of judgment and decree. Account No.3601 belonged to Ramzan Khan and Rashidan Bibi. No account existed in the name of judgment debtors No.1 and 2. According to him, a sum of Rs. 3,52,474/- was sent to the bank vide order No. 728963 dated 29.7.2002. It was found to have been credited in account No.3601 and information to this effect was given to the decree holder. However, in his cross-examination, he has deposed that the amount which was credited to account No.3601 belonged to Ramzan Khan and Rashidan Bibi. The cheque was returned to the Army. He has also admitted that account No.3601 in the Punjab National Bank at Jassur was not in the name of Dimple.

7. The decree holder has deposed that she was to be paid 1/3rd share in the amount. However, the judgment debtor No.3 has not released her share. She is an old lady and senior citizen. She has also admitted that bank has informed that the bank account number was incorrectly given.

8. The letter sent to decree holder is Ex.PW-1/B. The copy of pass-book of account of Dimple is mark 'A'. The Executing Court has not executed the decree only on the pretext that this account number as per mark 'A' was not given in the judgment.

9. According to Mr. Manoj Chauhan, learned counsel appearing on behalf of respondent No.4, the Army has already released the amount in favour of the family members of the deceased. The account No. 3601 belonged to Ramzan Khan and Rashidan Bibi. The Executing Court should have ascertained the account from the judgment debtor No.3 whereby the amount has been received by judgment debtors No.1 and 2. The Executing Court could always mould the relief to ensure the execution of the judgment and decree dated 28.10.2006.

10. Their Lordships of the Hon'ble Supreme Court in ***Topanmal Chhotamal vs. M/s Kundomal Gangaram and others***, AIR 1960 SC 388 have

held that it is certainly open to the court to look into the pleadings and judgment. Their Lordships have held as under:

> **"4. At the worst the decree can be said to be ambiguous. In such a case it is the duty of the executing Court to construe the decree. For the purpose of interpreting a decree, when its terms are ambiguous, the Court would certainly be entitled to look into the pleadings and the judgment : see Manakchand v. Manoharlal, 71 Ind. App. 65 : (AIR 1944 P. C. 46). In the plaint in the Agra suit, Suit No. 205 of 1949, not only relief was asked for against the firm, but also a personal decree was claimed against defendants 2 to 6. The said defendants inter alia raised the plea that a personal decree could not be passed against them because they were not made parties to the suit filed in the Chief Court, Sind, and were not personally served therein. The learned Civil Judge, Agra, in accepting the plea made the following observation :**
>
> > **"The defendants 2 to 6 were not made parties in Suit No. 533 of 1947 and were not individually served in that case. I think, therefore, the plaintiff cannot get a personal decree against defendants 2 to 6."**
>
> **After citing the relevant passage from the decision of the Madras High Court in Sahib Thambi Marakayar v. Hamid Marakayar, ILR 36 Mad. 414, the learned Civil Judge concluded thus :**
>
> > **"That being the law there is no reason for construing the decree obtained by the plaintiff in Suit No. 533 of 47 as creating a larger liability against the defendant partners of the firm than to make the partnership property in their hands liable. I hold, therefore, that a personal decree against defendants 2 to 6 cannot be given but only as regards the property of the firm defendant No. 1 which may be found in their hands. The plaintiff is thus entitled to a decree for Rs. 12,140-1-0 with costs further and pendente lite interest at 3 p. c. p. a. against defendant No. 1 as may be found in the hands of defendants 2 to 6."**
>
> **Then followed the decretal order. It is manifest from the pleadings and the judgment of the learned Civil Judge that when a personal decree was sought against respondents 2 to 6 on the same grounds that would have been open to the appellant for executing the decree against them under Order XXI, Rule 50, C. P. C., the learned Judge, for specific reasons mentioned by him, refused to give the appellant the said relief and expressly confined it to the assets of the firm in the hands of the partners."**

11. Their Lordships of the Hon'ble Supreme Court in ***Bhavan Vaja and others*** vs. ***Solanki Hanuji Khodaji Masang and another***, AIR 1972 SC 1371 have explained succinctly the duty of the executing court as under:

> **"19. It is true that an executing court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceedings leading upto the decree. In order to find out the meaning of the words employed in a decree the Court, often has to ascertain the circumstances under which those words came to be used. That is the plain duty of the execution Court and if that Court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it. Evidently the execution court in this case thought that its jurisdiction began and ended with**

merely looking at the decree as it was finally drafted. Despite the fact that the pleadings as well as the earlier judgment rendered by the Board as well as by the appellate Court had been placed before it, the execution Court does not appear to have considered those documents. If one reads the order of that Court, it is clear that it failed to construe the decree though it purported to have construed the decree. In its order there is no reference to the documents to which we have made reference earlier. It appear to have been unduly influenced by the words of the decree under execution. The appellate Court fell into the same error. When the matter was taken up in revision to the High Court, the High Court declined to go into the question of the construction of the decree on the ground that a wrong construction of a decree merely raises a question of law and it involves no question of jurisdiction to bring the case within Section 115, Civil Procedure Code. As seen earlier in this case the executing Court and the appellate Court had not construed the decree at all. They had not even referred to the relevant documents. They had merely gone by the words used in the decree under execution. It is clear that they had failed to construe the decree. Their omission to construe the decree is really an omission to exercise the jurisdiction vested in them."

12. Learned Single Judge of Patna High Court in ***Bhagwati Prasad*** vs. ***Babulal Bathwal***, AIR (44) 1957 Patna 8 has held that the executing court may construe decree. Learned Single Judge has held as under:

"6. So far as the first point is concerned, it is true that the Courts below have referred to a number of materials in order to interpret the House Controller's judgment which takes the place of the decree in the execution case. Mr. Sinha has referred to the decision of a Division Bench of the Calcutta High Court in -- 'Nuddyar Chand Shaha v. Gobind Chunder Guha', 10 Cal 1092 (A). In that case, the terms of the decree were uncertain. The executing Court took oral and documentary evidence in order to ascertain the exact meaning of the terms of the decree. Their Lordships held that the executing Court could not take such evidence in order to ascertain what the decree meant.

Even if it was not permissible for the executing Court in the present case to refer to other evidence in order to understand the judgment of the House Controller Mr. Sinha had himself conceded that the executing Court could certainly refer to the House Controller's judgment and to the pleadings of the parties in order to find out the premises from which the appellant was ordered to be evicted. There are also many decisions of this Court and other Courts to this effect.

I may refer only to some of those cases. In -- 'Baij Nath Sahay v. Gajadhar Prasad', 58 Ind Cas 276: (AIR 1920 Pat 118) (B), it was held by a Division Bench of this Court that, in construing a decree, the executing Court is competent to take the assistance of the pleadings and the judgment. This was followed by another Division Bench of this Court in - 'Bibi Wakilan v. Bibi Kasiman', AIR 1930 Pat 536 (C).

In -- 'Moti-Ur-Rahman Khan v. Sonu Lal', 175 Ind Cas 47: (AIR 1938 Pat 195) (D), Fazl Ali J. (as he then was), Agarwala J. agreeing, held that an executing Court cannot go behind the decree or in any way add to or amend the terms thereof but it is the duty of a Court to ascertain the property which is the subject of the decree, and, for

this purpose, it is entitled to look at the paramount description of the property.

7. The House Controller's order which is under execution has been marked as Ex. I-8. It appears from this order that the respondent filed his application for eviction of Ghugla Sah and others and the appellant from two rooms of holding No. 78 in ward No. IV of Kathihar Municipality. The rental of each of these, as mentioned in the order itself, was Rs. 35/- per month. Admittedly, the rental of Rs. 35 is payable by the appellant to the respondent not for one room but for the entire block in his possession.

It is perhaps from this point of view that the House Controller has stated in his order (Ex. I-8) that the landlord requires the "houses" occupied by the two tenants for opening shops for his two sons. The operative part of his order is as follows:

"I hereby direct that these houses (referring to the block in occupation of Ghugli Sah and others and to the block in occupation of the appellant) in question would be vacated and made available to the landlord within three months of the date of this order."

This clearly shows that he directed the appellant's eviction not only from one room but from the entire block in his occupation as a tenant of the respondent."

13. The Division Bench of Kerala High Court in ***Mundan Raman*** vs. ***Kochukunju Narayanan***, AIR 1957 Kerala 31 has held that the decree can be construed with the aid of the judgment and the pleadings. Learned Single Judge has held as under:

"4. The next objection relates to the amount allowed to be recovered. The suit was one for recovery of leased properties with rent past and future. The decree does not specify the quantum of rent allowed after the date of suit. -The decree-holder produced a copy of the plaint and the judgment in the case. The judgment states as follows:

"Future pattom also allowed for three years or till recovery of property, at the rate claimed in the i plaint."

5. This is a case in which the decree has to be construed with the aid of the judgment and the pleadings. It is seen from the plaint that the plaintiff claimed rent from the date of suit till date of recovery of possession at the rate of Rs. 2,500/- per annum. When the trial court held that future pattom was allowed at the rate claimed in the plaint it is clear that what was allowed was rent from the date of suit at the rate of Rs. 2,500/- pre annum. It is however seen from the execution petition that the decree-holder claimed rent at the rate of Rs. 5,000/- per annum from 10-4-1950. THIS claim is quite unsupportable by the terms of the decree and learned counsel for the respondent did not attempt to support the same. We therefore bold that the decree-holder is entitled to claim rent from the date of suit at the rate of Its. 2,500/- per annum only. Another question that arises in this connection is the ' period from which future rent can be allowed. The nature of the transaction which has given rise to tins decree has to be considered in deciding this question, The defendant-mortgaged the properties with possession to the plaintiff who leased the same to the defendant at the same time. The decree was obtained on the basis of that lease. The defendant' filed a later suit against the plaintiff as O. S. No. 152 of 1951 of the District Court of Kottayam for redemption of the mortgage. He deposited the mortgage money also along with the

plaint. That suit was decreed terminating the mortgage as on the date of the plaint, viz., 4-8-1951. Copies of the judgment and decree in O. S. No. 152 were produced in this court and we have allowed the application for admitting the same in evidence. The question is whether the decree-holder is entitled to recover rent after 4-81951 when his rights as mortgagee lessor terminated. We feel no doubt that the later decree must be given effect to. The later decree is between the same parties and the earlier decree is inconsistent with the terms of the later one. In such a case the earlier decree becomes unenforceable and this position has been laid down at least in two reported decisions of this court viz., Arumukom Nadar v. Saidukannu Pakeer Pillai 1950 Ker LT 32 (B) and Padmanabhan Krishnan v. Mathevan Pillai Kesava 1952 Ker LT 319: (AIR 1952 Trav C 294) (C). The relation of lessor and lessee came to an end when the decree-holder ceased to be the mortgagee in possession and the judgment-debtor cannot be made liable for rent after such date. The decree-holder is not' therefore entitled to claim rent after 4-8-1951."

14. Learned Single Judge of this Court in ***Brij Lal v. Roshan Lal and others***, AIR 1980 HP 13 has held that a decree has to be enforced and interpreted in such a manner that the litigation between the parties is shortened and for this purpose the real intention of the parties can be gathered from the various facts and circumstances of the case which led to the passing of the decree. Learned Single Judge has held as under:

"7. A close scrutiny of Exhibit DEH and Exhibit DH-2 and the pleadings of the parties clearly shows that the decree-holder (plaintiff) who was the predecessor-in-interest of the present respondents was to become the full fledged owner of the property on payment of Rs. 5130-78 paise and that the judgment debtor (defendant) was to lose all interests in this property. The words to the effect that the plaintiff shall become the "absolute owner" of the property clearly mean that the plaintiff was to get the possession and ownership of the property and that the defendant (judgment-debtor) was to lose all rights in this property. If this is so, then definitely the plaintiff could get the possession of the property for which the consideration of Rs. 5130-78 paise was to be paid by him. The statement of the judgment-debtor Brij Lai, dated 22-11-1968, is also very significant where he admits that he was to receive Rs. 5130-78 paisc within two months and

thereafter Waziru Ram decree-holder (plaintiff) was to get the shops. The present decree, dated 31-&-66 has to be enforced and interpreted m a manner, that the litigation between the parties is shortened and for this purpose the real intention cf the parties can be gathered from the various facts and circumstances of the case which led to the passing of this decree as has been laid down in Bhavan Vaja and others case (supra)."

15. Accordingly, the petition is allowed. Order dated 21.6.2014 is set aside. Judgment debtor No.3-bank is directed to pay the share of the petitioner if the entire amount of Army Group Insurance Fund has been deposited in the account of judgment debtors No.1 and 2, and in case the amount has been sent back to respondent No.4 by judgment debtor No.3-Bank in that eventuality, respondent No.4 shall release the amount to the decree holder within a period of six weeks from today. Pending application(s), if any, also stands disposed of. No costs.

****

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

Mahindra and Mahindra Finance Limited. ...Appellant.

Versus

Surinder Panjta and another. ...Respondents.

FAO No. 268 of 2014
Reserved on : 2.12.2014
Decided on: 19.12. 2014

Arbitration and Conciliation Act, 1996- Sections 2(e) and 34- Respondent No. 1 had approached appellant for grant of credit facilities for the purchase of vehicle- it was specifically provided in Clause 30 of the agreement that Courts at Mumbai alone shall have exclusive jurisdiction in respect of any matter, claims or dispute arising out of agreement- respondents defaulted in the payment of loan amount on which an Arbitrator was appointed, who announced the award- an application was filed for executing the award before the District Judge, Shimla- held, that the Courts at Mumbai and Courts at Shimla have jurisdiction to hear and entertain the dispute- parties had consciously excluded the jurisdiction of Courts at Shimla and had conferred the jurisdiction on the Courts at Bombay – therefore, Execution Petition can only be filed before the Courts at Bombay and Courts at Shimla are not competent to entertain the petition.

Cases referred:

Hakam Singh vs. M/s Gammon (India) Limited, 1971 (1) SCC 286
Globe Transport Corporation vs. Triveni Engineering Works and another, (1983) 4 SCC 707
A.B.C. Laminart Pvt. Ltd. and another vs. A.P. Agencies, Salem, (1989) 2 SCC 163
R.S.D.V. Finance Co. Pvt. Ltd. vs. Shree Vallabh Glass Works Ltd. (1993) 2 SCC 130
Angile Insulations vs. Davy Ashmore India Ltd. and another, (1995) 4 SCC 153
M/s Shriram City Union Finance Corporation Ltd. vs. Rama Mishra, AIR 2002 SC 2402
New Moga Transport Company vs. united India Insurance Co. Ltd. and others, AIR 2004 SC 2154
M/s. Hanil Era Textiles Limited vs. M/s Puromatic Filters (P) Ltd., AIR 2004 SC 2432
Shree Subhlaxmi Fabrics (P) Ltd. vs. Chand Mal Baradia and others, (2005) 10 SCC 704
Rajasthan State Electricity Board vs. Universal Petrol Chemicals Limited, (2009) 3 SCC 107
Shree Baidyanath Ayurved Bhawan Private Limited vs. Praveen Bhatia and others, (2009) 8 SCC 779
Balaji Coke Industry Private Limited vs. Maa Bhagwati Coke Gujarat Private Limited, (2009) 9 SCC 403
Swastik Gases Private Limited vs Indian Oil Corporation Limited, (2013) 9 SCC 32
M/s Libra Mining Works vs Baldota Brothers, Importers and Exports and others, AIR 1962 AP 452
M/s. Rai Bahadur Basakha Singh and Sons (Contractors) Pvt. Ltd. vs. M/s Indian Drugs and Pharmaceutical Limited, AIR 1979 Delhi 220
Computer Sciences Corporation India Pvt. Ltd. vs. Harishchandra Lodwal and another, AIR 2006 MP 34

For the Appellant: Mr. G.C. Gupta, Sr. Advocate with
Ms. Meera Devi, Advocate.

For the Respondents: Mr. Vipan Rajta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Appeal is directed against the order dated 2.6.2014 rendered by the District Judge (F), Shimla in case No.RBT-28-S/10 of 2013/11.

2. "Key facts" necessary for the adjudication of this petition are that respondent No.1 had approached appellant, i.e. Mahindra and Mahindra Finance Limited for the grant of certain credit facilities for the purchase of Tata Spacio. The agreement was entered into between appellant and respondent No.1. The Loan-cum- hypothecation agreement No.B0042496 was executed on 24.9.2004 between appellant and respondent No.1 as borrower and respondent No.2 as guarantor. Clauses 29 and 30 of the loan agreement read as under:

"29) Arbitration:

All disputes, differences, and/or claim arising out of these presents or in any way touching or concerning the same or as to constructions, meaning or effect hereof or as to the right and liabilities of the parties hereunder shall be settled by arbitration to be held in accordance with the provisions of the Arbitration and conciliation Act, 1996 or any statutory amendments thereof and shall be referred to the sole arbitrator to be nominated by the lender. In the event of death, refusal, negligent, inability or incapability of a person so appointed to act as an arbitrator, the lender may appoint a new arbitrator. The arbitrator shall not be required to give any reasons for the award and the award of the arbitrator shall be final and binding on all parties concerned. The arbitrations proceeding shall be held in Mumbai.

30) Jurisdiction:

It is agreed by and between the parties hereto that the Courts at Mumbai alone shall have exclusive jurisdiction in respect of any matter, claims or dispute arising out of or in any way relating to these presents or to anything to be done under and pursuant to these presents or of any clause or provision thereof, notwithstanding that the whole or substantial part of the cause of action may not have arisen in Mumbai."

3. Respondents made default in the payment of loan amount as a result of which, notices were issued by the appellant to the respondents on 6.12.2010 expressing intention to refer the matter to sole Arbitrator. Sh. Sanjay Aggarwal was appointed as sole Arbitrator. The parties were advised to attend the proceedings on 7.2.2011. The proceedings were held on 28.2.2011. Respondents did not attend the proceedings held on 28.2.2011. Respondents were proceeded ex parte. The Sole Arbitrator made an award whereby respondents were directed to pay jointly and severally a sum of Rs. 3,64,732/- with future interest with effect from 3.1.2011 till the payment was received or recovered @ 18% per annum. Respondent No.1 was directed to hand over the vehicle/machine to the appellant in case the same was in possession of respondent No.1. In case the appellant has already re-possessed the vehicle, the appellant was at liberty to dispose of the same after giving due notice to the respondents and the sale proceed was to be adjusted in the awarded amount.

4. The appellant filed an application under order 21 rule 11 of the Code of Civil Procedure for the execution of the award. It was assigned RBT No. 28-S/10 of 2013/11 in the court of District Judge (Forest). Learned District

Judge (Forest) returned the award to present the same before the competent authority vide order dated 2.6.2014. Hence, the present appeal.

5. The loan agreement was made on 24.9.2004. Registered office of appellant is situated at Gateway Building, Appollo Bunder, Mumbai. Clause 2 of the loan agreement reads as under:

> **"2. The borrower agrees that so long as the loan shall continue the borrower shall;**
>
> **a) Pay the lender at its office at Gateway Building, Appollo Bunder, Mumbai-400 001 or such other address as may from time to time be notified a down payment and other sums mentioned in Schedule-1 at the time of application. The borrower shall pay periodical installment mentioned in Schedule 1 payable periodically as per the due dates mentioned in Schedule 1;**
>
> **b) Pay the lender, without prejudice to the right of the lender, on a demand made by the lender, as late charge an amount equal to 3% (three percent) per month of the amount that has remained outstanding beyond due date till payment shall be payable by the borrower to the lender, the late charge being calculated from the date the periodical installment was due and payable till the date of payment."**

6. It is evident from clause 29 of the loan agreement that the arbitration proceedings were to be conducted at Mumbai and as per clause 30, the courts at Mumbai alone were having the exclusive jurisdiction in respect of any matter, claims or dispute arising out of or in any way relating to the agreement or to anything to be done under and pursuant to these agreements or of any clause or provision thereof, notwithstanding that the whole or substantial part of the cause of action may not have arisen in Mumbai.

7. Mr. G.C. Gupta, learned Senior Advocate has vehemently argued that since the agreement was executed at Shimla and the money was sanctioned at Shimla, the principal court at Shimla had the jurisdiction to execute the award dated 11.3.2011.

8. According to clause 2 of the loan agreement, as quoted hereinabove, the borrower was to pay the lender installments at its office at Gateway Building, Appollo Bunder, Mumbai-400 001 or such other address as may from time to time be notified at the time of down payment and other sums mentioned in Schedule-1. The borrower was bound to pay periodical installment mentioned in Schedule 1 payable periodically as per the due dates mentioned in Schedule 1. There is no other address given in Schedule-1 where the payment was to be made.

9. Mr. G.C. Gupta has drawn the attention of the Court to sections 2 (e), 34, 35, 36, 40 and 42 of the Arbitration and Conciliation Act, 1996. In the instant case, parties have consciously entered into agreement dated 24.9.2004. In case of dispute, they have agreed to refer the matter to the Arbitrator and the arbitration proceedings were to be held in Mumbai. As per clause 29 of the loan agreement, the parties have also agreed to the exclusive jurisdiction of courts at Mumbai to resolve the disputes arising out of agreement.

10. Mr. G.C. Gupta has argued that clause 30 of the agreement is void. According to him, the parties cannot confer jurisdiction on the court which has no jurisdiction at all. Mr. G.C. Gupta has also argued that clause 30 of the agreement is violative of section 28 of the Contract Act. He has also referred to section 20 of the Code of Civil Procedure. However, fact of the

matter is that the appellant is a company duly registered under the Companies Act. Its registered office is at Gateway Building, Appollo Bunder, Mumbai.

11. According to plain language of section 2 (e) of the Arbitration and Conciliation Act, 1996, "court" means the principal civil court of original jurisdiction in a district having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principle civil court, or any court of small causes. Section 36 provides that where after the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court. The appellant-company was liable to be sued where its head office or where its branch of business exists. It is settled law that expression "corporation" as per explanation-II would include company. What has happened in the present case is that the seat of Arbitrator was at Mumbai as agreed between the parties. The jurisdiction of the other courts has been excluded except at Mumbai. The expression "alone" finds mention in clause 30 of the agreement entered into between the parties on 24.9.2014.

12. Mr. G.C. Gupta, as noticed hereinabove, has argued that clause 30 of the loan agreement is violative of section 28 of the Contract Act. However, the court is of the view that the part of cause of action has also arisen in Mumbai and in Shimla. The installment was to be paid by respondent No.1 to appellant-company at Gateway Building, Appollo Bunder, Mumbai. The award has been made by the Arbitrator at Mumbai. It is an *ex parte* award. If the company was to be sued it could be sued where the principal office or subordinate office is situated. The parties have agreed to get the dispute tried and adjudicated upon by the courts at Mumbai alone and thus, the court mentioned in the agreement has the jurisdiction to execute the award also.

13. Their Lordships of the Hon'ble Supreme Court in ***Hakam Singh*** vs. ***M/s Gammon (India) Limited***, 1971 (1) SCC 286 have held that since the respondents have their principle office in Bombay they were liable in respect of a cause of action arising under the terms of the tender to be sued in the courts at Bombay. It was not open to the parties by agreement to confer by their agreement jurisdiction on a court which it does not possess under the Code. However, where two courts or more have under the Code of Civil Procedure jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy and does not contravene section 28 of the Contract Act. Their Lordships have further held that there is nothing in the Code of Civil Procedure that a corporation referred to under order 20 means only a statutory corporation and not a company registered under the Indian Companies Act. Their Lordships have held as under:

> **"4. The Code of Civil Procedure in its entirety applies to proceedings under the Arbitration Act. The jurisdiction of the Courts under the Arbitration Act to entertain a proceeding for filing an award is accordingly governed by the provisions of the Code of Civil Procedure. By Cl. 13 of the agreement it was expressly stipulated between the parties that the contract shall be deemed to have been entered into by the parties concerned in the City of Bombay. In any event the respondents have their principal office in Bombay and they were liable in respect of a cause of action arising under the terms of the tender to be sued in the Courts at Bombay. It is not open to the parties by agreement to confer by their agreement jurisdiction on a Court which it does not possess under the Code. But where two courts or more have under the Code of Civil Procedure jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in**

one of such Courts is not contrary to public policy. Such an agreement does not contravene S. 28 of the Contract Act.

5. Counsel for the appellant contended that merely because the respondent carried on business in Bombay the Courts at Bombay were not invested with jurisdiction to entertain any suit or a petition for filing an arbitration agreement. Section 20 of the Code of Civil Procedure provides :

> **"Subject to the limitations aforesaid, 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 the commencement of the suit, actually and voluntarily resides, or carries on business. or personally works for gain; or**
> >
> > **(b) x x x x**
> >
> > **(c) the cause of action, wholly or In part, arises.**
> >
> > *** * ***
>
> **"Explanation II -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." Plainly by the terms of S. 20 (a) read with Explanation II, the respondent Company was liable to be sued at Bombay where it had its principal place of business.**

6. The argument of counsel for the appellant that the expression "corporation" in Explanation II includes only a statutory corporation and not a company registered under the Indian Companies Act is, in our judgment, without substance. The Code of Civil Procedure uses the expression "corporation" as meaning a legal person and includes a company registered under the Indian Companies Act. Order 29 of the Code of Civil Procedure deals with suits by or against c corporation and there is nothing in the Code of Civil Procedure that a corporation referred to under S. 20 mean' only a statutory corporation and not a company registered under the Indian Companies Act."

14. Their Lordships of the Hon'ble Supreme Court in ***Globe Transport Corporation*** vs. ***Triveni Engineering Works and another***, (1983) 4 SCC 707 have held that the parties can by agreement opt for jurisdiction of courts at one particular place of suing excluding other places which are otherwise open to them for suing. Their Lordships have held as under:

> **"2. This appeal by special leave is directed against an order made by the High court of Allahabad rejecting the revision application preferred by the appellant against an order made by the court of Civil Judge, Allahabad holding that it had jurisdiction to entertain the suit filed by the respondents against the appellant claiming damages for the loss suffered by them in respect of the goods carried by the appellant. The goods were entrusted by the consignor to the appellant for carriage at Baroda and under the consignment note issued by the appellant, the goods were to be carried to Naini. It appears that the truck in which the goods were carried met with an accident, as a result of which the goods were damaged and since the goods were delivered to the first respondent who were the endorsees of the consignment note, in damaged condition, the**

respondents fileld a suit claiming damages for the loss suffered by the first respondent. The consignment note contained various terms and conditions of the carriage and one of the terms and conditions was that set in Clause 17 which provided that "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". Notwithstanding this term of the Contract of Carriage, the suit was filed by the respondents in the court of the Civil Judge, Allahabad which had jurisdiction over Naini, being a place where goods were to be delivered and were in fact delivered to the first respondent. The appellant, therafore, raised an objection before the court of the Civil Judge, Allahabad contending that the court had no jurisdiction io entertain the suit since the court in Jaipur City alone had jurisdiction by reason of the term embodied in Clause 17 of the Contract of Carriage. The answer made by the respondents to this preliminary objection was that a part of the cause of action had arisen in Naini which was within the jurisdiction of the court of Civil Judge, Allahabad and that court had, therefore, jurisdiction to entertain the suit and Clause 17 did not have the effect of ousting the jurisdiction of the court of Civil Judge, Allahabad, because the court in Jaipur City had no jurisdiction to entertain the suit and it was not competent to the parties by agreement to confer on the court jurisdiction which it did not possess. The court of Civil Judge, Allahabad rejected the preliminary objection of the appellant and held that since a part of the cause of action had arisen in Naini, the court had jurisdiction to entertain the suit. The appellant being aggrieved by this order made by the Civil Judge, Allahabad preferred a revision application in the High court, but the High Court agreed with the view taken by the court of Civil Judge, Allahabad and held that since no part of the cause of action had arisen in Jaipur, the Civil court in Jaipur had no jurisdiction to entertain the suit and hence Clause 17 of the Contract of Carriage was ineffectual. The appellant thereupon preferred the present appeal by special leave obtained from this Court."

15. Their Lordships of the Hon'ble Supreme Court in ***A.B.C. Laminart Pvt. Ltd. and another*** vs**. *A.P. Agencies, Salem***, (1989) 2 SCC 163 have considered sections 23 and 28 of the Indian Contract Act, 1872 and Section 20 (c) of the Code of Civil Procedure and have held that agreement excluding court's jurisdiction absolutely would be void. However, where more than one court has jurisdiction, agreement to submit to one, to the exclusion of the others is valid. Nature of exclusion intended to be determined on facts and circumstances of each case. Their Lordships have held as under:

"2. The first appellant is a manufacturer and supplier of metallic yarn under the name and style 'Rupalon Metallic Yarn' having its registered office at Udyognagar, Mohamadabad, Gujarat within the jurisdiction of the civil Court of Kaira. The second appellant is a sister concern of the first appellant doing business with it. The respondent is a registered partnership firm doing business in metallic yarn and other allied products at Salem.

9. Section 28 of the contract Act, 1872 provides that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunal, or which limits the time within which he may thus enforce his rights, is void to that extent. This is subject to exceptions, namely, (1) contract to refer to arbitration and to abide by its award, (2) as a matter of commercial

law and practice to submit disputes on or in respect of the contract to agreed proper jurisdiction and not other jurisdictions though proper. The principle of Private International Law that the parties should be bound by the jurisdiction clause to which they have agreed unless there is some reason to contrary is being applied to municipal contracts., In Lee v. Showmen's Guild, (1952) 1 AN ER 1175 at p. 1181 Lord Denning said :

> **"Parties cannot by contract oust the ordinary courts from their jurisdiction. They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in cases of error of law, then the agreement is to that extent contrary to public policy and void."**

10. Under S. 23 of the Contract Act, the consideration or object of an agreement is lawful, unless it is opposed to public policy. Every agreement of which the object or consideration is unlawful is void. Hence there can be no doubt that an agreement to oust absolutely the jurisdiction of the Court will be unlawful and void being against the public policy. Ex dolo malo non oritur actio. If therefore it is found in this case that Clause 11 has absolutely ousted the jurisdiction of the Court it would be against public policy. However, such will be the result only if it can be shown that the jurisdiction to which the parties have agreed to submit had nothing to do with the contract. If on the other hand it is found that the jurisdiction agreed would also be a proper jurisdiction in the matter of the contract it could not be said that it ousted the jurisdiction of the Court. This leads to the question in the facts of this case as to whether Kaira would be proper jurisdiction in the matter of this contract. It would also be relevant to examine if some other courts than that of Kaira would also have had jurisdiction in the absence of Clause 11 and whether that would amount to ouster of jurisdiction of those courts and would thereby affect the validity of the clause.

15. In the matter of a contract there may arise causes of action of various kinds. In a suit for damages for breach of contract the cause of action consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. The making of the conttract is part of the cause of action. A suit on a contract, therefore, can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have (been) performed or its performance completed. If the contract is to be performed at the place where it is made, the suit on the contract is

to be filed there and nowhere else. In suits for agency actions the cause of action arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation of a contract, the place where repudiation is received is the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the Court where the suit is filed and that contract is found to the invalid, such part of cause of the action disappears. The above are some of the connecting factors.

16. So long as the parties to a contract do not oust the jurisdiction of all the Courts which would otherwise have jurisdiction to decide the cause of action under the law it cannot be said that the parties have by their contract ousted the jurisdiction of the Court. If under the law several Courts would have jurisdiction and the parties have agreed to submit to one of these jurisdictions and not to other or others of them it cannot be said, that there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy. Would this be the position in the instant case?

18. In Hakam Singh v. M/s. Gammon (India) Ltd., (1971) 3 SCR 314: (AIR 1971 SC 740) the appellant agreed to do certain construction work for the respondent who had its principal place of business at Bombay on the terms and conditions of a written tender. Clause 12 of the tender provided for arbitration in case of dispute. Clause 13 provided that notwithstanding the place where the work under the contract was to be executed the contract shall be deemed to have been entered into by the parties at Bombay, and the Court in Bombay alone shall have jurisdiction to adjudicate upon. On dispute arising between the patties the appellant submitted a petition to the Court at Varanasi for an order under Section 20 of the Arbitration Act, 1940 that the agreement be filed and an order of reference be made to an arbitrator or arbitrators appointed by the Court. The respondent contended that in view of the Clause 13 of the arbitration agreement only the Courts at Bombay had jurisdiction. The Trial Court also held that the entire cause of action had arisen at Varanasi and the parties could not by agreement confer jurisdiction on the Courts at Bombay which they did not. otherwise possess. The High Court in revision held that the Courts at Bombay had jurisdiction under the general law and hence could entertain the petition and that in view of Clause 13 of the arbitration agreement the petition could not be entertained at Varanasi and directed the petition to be retruned for presentation to the proper Court. On appeal therefrom one of the questions that fell for consideration of 'this Court was whether the Courts at Bombay alone had jurisdiction over the dispute. It was held that the Code of Civil Procedure in its entirety. applied to' proceedings under the Arbitration Act by virtue of Section 41 of that Act. The jurisdiction of the Court under the Arbitration Act to entertain a proceeding for filing an award was accordingly governed by the provisions of the Code of Civil Procedure. By the terms of Section 20(a) of the Code of

Civil Procedure read with explanation 11 thereto the respondent company which had its principal place of business at Bombay was liable to be sued at Bombay. It was held that it Was not open to the parties to agreement to confer by their agreement jurisdiction on a Court which it did not possess under the Code. But where two Courts or more have under the Code of Civil Procedure jurisdiction to try suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such Courts was not contrary to public policy and such an agreement did not contravene Section 28 of the Contract Act. Though this case arose out of an arbitration agreement there is no reason why the same rule should not apply to other agreements in so far as jurisdiction is concerned. Without referring to this decision a Division Bench of the Madras High Court in Nanak Chand v. T. T. Electric Supply Co., AIR 1975 Mad 103 observed that competency of a Court to try an action goes to the root of the matter and when such comptency is not found, it has no jurisdiction at all to try the case. But objection based on jurisdiction is a matter which parties could waive and it is in this sense if such jurisdiction is exercised by Courts it does not go to the core of it so as to make the resultant judgment a nullity. Thus it is now a settled principle that where there may be two or more competent Courts which can entertain a suit consequent upon a part of the cause of action having arisen there within, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague it is not hit by Ss. 23 and 28 of the Contract Act. This cannot be understood as parties contracting against the Statute. Mercantile Law and practice permit such agreements."

16. In the instant case as per clause 2 of the loan agreement, money was payable at Mumbai or as per the place mentioned in Schedule-1. However, there is no other place mentioned in Schedule-1 except Mumbai.

17. Their Lordships of the Hon'ble Supreme Court in ***R.S.D.V. Finance Co. Pvt. Ltd.*** vs. ***Shree Vallabh Glass Works Ltd***. (1993) 2 SCC 130 have held that when the amount was deposited by the plaintiff with defendant company through cheque of bank at Bombay and the same was deposited in the bank account of defendant in Bombay branch of bank and the post-dated cheques payable to plaintiff at Bombay issued by defendant dishonoured by bank on maturity, suit filed in Bombay on the basis of the deposit receipt as well as the dishonoured cheques, in these circumstances the cause of action arose in Bombay and hence Bombay court had jurisdiction to entertain the suit. Their Lordships have held as under:

"2. This appeal is directed against the judgment of the Bombay High Court dated 24th October, 1991. Brief facts of the case are that the appellant R.S.D.V. Finance Company Private Limited (hereinafter referred to as 'the plaintiff') filed a summary suit against the respondent Sh. Vallabh Glass Works Limited (hereinafter referred to as 'the defendant') in the ordinary original civil jurisdiction of the High Court. The case of the plaintiff was that it had deposited a sum of Rupees 10,00,000/- with interest to be charged @ 19% per annum, with the defendant. The said deposit was to be for a period of 90 days. The aforesaid amount of Rupees 10,00,000/- was given to the defendant-company through Cheque No. 933251 dated 5th July, 1983 in the bank account of the defendant at Bombay. The defendant issued a deposit receipt for the aforesaid amount dated 11-7-1983. The aforesaid deposit receipt contained an endorsement to the effect 'Subject to Anand jurisdiction'. The date of maturity of

the aforesaid amount was to expire on 3-10-1983. According to the plaintiff the defendant failed to pay the amount of Rupees 10,00,000/- and requested the plaintiff to continue the said deposit till the end of November, 1983 and for that purpose, handed over to the plaintiff 5 post dated cheques of Rs. 2,00,000/- each drawn on a Bombay bank. The defendant had also issued a cheque dated 30th November, 1983 for a sum of Rs. 22,288.32 by way of interest on the said amount of Rs. 10,00,000/-. This cheque was also drawn in favour of the plaintiff payable in Bombay. The plaintiff submitted the aforesaid 5 cheques for payment but the same were dishonoured for the reason "insufficient funds". The plaintiff in these circumstances filed a summary suit against the defendant for Rs. 10,00,000/- as principal and interest @ 19% per annum with 90 days rests.

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, Salem, (1989) 2 SCR 1 : (AIR 1989 SC 1239).”

18. Their Lordships of the Hon’ble Supreme Court in ***Angile Insulations*** vs. ***Davy Ashmore India Ltd. and another***, (1995) 4 SCC 153 have held that the territorial jurisdiction of court normally lies where cause of action arises, but it will be subject to terms of a valid contract between the parties and where two courts having jurisdiction consequent upon a part of the cause of action arising therewith, if parties stipulate in the contract to vest jurisdiction in one such court to try the disputes arising between themselves and if the contract is unambiguous, explicit and clear and is not pleaded to be void and opposed to section 23 of the Contract Act, then suit would lie in the court agreed to by the parties and the other court will have no jurisdiction even though cause of action arose partly within the territorial jurisdiction of that court. Their Lordships have held as under:

“5. So, normally that court also would have jurisdiction where the cause of action, wholly or in part, arises. But it will be subject to the terms of the contract between the parties. In this case, Clause (21) reads thus :

"This work order is issued subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, fall within the jurisdiction of the above court only."

A reading of this clause would clearly indicate that the work order issued by the appellant will be subject to the jurisdiction of the High Court situated in Bangalore in the State of Karnataka. Any legal proceeding will, therefore, be instituted in a Court of competent jurisdiction within the jurisdiction of High Court of Bangalore only. The controversy has been considered by this Court in A.B.C. Laminart Pvt. Ltd. v. A. P. Agencies, Salem. (1989) 2 SCC 163 : (AIR 1989 SC 1239). Considering the entire case law on the topic, this Court held that the citizen has the right to have his legal position determined by the ordinary Tribunal except, of course, subject to contract (a) when there is an arbitration clause which is valid and binding under the law, and (b) when parties to a contract agree as to the jurisdiction to which dispute in respect of the contract shall be subject. This is clear from S. 28 of the Contract Act. But an agreement to oust absolutely the jurisdiction of the Court will be unlawful and void being against the public policy under S. 23 of the Contract Act. We do not find any such invalidity of Clauses (21) of the Contract pleaded in this case. On the other hand, this Court laid that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therewith, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves,the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague, it is not hit by Ss. 23 and 28 of the Contract Act. This cannot be understood as parties contracting against the statute. Mercantile law and practice permit such agreements.

6. In this view of the law and in view of the fact that the agreement under which Clause (21) was incorporated as one such clause, the parties are bound by the contract. The contract had not been pleaded to be void and being opposed to S. 23 of the Contract Act. As seen, Clause (21) is unambiguous and explicit and that, therefore, the parties having agreed to vest the jurisdiction of the Court situated within the territorial limit of High Court of Karnataka, the Court of subordinate Judge, Dhanbad in Bihar State has no jurisdiction to entertain the suit laid by the appellant. Therefore, the High Court was right in upholding the order of the Trial Court returning the plaint for presentation to the proper Court."

19. Their Lordships of the Hon'ble Supreme Court in ***M/s Shriram City Union Finance Corporation Ltd.*** vs. ***Rama Mishra***, AIR 2002 SC 2402 have held that it is open for parties to choose any one of two competent courts to decide their disputes and once parties bound themselves as such it is not open for them to choose a different jurisdiction. Their Lordships have held as under:

"6. Two points which are up for our consideration is, first, regarding the arrears and its payment by the respondent, and the other regarding the jurisdiction of the Court namely, whether in view of the aforesaid specific clause under lease agreement, the Court of Bhubaneshwar or the Court at Calcutta would have jurisdiction to try the issues between the parties. So far the first point is concerned when the matter was listed earlier learned counsel for the respondent felt there was possibility of some settlement for which he took time. According to the instructions received by him, the term which is offered was acceptable to the appellant which was, if the respondent pays rupees five lacs in one instalment, the appellant will not pursue the matter in respect of any further claim over and above that. When the case is taken up today learned

counsel for the respondent submits that his client is agreeable to pay the amount of Rs. 5,00,000/- within two months which is acceptable to the appellant. In view of this it would be futile for us to enter into the first question raised.

7. This leads us to the second question, which counsel for the appellant submits with vehemence to be considered as this issue is being raised time and again and unless this is settled, the parties will continue to litigate for long in the various Courts. So we took up the second point for consideration. We heard the counsel for the parties in this regard. The submission for the appellant is strongly based on Cl. 34 of the aforesaid agreement which is quoted herein:-

> **"34. Subject to the provisions of Cl. 32 above it is expressly agreed by and between the parties herein above that any suit, application and or any other legal proceeding with regard to any matter, claims, differences and for disputes arising out of this agreement shall be filed and for referred to the Courts in Calcutta for the purpose of jurisdiction."**

9. In the present case the impugned order of the High Court and the order passed by the appellate Court arises out of the order passed by the Civil Judge, Bhubaneshwar. We have to keep in mind there is difference between inherent lack of jurisdiction of any 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 Court having jurisdiction. Thus the question is not whether the Orissa Courts have the jurisdiction to decide respondent's suit but whether the respondent could have invoked the jurisdiction of that Court in view of the aforesaid Cl. 34. A party is bound either by provision of the Constitution, statutory provisions or any rule or under terms of any contract which is not against the public policy. 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 Court has 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 agrees that their dispute shall be tried by only one of them then the party can only file the suit in that Court alone to which they have so agreed. In the present case as we have said through Cl. 34 of the agreement, the parties have bound themselves that 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.

10. For the said reasons we have no hesitation to hold that the suit filed by respondent in the Civil Court at Bhubaneshwar would not be valid, in view of the said agreement.

> **Since an application for filing an award in respect of a dispute arising out of the terms of the agreement could be filed in the Courts in the City of Bombay, both because of the term of Cl. 13 of the agreement and because of the respondents had their Head Office where they carry on business at Bombay, the agreement between the parties that the Courts in Bombay alone shall have jurisdiction to try the**

proceedings relating to arbitration was binding between them."

12. Hence we hold this second question in favour of the appellant that in view of Cl. 34 of the agreement it is the courts at Calcutta alone would be competent Court to adjudicate the dispute between the parties and hence finding to the contrary given by the Courts below is hereby set aside."

20. Their Lordships of the Hon'ble Supreme Court in ***New Moga Transport Company*** vs. ***united India Insurance Co. Ltd. and others***, AIR 2004 SC 2154 have held that choice of forum by agreement is not invalid. Their Lordships have held as under:

"10. On a plain reading of the Explanation to Section 20, CPC it is clear that Explanation consists of two parts, (i) before the word "or" appearing between the words "office in India" and the word "in respect of and the other thereafter. The Explanation applies to a defendant which is a Corporation which term would include even a company. The first part of the Explanation applies only to such Corporation which has its sole or principal office at a particular place. In that event, the Court within whose jurisdiction the sole or principal office of the company is situate will also have jurisdiction inasmuch as even if the defendant may not actually be carrying on business at that place, it will be deemed to carry on business at that place because of the fiction created by the Explanation. The latter part of the Explanation takes care of a case where the defendant does not have a sole office but has a principal office at one place and has also a subordinate office at another place. The expression "at such place" appearing in the Explanation and the word "or" which is disjunctive clearly suggest that if the case falls within the latter part of the Explanation. It is not the Court within whose jurisdiction the principal office of the defendant is situate but the Court within whose jurisdiction it has a subordinate office which alone have the jurisdiction "in respect of any cause of action arising at any place where it has also a subordinate office".

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 the plaintiff No. 1 (respondent No. 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. If it is so done, the question of limitation shall not be raised and the suit shall be decided on its own merits in accordance with law. The appeal is allowed. No costs."

21. Their Lordships of the Hon'ble Supreme Court in ***M/s. Hanil Era Textiles Limited*** vs. ***M/s Puromatic Filters (P) Ltd.***, AIR 2004 SC 2432 have held that when part of cause of action accrued in both the places viz., Delhi and Bombay and there is a clause in agreement between parties, however, conferring jurisdiction in courts in Bombay, would not be opposed to public policy. Even though clause was not qualified by words like "alone" "only" or "exclusively", but

taking into consideration that purchase 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 plaintiffs' case the final payment was to be made at Bombay, it can be inferred that courts in Bombay have jurisdiction to the exclusion of all other courts. Their Lordships have held as under:

> **"7. The effect of Clause 17 of the Purchase Order which mentions any legal proceedings arising out of the order shall be subject to the jurisdiction of the Courts in Mumbai, has to be examined in the aforesaid background. Under sub-sections (a) and (b) of Section 20, the place of residence of the defendant or where he carries on business or works for gain is determinative of the local limits of jurisdiction of the Court in which the suit is to be instituted. Subsection (c) of Section 20 provides that the suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action, wholly or in part, accrues. As shown above, in the present case, a part of cause of action had accrued in both the places, viz., Delhi and Bombay. In Hakam Singh v. Gammon (India) Ltd. 1971 (1) SCC 286, it was held that it is not open to the parties to confer by their agreement jurisdiction on a Court which it does not possess under the Code. But where two Courts or more have under the Code of Civil Procedure jurisdiction to try a suit or a proceeding, an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. It was also held that such an agreement does not contravene Section 28 of the Contract Act.**
>
> **9. Clause 17 says - any legal proceedings arising out of the order shall be subject to the jurisdiction of the Courts in Mumbai, The 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 plaintiffs 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."**

22. Their Lordships of the Hon'ble Supreme Court in ***Shree Subhlaxmi Fabrics (P) Ltd.*** vs. ***Chand Mal Baradia and others***, (2005) 10 SCC 704 have held that it is not open to the parties to confer by their agreement jurisdiction on a court which it does not possess under the Code of Civil Procedure. However, where two courts or more have under the Code of Civil Procedure jurisdiction to try a suit or a proceeding, an agreement between the parties that the disputes between them shall be tried in one of such courts is not contrary to public policy and such an agreement does not contravene section 28 of the Contract Act. Their Lordships have taken into consideration that in this case both defendant No.1 and defendant No.2 have their offices at Bombay. Their Lordships have held as under:

> **"16. The plaintiff wants that the Hindustan Chamber of Commerce (defendant No. 2) may be restrained from proceeding with arbitration of the dispute, which has been raised by the appellant Shree Subhlaxmi Fabrics Pvt. Ltd. (defendant No. 1). Both defendant No. 1 and defendant No. 2 have their offices at Bombay. Insofar as commencement of proceedings before defendant No. 2 by defendant**

No. 1 is concerned, no part of cause of action has accrued in Calcutta.

17. In Hakam Singh vs. Gammon (India) Ltd. *(1971 (1) SCC 286,)* it has been held that it is not open to the parties to confer by their agreement jurisdiction on a court which it does not possess under the Code. But where two courts or more have under the Code of Civil Procedure jurisdiction to try a suit or a proceeding, an agreement between the parties that the disputes between them shall be tried in one of such courts is not contrary to public policy and that such an agreement does not contravene Section 28 of the Contract Act. In A.B.C. Laminart (P) Ltd. vs. A.P. Agencies *(1989 (2) SCC 163,)* it was held as under: -

> **"When the court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ousting expression or clause properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction to the courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, ipso facto take away jurisdiction of other courts. Where an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other courts. 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 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 exclusion 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."**

This view has been reiterated in Angile Insulation vs. Davy Ashmore India Ltd. *(1995 (4) SCC 153.)*

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."

23. Their Lordships of the Hon'ble Supreme Court in ***Rajasthan State Electricity Board*** vs. ***Universal Petrol Chemicals Limited***, (2009) 3 SCC 107 have held that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therein, if parties to the contract agree to vest jurisdiction in one such court to try the dispute, such agreement is valid and binding. Their Lordships have further held that clauses in both agreements and purchase order specifically mentioned that contract was subject to jurisdiction of Jaipur courts only, thus, courts at Calcutta would not have territorial jurisdiction to try and decide such disputes. Their Lordships have held as under:

> **"5. Before we proceed further it would be appropriate for us to extract herein the relevant clauses with respect to adjudication of the disputes, if any, which were common in both the agreements.**

Clause 30 of the General Conditions of the Contract inter alia stipulates as under:-

> **"30.....The contract shall for all purposes be construed according to the laws of India and subject to jurisdiction of only at Jaipur in Rajasthan Courts only....."**

6. Clause 31 of the General Conditions of the Contract, which is an arbitration clause, reads as under:-

> **"31. ARBITRATION**
>
> **(a) If at any time any question, dispute to difference whatsoever which may arise between the Purchaser and the Supplier upon or in relation to Contract, either party may forthwith to the order a notice in writing of the existence of such question(s)/dispute(s) differences and the same shall be referred to the Chairman, RSEB, Jaipur or any person appointed by him for the purpose (herein referred to the `Arbitrator'). Such reference shall be deemed to be a submission to the arbitration within the meaning of the Indian Arbitration Act, 1940 and the statutory modifications made thereof.**
>
> **(b) The award of the Arbitrator shall be final and binding on both the parties.**
>
> **(c) Upon every or any such reference, the cost incidental to such reference and an award shall be in the discretion of the Arbitrator who may determine the amount thereof and direct the same to be borne and paid.**
>
> **(d) Work under the Contract shall, if reasonably possible, continue during the arbitration proceedings and no payment due or payable by the Purchaser shall be withheld on account of such proceedings."**

7. In the second purchase order which is dated 02.12.1987, in addition to the above mentioned clauses, a clause was also incorporated which is with respect to the jurisdiction of the Court in case of disputes:

> **"DISPUTES**
>
> **All disputes, differences or questions whatever which may arise between the Purchaser and the Supplier upon or in relation with or in connection with the contract shall be deemed to have arisen at Jaipur (Rajasthan) and no Court other than the Court at Jaipur (Rajasthan) shall have jurisdiction to entertain or try the same."**

27. The aforesaid legal proposition settled by this Court in respect of territorial jurisdiction and applicability of Section 20 of the Code to 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 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 of 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.

29. The Division Bench of the Calcutta High Court was aware of the clauses and stipulations in the agreements and was also aware of the abovementioned decisions of this Court, but the Division Bench held that the said forum selection clause agreed to and entered into between the parties would not apply in view of the specific provision of Section 31(4) of the Act. The said provision as well as sub-Section (3) are extracted below:-

> **"31. Jurisdiction.**
>
> **(1).....**
>
> **(2).....**
>
> **(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.**
>
> **(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference, and the arbitration proceedings shall be made in that Court and in no other Court."**

30. Having noticed the aforesaid provision of Section 31(4), the Division Bench held that since the aforesaid provision starts with a non-obstantive clause, the said provisions would only apply and would come into operation. The Division Bench finally held thus:

> **"The said argument cannot be sustained after a plain reading of Section 31(4) of the Act. It is clear from the language used therein that where in any application has been made in a court, competent to entertain, in that case that court alone shall have jurisdiction. The requirement is not that the application should be allowed. Since in the instant case admittedly an application under Section 20 has been made, which is an application in a reference, Calcutta High Court will have jurisdiction."**

The said findings were rendered by the Division Bench upsetting the findings of the learned Single Judge who had held that the non-obstantive clause appearing in sub-Section (4) of Section 31 would not be attracted in the present case where the parties by an agreement had agreed to a particular forum having jurisdiction over the dispute between the parties for adjudication.

24. Their Lordships of the Hon'ble Supreme Court in ***Shree Baidyanath Ayurved Bhawan Private Limited*** vs. ***Praveen Bhatia and others***, (2009) 8 SCC 779 have held that if parties to the contract conferred jurisdiction on one of the courts which would have otherwise jurisdiction to deal with the matter, the same should ordinarily be given effect to. Their Lordships have held as under:

"13. The parties hereto are governed by the terms of the contract. If, in terms of the provisions of the contract, they by agreement conferred jurisdiction on one of the courts which would have otherwise jurisdiction to deal with the matter, the same should ordinarily be given effect to. In A.B.C. Laminart Pvt. Ltd. & Anr. v. A.P. Agencies, Salem [(1989) 2 SCC 163], this Court held that when the Court has to decide the question of jurisdiction pursuant to an ouster clause, it is necessary to construe the same properly. In such an event, it was opined that other courts should avoid exercise of jurisdiction. [See also Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd. [(2004) 4 SCC 671]

15. It is not in dispute that two awards have been made by two different arbitrators. Objections to the said awards have been filed by both the parties. One of the questions which, thus, is required to be taken into consideration is as to whether the appointment of respective arbitrators by the parties was valid and, thus, whether the arbitrators had acted within the four corners of the arbitration agreement.

17. The cases mentioned in Annexure-I thereto are directed to be transferred to Jhansi. The Court concerned should send the records of the respective cases to the District Judge, Jhansi who shall in turn transfer them to the courts having appropriate jurisdiction in this behalf. The transferee court therefore should issue notices to the parties after fixing date(s) of hearing in the matters transferred to their courts."

25. Their Lordships of the Hon'ble Supreme Court in ***Balaji Coke Industry Private Limited*** vs. ***Maa Bhagwati Coke Gujarat Private Limited***, (2009) 9 SCC 403 have held that where two or more competent courts have jurisdiction to entertain a suit, parties to contract can agree to vest jurisdiction in one such court to try the dispute and such agreement is valid. Their Lordships have held as under:

"28. This Court in A.B.C. Laminart case went on to observe that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therewithin, if the parties to the contract agree to vest jurisdiction in one such court to try the dispute which might arise between them, the agreement would be valid.

30. In the instant case, 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 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, West Bengal, was valid and the Respondent- Company had wrongly chosen to file its application under Section 9 of the Arbitration and Conciliation Act before the Bhavnagar Court (Gujarat) in violation of such agreement. The decisions of this Court in A.B.C. Laminart (P) Ltd. (supra) as also Hakam Singh (supra) are very clear on the point."

26. Their Lordships of the Hon'ble Supreme Court in ***Swastik Gases Private Limited*** vs ***Indian Oil Corporation Limited***, (2013) 9 SCC 32, have surmised the entire case law and have held that by inserting a clause that courts at Kolkata shall have jurisdiction, courts at Kolkata alone shall have jurisdiction to the exclusion of other courts. Exclusion of jurisdiction clause in agreement should be given its natural and plain meaning, lest very existence of

said clause would be rendered meaningless. Their Lordships have held as under:

> **"7. We have heard Mr. Uday Gupta, learned counsel for the appellant and Mr. Sidharth Luthra, learned Additional Solicitor General for the company. Learned Additional Solicitor General and learned counsel for the appellant have cited many decisions of this Court in support of their respective arguments. Before we refer to these decisions, it is apposite that we refer to the two clauses of the agreement which deal with arbitration and jurisdiction. Clause 17 of the agreement is an arbitration clause which reads as under:**
>
> > **17.0. Arbitration**
> >
> > **If any dispute or difference(s) of any kind whatsoever shall arise between the parties hereto in connection with or arising out of this Agreement, the parties hereto shall in good faith negotiate with a view to arriving at an amicable resolution and settlement. In the event no settlement is reached within a period of 30 days from the date of arising of the dispute(s)/difference(s), such dispute(s)/difference(s) shall be referred to 2 (two) Arbitrators, appointed one each by the parties and the Arbitrators, so appointed shall be entitled to appoint a third Arbitrator who shall act as a presiding Arbitrator and the proceedings thereof shall be in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof in force. The existence of any dispute(s)/difference(s) or initiation/continuation of arbitration proceedings shall not permit the parties to postpone or delay the performance of or to abstain from performing their obligations pursuant to this Agreement.**
> >
> > **8. The jurisdiction clause 18 in the agreement is as follows:**
> >
> > **18.0. Jurisdiction**
> >
> > **The Agreement shall be subject to jurisdiction of the courts at Kolkata.**
>
> **9. The contention of the learned counsel for the appellant is that even though clause 18 confers jurisdiction to entertain disputes inter se parties at Kolkata, it does not specifically bar jurisdiction of courts at Jaipur where also part of the cause of action has arisen. It is the submission of the learned counsel that except execution of the agreement, which was done at Kolkata, though it was signed at Jaipur, all other necessary bundle of facts forming 'cause of action' have arisen at Jaipur. This is for the reason that:**
>
> > **(i) The regional office of the respondent - company is situate at Jaipur;**
> >
> > **(ii) the agreement was signed at Jaipur;**
> >
> > **(iii) the consignment agency functioned from Jaipur;**
> >
> > **(iv) all stock of lubricants was delivered by the company to the appellant at Jaipur;**
> >
> > **(v) all sales transactions took place at Jaipur;**
> >
> > **(vi) the godown, showroom and office of the appellant were all situated in Jaipur;**

(vii) various meetings were held between the parties at Jaipur;

(viii) the company agreed to lift the stock and make payment in lieu thereof at a meeting held at Jaipur and

(ix) the disputes arose at Jaipur.

The learned counsel for the appellant would submit that since part of the cause of action has arisen within the jurisdiction of the courts at Jaipur and clause 18 does not expressly oust the jurisdiction of other courts, Rajasthan High Court had territorial jurisdiction to try and entertain the petition under Section 11 of the 1996 Act. He vehemently contended that clause 18 of the agreement cannot be construed as an ouster clause because the words like, 'alone', 'only', 'exclusive' and 'exclusive jurisdiction' have not been used in the clause.

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.

57. For the reasons mentioned above, I agree with my learned Brother that in the jurisdiction clause of an agreement, the absence of 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 makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute. In the present case, only the Courts in Kolkata had jurisdiction to entertain the disputes between the parties."

27. Division Bench of Andhra Pradesh in ***M/s Libra Mining Works*** vs ***Baldota Brothers, Importers and Exports and others***, AIR 1962 AP 452 has held that where agreement limited recourse to one of several competent courts, it is not hit by section 28 and clause in contract entered into at Bombay that contract was subject to Bombay jurisdiction, the parties held intended to give exclusive jurisdiction to Bombay courts. The Division Bench has held as under:

"(10) Do the provisions of the Act warrant the submission that agreements of this description would in any way violate that Section? We do not think that this argument is well-founded. It is manifest that the object of the section is to render illegal, agreements which absolutely restrict the enforcement of rights arising under the Contract which a party has under the ordinary law and confines such vitiated by reason of Section 28. Consequently, Section 28 does not cause any impediment in the way of the parties agreeing to limit recourse to one of several competent courts. The agreement merely amounts to selection of one o the several jurisdictions and it does not deprive any Court of its inherent jurisdiction. Surely, it is open to the parties to agree to such a course and it is not hit by Section 28. There is abundant authority for this proposition. (Vide Hossen Kasam Dada (India) Ltd. v. Motilal Padampat Sugar Mills Co. Ltd., ILR (1954) Mad 855: (AIR 1954 Mad 845) Achratial Kesavlal Mehta and Co. v. Vijayam and Co., 49 Mad LJ 189 : (AIR 1925 Lah 57) (FB). It is too late now to contend that Section 28 of the Indian Contract Act stands in the way of the parties entering into an agreement providing for a Forum for the determination of disputes arising under the contract.

(13) To the same effect is the judgment of Lahore High Court in ILLR (1945) Lah 281: (AIR 1945 Lah 57)(FB). The agreement relating to jurisdiction, which fell to be considered by the Full bench of the Lahore High Court, was in these words:

"If however, it be deemed necessary to apply to the Court of law, the suit can only be filed in the Court at Karachi and through no other Court".

This case also contains an elaborate discussion in such agreements. Their Lordships held that an agreement did not fall within the mischief of Section 28, that the only Court that was competent to take cognizance of the suit was Court at Karachi and that the suit founded upon a contract with a clause like that Court not be instituted at Lahore. The principle adumbrated in A.K. Kalliyappa Chettiar and Sons v. Currimbhoy Laljee and Co., AIR 1954 Tra-Co. 461 is in accord with the above-mentioned cases. While not disputing the correctness of the proposition enunciated in the above cases, Sri Suryanarayana sought to distinguish them on the ground that while in those cases the parties intended to give exclusive jurisdiction to one of the two competent courts in the instant case, such a course was not within the contemplation of the parties. We do not think that we can assent to this proposition. Though the phraseology in the present case is different from that adopted in the cases under citation, in our opinion, the import is the same. The clause clearly denotes that the parties agreed to have the disputes arising out of the contract settled by the Courts in Bombay. The absence of the word 'only' cannot form the ground of distinction. If we would accept the interpretation sought to be placed upon this clause by the learned counsel for the appellant that term is otiose and unmeaning. Without the existence of such an agreement, the Bombay court has jurisdiction to take cognizance of suits for the enforcement of rights arising under the contract for the reason that these agreements were entered into at Bombay, having regard to the context in which it occurs, there can be little doubt that clause constitutes contracting out of the right to bring actions in other competent courts. We are not persuaded that eth connotation of this clause is different from these embodied in the cases referred to above."

28. Learned Single Judge of Delhi High Court in ***M/s. Rai Bahadur Basakha Singh and Sons (Contractors) Pvt. Ltd.*** vs. ***M/s Indian Drugs and Pharmaceutical Limited***, AIR 1979 Delhi 220 has held that where two courts have jurisdiction to try a proceeding or suit, the parties may agree that the disputes between them shall be tried in one of such courts. Learned Single Judge has held as under:

> **"4. It is well settled that parties by agreement cannot confer jurisdiction on any court which it did not otherwise possess. But where two courts have jurisdiction to try a proceeding or suit the parties may agree that the disputes between them shall be tried in one of such courts. It is admitted that the courts at Dehradun have jurisdiction in the matter under section 20 of the Code of Civil Procedure as the construction of the building in question was done within the jurisdiction of that court, Clause 3 o the Special Conditions of the Contract is as under:-**
>
> **3. Jurisdiction of Court:-**
>
> **Except as provided in Clause 25 of the bond, all the disputes arising out of the contract bond, Dehradun Courts alone will have the jurisdiction."**

29. Learned Single Judge of Madhya Pradesh High Court in ***Computer Sciences Corporation India Pvt. Ltd.*** vs. ***Harishchandra Lodwal and another***, AIR 2006 MP 34 while interpreting sections 37 and 39 of the Arbitration and Conciliation Act, 1996 has held as under:

> **"6. Learned counsel further submits that section 37 of the Code defines the Court which passes the decree and section 39 laid down the procedure for transfer of decree. It is submitted that unless and until the decree is sent for execution by the Court it passed the decree for execution to another court of competent jurisdiction the transferee court cannot execute decree under sections 37 and 39 of the Act.**
>
> **7. Learned court below has disposed of the application holding that the petitioner is competent to execute the decree at Delhi.**
>
> **8. In view of the aforesaid position of law, since award is passed at Indore therefore unless and until the Court at Indore transfer the decree to the Court at Delhi, it cannot be executed. In view of this decree dated 24-1-2003, is set aside with the direction to the Court below to consider the application for transfer so as to enable the petitioner to proceed with the execution of decree at Delhi."**

30. There is no merit in the contention of Mr. G.C. Gupta, learned Senior Advocate that clause 30 of the loan agreement is void. It is always open to the parties to get the dispute adjudicated upon in one court by excluding other if part of cause of action arose in jurisdiction's of both the courts. The appellant knew that though part of cause of action has arisen at Shimla, but has decided to get the matter adjudicated upon from the courts at Mumbai where the part of cause of action has also arisen. The parties cannot be permitted to exclude one clause of the agreement. All the clauses are required to be read harmoniously. In the present case, as per clause 29 of the loan agreement, arbitration proceedings were to be held in Mumbai and the same in fact were held in Mumbai and the award was passed in Mumbai. However, the application under order 21 rule 11 of the Code of Civil Procedure was filed at Shimla. The company knew from the very beginning that it has principal office at Mumbai and subordinate office at Shimla and despite that has agreed to

exclude territorial jurisdiction of all the courts except at Mumbai for adjudicating upon any dispute arising under the agreement. Clause 30 of the loan agreement, in view of the discussion, made hereinabove cannot be held to be violative of section 28. It is valid clause agreed consciously between the parties.

31. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application, if any, also stands disposed of. No costs.

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

Anil Thakur .....Petitioner.
Versus
State of H.P. & others .....Respondents.

CWP No. 262 of 2014-G.
Reserved on : 16th December, 2014.
Date of Decision : 22nd December, 2014.

Constitution of India, 1950- Article 226- Petitioner was declared successful for the post of Sub Inspector in H.P. Police- he received a memo stating that an FIR was registered against him and his appointment was kept in abeyance- police filed a cancellation/closure report which was accepted – petitioner was appointed on 24.6.2009- date of appointment was mentioned on 24.6.2009 in the seniority list -petitioner had made a representation to the Director General of Police and requested him to consider his date of appointment as 12.12.2008 on which date other candidates were selected- held, that offence alleged in the FIR does not involve moral turpitude- respondents had not verified the correctness, truthfulness, veracity or otherwise of the allegations made in the FIR- cancellation of FIR exonerated the petitioner, which would relate to the date of his selection – consequently, petition allowed and the respondent directed to consider the petitioner as having been appointed from the date when other persons were appointed. (Para-4 to 8)

Cases referred:
Allahabad High Court reported in Satya Prakash Pandey versus Union of India and others (2010)7 ADJ 297
Jagtar Singh versus Director, Central Bureau of Investigation and others 1993 Supp (3) SCC 49

For the Petitioner: Mr. K.D. Shreedhar, Senior Advocate with Mr. Yudhvir Singh, Advocate
For the respondents: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The petitioner applied for the post of Sub Inspector in Himachal Pradesh Police. The said post was to be filled up through the Himachal Pradesh Subordinate Services Selection Board. The petitioner having qualified the written test, hence, he was on 8.5.2008 requested to appear for physical and efficiency test and on his having qualified the aforesaid test, he was asked to appear in the interview to be held on 22.08.2008. On his having successfully passed the viva voce conducted by the Interviewing Board, the result of the interview was declared and published in various newspapers on 29.8.2008.

Accordingly, he was directed to appear along with original documents pertaining to recruitment on 16.9.2008. However on 15.11.2008, the petitioner received a memo stating that an FIR had been registered against him which was pending investigation and keeping in view the pendency of the FIR registered against him, he was apprised that his appointment was kept in abeyance. On 24.11.2008, the petitioner represented to the department. On 30.11.20008, on conclusion of the investigation by the Investigating Officer into the offences constituted in the FIR lodged against the petitioner a cancellation/closure report was filed before the Criminal Court of competent jurisdiction. The Criminal Court of competent jurisdiction before whom the closure/cancellation report was filed by the Investigating Officer under orders rendered on 4.4.2009, accepted the cancellation/closure report. However only on 23.6.2009 an offer of appointment was given to the petitioner by the respondents which offer having come to be accepted by the petitioner, the latter was under appointment letter of 24.6.2009, appointed to the post for which he was selected. Thereafter the petitioner was sent for basic training course w.e.f. 18.1.2010. On 13.2.2013 a provisional seniority list was circulated wherein the name of the petitioner was reflected to be occurring at the apposite place, however, in it his date of appointment was proclaimed to be 24.6.2009. The petitioner had made a detailed representation to the Director General of Police and requested him to consider his date of appointment as 12.12.2008 on which date the other candidates selected alongwith him were issued appointment letter qua the post for which they have come to be selected. Since, the representation of the petitioner came to be rejected by the respondents, as such, he is aggrieved by the rejection of his representation and is constrained to institute the instant writ petition before this Court.

2. The relief which the petitioner seeks from this Court is of quashing of the order comprised in Annexure P-15 of 18.12.2013 besides he prays that order comprised in Annexure P-5 of 15.11.2008 whereby the petitioner's appointment was kept in abeyance given the pendency of investigation in an FIR lodged against him be also quashed and set aside and he be declared to have been appointed as Sub Inspector w.e.f. 12.12.2008.

3. The learned Deputy Advocate General appearing for the respondents has vehemently espoused before this Court that the act of the respondents in rejecting the representation of the petitioner herein wherein he had claimed a relief analogous to the one as voiced in the instant writ petition is tenable as the respondents were beset with a tenable constraint of investigation pending against the petitioner in an FIR lodged against him in Police Station Shillai. However, the learned counsel appearing for the petitioner vigorously concerted before this Court that the petitioner on his coming to be selected as Sub Inspector, as such, on his selection, dehors the pendency of investigation into the FIR lodged against him was neither unsuitable nor unfit to be offered and issued an appointment letter along with other candidates contemporaneously selected alongwith him. The learned counsel appearing for the petitioner has relied upon a judgment of the Hon'ble ***Allahabad High Court reported in Satya Prakash Pandey versus Union of India and others (2010)7 ADJ 297*** wherein the Hon'ble Allahabad High Court while considering the impact and import of suppression by the petitioner therein of the fact of pendency of a criminal case against him at the time contemporaneous to his being proposed to be appointed had in the relevant paragraphs No.15 and 16, which are extracted hereinafter emphatically pronounced that the factum of involvement of a selected candidate in a scuffle which occurred on the spur of moment and which sequeled the lodging of an FIR would not render the selected candidate to be construable to be either not bearing a good moral character or his, hence, being debarred to assert claim for appointment or for continuation in service, if appointed. The factum of registration of an FIR against a selected candidate and its constituting a bar against his being appointed in service or continuing in service would arise or erupt only in the event of his being involved

in an offence involving moral turpitude, involvement wherein would render his character to be construable to be not above board hence rendering him unfit for either being appointed or continuing in service. Relevant paragraphs No.15 and 16 of the judgment supra read as under:-

> "15. Apart from the police report from the Inspector-In-Charge of the police station Unchahar, Raibareli, the character certificate at the level of the Superintendent of Police, Raibareli has also been obtained which shows that character of the petitioner is satisfactory and there is no adverse material against him. A similar character certificate has been issued by the Gram Pradhan of Itaura Bujurg, Raibareli. Learned Counsel for the petitioner has argued that the sole purpose of police verification is that whether the candidate is having good moral character and is involved in any criminal case of such a nature which can hold him to be involved moral turpitude. The offices of the Government department should not be held by the persons who cannot have the confidence of the people. His character should be above board. At the same time, it is also to be seen that stereotype classifications are not made. For instance, if a person is involved in a scuffle which occurred due to sudden cycle accident on the road or is involved in some kind of 'marpeet' during heated exchange of words on the spurt of the moment. Definitely, these are instances which may result into an FIR being lodged and a case being conducted but eruption of scuffle on the spur of the moment will not necessarily mean that a candidate belongs to a group of criminals. It may also not necessarily mean that the petitioner does not have a good moral character.
>
> 16. In the world of today when job opportunities are shrinking, a young lad of twenty years can hardly be expected to go an extra mile to inform the authorities about a case which can get him rejected at the threshold. If a specific question is not asked he cannot be expected to analyze the query by himself and prepare the answer which is prejudicial to his interest. Social and economic pressure on a young boy is today's society is a reality. The moral values which are otherwise vanishing cannot be stretched beyond a limit. The virtues and values in a candidate should be decided on a practical apparatus. Realities of life cannot be wished away. In the present case, when the petitioner was neither convicted nor fined nor bound down nor prosecuted nor debarred from appearing in any examination, his answer to clause 12 as 'No' can be read as near truth. The Inspector in-charge Police Station-Unchahar as well as the Superintendent of Police of District have verified his character as being good, the certificate of good moral character has been issued by the Village Pradhan. On inquiry no adverse material has come out against him nor any complaint was made to the police by any of the villagers."

4. Moreover in a judgment reported in ***1993 Supp (3) SCC 49 in case titled as Jagtar Singh versus Director, Central Bureau of Investigation and others***, the relevant paragraphs 3 and 4 whereof are extracted hereinafter, bring to the fore the factum of even the Hon'ble Apex Court on the strength of occurrence of a singular previous incident involving the appellant therein had held that, hence, any conclusion could not be drawn that the selected candidate or the aspirant was unfit for appointment in public service. Even though when there is reticence therein qua the magnitude or enormity of the incident involving him, it appears that the incident involving the appellant therein was a trifling incident not hinging upon immorality nor tantamounting to commission of an offence involving moral turpitude. Obviously, then it did not impinge upon the moral character of the appellant

therein. If the above deduction is arriveable qua the fact of the Apex Court having not construed a trivial incident or a trifling incident not proclaiming the commission of an offence constituting moral depravity or tantamounting to an offence involving moral turpitude, to be not rendering the appellant therein to be unfit for public employment , as such, while applying the ratio of the above judgment and for the reasons recorded hereinafter this Court would be prodded to form an inference that the factum of involvement of the petitioner herein in offences constituted under Sections 147, 148, 451, 506 (II), 379, IPC does not obviously proclaim the factum of his involvement in offences involving moral turpitude, nor also hence the provisions aforesaid constitute any offence, construable to be pronouncing upon the moral depravity of the petitioner, rather it being a trifling incident which occurred on the spur of the moment and which ultimately sequelled the institution of a closure report by the Investigating Officer before the criminal Court of Competent jurisdiction which ultimately came to be accepted, as such, its occurrence and pendency at the stage of selection of the petitioner herein for appointment to the post of Sub Inspector ought not to have acted as a deterrent against the petitioner then being offered appointment to the post against which he had come to be selected. Relevant paragraphs No.3 and 4 of the judgment supra read as under:-

> "3. Before us an affidavit has been filed by Mr. Dandapani, Secretary to the Government of India in the Ministry of Personnel and Training, claiming privilege in respect of the documents which contain reasons to show that the appellant is not a suitable person for appointment to the post of Senior Public Prosecutor. The documents are in a sealed cover. In para 4 of the affidavit it is stated as under:
>
> "However, I have no objection to the aforesaid records being produced for perusal by the Hon'ble Court for satisfying itself about the bona fides and genuineness of the privilege."
>
> 4. Mr. D.P. Gupta, learned Solicitor General has filed copies of the documents for our consideration. It is not disputed that the District Magistrate, Nainital by his letter dated September 20, 1984 reported that there was no adverse entry against the appellant in the records of the Chowki Kathgodam which might affect his appointment as a Government servant. The District Magistrate's letter was based on the verification done by incharge Chowki Kathgodam, police station Haldwani, Senior Sub Inspector Local Intelligence Unit, Nainital and finally by the Senior Superintendent of Police, Nainital who appended the endorsement "character verified and found correct". Not satisfied with the initial verification in favour of the appellant further investigations were made regarding his character and antecedents and it was finally concluded that the appellant was not a suitable person to be appointed to the Government service. It is not necessary for us to go into the question as to whether the claim of privilege by the respondents is justified or not. We also do not wish to go into the details of the investigations made regarding the antecedents and character of the appellant. We have carefully examined the material on the basis of which the respondents have come to the conclusion that the appellant is not suitable for appointment to the post of Senior Public Prosecutor in the Central Bureau of Investigation and we are of the view that the respondents are not justified in reaching a conclusion adverse to the appellant. NO reasonable person, on the basis of the material placed before us, can come to the conclusion that the appellant's antecedents and character are such that he is unfit to be appointed to the post of Senior Public Prosecutor. There has been total lack of application of mind on the part of the respondents. Only on the basis of surmises and conjectures arising out of a single incident which

> happened in the year 1983 it has been concluded that the appellant is not a desirable person to be appointed to the Government Service. We are of the view that the appellant has been unjustifiably denied his right to be appointed to the post to which he was selected and recommended by the Union Public Service Commission."

5. In another judgment reported in case titled as Commissioner of Police and others versus Sandeep Kumar, (2011) 4 SCC 644 the Hon'ble Apex Court while being seized of the factum of the respondent therein having omitted to disclose or suppressed the factum of his involvement in a criminal case, had given the fact that at the time of the commission of the offence, the respondent was 24 years of age at which age youth had a tendency to commit indiscretions. Consequently, the suppression or non-disclosure by the respondent therein of the fact of his involvement in a criminal case at the time of his filling up the requisite/apposite column in the verification form was construed not to be militating against his rights to be retained in public service.

6. Besides in a judgment of the Hon'ble Delhi High Court in ***W.P. (C) No.8731 of 2011, Devender Kumar Yadav versus Govt. of NCT of Delhi and another*** , rendered on 30.03.2012, the Hon'ble Delhi High Court while being seized of the validity of the de-recommendation of the petitioner therein for employment in Delhi Police by the Screening Committee on the score of his being unsuitable and unfit on the strength of his having two criminal cases to his discredit, which de-recommendation, however, was upheld by the Central Administrative Tribunal was constrained to render a judgment reversing the view pronounced by the Central Administrative Tribunal in O.A. No. 97 of 2010. On an ad nauseam and in extenso consideration of the law on the subject relating to the factum whether the involvement of a selected candidate in a criminal case renders him unfit for appointment and if appointed, renders him unfit to continue in service, had in the concluding paragraphs while denouncing the de-recommendation of the petitioner by the Screening Committee, inasmuch as his being unsuitable for employment on the score of his having two criminal cases to his discredit held that the opinion formed by the screening committee qua unsuitability of the petitioner for employment in public service was surmisal as it had no material before it which could germinate an inference that the petitioner has actually committed the offence for which he was prosecuted, rather had proceeded to also held that there is a presumption of innocence attached to the accused in criminal cases and the onus was on the prosecution to prove the charges leveled against him. The essence thereof is that the Hon'ble Delhi High Court had in the judgment supra, relevant paragraphs whereof are extracted hereinafter, rendered emphatic, clear and lucid findings that the screening committee which is beset with or seized of the factum of pendency of a criminal case/cases against the candidate proposed to be appointed or selected in public service and whose appointment or continuation in service is, hence, beset with peril ought not to de-recommend the appointment of the selected candidate in public service or qua his continuing in public service unless a preceding independent inquiry has unearthed material qua the truthfulness or otherwise of the allegations and such findings and conclusions are placed before the relevant/apposite committee and which committee dispassionately, hence on a thorough application of mind to such material renders a vindicable finding qua the suitability or otherwise of the selected candidate for appointment and if appointed, his continuation in public service. Relevant paragraphs of the judgment supra read as under:-

> ".....We cannot presume that a witness, who does not support the case of the prosecution is necessarily doing so in collusion with the accused, in order to save him from punishment, despite his actually having committed the offence, with the commission of which he is charged. It may be true in some cases, but may not necessarily be so in each case. What has to be seen in such cases is as to whether the material witnesses were examined or not. If they are

examined, but do not support the prosecution and consequently it is held that the charge against the accused does not stand proved, that would not be a case of technical acquittal. We would like to note here that no independent inquiry was held by the respondents to verify the truthfulness or otherwise of the allegations which were made against the petitioner in the FIRs that were registered against him.

The Screening Committee which considered the case of the petitioner had no material before it which could give rise to an inference that the petitioner had actually committed the offences for which he had been prosecuted. As noted earlier, there is a presumption of innocence attached to an accused in a criminal case and the onus is on the prosecution to prove the charges leveled against him. Acquittal of the accused, after trial, only strengthens and reinforces the statutory presumption, which is otherwise available to him. We, therefore, hold that the view taken by the Screening Committee was not based on some legally admissible material and therefore, cannot be sustained in law. The case of the petitioner before us is squarely covered by the decisions of the Supreme Court in Sandeep Kumar (Supra) and Ram Kumar (supra as well as by the decision of this Court in Robin Singh (supra), Naveen Kumar Mandiwaandi (supra), Dinesh Kumar (supra), Omveer Yadav (Supra), Jai Prakash (supra) and Daulat Ram (supra). In face the case of the petitioner, before us stands on a much stronger footing than the cases of Sandeep Kumar (supra), Ram Kumar (supra), Robin Singh (supra) wherein the persons concerned had concealed their prosecution. His case stands on a better footing than the case of Subhash Chand, who was prosecuted under Section 307 of IPC and Omveer Yadav, who was alleged to have committed offence under Section 392 of IPC.

For the reasons stated hereinabove, the impugned order dated 31.5.2011 passed by the Tribunal cannot be sustained and the same is accordingly set aside. The respondent is directed to issue an appointment letter to the petitioner within 08 weeks subject to his otherwise being fit and completing all necessary formalities and requirements. The petitioner would be entitled to seniority as well as pay and allowances from the date of he joins the service."

7. The petitioner was selected for appointment in the police department. The FIR which was lodged against him was under investigation by an official of the police department. The Investigating Officer on conducting and carrying out the investigation and on his having completed the same, his having formed an opinion qua no offence having been committed by the petitioner herein sequelled the institution of a cancellation report at his instance before the Criminal Court of competent jurisdiction which came to be accepted and on whose acceptance, the respondents then came to construe the petitioner suitable for appointment, is the factum probandum which does devolve upon especially given the fact that the offence constituted against the petitioner herein in the FIR alleged against him is not an offence involving moral turpitude rather is a trivial and trifling incident, the legitimacy or vindicability of the act of the respondents to on his selection construe him unfit or unsuitable for his being appointed then. The unvindicability of the act of the respondents in, given the pendency of a criminal case against the petitioner herein kept his appointment in abeyance is stepped up and lent a fillip by the factum of a vivid pronouncement in the FIR of the offences recorded therein having occurred on 24.8.2008 qua which an FIR was belatedly lodged on 30.8.2008 which factum of procrastinated lodging of the FIR before the police station concerned itself per se is communicative of and articulates the factum of the allegations comprised in the FIR lodged against the petitioner being vitiated with the vice of concoction and premeditation, arising from imprompt lodging of the FIR which vitiatory

factor in lending, hence, prevarication to the allegations comprised in it against the petitioner herein ought to have immediately seized the attention of the respondents in concluding qua the factum of truthfulness or otherwise of the allegations recorded therein. Moreover, when the said elicitation qua the factum of the truthfulness or veracity or otherwise of the allegations against the petitioner herein in the FIR lodged against him could have been garnered or gathered by the respondents from the Investigating Officer who was an official subordinate to the respondents. However, there is no record portraying that the respondents while having inaptly, at the stage of the lodging of the FIR and its portraying the purported commission of offences against the petitioner herein which may have occurred at the spur of moment or which were trivial acts of youthful indiscretion and were not offences involving moral turpitude which rather would render the petitioner unfit and unsuitable for his being offered appointment against the post for which he was selected, even when there was no material on record gathered by them or mobilised by them from the Investigating Officer conveying the truthfulness or otherwise of the allegations comprised in the FIR lodged against the petitioner, concluded that given the mere factum of pendency of an FIR against the petitioner was severe constraint for issuing appointment letter to him in quick succession to his selection, is rather construable to by an act ridden with thorough non application of mind or a severely and grossly unvindicable act anvilled upon no material. Therefore, for non existence of any material on record for fostering succor to a conclusion that the respondents had undertaken a thorough and threadbare exercise to verify the correctness, truthfulness, veracity or otherwise of the allegations constituted in the FIR lodged againsg the petitioner. In the absence, hence, of any such exercise having been undertaken by the respondents preceding to their act of having kept the petitioner's appointment in abeyance does constitute infraction of the rule enjoined upon the respondents by the judgment of the Hon'ble Delhi High Court in Devender Kumar Yadav's case (supra) mandating therein that prior to construing a selected candidate unfit for public employment the Screening Committee on available material on record ought for recorded reasons conclude qua the truthfulness of the allegations comprised in the FIR lodged against a selected candidate then proceeed to render vindicable conclusion qua his hence being barred from seeking public employment. For infraction thereof, rather gives leverage to the inference that the respondents had unilaterally concluded without any material on record qua the truthfulness of the offences constituted in the FIR lodged against the petitioner, such unilateralness not hinged upon nor anchored upon any material necessitates deprecation. Besides, the omission and apathy on the part of the respondents to elicit or garner necessary facts at the earliest or with promptitude from the Investigating Officer qua the truthfulness of the allegations comprised in FIR qua the petitioner herein also rather portrays that it had acted in a perfunctory , short shift and mechanical manner even when prima facie given the procrastinated delay in the lodging of the FIR qua the incident involving the petitioner herein would then have prima facie rendered the allegations therein to be deprived of their veracity. For reiteration such premature/inchoate determination by the respondents without sufficient material on record qua the guilt of the petitioner, merely on the score of an FIR having been lodged against him is also a determination in derogation of the cardinal principle of criminal jurisprudence proclaiming that a man cannot be adjudged guilty unless is pronounced so by a Court of law. In aftermath, such an inchoate determination not founded upon any material is in gross detraction of the verdict of the Hon'ble Courts referred to hereinabove. Besides, the respondents appear to have also perpetrated a wrong upon the petitioner in denying to him appointment immediately on his coming to be selected by them. Preeminently, the factum of the pendnecy of an FIR against the petitioner, more so for a trifling or a trivial incident herein even when rather prima facie given the procrastinated delay in the lodging of the FIR, the allegations therein per se were construable to be premeditated or concocted, as such, bereft of veracity, the respondents having kept the appointment of the

petitioner in abeyance, in face thereof have infringed a valuable right of the petitioner for his being appointed in quick succession to his selection contemporaneous with other selected candidates. Aggravated strength and muscle to the untenability of the act of the respondent in omitting to give appointment to the petitioner contemporaneous to his selection merely for pendency of an FIR against him which on investigation constrained the Investigating Officer to file a closure/cancellation report before the Criminal Court of competent jurisdiction which came to be accepted per se bespeaks of the falsity of the allegations comprised in the FIR. In face thereof, when the allegations comprised in the FIR lodged against the petitioner though sequelled the filing of a cancellation report and its acceptance by the Criminal Court of competent jurisdiction subsequent to his selection and while till then his appointment was kept in abeyance, the Court adjudges that the factum of his being hence exonerated of the allegations comprised in the FIR ought to for reasons detailed threadbare hereinabove relate back to the date of his selection. If so, the act of the respondent holding back of his appointment letter is construed to be untenable.

8. For the foregoing reasons, the petition is allowed and impugned Annexure P-5 of 15.11.2008 and Annexure P-15 of 18.12.2013 are quashed and set aside. The respondents are directed to consider the petitioner for his being appointed to the post of Sub Inspector from the date when the other persons of his Batch were appointed inasmuch as on 12.12.2008 with all consequential benefits.

9. All the pending applications, if any, also stands disposed of.

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

Dr. Neha Mahajan .....Petitioner.

Versus

Union of India and ors. .....Respondents.

CWP No. 7404 of 2014.
Reserved on 19.12.2014.
Decided on: 22.12.2014.

Constitution of India, 1950- Article 226- Petitioner was found suitable for the post of Dental Doctor- she joined her duty on 17.10.2013- her services were terminated on 16.9.2014- As per para 8(d) of the scheme formulated by Union of India, maximum period of contract was two years subject of the review of the conduct and performance after 11 months- held, that conduct of the petitioner was not reviewed properly in accordance with guidelines - the action of the respondents of not renewing the contract of the petitioner is illegal, arbitrary and violative of Articles 14 & 16 of the Constitution of India- petition allowed and respondents directed to permit the petitioner to continue her services as dental doctor. (Para-6 to 9)

For the petitioner: Mr. J.L.Bhardwaj, Advocate.
For the respondents: Mr. Ashok Sharma, ASGI, for the respondents.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J. (oral)

The Government of India, Ministry of Defence has laid down the procedure for contractual employment of staff for ex-servicemen Contributory

Health Scheme (ECHS) Polyclinics on 22.9.2003. According to para 5 of the guidelines, the advertisement for filling up the posts of medical, dental and specialist officers and officers in charge Polyclinic is required to be placed in the National newspapers, Local/regional newspapers. The selection procedure is provided under para 7 of the guidelines. It reads as under:

"**ADVERTISEMENTS**

5. Advertisements inviting applications for employment under the ECHS for medical, dental & specialist officers and officers in charge Polyclinic will be placed in the National newspapers, Local/regional newspapers will be used for placing advertisements for employment of paramedical staff. Application forms will be made available at concerned Station Headquarters (Stn HQ). The employment of categories listed in Para 3 (a) to (c)

above will be carried out by the Station Commander through a Station board of Officers. The Conservancy, Housekeeping, Records Maintenance & Data Entry and Motor Vehicles Operation &Maintenance Services will be outsourced through the licensed service provider/agency/contractor, for which advertisements for registration with the Station Headquarters will also be placed in local/regional newspapers.

APPLICATIONS

6. The applications will be submitted by the candidates to the Stn HQ under whose jurisdiction Polyclinics are located. The applications will be processed by a Board of Officers to be set up by the Station Commander.

SELECTION PROCEDURE

7. The procedure for the selection of candidates on contractual basis will be as under:-

(a) **Constitution of the Board of Officers**. A Board of Officers for employment of medical/para medical/non medical staff for the ECHS Polyclinics will be constituted by the Station Commander. The Board Officers will comprise the following:-

(i) Chairman - Station Commander

(ii) Member - Senior Executive Medical Officer(SEMO)/Principal Medical Officer (PMO) /Senior Medical Officer (SMO) of the Station.

(iii) Member - Any officer from the Station (Non Medical)

(iv) Specialist – Where specialist/super specialist doctors are to be employed, Commanding Officer, Service Hospital / Deputy Director Medical Services (DDMS) Area /Command will nominate a specialist of that category on the board.

(v) In attendance - Rep of Regional Centre (ECHS)(optional)"

2. According to para 8(d) of Annexure P-7 dated 22.9.2003, the duration of the employment is entirely contractual in nature and is normally for a period of two years at the maximum, subject to review of their conduct and performance after eleven months. The detailed procedure for renewal of the contractual employment is provided as per Annexure P-6 dated 7.3.2006. Para 5 whereof reads as under:

"5. In view of the above, henceforth, the contractual employment at ECHS Polyclinic will be for a period upto superannuation on renewal after every eleven months based on the review of conduct and performance of contractual employee. Therefore when an individual's

performance is satisfactory and he has adequate residual age for the specific post he is holding; no wasteful expenditure will be incurred in advertising fresh selection nor effort put in by convening a selection board."

3. The interviews for the post of Dental Doctor were held on 20.7.2013. The petitioner was found suitable as per the criterion laid down. The petitioner was offered the appointment letter on 14.10.2013. She joined the duties on 17.10.2013. An agreement was also entered into by the petitioner on 16.10.2013. The services of the petitioner were terminated on 16.9.2014. The petitioner made representation. She was heard in person by respondent No. 3 on 29.9.2014. The respondents have also issued fresh advertisement for filling up the posts of Dental Doctors in the month of September, 2014. The interviews were held on 29.9.2014. The petitioner has also participated in the selection process.

4. Mr. J.L.Bhardwaj, Advocate, for the petitioner has vehemently argued that the respondents while terminating the services of the petitioner have not taken into consideration the criterion laid down as per Annexure P-7 dated 22.9.2003 and Annexure P-6 dated 7.3.2006. He has specifically drawn the attention of the Court to para 5, quoted hereinabove. On the other hand, Mr. Ashok Sharma, learned ASGI has strenuously argued that the petitioner's performance as a doctor was not up to the mark and under these circumstances, it was open to the employer not to renew the contract.

5. We have gone through the material placed on record and heard the learned counsel for the parties.

6. The petitioner has been selected strictly as per the selection procedure laid down in Annexure P-7 dated 22.9.2003. The petitioner has also made a representation on 18.9.2014, pursuant to which she was to be given personal hearing. The reasons assigned for the termination of the petitioner's services are contained in Annexure R-2 dated 29.9.2014. These reasons have been assigned after terminating the services of the petitioner on 16.9.2014. The mis-conduct pointed out in Annexure R-2 is of a trivial nature. It is more of ego problem than serious aspersions on the duties discharged by the petitioner. It is expected that doctor always seeks the assistance of another doctor in case there is emergency.

7. Now, as far as the non-functioning of the Dental X-Ray machine is concerned, the same was required to be repaired by the mechanic. The petitioner is a dental doctor and not mechanic. The other reason assigned is also equally trivial whereby the respondent No. 3 has pointed out that the petitioner was not wearing proper dress. The performance of the petitioner was to be seen as a dental doctor as a whole during her subsisting contract. It was also highlighted in para 5 of Annexure P-6 that if the individual's performance was up to the mark and has adequate residual age for the specific post he is holding, no wasteful expenditure should be incurred in advertising fresh selection nor effort put in convening a selection board. There is no material other than Annexure R-2 placed on record to show that the petitioners conduct and performance was ever adjudged during the subsisting period of the contract.

8. Mr. Ashok Sharma, learned ASGI has also placed on record the recommendations made by the Selection Committee pursuant to the fresh advertisement. We are of the considered view that the action of the respondents of not renewing the contract of the petitioner in view of para 5 of Annexure P-6 dated 7.3.2006, is illegal and arbitrary and thus violative of Articles 14 & 16 of the Constitution of India.

9. Accordingly, the Writ Petition is allowed. The termination of the petitioner dated 16.9.2014 is quashed and set aside. The respondents are directed to permit the petitioner to continue as dental doctor as per para 5 of

Annexure P-6 dated 7.3.2006. She would be permitted to join her duties forthwith, if not already permitted to do so. Needless to add that in view of the decision as above, we deem it not necessary to open the proceedings of the fresh selection placed on record before us by Mr. Ashok Sharma, learned ASGI in a sealed cover. The proceedings contained in the sealed cover are ordered to be returned to Mr. Ashok Sharma, learned ASGI.

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

Bharat Sanchar Nigam Limited .....Appellant.
Versus
M/S Priya Raj Electronics Ltd. .....Respondent.

Arb. Appeal No. 9 of 2014.
Decided on: December 23, 2014.

Limitation Act, 1963- Section 5- Judgment was announced on 23.11.2013- Appeal was filed on 15.11.2014- it was stated that applicant had sought legal opinion to assail the judgment and the delay occurred due to this- held, that no material was placed on record to show as to how case was processed up to October, 2014- words "sufficient cause" used in section 5 of the Limitation Act should be interpreted liberally but a distinction must be made where the delay is inordinate and condonation would cause prejudice to the other side- applicant had failed to make out sufficient cause for delay- hence, application dismissed. (Para-4 to 6)

Case referred:
Maniben Devraj Shah versus Municipal Corporation of Brihan Mumbai, (2012) 5 SCC 157

For the appellant: Mr. Rajesh Verma, Advocate, vice Mr. Rajinder Dogra, Advocate.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

CMP(M) No. 52 of 2014 & Arb. Appeal No. 9 of 2014.

The applicant-appellant has instituted an appeal against the judgment dated 23.11.2013 rendered in Arbitration Case No. 6-S/2 of 2013/05 by the learned District Judge (Forests), Shimla, H.P. as well as Arbitration Award dated 3.6.2003, rendered by the sole Arbitrator Sh. Amardeep Singh, DGM(F&A), BSNL, Hamirpur. The appeal is barred by 326 days.

2. The applicant-appellant has sought condonation of delay by way of present petition. The impugned judgment was rendered by the learned District Judge (Forests), Shimla, H.P. on 23.11.2013. The certified copy of the same was applied on 24.11.2013. It was attested on 29.11.2013 and delivered to the applicant-appellant on 11.12.2013. The applicant-appellant has sought the legal opinion to assail the impugned judgment. It was decided, as per the averments contained in the petition, to file an appeal against the judgment dated 23.11.2013, in the last week of October, 2014. Thereafter, the appeal was drafted and filed on 15.11.2014.

3. There is a gross delay in filing the appeal. The Courts ought to be liberal while dealing with the application under Section 5 of the Limitation Act, 1963, but at the same time, cannot be oblivious of the rights which have

accrued to the parties. The delay has to be explained after the expiry of the period of limitation. The impugned judgment is dated 23.11.2013. The certified copy was obtained on 11.12.2013. The applicant-appellant has not explained the delay of about 10 months from December, 2013 up to October, 2014.

4. There is no contemporaneous material placed on record how the case was processed up to October, 2014 except a bald assertion in the petition. Moreover, no cogent reason is assigned for condonation of delay in the present petition.

5. Their Lordships of the Hon'ble Supreme Court in ***Maniben Devraj Shah*** versus ***Municipal Corporation of Brihan Mumbai***, (2012) 5 SCC 157 have held that expression "sufficient cause" used in section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. Their Lordships have further held that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under section 5 of the Limitation Act and other similar statues, the courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. Their Lordships have also held that expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. Their Lordships have also held that a distinction must be made between a case where the delay is inordinate and a case where the delay is of few days and whereas in the former case the consideration of prejudice to the other side will be a relevant factor, in the latter case no such consideration arises. Their Lordships have held as under:

> "14. We have considered the respective arguments / submissions and carefully scrutinized the record. The law of limitation is founded on public policy. The Limitation Act, 1963 has not been enacted with the object of destroying the rights of the parties but to ensure that they approach the Court for vindication of their rights without unreasonable delay. The idea underlying the concept of limitation is that every remedy should remain alive only till the expiry of the period fixed by the Legislature. At the same time, the Courts are empowered to condone the delay provided that sufficient cause is shown by the applicant for not availing the remedy within the prescribed period of limitation.
>
> 15. The expression 'sufficient cause' used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the Courts to apply the law in a meaningful manner which serve the ends of justice. No hard and fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years this Court has advocated that a liberal approach should be adopted in such matters so that substantive rights of the parties are not defeated merely because of delay.
>
> 20. In Vedabai v. Shantaram Baburao Patil, (2001) 9 SCC 106, the Court observed that a distinction must be made between a case where the delay is inordinate and a case where the delay is of few days and whereas in the former case the consideration of prejudice to the other side will be a relevant factor, in the latter case no such consideration arises.
>
> 23. What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.

24. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay.

25. In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and / or its agencies / instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest."

6. Accordingly, in view of the settled legal position, as discussed hereinabove, I find no sufficient cause in the present petition to condone the delay. The same is dismissed.

7. Consequently, the appeal bearing No. 9 of 2014 is also dismissed.

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

Rajinder Kumar & ors. .....Appellants.

Versus

Jagdish Chand & anr. .....Respondents.

RSA No. 27 of 2004.
Reserved on: 16.12.2014.
Decided on: 23.12.2014.

Indian Easement Act, 1882- Section 15- House of the plaintiff had an access by means of a path over the land of the defendant – defendant started interfering with path without any right to do so- path was also recorded in the copy of the jamabandi and in Aks Sazra- held that defendant had no right to obstruct the path- hence, the defendant restrained from obstructing the path. (Para-8 to 20)

For the appellant(s): Mr. Ramakant Sharma, Advocate.
For the respondents: Mr. Rajneesh K. Lal, 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, Hamirpur, H.P. dated 14.10.2003, passed in Civil Appeal No.34 of 1997.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondent Jagdish Chand instituted a suit in the Court of learned Sub Judge (II), Hamirpur, for declaration and permanent injunction against the appellants-defendants (hereinafter referred to as the defendants and proforma defendant, namely Dev Raj, for the convenience sake). According to the facts enumerated in the plaint, the land bearing Kh. No. 158 was divided into three parts i.e. Kh. No. 158/1, 158/2/1 and 158/2/2. It was in the ownership and possession of predecessor of defendants No. 4(i) to 4(v), namely

Sh. Puran Chand. The portion of the same was sold to defendants No. 1 to 3, namely Rajinder Kumar, Pushpam Devi and Dinu Ram. Kh. No. 158/2/1 comprising the disputed path, came to the share of defendant No. 1, Sh. Rajinder Kumar. The house of the plaintiff as well as the proforma defendant was situated over land comprised in Kh. No. 150 and 152. They had access to their house by use of the said path over the land of Rajinder Kumar for the last 20 years, continuously, openly, peacefully and without any interruption from any quarter including the defendants as an easement of way and as of right. They have acquired easementary right over the path by way of prescription. The path was shown in *Aks Tatima Mashmula* with letters 'A', 'B', 'C'. From point 'A' to point 'X', there existed a public path between Kh. No. 117 and 149 and also a public path from point 'A' to 'Y' which passes through Kh. No. 114 and on the western *meend* of Kh. No. 158/2/1. The path, according to the plaintiff, was also beyond point 'Y' and goes to *Tika Didwin*. The defendants have no legal right to cause any obstruction in the path in question. The defendants in collusion with each other have started interfering with the path. The matter was also reported to the local Panchayat. The Panchayat visited the spot on 29.1.1991. It is, in these circumstances, suit for declaration and permanent injunction to the effect that plaintiff and proforma defendant have acquired easementary right of path by way of prescription was filed.

3. The suit was contested by defendants No. 1,2 & 4. They have filed the written statement(s). According to them, there was no path in existence over Kh. Nos. 158, 117 and 150 being used by the plaintiff and proforma defendant. It was denied that path existed over Kh. No. 158/2/1. The land in Kh. No. 158/2/1 was stated to be in the ownership and possession of defendant No. 1. According to them, there was alternative path available on the spot from the eastern side of the house of the plaintiff, which he was using since long to have access to his house.

4. The replication was filed by the plaintiff. The trial Court framed the issues on 10.12.1991. The suit was decreed by the learned Sub Judge (II), Hamirpur on 29.8.1997. The defendants filed an appeal before the learned District Judge, Hamirpur against the judgment and decree dated 29.8.1997. The learned District Judge, Hamirpur dismissed the same on 14.10.2003. Hence, this regular second appeal.

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

> "1. Whether the impugned judgment and decree is the result of non-consideration of the provisions of Section 15 of the Easements Act, 1882?
>
> 2. Whether the impugned judgment and decree can be sustained when the findings given by the learned trial Court with respect to the documents Exts. P1 and P2 having not been assailed by the plaintiff ?
>
> 3. Whether the impugned judgment and decree is the result of complete misreading, misinterpretation as well as misappreciation of the law laid down by this Hon'ble Court reported in 2000(1) S.L.J. 404?
>
> 4. Whether the learned lower appellate court was right in reversing the findings of the learned trial court especially when there were no cross-objections or appeal having been filed by the plaintiff ?"

6. Mr. Ramakant Sharma, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that both the Courts below have not taken into consideration provisions of Section 15 of the Easements Act, 1882. He has contended that the documentary evidence placed on record has not been correctly appreciated by both the Courts below. He has also contended that the findings recorded by the learned trial Court could not be set aside by

the first appellate Court since no cross-objection or appeal was filed by the plaintiffs. On the other hand, Mr. Rajnish K. Lal, Advocate, has supported the judgments and decrees passed by both the Courts below.

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

8. Defendant Puran Chand has died during the pendency of this regular second appeal and his legal heirs were brought on record vide order dated 4.1.2014 in CMP(M) No. 12117 of 2013.

9. PW-1 Jagdish Chand has testified that his house was situated over Kh. Nos. 150 & 152. The disputed path starts from Kh. No. 150, 152 and goes up to Kh. No. 158. The house was constructed in the year 1963. They were using this path for the last 28-29 years. This path was only egress and ingress to their house. They continued to use this path till January, 1991. In the month of January, 1991, the defendants obstructed the path in question and the matter was reported to the Panchayat. The path comprised in Kh. No. 158/2/1 is between his house and the house of defendants, there is a distance of 10-15 meters, which only constitutes the path. He has denied the suggestion that from his house, he takes the '*Sare-am rasta'* towards the east. He has denied that from the house of Rajinder, the '*Sare-am rasta'* is at a distance of 100 yards, but has stated that the same is at a distance of 30 yards. His house faces towards the east.

10. PW-2 Gian Chand stated that the house of Nathu was constructed 25/30 years ago. Nathu had been using the path in dispute for the last 28-30 years. There was no path except the path in dispute for the house of Nathu Ram. The path meets with the '*Sare-am rasta'*. Neither Nathu Ram nor his sons were ever stopped. The defendants have blocked this path in dispute by constructing a wall and house over it. The complaint was made by the plaintiff. The members of Panchayat visited the spot and directed the defendants not to obstruct the path. The plaintiff goes to his house through this path.

11. PW-3 Beer Singh deposed that the house of the plaintiff was constructed 30/32 years ago. There was path which the plaintiff has been using since the time of construction of his house. Rajinder constructed the house 4-5 years ago. The path in dispute was closed in January, 1991. There was no other path available to the plaintiff. This is the only path, the plaintiff uses to go to his house. The path in dispute is 20-25 feet in length and 2 feet in width. He has denied the suggestion that there was path in front side of the house of the plaintiff which leads to Bazar.

12. PW-4 Jai Dev has also supported the statement of PW-2. According to him, the path was used by the plaintiff for the last 30 years.

13. PW-5 Desh Raj testified that the house of the plaintiff was constructed by Sh. Nathu Ram, father of the plaintiff, in the year 1963. The path is 7 *karams* in length and 2 feet in width. The defendants also used this path. Towards the east side of the house of the plaintiff, there are fields of rice. From that side, there is no path which leads to the house of the plaintiff. The plaintiff had been using this path.

14. DW-1 Puran Chand testified that the plaintiff has his own path for egress and ingress to his house. In his cross-examination, he has shown ignorance that the house of the plaintiff was constructed in the year 1963. He has, however, admitted that Kh. No. 158 has been partitioned into 3 plots, of which Kh. No. 158/2/1 is owned by Rajinder. He has admitted that now there was a path from the land of the defendant comprised in Kh. No. 158/2/1.

15. DW-2 Rajinder Sharma deposed that he purchased suit land in the year 1986. He has constructed his house over it in the year 1988.

Previously, there was no path in the suit land. The plaintiff used to take the path situated in the eastern direction. From the western side of the house of the plaintiff, there is no path which passes through his land. In his cross-examination, he has admitted that the house of the plaintiff was constructed 32/33 years back. It was situated on Kh. No. 150 & 152.

16. DW- 3 Prabh Dayal deposed that the plaintiff used the path which goes from the eastern side of his house. The house of the plaintiff was constructed 30/35 years ago.

17. DW-4 Bal Raj, deposed that the plaintiff goes to his house from the path which is in the eastern side. Adjacent to the house of Rajinder, there was a path which leads to the house of Rajinder. He has admitted that the house was constructed by plaintiff's father in the year 1963. He also admitted that from the '*Sare-am rasta'*, one path leads to the house of Rajinder.

18. It is not in dispute that the house of the plaintiff is situated on land bearing Kh. No. 150/152. Kh. No. 158 was divided into 3 parts i.e. 158/1, 158/2/1 and 158/2/2. Kh. No. 158/2/1 was owned by defendant Rajinder Kumar. He has constructed the house in the year 1988. According to the '*Misal haquiyat'* for the year 1970-71 Ext. P-3, DW-4 Puran Chand was the owner of the land. According to the remarks column, a path existed over a portion of the land bearing Kh. No. 158. This path, as per the entries in remarks column of Ext. P-3, while leading to Kh. No. 117, goes to Kh. No. 150 over which the house of the plaintiff is in existence. According to *'Aks Shajra'* Ext. P-2, the path is shown in existence in Kh. No. 158 in "**L**" shape.

19. According to the ocular statements of plaintiff and his witnesses, the house was constructed in the year 1963. The plaintiff had been using this house for more than 28-29 years. He has no other access, other than the existing disputed path, to reach his house. The plaintiff has specifically denied the existence of alternative path on the eastern side of his house. DW-3 Prabh Dayal and DW-4 Bal Raj have admitted that on the eastern side of the house of the plaintiff, there exists the fields of paddy crop. The plaintiff has also reported the matter to the Panchayat. It has come in the statement of PW-2 that the members of the Panchayat have visited the spot. Defendant No. 4 has appeared as DW-1. He has admitted in his cross-examination that the only passage in existence over the land over Kh. No. 158/2/1 is used by the plaintiff to reach his house.

20. Now, as far as the alternative path suggested by the defendant on the eastern side is concerned, there exist paddy fields. Thus, on the basis of the ocular and documentary evidence, the disputed path is the only path available to the plaintiff to reach his house. The revenue record also supports the case of the plaintiff, more particularly, as per '*Misle Haquiqat'* for the year 1970-71 Ext. P-3 and Ext. P-2 copy of '*Aks Shajra'*. The plaintiff had been using this path for the last more than 20 years, peacefully and without any interruption or disruption. The path has been obstructed by the defendants. The Courts below have correctly appreciated the oral as well as documentary evidence placed on record. It is the duty of the first appellate Court to appreciate the documentary evidence, if there was misreading of the revenue entries by the trial Court. The substantial questions of law are answered accordingly.

21. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Ved Prakash .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 394 of 2011.
Reserved on: 17th December, 2014.
Date of Decision : 24th December, 2014.

Indian Penal Code, 1860- Section 302- An altercation had taken place between the accused and deceased during the prize distribution function- accused had threatened the deceased with dire consequences and deceased was found in an injured condition- deceased told that he was attacked by accused with Khukri- deceased was taken to Hospital at Narkanada but he was declared brought dead- evidence regarding the motive for the commission of offence was not consistent- testimony of PW-3, to whom dying declaration was made, was not supported by PW-1, brother of the deceased- PW-3 had not told any person that deceased had made a dying declaration to him – he was declared brought dead in the hospital- therefore, testimony of PW-3 that dying declaration was made to him was not believable- witnesses to disclosure statement did not support the same- in these circumstances, prosecution version was not proved- accused acquitted. (Para-9 to 16)

For the Appellant: Ms. Aruna Chauhan, Legal Aid counsel..
For the Respondent: Mr. P.M. Negi, Deputy Advocate General with Mr. Ramesh Thakur and Mr. J.S. Guleria, Assistant Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment of the learned Addl. Sessions Judge, Kinnaur at Rampur, Himachal Pradesh, rendered on 04.07.2011 in Sessions trial No. 34-AR/7 of 2010, whereby, the learned trial Court convicted the accused for his having allegedly committed the offence punishable under Section 302 of the Indian Panel Code (hereinafter referred to as "IPC") and sentenced him to undergo rigorous imprisonment for life and to pay a fine of Rs.5,000/- and in default of payment of fine, sentenced him to suffer simple imprisonment for one year.

2. The facts relevant to decide the instant case are that on 23.6.2009 a tournament was organized at village Dudh Bahali by Yuvak Mandal of Village Jahu Deem. Accused Ved Prakash was the President of the Organizing Committee and PW8 Hari Singh was invited as Chief Guest. In the tournament the team of Baragaon emerged as winner and the team of village Jahu Deem was runners up. The prizes were distributed to the winner and runner up team by PW8 Sh. Hari Singh. During the prize distribution function, an altercation had taken place between the accused and deceased Bhupinder and the accused had threatened the deceased with dire consequences. After the tournament was over deceased Bhupinder, Sunil Kumar, Satish Kumar, Raju, Jatti Ram, Kaku Ram and Pramod Kumar went to nearby fields for a party in which they consumed liquor. After the party was over, all of them came to the ground. Thereafter, Sh. Sunil Kumar and Raju went to the house of Sh. Satish Kumar for dinner and after taking their dinner they left for their houses. When they reached near the ground, they found the deceased lying there in an injured condition and he told them that he was attacked by accused Ved Prakash with 'Khukhari'. Sunil

Kumar and Raju got scared and both of them fled away. At about 9.30 P.M., PW12 Bela Singh, visited the house of the deceased and informed his mother and brother, Sh Surender Singh that somebody was quarreling with his brother at the place where tournament was held. Upon this Surender Singh and his mother visited the spot and found deceased Bhupinder Singh lying there with bleeding injury on his neck. Surender Singh along with Sh. Hari Singh brought the deceased to hospital at Narkanada but the doctor declared him dead. The information about this occurrence was given by Satish Kumar in Police Station, Rampur on telephone at about 11.40 PM which was recorded in the daily diary of the police station at Sr. No.39. After receiving this information, SI Brij Lal visited PHC Narkanda where the dead body of deceased Bhupinder was lying. He conducted inquest over the dead body of the deceased and thereafter he sent the dead body to IGMC, Shimla for postmortem examination. On 24.6.2009, SI Brij Lal visited the spot where he recorded statement of Surender Kumar, brother of the deceased under Section 154, Cr.P.C., on the basis of which FIR was registered in Police Station, Rampur against the accused under Section 302, IPC. During the course of investigation chappal was recovered from the spot which the accused was wearing on the date of occurrence. The accused was arrested and on the basis of his disclosure statement, he got recovered the khukhari which was concealed by him under the stone near water kuhal below village Naula. The postmortem of the dead body of the deceased was conducted in IGMC, Shimla by Dr. A.K. Sharma and Dr. Sangeet Dhillon and they opined that the deceased died due to hemorrhagic shock as a result of ante mortem cut throat injury.

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

4. Accused was charged for his having committed an offence under Section 302 of the IPC by the learned trial Court. In proof of the prosecution case, the prosecution examined 24 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the Court, in which the accused claimed innocence and pleaded false implication in the case.

5. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

6. The accused/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. The learned defence counsel has concertedly and vigorously contended that the findings of conviction recorded by the learned trial Court are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

7. On the other hand, the learned Deputy 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. This Court has traversed through the entire evidence available on record. The accused is alleged to have committed murder of deceased Bhupender. The entire thrust of the evidence existing on record against the accused is in its entirety circumstantial in nature. In a case of circumstantial evidence the prosecution is entailed with a heavy legal obligation to unerringly

by cogent evidence prove each of the links in the chain of circumstances. On each of the links in the chain of circumstances having come to be proved by cogent and potent evidence would, hence, prop up a conclusion that the prosecution has proved the guilt of the accused beyond reasonable doubt. Contrarily, in case any of the links in the chain of circumstances gets severed or broken then severance of any link begets disruption in the entire chain of circumstances buoying an inference that the obligation cast upon the prosecution to prove the guilt of the accused beyond reasonable doubt has remained un-satiated or un-accomplished. Besides in a case of circumstantial evidence, proof of motive is relevant as well as necessary besides it constitutes the initial link in the chain of circumstances along with other links therein for upsurging, on proof of each of the links by the prosecution by adduction of evidence of probative worth, an inference of the guilt of the accused having been invincibly established. The motive which actuated the accused to commit the murder of deceased Bhupender is comprised in a threatening meted out by the accused to the deceased on 23.06.2009 in a tournament organized by the Yuvak Mandal, Jahu Deem. The accused was the president of the organized committee. A dispute is alleged to have erupted inter se the contestants of the tournament, inasmuch, as inter se the team of Jahu Deem and team of Baragaon. The propellant cause for the eruption of a dispute between the team of Baragaon, winner in the tournament and the team of Jahu Deem, the runners up in the tournament of which the deceased was a member, was over the amount of prize money which was to be awarded to the winners and runners up. PW-1 Surinder Singh, the brother of the deceased deposes that on termination of the altercation on his intercession though begot temporary amity, yet the accused in his presence had threatened his brother with dire consequences. The prosecution on the factum of the deposition comprised in the examination-in-chief of PW-1 wherein he deposes that an altercation ensued inter se the accused and the deceased qua the amount of prize money to be awarded to the winners and the runners up in the tournament and of the accused having threatened his deceased brother with dire consequences per se constitutes proof of motive which propelled the accused to murder the deceased. However, the fact as deposed by PW-1 of the accused having threatened his deceased brother with dire consequences has not been deposed by PW-3 Sunil Kumar and PW-4 Satish Kumar, both of whom were present at the time of distribution of prize money to the winners and runners up in the tournament. In the face of both PW-3 and PW-4 having omitted to depose in corroboration with the deposition of PW-1 in his examination-in-chief of the accused having threatened the deceased with dire consequences leaves the factum of the deposition of PW-1 comprised in his examination-in-chief of the accused having threatened the deceased with dire consequences to be for lack of inter se corroboration unproved as well as unsubstantiated. His bald testimony in proof of purported motive reared by the accused cannot stand vindication. In sequel, when the motive as attributed to the accused by the prosecution arising from the deposition of PW-1 comprised in his examination-in-chief of the accused having threatened his deceased brother with dire consequences falls apart besides become emasculated for lack of corroboration thereof by both PW-3 and PW-4, the concomitant deduction which props up is that even though an altercation did take place between the accused and the deceased over the issue of the amount of prize money to be given to the winners and runners up in the tournament, nonetheless, the said altercation did not acquire such aggravation so as to actuate or foment the accused to as solitarily deposed by PW-1 to mete a threatening to the deceased of his being beset with the peril of dire consequences. Rather, it appears on a reading of the testimony of PW-8, Hari Singh, the Chief Guest in the tournament that prize money of Rs.1000/- was initially offered by the organizing committee of which the accused was the President to the winners and Rs.600/- to the runners up. Though, an amount of Rs. Rs.600/- was offered to the runners up, however, the aforesaid offer of prize amount to the runners up when reneged, led to an altercation inter se the

accused and the deceased. Nonetheless, when PW-1 deposes that it was put to rest and settled on the accused having handed over the full prize money to the team of the deceased rather quells besides extinguishes in wholesome and entirety, the factum of any subsisting grudge having been nursed either by the accused or the deceased which could ultimately sequel the accused to murder the deceased. More so, even PW-8 has not corroborated the testimony of PW-1 as existing in his examination-in-chief qua the fact of the accused on the fateful day when the altercation ensued inter se them qua the prize money having meted out any threat to the deceased that he would be beset with perilous consequences. Consequently, the depositions of the aforesaid witnesses i.e. PW-3, PW-4 and PW-8 undermine the efficacy of the deposition of PW-1 qua any grudge having been nursed by the accused which actuated him to murder the deceased. Consequently, when the evidence qua any motive purportedly nursed by the accused against the deceased arising from a previous altercation inter se them over the issue of amount of prize money which as deposed by PW-8, Hari Singh came to be put to rest, as such, extinguished, consequently, it is to be invincibly concluded that, hence, there was no iota of any grudge nursed by the accused against the deceased. In aftermath, it can be concluded that at no stage thereafter the accused bore any vendetta against the deceased which drove him to murder the deceased.

10. Therefore, when the prosecution has been unable to portray by consistent evidence comprised in the depositions of PW-1, PW-3, PW-4 and PW-8 of any motive having been nursed by the accused against the deceased, the initial link in the chain of circumstances stand snapped, de-linked and severed.

11. The prosecution has also anvilled its case upon the purported dying declaration made by the deceased to PW-3 Sunil Kumar, wherein he attributed to the accused the role of his having attacked him with a khukhari (Ex.P-5). The learned Sessions Judge while convicting the accused/appellant on the strength of the said link in the chain of circumstances has read the testimony of PW-3 in a grossly unwholesome and in a piece meal manner, as such, hence, erroneously held that it constitutes a vital and credible piece of evidence and on its strength laid the foundation for the conviction of the accused for the offence alleged. The deposition of PW-3 as garnered into play by the prosecution for proving the factum of the accused having made a dying declaration to the former is per se ridden with pervasive infirmities. The foremost and dominating infirmity which tears apart the truth of the factum of the dying declaration having been made by the deceased to PW-3 Satish Kumar whereupon the prosecution rests its case, is the factum of PW-1, who had on intimation to him by one Bellan Singh having proceeded to the site of occurrence and on arrival there having noticed his brother lying in an injured condition with copious emission of blood from the injury on his neck, having omitted to divulge in his examination-in-chief of any dying declaration having been made by the deceased to him, wherein he attributed guilt to the accused. PW-1 Surinder Singh, the brother of the deceased was the best person to whom the deceased would have made a dying declaration. The omission of the deceased to make a dying declaration to PW-1 renders suspect the factum of any dying declaration having been made by the deceased to PW-3. More so, what aggravates the factum of PW-3 having falsely deposed qua the factum of a dying declaration having been made by the deceased to him is embedded in the factum of his having not divulged the revelation made by the deceased to him of the accused having put him to death to either any family member of the deceased or to any villager. Even otherwise, the deposition of PW-3 stands wholly undermined in the face of it having been made at a stage when no potent and cogent evidence exists on record portraying the factum of the cognitive faculties of the deceased then being alive so as to empower and equip him to render a version qua the incident to PW-3, Satish Kumar. In absence thereof, it appears that PW-2 has invented the dying declaration made by the deceased to him

wherein the latter inculpated the accused. The MLC qua the deceased comprised in Ex.PW21/A which brings to the fore the factum of the deceased on arrival at PHC, Narkanda having succumbed to the injuries at 11.30 p.m. However, preceding to the arrival of the deceased at PHC, Narkanada wherein he was examined by the doctor concerned and declared to be dead, the deceased at 9.00 a.m. purportedly rendered a dying declaration to PW-3 inculpating the accused in the offence alleged. However, given the demise of the deceased in quick succession to his having purportedly made a dying declaration to PW-3 and hence, when the injuries were heinous, grave and lethal, leading to the demise of the deceased in quick succession to the purported making of the dying declaration by the deceased to PW-3, obviously the factum of absence of cogent evidence portraying that the deceased then was fit to make a statement renders open an inference that the deceased was disempowered by lethal injuries on his body to make a dying declaration qua the incident before PW-3. What, for reiteration, belittles the effect of the purported aforesaid dying declaration of the deceased, is the fact of one Raju being simultaneously present with PW-3 when the purported dying declaration is alleged to have been made by the deceased to PW-3. However, the investigating officer recorded the statement alone of PW-3 and has omitted to record the statement of one Raju, who was also accompanying PW-3 when the dying declaration was made by the deceased to the latter. The recording of the statement of one Raju by the Investigation Officer, who was accompanying PW-3 at the time aforesaid and his consequent deposition before the learned trail Court would have lent strength and vigour to the testimony of PW-3 qua the fact of the deceased having made a dying declaration before him wherein he had inculpated the accused. The omission on the part of the Investigating Officer to record the statement of one Raju and his consequent non-examination in Court has de-facilitated the unearthing of apposite and germane evidence to lend corroboration to the version as deposed by PW-3 qua the factum of the deceased having made a dying declaration before him in the presence of Raju, wherein he had inculpated the accused. Besides, in the aforesaid omission by the Investigating Officer, he has, hence, suppressed the relevant, admissible and best evidence for lending corroboration to the testimony of PW-3. The suppression by the Investigating Officer appears to be with an oblique motive to with ingenuity concoct a dying declaration as a link against the accused. However, an engineered and contrived link against the accused purportedly constituted by the dying declaration made by the deceased before PW-3 for the reasons aforesaid is frail, besides it capsizes. In aftermath, another link in the chain of the circumstances against the accused gets snapped, de-linked and emasculated.

12. PW-5 deposes that the accused had requested PW-5 Yash Pal on 23.06.2009 to give his chappals to the latter for wearing as he had some problem in his foot. PW-5 acceded to his request. Consequently, the accused handed over his shoes to PW-5 whereas PW-5 handed over his chappals to the accused. The chappals were found at the site of occurrence. The prosecution on the strength of deposition of PW-5 Yash Pal, who had identified the chappals as handed over by him to the accused, canvasses before this Court that with theirs being found near the site of occurrence constitutes proof of the factum of the accused being in the vicinity of the deceased at the time of the occurrence and his having fled bare foot therefrom. It is further canvassed that the fact of the chappals worn by the accused as proved by PW-5 when found in the vicinity of the site of occurrence discloses his inculpation in the offence alleged. However, the factum of recovery of chappals handed over by PW-5 to the accused, is hence canvassed by the prosecution to be worn by him at the time of occurrence besides also the proved factum of its efficacious recovery under memo Ex.PW1/B, though does tentatively garner a conclusion qua the factum of its constituting proof of a link, conveying as such the inculpation of the accused, nonetheless, in the face of PW-5 in his deposition comprised in his cross-examination having deposed that the shoes which were handed over by

the accused to him in exchange or in lieu of his having handed over the chappals to the former were un-torn, whereas, the shoes as produced in Court purportedly handed over by the accused to PW-5 in exchange or in lieu of the latter having handed over his chappals to the former when rather found to be in a torn condition, gives leeway to an inference, thence, that the accused had not handed over his shoes to PW-5 nor the latter on his receiving the shoes of the accused hand handed over his chappals to him. In nut shell, the factum of the production of torn shoes of the accused contrarily to the deposition of PW-5 of the accused having handed over to him shoes which were in an un-torn condition conveys that neither the chappals were handed over by PW-5 to the accused nor the accused had handed over his shoes to PW-5. Besides, it is apparent on a reading of the testimony of PW-1 that at the site of occurrence whereof chappals were found blood smeared earth was in existence and was lifted by the Investigating Officer on pieces of cotton. If in the vicinity of the chappals, blood as had oozed from the wounds of the deceased had found, its place on the soil and that too in the vicinity of the place wherefrom the chappals were recovered under memo Ex.PW1/B, the factum of absence of blood on chappals Ex.P-2 when construed in conjunction and entwinement with the factum of the deposition of PW-5 qua the fact of his having handed over his chappals to the accused and the latter in exchange having handed over his shoes to him having for reasons aforesaid standing effacement, hence, another purported link constituted by the recovery of the chappals worn by the accused at the relevant time from the site of occurrence gets severed and emasculated.

13. Khukhari, Ex.P-5 was recovered under recovery memo Ex.PW16/B. The factum of its efficacious recovery under recovery memo Ex.PW16/B stands convincingly proved by the testimonies of PW-10 Suresh Kumar and PW-16 Pistu Ram besides, with photographs Mark A-1 and A-2, divulging the factum of the presence of the accused along with the witnesses to its recovery though lends firmness and formidability to the factum of its hence having come to be recovered in a legally ordained manner. However, the mere factum of its recovery under recovery memo Ex.PW16/A would not constitute it to be validly proved. For it to constitute a proven link in the chain of circumstances cogent proof was ordained to upsurge conveying that preceding its recovery under memo Ex.PW16/A, the accused had volitionally and voluntarily made a disclosure statement qua the place of its hiding, keeping or concealment by him. Since the accused alone would be in the know of its place of hiding, keeping or concealment by him, hence, to countervail any submission on the part of the defence that its recovery was not concocted, inasmuch as, it was kept at its place of recovery by the Investigating Officer and the accused accosted the police officials thereto along with the witnesses as a measure of a charade to connote that it was hence recovered at his instance in pursuance to a disclosure statement, Ex.PW24/G in presence of witnesses, it was imperative for the witnesses to disclosure statement Ex.PW PW24/G, purportedly preceding the effectuation of recovery of Khukhari, Ex.P-5 under recovery memo Ex.PW16/A, to depose in unison and in harmony qua the factum of the accused having volitionally in their presence recorded statement attributed to him comprised in Ex.PW24/G portraying therein his solitary knowledge qua the place of keeping, hiding and concealment of Khukhari Ex.P-5 and his willingness to get it recovered at his instance by the Investigating Officer. However, both the witnesses to Ex.PW24/G, which is the purported disclosure statement preceding the recovery of the khukhari under recovery memo Ex.PW16/A, inasmuch as PW-9 Ankush Graik and PW-23 Pinku have not supported the prosecution version of the accused having made any disclosure statement in their presence. The omission on the part of both PW-9 and PW-23 to depose in unison qua the factum of the making of in their presence the disclosure statement attributed to the accused comprised in Ex.PW24/G unflinchingly conveys that Ex. PW24/G was in-volitionally made besides, it was a concoction and an invention on the part of the Investigating Officer, in sequel

to duress and compulsion exercised upon the accused. In other words, for want of the witnesses to Ex.PW24-G, inasmuch as PW-9 and PW-23 having omitted to forcefully covey in their respective depositions qua the factum of it having been prepared in their presence by the Investigating Officer in pursuance to a volitional motion of the accused renders it to be suspect or renders it to be not constituting evidence of probative worth so as to concomitantly convey to this Court that the recovery of khukhari ExP-5 under recovery memo Ex.PW16/A was in pursuance to a valid disclosure statement Ex.PW24/G. In other words, when the disclosure statement comprised in Ex.PW24/G which precedes the recovery of khukhari Ex.P-5 effected under recovery memo Ex.PW16/A is vulnerably to skepticism, as a corollary, recovery of Ex.P-5 in pursuance to Ex.PW24/G under recovery memo Ex.PW16/A is also rendered inconsequential and inefficacious. Further more, when no blood of the deceased was found on the khukhari, as such, dispels the factum of its user by the accused.

14. The presence of injuries on the person of the accused as portrayed by the deposition of PW-13 Dr. Sudesh, who has also deposed the factum of theirs having occurred within 72 hours from the time of his examination, besides the blood occurring on the sweater and T-shirts and jeans of the accused have been pressed into service by the prosecution to convey before this Court that the aforesaid evidence is a vital link in the chain of circumstances. The factum of the injuries having been found on the person of the accused and with the revelation of theirs being caused within 24-72 hours of the examination, hence, are canvassed to be linkable to the time of the occurrence, yet the mere factum of injuries when attributable to the factum of theirs having been gained on the person of the accused during the duel which he had with the deceased besides, when their existence can also be attributed to the factum of theirs having been inflicted by the police officials during the course of his custodial interrogation, obviously then the injuries on the person of the accused per se do not mark the factum of the involvement of the accused in the offences alleged. Even though the presence of blood on the clothes of the accused which blood was opined in Ex.PW14/E to be the blood of the accused does not also when, hence, the occurrence of blood is attributable to the factum of its having oozed thereon from the injuries sustained by the accused, reasons whereof has been concluded to be not during the course of the lethal blow purportedly delivered by him upon the deceased, consequently, the presence of blood on his clothes does not constitute any link in the chain of circumstances. Consequently, another link in the chain of circumstances gets severed and emasculated.

15. The prosecution concerts that prior to the said occurrence, the accused on 6.3.2009 had also attacked a shopkeeper at Jahu Deem with a Khukhari, which matter was compromised later on. However, through the aforesaid factum, the prosecution concerts that hence, the accused having a tendency towards criminality given his having pre-indulged in a criminal act is communicative of his having committed the offence. However, the said concert on the part of the prosecution is highly misplaced. Merely on the basis of a previous incident the prosecution cannot constrain this Court to conclude that, hence, the guilt of the accused in the instant case stands clinchingly proved rather it was incumbent upon the prosecution to prove by cogent and reliable evidence each of the links in the chain of circumstances. Such chain of circumstances as have been adverted to hereinabove, have been concluded to be not have come to be proved by cogent evidence, rather their efficacy stands dispelled and overcome. Therefore, merely on the strength of a previous criminal act attributed to the accused by the prosecution, it does not either solitarily constitute a potent link besides also does not constitute a relevant and germane piece of evidence to on its strength succor a conclusion qua the guilt of the accused. Even otherwise the said circumstance devolves upon the character of the accused. During the entire course of cross-examination of the prosecution witnesses by the learned defence counsel, it has not been portrayed therein that

the accused was a person of a good character, only in the event of a portrayal having been made during the course of suggestions put to the prosecution witnesses by the learned defence counsel of the accused being a person of good character, evidence in repulsion thereof constituted by his previous purported criminal antecedents could have been brought on record as envisaged by Section 54 of the Evidence Act. Obviously, when such portrayal by the defence of the accused having good character is amiss, the factum of the previous criminal antecedents of the accused does not constitute either a link nor is relevant or germane on score whereof the prosecution can succeed.

16. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has omitted to appraise the entire evidence on record, in, a wholesome and harmonious manner. On the other hand, it appears that by a giving piece meal reading, to the evidence on record, it has also discarded the probative force and relevance of the facets aforesaid, hence, indulged in gross mis-appreciation of the evidence sequeling substantial mis-carriage of justice.

17. Hence, the appeal is allowed and the impugned judgment of the learned trial Court is set aside. The accused/appellant is acquitted of the offence charged and he be set free forthwith, if not required in any other case. Records be sent back.

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

Krishan Chand & ors. .....Appellants.

Versus

Anil Kumar & others .....Respondents.

RSA No. 513 of 2002.
Reserved on: 16.12.2014.
Decided on: 29.12.2014.

Hindu Succession Act, 1956 - Section 14- 'N' minor widow of 'J' succeeded to his share on his death- she re-married 'K'- plaintiff contended that she forfeited her right in the property upon her re-marriage- held, that plaintiff had failed to prove the marriage of 'N' with 'K' after the death of 'J'- she was shown to be the owner in possession in revenue record, which carried with it a presumption of truth- presumption was not rebutted by the plaintiff- interest of the husband devolved upon the widow immediately on the date of his death and she became full owner on the commencement of Hindu Succession Act- her right cannot be forfeited by her subsequent marriage. (Para- 19 to 33)

Cases referred:

Kanuri Sri Sankara Rao vrs. Kanuri Rajyalakshamma, AIR 1961 Andhra Pradesh 241

Eramma vrs. Veerupana and others, AIR 1966 SC 1879

Punithavalli Ammal vrs. Minor Ramalingam and another, AIR 1970 SC 1730

Jagdish Mahton vrs. Mohammad Elahi and ors., AIR 1973 Patna 170

Vaddeboyina Tulasamma and ors. Vrs. Vaddeboyina Sesha Reddi (dead) by LRs., AIR 1977 SC 1844

Sulochana Dei vrs. Khali Dei and ors., AIR 1987 Orissa 11

Velamuri Venkata Sivaprasad vrs. Kothuri Venkateshwarlu, AIR 2000 SC 434

Cherotte Sugathan vrs. Cherotte Bharathi & ors., BI AIR 2008 SC 1467

Jayaram Govind Bhalerao vrs. Jaywant Balkrishna Deshmukh & ors., AIR 2008 Bombay 151

Baliram Atmaram Dhake vrs. Rahubai alias Saraswatibai, AIR 2009 Bombay 57

For the appellant(s): Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Neeraj Gupta, Advocate.

For the respondents: Mr. K.D.Sood, Sr. Advocate, with Mr. Mukul Sood, 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, Solan, H.P. dated 19.9.2002, passed in Civil Appeal No.14-S/13 of 2002.

2. Key facts, necessary for the adjudication of this regular second appeal are that the appellants-plaintiffs (hereinafter referred to as the plaintiffs) have filed suit for declaration. According to the plaint, one Sh. Masadi was common ancestor of the parties. He has three sons, namely, Sh. Dhani Ram Kanshi Ram and Jiwa Nand alias Jawala. The plaintiffs and proforma defendant No. 7 as per the array of parties given in the original suit are the successors in interest of Sh. Dhani Ram and respondents-defendants No. 1 to 6 (hereinafter referred to as the defendants) are the successors-in-interest of Sh. Kanshi Ram. Sh. Dhani Ram died in the year 1995. Sh. Kanshi Ram died in the year 1970-71. Sh. Jiwa Nand had died in the year 1933. Sh. Masadi was having land in three villages which was coparcenary property. He died in the year 1932 and after his death, all his sons inherited the coparcenary property in equal shares. Sh. Jiwa Nand died issueless in the year 1933 and he was survived by his minor widow namely Smt. Nardu. Smt. Nardu remarried with Sh. Kanshi Ram, the predecessor of defendants No. 1 to 6 in accordance with local custom prevalent in the area. She gave birth to defendant No. 3 namely, Sh. Daulat Ram and three daughters i.e. defendants No. 4 to 6 as per the details of parties in the original suit, namely, Smt. Nanki, Krishani and Rameshwari. A family partition took place in between 1940 to 1945. Sh Dhani Ram and Kanshi Ram got both half share each in the suit land and came in possession of their respective ½ share exclusively to the exclusion and complete ouster of 1/3rd share of their third brother Sh. Jiwa Nand. Thus, according to them, mutation No. 142 of village Pansoda, mutation No. 81 of Village Mashlog and mutation No. 49 of village Thathali attested about 62 years back whereby the interest of late Sh. Jiwa Nand qua 1/3rd share in the suit land devolved upon his widow Smt. Nardu was illegal and void. The subsequent entries on the basis of aforesaid mutations qua 1/3rd share in the name of Smt. Nardu till the year 1991 were also wrong and illegal and not binding upon the plaintiffs. The inheritance qua 1/3rd share of Sh. Jiwa Nand which opened in the year 1933, the rights of Nardu got extinguished on her remarriage with the father of defendant No. 3 since widows at that time were having only limited interests i.e. a right of maintenance in the property of their deceased husbands and that right extinguished on their remarriage. According to the plaintiffs, they and defendants No. 3 to 6 remained in possession of ½ share each jointly on the spot. The possession of the plaintiffs and defendants No. 3 to 6 qua 1/3rd share of Sh. Jwala in the suit land is un-interrupted, continue, hostile and to the knowledge of the whole world which has been perfected into title by way of adverse possession. This fact was in the knowledge of defendants because on 1.6.1979 the defendant No. 3 in collusion with her mother had applied to the revenue authorities for partition of the suit land in which the father of the plaintiffs had denied the 1/3rd share of the deceased mother of defendant No. 3. She failed to determine her title qua 1/3rd share of her husband within 12 years and as such she was completely ousted. Smt. Nardu died in the year 1991 and her inheritance has gone in favour of defendants No. 1 & 2 as per the array of parties given in the original suit on the basis of an oral and un-registered will dated 15.7.1991. The Will was outcome of fraud, manipulation and fabrication. It is in these circumstances, the plaintiffs have filed suit for declaration to the effect that the

plaintiffs alongwith proforma defendant No. 7 as per the details given in the array of parties in the original suit and defendants No. 3 to 6 were joint owners in possession of ½ share each in the suit land and all the revenue entries qua 1/3rd share of Sh. Jiwa Nand in favour of deceased Smt. Nardu since 1933 till her death and the Will dated 15.7.1991 executed by her in favour of defendants No. 1 & 2 and the mutations No. 117, 243 and 385 dated 24.2.1992 were wrong, illegal and null and void. In the alternative, the plaintiffs alongwith proforma defendant No. 7 and defendants no. 3 to 6 have perfected their title on the date of complete ouster qua 1/3rd share of Sh. Jiwa Nand which is presently recorded in the name of Smt. Nardu.

3. The suit was contested by defendants No. 1 & 2. According to them, the revenue entries were valid. Smt. Nardu has rightly succeeded to the share of Sh. Jiwa Nand. They have denied that any family partition took place between the father of plaintiffs and father of defendant No. 3. The Will executed in their favour was voluntary act of Smt. Nardu Devi. The other defendants have also contested the suit According to them, Smt. Nardu has not remarried in the year 1933 with the father of defendant No. 3. Smt. Nardu had become owner of 1/3rd share in the year 1956. The predecessor of the plaintiffs have admitted the mutation of inheritance of Sh. Jiwa Nand to be correct as he never filed suit before 1956 to the effect that Smt. Nardu was disqualified to inherit her husband. They have supported the revenue entries.

4. The issues were framed by the learned Sub Judge, Ist Class, Arki. He dismissed the suit on 30.1.2002. The appellants-plaintiffs, feeling aggrieved by the judgment and decree dated 30.1.2002, filed an appeal before the learned District Judge, Solan. The learned District Judge, Solan also dismissed the same on 19.9.2002. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 4.12.2002 and 23.7.2014:

> "1. Whether the findings rendered by both the courts below are erroneous, perverse in upholding the Will without discussing the evidence regarding the due execution and attestation thereof and the question of suspicious circumstances?
>
> 2. Whether the courts below have wrongly held Smt. Nardoo to be absolute owner of the property by misapplying the provisions of Section 14(1) of the Hindu Succession Act?
>
> 3. Whether the trial Court has wrongly applied the provisions of rule of estoppels in dismissing the suit of the plaintiff-appellants by ignoring the provisions of Evidence Act?
>
> 4. Whether both the courts below have recorded perverse findings in holding that Smt. Nardoo acquired absolute title to the estate of late Sh. Jeeva Nand, who died in the year 1933 without there being any provision vesting a widow with absolute right?
>
> 5. Whether both the courts below have wrongly presumed the title to have legally vested in Smt. Nardoo, who could not have inherited right of her husband at the time of his death and later on account of disability incurred by her by remarrying with Sh. Kanshi Ram. Whether the findings of both the courts below holding the Will alleged to have been executed by Smt. Nardoo in favour of Defendants 1 & 2 to be valid, without conclusively deciding her right to inherit such an estate which was subject matter of the alleged Will?"

6. Mr. Bhupinder Gupta, learned Sr. Advocate, on the basis of the substantial questions of law framed, has vehemently argued that the findings recorded by both the Courts below while upholding the Will are contrary to record. He also contended that Smt. Nardu has never become absolute owner of

the property and the courts below have wrongly applied the provisions of Section 14(1) of the Hindu Succession Act, 1956. According to him, the courts below have not correctly appreciated the oral as well as documentary evidence by ignoring the provisions of The Indian Evidence Act. On the other hand, Mr. K.D.Sood, learned Sr. Advocate, has supported the judgments and decrees passed by both the Courts below.

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

8. Since the substantial questions of law are interconnected, these were taken up together for discussion to avoid repetition of evidence.

9. PW-1 Krishan Chand has stated that the suit land is situated in village Pansoda, Thathli and Mashlog. It is owned by Sh. Dhani Ram and Daulat Ram in equal shares. Sh. Dhani Ram was his father. This land was divided between Dhani Ram and Daulat Ram about 50 years back and since then they are having ½ share each. His father were three brothers, namely, Dhani Ram, Kanshi Ram and Jiwa Nand. Jiwa Nand died in the year 1932. His share has wrongly gone to Smt. Nardu. His grandfather died in the year 1930. Smt. Nardu remarried with Sh. Kanshi Ram and since then Kanshi Ram and Daulat Ram are coming in possession of it to the extent of ½ share each but the revenue record is showing the land as joint which was wrong. His family and family of Daulat Ram are residing separately. Kanshi Ram died about 30 years back. Smt. Nardu had executed Will in the year 1990 in favour of Anil Kumar and Shashi Kumar qua the share of Sh. Jiwa Nand though the plaintiffs and defendants are entitled to half share each and they are cultivating the land according to their share. He and Daulat Ram are entitled to the share of Sh. Jiwa Nand to the extent of ½ share each. He also proved documents Ext. PW-1/A to PW-1/G. PW-1/A is the pedigree table and PW-1/B to Ext. PW-1/E are the copies of jamabandi pertaining to the land situated in villages Thathali, Mashlog and Pansoda. Ext. PW-1/F and Ext. PW-1/G are the copies of mutations No. 177 and 385.

10. PW-2 Parvati Devi has testified that she had three brothers namely, Jiwa Nand, Dhani Ram and Kanshi Ram. Jiwa Nand had died about 60 years back. Smt. Nardu was his wife. Sh. Jiwa Nand died after six months of his marriage. Smt. Nardu remarried Sh. Kanshi Ram as per the custom and she remained his wife till her death. Kanshi Ram and Dhani Ram had partitioned the land long back and after partition they are cultivating the suit land to the extent of half share each.

11. PW-3 Nandi Ram has supported the version of PW-1 Krishan Chand and PW-2 Smt. Parvati.

12. PW-4 Ram Dev testified that in the year 1991, he was the ward member of Gram Panchayat Navgaon. He was never summoned by Sh. Daulat Ram etc. to write a Will. Sh. Lal Chand was the ward member of Navgaon and Sh. Chet Ram was the ward member of Kothi and Shamkoh. Lal Chand is resident of village which is distance of 3 kms.

13. PW-5 Smt. Nirmala was the Secretary of Gram Panchayat Navgaon. She was summoned by the plaintiffs to prove documents Ext. PW-5/A to Ext. PW-5/D. Ext. PW-5/A is the list of members of the Gram Panchayat Navgaon, Ext. PW-5/B is the death certificate of Smt. Nardu, Ext. PW-5/C is the birth certificate of Sh. Anil Kumar and Ext. PW-5/D is the birth certificate of Sh. Shashi Kumar. Ext. P-1 to P-4 are the copies of the statements of Sh. Dhani Ram, Kanahya, Nandu and Raghuvir recorded during the partition proceedings. Ext. P-5 and Ext. P-6 are the mutation Nos. 81 and 139, respectively. Ext. P-7 is the copy of order dated 25.6.1992 rendered by the Sub Divisional Collector, Arki. Ext. P-8 and P-9 are the copies of the jamabandi for the year 1991-92 pertaining to mauza Thathali. Ext. P-10 is the copy of 'missal haquiyat' for the

year 1962-63 of mauza Thathali. Ext. P-11 is the copy of mutation No. 177 dated 24.2.1992, vide which mutation was sanctioned in favour of defendants No. 1 & 2 on the basis of the Will executed by Smt. Nardu. Ext. P-12 is the copy of 'missal haquiyat' pertaining to village Mashlog. Ext. P-13 is the copy of mutation No. 243 of mauza Mashlog vide which the mutation qua land of Mashlog belonging to Smt. Nardu was sanctioned in favour of defendants No. 1 & 2. Ext. P-14 is the copy of jamabandi for the year 1991-92 of Mauza mashlog. Ext. P-15 to P-17 are the copies of 'missal haquiyat', jamabandies for the year 1962-63 and 1991-92 pertaining to the landof village Pansoda. Ext. P-18 is the copy of mutation No. 385 vide which the mutation was sanctioned in favour of defendants No. 1 & 2 qua the land of Smt. Nardu. Ext. P-19 is the copy of mutation No. 243 vide which the mutation qua the land of Mashlog was attested in favour of defendants No. 1 & 2 on 24.2.1992.

14. DW-1 Gopal Chand Gupta, has proved Ext. DW-1/A.

15. DW-2 Sh. Khajana Ram deposed that Sh. Jiwa Nand died about 50 years back. His property was succeeded by Smt. Nardu. Smt. Nardu also died and now the land was in possession of Daulat Ram. Kanshi Ram, Jiwa Nand and Dhani Ram were real brothers. Smt. Kamla was the legally wedded wife of Sh. Kanshi Ram. They remained husband and wife till the year 1962. Thereafter, divorce took place between them as per the custom and then Kamla married to another person in village Chhamla. From the year 1962 onwards, Nardu started living with Sh. Kanshi Ram as his wife. Kanshi Ram died about 30-35 years back and after his death, he was inherited by Smt. Nardu. Smt. Nardu gave birth to one Daulat Ram and three daughters.

16. DW-3 Dhani Ram testified that Jiwa Nand was known to him. He died 50 years back. Jiwa Nand was succeeded by Smt. Nardu. He was present at the time of attestation of mutation qua inheritance of Jiwa Nand in favour of Nardu. The wife of Kanshi Ram was Smt. Kamla. She remained with him till the year 1962. Thereafter, divorce took place between them as per custom. Kanshi Ram died 20-25 years back.

17. DW-4 Sant Ram has supported the version of DW-3.

18. DW-5 Jagar Nath and DW-6 Chet Ram were the marginal witnesses of Will Ext. DW-5/A. According to them, the Will was executed at the instance of Smt. Nardu who was in a sound disposing mind and had put the thumb impression on the will. They have also identified their signatures on the Will.

19. According to the plaintiffs, immediately after the death of Jiwa Nand, Nardu solemnized the marriage with Kanshi Ram. The date of birth of PW-1 Krishan Chand is 24.9.1967. Thus, his statement has no relevance as far as the alleged marriage of Nardu and Kanshi Ram is concerned. According to PW-2 Smt. Parwati, the marriage of Smt. Nardu was solemnized in the presence of 4 Panchs. According to her, Sh. Kanhiya and Kesru Ram were among those Panchs. However, these were not examined by the plaintiffs. PW-2 Parwati has admitted in her cross-examination that she was residing at her matrimonial house for the last 75 years. She was not even aware of the death of Jwala. She also admitted that she was not present at the time when the alleged marriage was solemnized between Kanshi Ram and Nardu. According to PW-3, Nandu Ram, at the time of marriage of Smt. Nardu with Kanshi Ram, Hiru alongwith number of persons was present. He himself was not present at that time. Hiru has not been examined by the plaintiffs. He is not even the resident of the same village. The plaintiffs have not placed any tangible evidence to prove the marriage of Kanshi Ram with Nardu immediately after the death of Jwala. According to the plaintiffs, the partition took place in the year 1945. According to PW-2 Parwati, oral partition has taken place. However, she did not know when the partition took place. PW-3 Nandu does not belong to the same village.

According to him, he visited the concerned village 15-20 years back after the death of Smt. Nardu and what happened between the period of 15-20 years was not known to him. He has also admitted in his cross-examination that he had no knowledge about the partition between Kanshi Ram and Dhani Ram. If the partition has taken place, as per the plaintiffs, in the year 1945, the same should have been recorded in the revenue record. The witnesses produced by the plaintiffs i.e. PW-2 and PW-3 have also admitted that Dhani Ram was Nambardar of the area. They have also admitted that mutations were also sanctioned in the presence of Sh. Dhani Ram. Interestingly, Dhani Ram has not filed any suit against Smt. Nardu during his life time.

20. What emerges from the facts enumerated hereinabove is that Kanshi Ram was married with Kamla. She remained with him even after 1956. The plaintiffs have failed to prove the marriage of Nardu with Kanshi Ram immediately after the death of Jwala in the year 1933-34. The plaintiffs, though have taken the plea of adverse possession, but have not prove the ingredients of adverse possession.

21. Now, the Court will advert to the documentary evidence proved on record by the parties. It is not in dispute that Masadi Ram had three sons, namely Dhani Ram, Kanshi Ram and Jiwa Nand alias Jwala. Vide mutation Nos. 138 and 139, the inheritance of Sh. Masadi was attested in favour of his three sons. Mutation No. 81 was attested in favour of Nardu after the death of Jiwa Nand. In copy of 'missal haquiyat' Ext. P-12, copy of Jamabandi for the year 1962-63 Ext. P-11, Smt. Nardu has been shown as owner-in-possession of the suit property. In the jamabandi for the year 1962-63 of mauja Pansoda, Smt. Nardu has been shown in joint possession with Dhani Ram and Kanshi Ram. The presumption of truth is attached to the revenue record though rebuttable, the plaintiffs have not rebutted these entries at all.

22. In the case of ***Kanuri Sri Sankara Rao vrs. Kanuri Rajyalakshamma,*** reported in ***AIR 1961 Andhra Pradesh 241,*** the learned Single Judge has held that under the terms of sub Sections (2) and (3) of Section 3, of the Hindu Women's Rights to Property Act, the interest of the husband devolves upon the widow immediately on the date of his death. It has been held as follows:

> "6. The question for consideration is whether, on a true construction of Section 3, Sub-sections (2) and (3) of the Hindu Women's Rights to Property Act, the widow acquires no rights as on the actual date of death of Venkatasiva Rao viz. 7-6-1956. Subsection (2) of Section 3 is quite clear that when a Hindu governed by Mitakshara school of Hindu Law dies having at the time of his death an interest in a Hindu joint family property, his widow shall have in the property the same interest as he himself had.
>
> Sub-section (3) provides that in respect of the interest which devolves on her under Sub-section (2) she shall have the limited interest known as the Hindu Women's estate and it further enacts that she shall have the same right of claiming partition as a male owner. It does not expressly or impliedly enact that the Hindu governed by the Mithakshara school of Hindu Law is deemed to live till his widow claims a right of partition.
>
> It is significant to note that under the terms of Sub-sections (2) and (3) of Section 3, the interest of the husband devolves upon the widow immediately on the date of his death. No legal fiction is imported in the section and the legislature does not provide that the husband is deemed to live till she claims partition or files a suit for working out her rights."

23. In the case of ***Eramma vrs. Veerupana and others,*** reported in ***AIR 1966 SC 1879,*** their lordships of the Hon'ble Supreme Court have held Section 14(1) of the Act contemplates that a Hindu female, who in the absence of

this provision, would have been limited owner of the property, will now become full owner of the same by virtue of this section. The object of the section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu Law and to make a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property with all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder. Their lordships have held as under:

> **"7.** It is true that the appellant was in possession of Eran Gowda's properties but that fact alone is not sufficient to attract the operation of S. 14. The property possessed by a female Hindu, as contemplated in the section is clearly property to which she has acquired some kind of title whether before or after the commencement of the Act. IT may be noticed that the Explanation to S. 14 (1) sets out the various modes of acquisition of the property by a female Hindu and indicates that the section applies only to property to which the female Hindu has acquired some kind of title, however restricted the nature of her interest may be. The words "as full owner thereof and not as a limited owner as given in the last portion of sub-section (1) of S. 14 clearly suggest that the legislature intended that the limited ownership of the Hindu female should be changed into full ownership. In other words, S. 14 (1) of the Act contemplates that a Hindu female, who, in the absence of this provision, would have been limited owner of the property will now become full owner of the same by virtue of this section. The object of the section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu law and to make a Hindu woman, who under the old law would have been only a limited owner a full owner of the property with all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder. The Explanation to sub-section (1) of S. 14 defines the word 'property' as including "both movable and immovable property acquired by a female Hindu by inheritance or devise ... ". Sub-section (2) of S. 14 also refers to acquisition of property. IT is true that the Explanation has not given any exhaustive connotation of the word 'property' but the word 'acquired' used in the Explanation and also in sub-s. (2) of S. 14 clearly indicates that the object of the section is to make a Hindu female a full owner of the property which she has already acquired or which she acquires after the enforcement of the Act. IT does not in any way confer a title on the female Hindu where she did not in fact possess any vestige of title. IT follows, therefore, that the section cannot be interpreted so as to validate the illegal possession of a female Hindu and it does not confer any title on a mere trespasser. In other words the provisions of S. 14 (1) of the Act cannot be attracted in the case of Hindu female who is in possession of the property of the last male holder on the date of the commencement of the Act when she is only a trespasser without any right to property."

24. In the case of ***Punithavalli Ammal vrs. Minor Ramalingam and another,*** reported in ***AIR 1970 SC 1730,*** their lordships of the Hon'ble Supreme Court have held that the rights conferred on a Hindu female under s. 14(1) of the Act are not restricted or limited by any rule of Hindu law. The section plainly says that the property possessed by a Hindu female on the date the Act came into force whether acquired before or after the commencement of the Act shall be held by her as full owner thereof. The provision makes a clear departure from the Hindu law texts or rules. Their lordships have held as under:

> "6. The explanation to the section is not necessary for our present purpose. It was conceded at the bar that Sellathachi was in possession of the property in dispute on the date the Act came into force. By virtue of the aforesaid provision, she became the 'full owner of the property on

that date From a plain reading of s. 14(1), it is clear that the estate taken by a Hindu female under that provision is an absolute one and is not defeasible under any circumstance. The ambit of that estate cannot be cut by any text, rule or interpretation of Hindu law. The presumption of continuity of law is only a rule of interpretation. That presumption is inoperative if the language of the -concerned statutory provision is plain and unambiguous. The fiction mentioned earlier is abrogated to the extent it conflicts with the rights conferred on a Hindu female under s. 14(1) of the Act. In Sukhram and anr. v. Gauri Shankar and anr.(1) this Court held that though a male member of a Hindu family governed by the Benaras School of Hindu law is subject to restrictions qua alienation of his interest in the joint family property but a widow acquiring an interest in that property by virtue of Hindu Succession Act is not subject to any such restrictions. This Court held in S. S. Munna Lal v. S. S. Rajkumar and ors. (2) that by virtue of s. 4 of the Act the legislature abrogated the rules of Hindu law on all matters in respect of which there is an express provision in the Act. In our opinion the rights conferred on a Hindu female under s. 14(1) of the Act are not restricted or limited by any rule of Hindu law. The section plainly says that the property possessed by a Hindu female on the date the Act came into force whether acquired before or after the commencement of the Act shall be held by her as full owner thereof. That provision makes a clear departure from the Hindu law texts or rules. Those texts or rules cannot be used for circumventing the plain intendment of the provision.

7. In our judgment the learned judges of the Madras High Court were not right in limiting the scope of s. 14:(1) by taking the aid of the fiction mentioned earlier. That in our opinion is wholly impermissible. On the point -under consideration the decision of the Bombay High Court in Yamunabai and anr. v.Ram Maharaj Shreedhar Maharaj and anr. (AIR 1960 Bom 463) lays down the law correctly."

25. In the case of ***Jagdish Mahton vrs. Mohammad Elahi and ors.,*** reported in ***AIR 1973 Patna 170,*** the Division Bench has held that there is nothing in Section 14 of the Hindu Succession Act that once a widow succeeds to the property of her husband and acquires absolute right over the same, she would be divested of that absolute right on her re-marriage. Their lordships have further held that the full ownership conferred on a Hindu widow under Section 14 of the Hindu Succession Act cannot be divested by her subsequent re-marriage. If Section 2 of the Hindu Widows' Re-marriage Act was to apply to cases where a Hindu widow has got an absolute interest in her deceased husband's property, that will be inconsistent with the provisions of the Hindu Succession Act and, therefore, invalid to the extent of inconsistency by virtue of the provisions of Section 4 (l) (b) of the Hindu Succession Act. Their lordships have held as under:

"8. The main point for consideration in this case is whether by reason of the provision of Section 2 of the Hindu Widows' Re-marriage Act, a widow, who has acquired absolute interest in the property of her deceased husband by operation of Section 14 of the Hindu Sucession Act would be divested of that interest by subsequent re-marriage. Section 2 of the Hindu Widows' Re-marriage Act, 1856 has the effect of divesting the estate inherited by a widow from her deceased husband as a result of her remarriage. By her second marriage the widow forfeits the interest taken by her in her husband's estate and it passed to the next heirs of her husband as if she was dead. Section 14 of the Hindu Succession Act, 1956, lays down "Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner." The only condition

which has to be fulfilled for the acquisition of the absolute right of the widow over the property of her husband is that she must be in possession over the said property at the time of the death of her husband. Section 4 (1) (b) of the Hindu Succession Act, 1956 lays down:

"Save as otherwise expressly provided in this Act--any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act".

It appears that the Hindu Succession Act has brought about radical changes in the law of succession and that this Act will supersede all rules of succession contained in any previous enactment or elsewhere which are inconsistent with any provision contained in the Hindu Succession Act. The Hindu Widows' Re-marriage Act which provides that a widow on re-marriage would be divested of her interest in her husband's property was a previous enactment regulating succession to the property and it was clearly the law on the subject immediately before the Hindu Succession Act came into force. The effect of passing of the Hindu Succession Act is that all other laws in force prior to the passing of the Hindu Succession Act shall cease to apply to the Hindus so far as they are inconsistent with any provision of the Hindu Succession Act.

13. Even if it be accepted for the sake of argument as found out by the courts below that Most Jogni remarried Budhari Koeri, this remarriage must have taken place after the death of Ram Sahay Mahto because there is no case of any of the parties that Most. Jogni remarried Budhan Koeri during the lifetime of Ram Sahay Mahto. In this circumstance, the condition for the application of Section 14 of the Hindu Succession Act, namely, that Most. Jogni was in possession over the property of her husband Ram Sahay Mahto at the time of his death, has been fulfilled in this case and, as such, she acquired 'absolute right over the property of her husband. There is nothing in Section 14 of the Hindu Succession Act that once a widow succeeds to the property of her husband and acquires absolute right over the same, she would be divested of that absolute right on her re-marriage. This view of mine finds corroboration in the decision in the case of Chinnappavu Naidu v. Meenakshi Ammal, AIR 1971 Mad 453. There is also nothing in Section 24 of the Hindu Succession Act which is contrary to Section 14 of the same Act which confers absolute right to a widow on her husband's property, if she was possessed of the same at the time of his death. The disqualification of a widow to inherit as envisaged in Section 24 of the Hindu Succession Act does not apply where a widow remarries after the succession had opened. In the instant case, the succession opened immediately on the death of Ram Sahay Mahto and so his widow Most. Jogni acquired absolute interest over the property of her husband. She could not be divested of this interest by her subsequent remarriage.

Section 2 of the Hindu Widows' Remarriage Act will have no application in the instant case by reason of the application of Section 4 (1) (b) of the Hindu Succession Act because the law embodied in Section 2 of the Hindu Widows' Re-marriage Act about the forfeiture of the right of the widow to hold the property of her previous husband on her subsequent remarriage is inconsistent with the provisions of law contained in Section 14 of the Hindu Succession Act conferring absolute right on a widow in respect of the property over which she is in possession at the time of the death of her husband. The full ownership conferred on a Hindu widow under Section 14 of the Hindu Succession Act cannot be divested by her subsequent re-marriage. Although not exactly on the same point but the principle of law enunciated by their Lordships of the Supreme Court in

the case of Punithavalli Ammal v. Minor Ramalingam, AIR 1970 SC 1730 may also be usefully applied to the instant case. It was held in the aforesaid case that the estate taken by a Hindu widow under Section 14 (1) of the Hindu Succession Act is an absolute one and not defeasible by the subsequent adoption made by her to her deceased husband after the Act has come into force.

16. I am in entire agreement with my learned Brother Mukharji, J. that Section 2 of the Hindu Widows' Re-marriage Act is inconsistent with Section 14 of the Hindu Succession Act, and, therefore, in cases, where a Hindu widow gets absolute right by inrcritanee in her husband's property, she cannot be divested of that right by virtue of Section 2 of the Hindu Widows' Re-marriage Act. In my opinion, Section 2 aforesaid merely divests a Hindu widow on re-marriage of limited interest held by her. It has been expressly so stated with regard to her husband's property coming to her by virtue of any Will or testamentary disposition. If the interest conferred upon her in her husband's property by virtue of will or testamentary disposition is not limited but absolute, the section has got no application. It appears that the section has also got no application where she gets her deceased husband's property by virtue of a non-testamentary disposition. Rights and interest acquired by her in her husband's property by inheritance, to her husband or to his lineal successors were limited interest before the passing of the Hindu Succession Act.

Rights and interest acquired by her in her deceased husband's property by way of maintenance except by a grant conferring upon her absolute right were also a limited interest. In view of the fact that the section was not made applicable to her deceased husband's property coming through non-testamentary disposition, it is doubtful whether the properly given to her by way of maintenance by a grant conferring absolute right on her could be divested on her remarriage. For the purpose of decision of the appeal, that point need not be examined in any further detail and, be that as it may, ordinarily Section 2 of the Hindu Widows' Remarriage Act was not intended to apply to cases where a widow acquired an absolute interest in her deceased husband's property.

17. After the passing of the Hindu Succession Act, by virtue of Section 14 of that Act, a widow gets an absolute interest in her deceased husband's property possessed by her. If Section 2 of the Hindu Widows' Re-marriage Act was to apply to cases where a Hindu widow has got an absolute interest in her deceased husband's property, that will be inconsistent with the provisions of the Hindu Succession Act and, therefore, invalid to the extent of inconsistency by virtue of the provisions of Section 4 (l) (b) of the Hindu Succession Act. Learned Counsel for the appellant placed reliance on Section 15 of the Hindu Succession Act, according to which, in absence of the heirs expressly mentioned in Clause (a) of Sub-section (11. the property inherited by a female Hindu from her father or mother was on her dying intestate to devolve on the heirs of her father while the property inherited by a female Hindu from her husband was to devolve upon the heirs of the husband. According to him, this showed that the intention of the makers of the Hindu Succession Act was that the property in the hands of a Hindu female should not go out of the hands of the branch to which it originally belonged. Section 15 applies only to cases where a female Hindu dies intestate.

It implicdly shows that she has been given full power in respect of the property possessed by her, be that of her father or mother or of her husband, to give it to any one she likes by a testamentary or non-testamentary disposition. It cannot, therefore, be said that the framers of

the Hindu Succession Act intended to divest a Hindu female of absolute right acquired by her in case of re-marriage or any other contingency. Section 23 of the Hindu Succession Act imposes some restriction on the power of a Hindu widow in respect of dwelling houses. Section 24 debars the widow of a pre-deceased son, widow of a pre-deceased son of a pre-deceased son or the widow of a brother from succession to the property of a Hindu dying intestate as such widow, If on the date the succession opens, she has re-married. Had the framers of the Act intended to divest a Hindu widow of the property inherited by her and possessed by her on ground of re-marriage, they would have made specific provisions for that in the Act itself. Sections 25 and 26 of the said Act also make provisions which are applicable to both males and females debarring them from succession or inheritance in certain cases and, thereafter, comes Section 28 which says that no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity or save as provided in the Act on any other ground whatsoever.

In my opinion, therefore, it is manifest from the provisions of the Act that the framers thereof never intended to divest a Hindu Widow of her interest in her deceased husband's property on the ground of remarriage and Section 2 of the Hindu Widows" Re-marriage Act is inconsistent with the provisions of the Act. This view is directly supported by a Bench decision of the Madras High Court in ATR 1971 Mad 433 and impliedly supported by the decision of the Supreme Court in AIR 1970 SC 1730 wherein it has been held that the estate taken by a Hindu widow under Section 14 (1) of the Hindu Succession Act is not defeasible by the subsequent adoption made by her to her deceased husband. My learned Brother Mukherji, J., has already referred to these two decisions and T need not refer to them in any further detail."

25. In the case of ***Vaddeboyina Tulasamma and ors. Vrs. Vaddeboyina Sesha Reddi (dead) by LRs.,*** reported in ***AIR 1977 SC 1844,*** their lordships have held that sub-section (1) of section 14 is large in its amplitude and covers every kind of acquisition of property by a female Hindu including acquisition in lieu of maintenance and where such property was possessed by her at the date of commencement of the Act or was 'subsequently acquired and possessed, she would become the full owner of the property. Their lordships have held as under:

"3. Since the determination of the question in the appeal turns on the true interpretation to be placed on sub-section (2) read in the context of sub-section (1) of section 14 of the Hindu Succession Act, 1956, it would be convenient at this stage to set out both the sub-sections of that section which read as follows:

"14(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.---In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner what- ever, and also any such property held by her as stridharas immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the

gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

Prior to the enactment of section 14, the Hindu law, as it was then in operation, restricted the nature of the interest of a Hindu female in property acquired by her and even as regards the nature of this restricted interest, there was great diversity of doctrine on the subject. The Legislature, by enacting sub-section (1) of section 14, intended, as pointed by this Court in S.S. Munna Lal v.S.S. Raikumar(1) "to convert the interest which a Hindu female has in property, however, restricted the nature of that interest under the Sastric Hindu law may be, into absolute estate". This Court pointed out that the Hindu Succession Act, 1956 is a codifying enactment and has made far-reaching changes in the structure of the Hindu law of inheritance, and succession. The Act confers upon Hindu females full rights of inheritance and sweeps away the traditional limitations on her powers of disposition which were regarded under the Hindu law as inherent in her estate". Sub-section (1) of section 14, is wide in its scope and ambit and uses language of great amplitude. It says that any property possessed by a female Hindu,. whether acquired before or after the commencement of the Act, shall be held by her as full owner thereof and not as a limited owner. The words "any property" are, even without any amplification, large enough to cover any and every kind of property, but in order to expand the reach and ambit of the section and make it all-comprehensive, the Legislature has enacted an explanation which says that property would include "both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatever, and also any such property held by her as stridhana immediately before the commencement" of the Act. Whatever be the kind of property, movable or immovable, and whichever be the mode of acquisition, it would be covered by subsection (1) of section 14, the object of the Legislature being to wipe out the disabilities from which a Hindu female suffered in regard to ownership of property under the old Sastric law, to abridge the stringent provisions against proprietary rights which were often regarded as evidence of her perpetual tutelege and to recongnize her status as an independent and absolute owner of property. This Court has also in a series of decisions given a most expansive interpretation to the language of sub-section (1) of section 14 with a view to advancing the social purpose of the legislation and as part of that process, construed the words 'possessed of' also in a broad sense and in their widest connotation. It was pointed out by this Court in Gummalepura Taggina Matada Kotturuswami v. Setra Veeravva(1) that the words 'possessed of mean "the state of owning or having in one's hand or power". It need not be actual or physical possession or personal occupation of the property by the Hindu female, but may be possession in law. It may be actual or constructive or in any form recognized by law. Elaborating the concept, this Court pointed out in Mangal Singh v. Rattno(2) that the section covers all cases of property owned by a female Hindu al- though she may not be in actual, physical or constructive possession of the property, provided of course, that she has not parted with her rights and is capable of obtaining possession of the property. It will, therefore, be seen that sub-section (1) of section 14 is large in its amplitude and covers every kind of acquisition of property by a female Hindu including acquisition in lieu of maintenance and where such property was possessed by her at the date of commencement of the Act or was 'subsequently acquired and possessed, she would become the full owner of the property.

4. Now, sub-section (2) of section 14 provides that nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property. This provi sion is more in the nature of a proviso or exception to sub-section (1) and it was regarded as such by this Court inBadri Pershad v. Smt. Kanso Devi(1). It excepts certain kinds of acquisition of property by a Hindu female from the operation of sub-section (1) and being in the nature of an exception to a provision which is calculated to achieve a social purpose by bringing about change in the social and economic position of women in Hindu society, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-section (1). It cannot be interpreted in a manner which would rob sub-section (1) of its efficacy and deprive a Hindu female of the protection sought to be given to her by sub-section (1). The language of sub-section (2) is apparently wide to include acquisition of property by a Hindu female under an instrument or a decree or order or award where the instrument, decree, order or award pre- scribes a restricted estate for her in the property and this would apparently cover a case where property is given to a Hindu female at a partition or m lieu of maintenance and the instrument, decree, order or award giving such property prescribes limited interest for her in the property. But that would virtually emasculate sub-section (1), for in that event, a large number of cases where property is given to a Hindu female at a partition or in lieu of maintenance under an instrument, order or award would be excluded from the operation of the beneficent provision enacted in sub-section (1), since in ,most of such cases, where property is allotted to the Hindu female prior to the enactment of the Act, there would be a provision, in consonance with the old Sastric law then prevailing, prescribing limit- ed interest in the property and where property is given to the Hindu female subsequent to the enactment of the Act, it would be the easiest thing for the dominant male to provide that the Hindu female shall have only a restricted interest in the property and thus make a mockery of sub-section (1). The Explanation to sub-section (1) which includes within the scope of that sub-section property acquired by a female Hindu at a partition or in lieu of maintenance would also be rendered meaningless, because there would hardly be a few cases where the instrument, decree, order or award giving property to a Hindu female at a partition or in lieu of maintenance would not contain a provision prescribing re- stricted estate in the property. The social purpose of the law would be frustrated and the reformist zeal underlying the statutory provision would be chilled. That surely could never have been the intention of the Legislature in enacting sub-section (2). It is an elementary rule of construction that no provision of a statute should be construed in isolation but it should be construed with reference to the con- text and in the light of other provisions of the statute so as, as far as possible, to make a consistent enactment of the whole statute. Sub-section (2) must, therefore, be read in the context of sub-section (1) so as to leave as large a scope for operation as possible to sub-section (1) and so read, it must be confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right, under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property. This constructional approach finds support in the decision in Badri Prasad's case (supra) where this Court observed that sub-section (2) "can come into operation only if acquisition in any of the methods enacted therein is made for the first time without there being any pre-existing right in the female Hindu who is in possession of the

property". It' may also be noted that when the Hindu Succession Bill 1954, which ultimately culminated into the Act, was referred to a Joint Committee of the Rajya Sabha, clause 15(2) of the Draft Bill, corresponding to the present sub- section (2) of section 14, referred only to acquisition of property by a Hindu female under gift or will and it was subsequently that the other modes of acquisition were added so as to include acquisition of property under an instrument, decree, order or award. This circumstance would also seem to indicate that the legislative intendment was that sub-section (2) should be applicable only to cases where acquisition of property is made by a Hindu female for the first time without any pre-existing right-a kind of acquisition akin to one under gift or will. Where, however, property is acquired by a Hindu female at a partition or in lieu of right of maintenance, it is in virtue of a pre-existing right and such an acquisition would not be within the scope and ambit of sub-section (2), even if the instrument, de cree, order or award allotting the property prescribes a restricted estate in the property.

8. In the circumstances, we reach the conclusion that since in the present case the properties in question were acquired by the appellant under the compromise in lieu or satisfaction of her right of maintenance, it is sub-section (1) and not sub-section (2) of section 14 which would be applicable and hence the appellant must be deemed to have become full owner of the properties notwithstanding that the compromise prescribed a limited interest for her in his properties. We accordingly allow the appeal, set aside the judgment and decree of the High Court and restore that of the District Judge, Nellore. The result is that the suit will stand dismissed but with no order as to costs."

26. In the case of ***Sulochana Dei vrs. Khali Dei and ors.,*** reported in ***AIR 1987 Orissa 11,*** the Division Bench has held that when the death of the husband took place in 1954 and the property had devolved upon the wife and wife remarriages in 1958, the wife would be exclusive owner of property devolved on her. It has been held as under:

"10. We find that the trial Court has correctly concluded that the respondent 1 had acquired exclusive title over the 'A' schedule properties on the coming into force of the Act, had remarried the respondent 1(a) in May, 1958 and had, for legal necessity and consideration, sold schedule 'A' properties in favour of the respondent 2 for Rs. 2,000/-. In an affirming judgment, we do not feel ourselves called upon to re-state and reiterate the reasons given by the Trial Court in support of these conclusions as it was not necessary to do so. (See AIR 1967 SC 1124 Girijanandini Devi v. Bijendra Narayan Choudhury)."

27. In the case of ***Velamuri Venkata Sivaprasad vrs. Kothuri Venkateshwarlu,*** reported in ***AIR 2000 SC 434,*** their lordships of the Hon'ble Supreme Court have held that The Hindu Widow's Re-marriage Act of 1856 has its full play on the date of re-marriage itself, as such Succession Act could not confer the widow who has already re-married, any right in terms of S. 14(1) of the Act of 1956. Their lordships have held as under:

"16. The Division Bench of the Andhra Pradesh High Court unfortunately has not been able to appreciate the admitted re-marriage of Lakshmamma in the year 1953. Re-marriage is a fact which ought to be taken note of in the matter under consideration and it is this change of status, by reason of remarriage, falls for determination in the present appeal. While there is no amount of doubt that by reason of the well settled law as laid down by this Court, to the effect that a limited right of maintenance permeated into an absolute right under Section 14 (1) of the Hindu Succession Act but would the effect be the same, in the event of there being a re-marriage of the widow prior to 1956? The Act of 1956,

incidentally is prospective in its operation and no element of retrospectivity can be attributed therein. The effect of remarriage is available in the Act of 1856. Section 2 thereof reads as below:

"2. 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 re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage 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."

48. Be that as it may the law as declared by Privy Council has been consistently followed that subsequent unchastity will not make a widow forfeit the property which she has succeeded to her husband on his death neither we express any contra view in regard thereto. In the contextual facts of the matter under consideration however, and since the factual situation of re-marriage of Lakshmamma in the year 1953, stands proved, it has to be held that Section 2 of the Hindu Widow's Re-marriage Act, 1956 gets attracted. As a result thereof, Defendant No.l's right to get maintenance from their deceased husband's property came to an end on civil death qua her ex-husband's estate latest by 1953. Hence there was no subsisting legal right of maintenance available to Defendant No.l qua her deceased husband's estate in any of his properties nor was there a subsisting limited interest of hers in any of those properties which get matured into full ownership under Section 14(1) of the Hindu Succession Act when it came into force. As such the legal situation is different in the present case and the law as laid down and as noticed above does not render any assistance to the Respondent herein. Similar is the situation in regard to another decision of the Madras High Court in the case of Chinnappavu Naidu v. Meenakshi Ammal and another, AIR (1971) Mad.453. The decision last noted dealt with the effect of Section 2 of the Hindu Widows Re-marriage Act, 1856 and the Division Bench of the Madras High Court came to a conclusion that by reason of Section 4(1)(b) of the latter Act, of the Hindu Succession Act, 1956. Section 14 prevails over Section 2 of the 1856 Act and as such re-marriage will not create any divestation. The re- marriage spoken of in the Madras High Court decision however, did take place after introduction of the Succession Act of 1956, as such this decision also does not lend any assistance to the respondent by reason of the factual differentiation in the matter presently before us."

28. However, in the instant case, the plaintiffs have not proved that immediately after the death of Jwala, Smt. Nardu remarried Kanshi Ram. There is no evidence that Nardu had remarried before coming into force of the Hindu Hindu Succession Act, 1956. PW-1 Krishan Chand, PW-2 Parwati and PW-3 Nandu Ram have though deposed that Nardu had remarried before coming into force of the Hindu Succession Act, 1956, however, the fact of the matter is that the plaintiffs have failed to prove that Nardu has contracted marriage with Kanshi Ram immediately after the death of Jiwa Nand. Rather, the evidence led by the contesting defendants is that Nardu has not remarried with Kanshi Ram till the coming into force of the Hindu Succession Act, 1956.

29. In the case of ***Cherotte Sugathan vrs. Cherotte Bharathi & ors.,*** reported in ***AIR 2008 SC 1467,*** their lordships of the Hon'ble Supreme Court have held that widow inheriting property of her husband on his death becomes its absolute owner and subsequent remarriage does not divest her of property in view of Sections 24 and 14. Their lordships have held as under:

> "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, 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 1956 Act, thus, shall prevail over the text of any Hindu Law or the provisions of 1856 Act. Section 2 of the 1856 Act would not prevail over the provisions of the 1956 Act having regard to Section 4 and 24 thereof."

30. In the case of ***Jayaram Govind Bhalerao vrs. Jaywant Balkrishna Deshmukh & ors.,*** reported in ***AIR 2008 Bombay 151,*** the learned Single Judge has held that in view of the provisions of Section 3(2) of the Hindu Women's Rights to Property Act, the widow was entitled to get same interest in joint family as was her husband had at the time of his death. The learned Single Judge has further held that since the Hindu widow in question got interest of her husband in coparcenary property 1942 as a limited estate but she became full owner of that interest in 1956 and by virtue of Section 30, she could bequeath her share or interest by executing a Will. It has been held as follows:

> "6. From the facts noted above, it is clear that the husband and brother-in-law of Sitabai were members of the Joint Hindu Family along with their father. Sitabai was married in 1938 and her husband had died in 1942 during the lifetime of his father. In 1945, his father also died and thus the Joint Family property of the coparcener was in the hands of Balkrishna. There is no dispute that the coparcenery had joint family property shown in Schedules "A", "B" and "C" in the plaint. Admittedly, under the old Mitakshara Hindu Law, on death of the father and brother, when there was no other male member in the family except Balkrishna, he alone would get whole of the property by survivorship and the female members would be entitled only to maintenance from that property. However, a drastic change was brought in the law by Hindu Women's Rights to Property Act, 1937 (hereinafter referred to as "the said Act"). Under Section 3(2) of the said Act, when a Hindu governed by any school of Hindu Law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu Joint Family property, his widow shall, subject to the provisions of Sub-section (3) have in the property same interest as he himself had. Sub-section (3) only declares that the Hindu widow would get only a limited interest known as a Hindu woman's estate, provided however that she shall have the right of claiming partition as a male owner. It means she could claim partition, get possession and enjoy the property, but she could not dispose of the property except in special circumstances. In 1942, when Narayan, husband of Sitabai died, he had an interest in the Joint Hindu Family property and admittedly the properties were governed by Mitakshara School of Hindu Law as applicable in Maharashtra. In view of the provisions of Sub-section 3(2) of the said Act, Sitabai would get the same interest in the Joint Hindu Family property as her husband had at the time of her death, but that interest was a limited interest. As the partition did not take place, after death of her husband or after the death of father-in-law, the joint family and the joint family property continued till Hindu Succession Act, 1956 was enacted.
>
> 7. Section 14 of the Hindu Succession Act, 1956 reads as under:
>
> 14. Property of a female Hindu to be her absolute property -(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. Explanation - In this sub-section, 'property'

includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in Sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

From this it is clear that any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner and not as a limited owner. The preamble of this Act clearly shows that the Hindu Succession Act was enacted to amend and codify the law relating to inteste. Thus, Section 14 amended the Hindu Law in relation to the intestate succession in respect of female Hindus. Thus, what Sitabai had received as the limited estate on death of her husband in 1942 by virtue of Section 3(2) of the said Act, she became full owner of the same by virtue of Section 14(1) of the Hindu Succession Act, 1956. Admittedly, in view of this legal provision, her suit for partition and separate possession was decreed in respect of the property shown in Schedules "B" and "C". She was required to prefer an appeal only in respect of the properties mentioned in Schedule "A" about which the suit was dismissed on the ground that the property was not possessed by the family and it was already acquired by the Government. It is not necessary to enter into the merits of that appeal. Possibly, she would get share in the compensation received from the Government in the same ratio in which she had share in the joint family property.

8. According to the appellant, Sitabai had executed a Will bequeathing her property to him. After her death, on the basis of that Will, the appellant had made an application before the appellate Court to implead him or to bring him on record as legal heir of the appellant -Sitabai. That appeal came to be rejected by the learned appellate Court relying on M.N. Aryamurthi (supra) and Addagada Raghavamma and other (supra) in which it was held that a Hindu cannot bequeath his share or interest in the joint family property by executing a Will. Mr. Walawalkar, learned Senior Counsel for the appellant pointed out that if these two judgments are carefully read, it would become clear that in both these matters, interest in the Joint Hindu Family property was sought to be bequeathed by executing a Will prior to the enactment of the Hindu Succession Act, 1956. He rightly pointed out that Section 30 of the Hindu Succession Act has made important departure from the legal position as it prevailed prior to the enactment of the Hindu Succession Act, 1956. Section 30 of the said Act reads as follows:

30. Testamentary succession - Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.

Explanation - The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhiillom, kutumba or kavaru shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section.

It will be useful to quote following observations from Mulla on Hindu Law 17th Edition, Vol. II page 374, in respect of the effect of Section 30:

According to Mitakshara law, no coparcener, not even a father, can dispose of by will his undivided coparcenary interest even if the other coparceners consent to the disposition, the reason being that at the moment of the death the right of survivorship (of the other coparceners) is in conflict with the right by device. Then the title by survivorship, being the prior title, take precedence to the exclusion of that by device. That rule of Mitakshara law is now abrogated by the Explanation which lays down in explicit terms that such interest is to be deemed to be property capable of being disposed of by will notwithstanding anything contained in any provision of the Act or any other law for the time being in force....

Prior to the coming into force of this Act neither under Mitakshara nor under Dayabhaga law could a widow or other limited female heir in any case dispose of by will any property inherited by her or any portion thereof, whether the property was movable or immovable. The effect of Section 14 of this act inter alia is to abrogate that traditional limitation. She is now full owner of all property howsoever acquired and held by her and can dispose of it by will....

From this, it is clear that inspite of the restrictions on the disposition of undivided coparcenary interest by coparcener or by a widow by will under the Mitakshra School of law, in view of the drastic change brought in by Section 30 and particularly Explanation to Section 30 of the Hindu Succession Act, the interest of a male Hindu in a Mitakshara coparcenary property shall be deemed to be property capable of being disposed of by a male or female within the meaning of this Section.

9. As pointed out earlier, Sitabai got interest of her husband in the coparcenary property in 1942 as a limited estate but she became full owner of that interest in 1956 and by virtue of Section 30, she could bequeath her share or interest by executing a will. It appears that this legal position was not brought to the notice of the learned appellate Court and the learned appellate Court rejected the application of the applicant holding that Sitabai could not bequeath her interest in the joint family property by a will in view of the above referred two authorities. As Their Lordships were concerned with the disposition of property by a Will executed prior to the enactment of the Hindu Succession Act, 1956 those authorities could not have been made applicable to the facts of the present case. I find support to this view from Gopal Singh and Anr. v. Dile Ram (Dead by Lrs. and Ors. wherein the Supreme Court held that the effect of the Hindu Succession Act, 1956 was that a female can transfer her property by will and since that case was subsequent to 1956, she had absolute estate and full capacity to make the Will. This legal position was also followed in several authorities by the Supreme Court, including Pavitri Devi v. Darbari Singh."

31. In the present case, Smt. Nardu executed Will in favour of defendants No. 1 & 2. The Will has been duly proved by defendants by producing marginal witnesses. The marginal witnesses have deposed that they have signed the Will as marginal witnesses on the Will and Smt. Nardu had also put her thumb impression on the same.

32. The learned Single Judge in the case of ***Baliram Atmaram Dhake vrs. Rahubai alias Saraswatibai,*** reported in ***AIR 2009 Bombay 57,*** have held that the widow inherits the property of her husband becomes absolute owner and her remarriage would not divest her of the property. It has been held as follows:

"10. The fact that in the year 1962 the plaintiff/respondent remarried would not divest her of her rights vested in her by virtue of Section 14 of the Hindu Succession Act, 1956. In support of this proposition the learned advocate for the respondent Shri Sangeet, advocate relied upon the case of Cherotte Sugathan (D) by L.Rs. and others vs Cherotte Bharathi and others [2008 AIR SCW 1525]. Their Lordships of the Supreme Court clearly laid down that widow inheriting property of her husband on his death would become absolute owner and subsequent remarriage would not divest her of property in view of Sections 24 and 14 of the Hindu Succession Act, 1956. It is also observed that Hindu Succession Act, 1956 overrides provisions of Hindu Widow's Remarriage Act, 1856."

33. Mr. Bhupinder Gupta, learned Sr. Advocate, has also argued that the long cohabitation of Smt. Nardu with Kanshi Ram would prove their marriage. However, in the instant case, no cogent evidence, whatsoever, has been led that immediately after the death of Jwala, Nardu had started living with Kanshi Ram. Kanshi Ram was already married to Kamla. The predecessor of the plaintiffs has not raised any objection at the time of attestation of the mutation in favour of widow Nardu Devi. The Courts below have correctly applied Section 14(1) of the Act to come to the conclusion that the widow Nardu Devi has acquired full right in the property after coming into force of the Hindu Succession Act, 1956. The substantial questions of law are answered accordingly.

34. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Sanjay Madan and another. ...Appellants.

Versus

National Insurance Company. ...Respondent.

Arb. Appeal No. 14 of 2010
Reserved on : 11.12.2014
Decided on: 29.12.2014

Arbitration and Conciliation Act, 1940- Section 39- House of the applicant was gutted in fire- he preferred a claim of Rs. 36 lacs before the Insurance Company- Surveyor assessed the loss as Rs. 26,09,668/- which was paid- the applicant demanded the remaining amount, which was not paid on which Arbitrators were appointed by the parties- Arbitrators passed separate awards and matter was referred to Umpire who allowed the claim and awarded the amount- objections were preferred under Section 34 of Arbitration and Conciliation Act which were dismissed as not maintainable holding that matter was covered by Arbitration Act, 1940- Arbitrator filed award in the Court on which notices were issued- Insurance Company preferred objections which were allowed and the award was set aside- held, that it was not stated in the notice that the appellant was coerced to give the receipt- appellant is a graduate and his plea that he had signed the blank papers was not acceptable- merely writing "WP" would not entitle the appellant to re-agitate the claim - when it was specifically written in the receipt that money was received in full and final settlement of the claim, there was no justification for invoking arbitration clause. (Para-10 to 22)

Cases referred:
State of Maharashtra vs. Nav Bharat Builders, 1994 Supp (3) SCC 83
M/s. P.K. Ramaih and Company vs. Chairman and Managing Director, National Thermal Power Corporation, 1994 Supp (3) SCC 126
Nathani Steels Ltd. vs. Associated Constructions, 1995 Supp (3) SCC 324
United India Insurance vs. Ajmer Singh Cotton and General Mills and others, (1999) 6 SCC 400
National Insurance Company Limited vs. Sehtia Shoes, (2008) 5 SCC 400
Union of India and others vs. Hari Singh, 2010 (10) Scale 205
Delhi High Court in M/s Vaish Brothers and Co. vs. Union of India and another, AIR 1999 Delhi 105
National Insurance Co. Ltd. vs. M/s Boghara Polyfab Pvt. Limited, AIR 2009 SC 170

For the Appellants : Mr. K.D. Sood, Sr. Advocate with
Mr. Naresh K. Sharma, Advocate.
For the Respondent: Mr. Ashwani K. Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted under section 39 of the Arbitration Act, 1940 against the judgment dated 15.9.2010 passed by learned Single Judge in Arbitration case No. 16 of 2006.

2. "Key facts" necessary for the adjudication of this petition are that on the night of 21.2.1992, when the Insurance Policy was in operation, a fire broke out in the insured house of the appellants. The house was gutted into fire completely alongwith fittings, fixtures etc. A claim of Rs. 36,00,000/- was preferred against the respondent-Insurance Company. Surveyor was deputed by the Insurance Company. Surveyor assessed the claim at Rs. 26,09,668/- vide his report 18.8.1992. Appellants were paid a sum of Rs. 10,00,000/- on 18.2.1993 against receipt and another sum of Rs. 16,09,668/- vide receipt dated 23.8.1993. The appellants served a notice dated 5.9.1993 Ex. CR-1 upon the Insurance Company claiming a sum of Rs. 9,30,332/- as balance amount of the insurance claim. The appellants invoked arbitration clause and two arbitrators, i.e. one by the claimants and one by the Insurance Company were appointed. Appellants appointed Sh. R.L. Sood, as Arbitrator while Insurance Company appointed Maharaj Bakhash Singh. Sh. Maharaj Bakhash Singh gave his separate award on 24.7.2003. Thereafter, Sh. R.L. Sood gave his award on 28.4.2004. Sh. Maharaj Bakhash Singh did not award any amount to the appellants. Sh. R.L. Sood awarded a sum of Rs. 9,30,332/-, i.e. the difference of the claim made by the claimants, soon after the occurrence of incident of fire and the amount paid by the Insurance Company on the basis of Surveyor's report. Since the Arbitrators did not agree, the matter was referred to the Umpire. The Umpire vide award dated 12.12.2004 has agreed with the award of Sh. R.L. Sood and awarded the amount together with interest and costs as awarded by Sh. R.L. Sood.

3. Objection petition under section 34 of the Arbitration and Conciliation Act, 1996 was filed by the Insurance Company. The Court rejected the objections vide order dated 23.12.2005 holding that objections under section 34 of the Arbitration and Conciliation Act, 1996 were not maintainable as the provisions of the old Act, i.e. Arbitration Act, 1940, were applicable to the case.

4. Sh. R.L. Sood, being one of the Arbitrators, filed award in the Court under section 14 of the Arbitration Act, 1940. Notices were issued to both the parties by the Court. The appellants applied for making the award of the

Umpire Rule of Court while Insurance Company filed objections. Learned Single Judge framed the following issues:

1. "Whether the Arbitrators and Umpire were entitled to file separate award as alleged, if so its effect? O.P.O.

2. Whether the Arbitrators have not filed the awards as per section 42 of the Arbitration Act, if so its effect? O.P.O.

3. Whether the award of the Arbitrator was filed beyond time as alleged, if so its effect? O.P.O.

4. Whether the objections have not been filed in time, if so its effect? OPR.

5. Whether the Arbitrator travelled beyond the scope as alleged, if so its effect? OPO

6. Whether the matter has been referred to the Arbitrator wrongly and has no jurisdiction to decide the same as alleged? OPO

7. Relief."

5. Learned Single Judge accepted the objections filed by the Insurance Company and the award was set aside. It is in these circumstances the present appeal has been preferred under section 39 of the Arbitration Act, 1940 against the judgment dated 15.9.2010.

6. According to Mr. K.D. Sood, learned Senior Advocate, learned Single Judge has misread and drawn a wrong inference from the facts proved on record. He has also contended that the findings of the learned Single Judge that there was no plea of coercion, fraud or misrepresentation, are contrary to record. According to him, the amount has been claimed specifically without prejudice and "WP" was written as the Insurance Company was not paying and releasing the amount.

7. Mr. Ashwani K. Sharma has supported the judgment dated 15.9.2010.

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

9. What emerges from the facts enumerated hereinabove is that the fire had taken place on the night of 21.2.1992. The ensured house was gutted into fire. Claim of Rs. 36,00,000/- was preferred. Surveyor submitted his report on 18.8.1993. He assessed the claim of Rs. 26,09,668/-. The appellants were paid Rs. 16,09,668/- vide receipt Ex.PW-4/C and another sum of Rs. 10,00,000/- on 18.2.1993 against receipt Ex.PW-4/D. It is evident from the contents of receipt Ex.PW-4/C that the amount has been received as full and final settlement of the claim arising from incident of fire which took place on 21.2.1992.

10. We have gone through the notice dated 5.9.1993 Ex.CR-1 which is at page 289, volume-III of the paper book. It is though mentioned in the notice that the amount of compensation has been received by the appellants without prejudice to their rights and under protest, however, it is not stated in the notice Ex.CR-1 that the appellants were coerced to give the receipt, i.e. Ex.PW-4/C. We have also gone through notice Ex.CR-2 dated 5.9.1993 whereby a request was made for the appointment of Arbitrator. In this notice also there is no mention of the coercion or undue influence or fraud or misrepresentation by the Insurance Company in obtaining receipt Ex.PW-4/C. We have also gone through the statement of claim filed before the Arbitrators dated 14.2.1993 and the written statement filed by the Insurance Company dated 24.2.1994. There is

no allegation in the claim petition that the Insurance Company has exercised undue influence, coercion, fraud or misrepresentation at the time of issuance of receipt Ex.PW-4/C.

11. Mr. K.D. Sood, learned Senior Advocate has drawn the attention of the Court to Ex.AW-4/A in order to prove that the Insurance Company has exercised undue influence, coercion, fraud and misrepresentation. Affidavit filed by AW-4 Sanjay Kumar is at page 86, Volume-II of the paper book. There is no averment in the affidavit that the Insurance Company has exercised undue influence while obtaining receipt Ex.PW-4/C. While appearing as DW-4 Sanjay Kumar has specifically deposed that his affidavit may be read in examination-in-chief, which is at page 116, Volume-II of the paper book. He has admitted in his cross-examination that after receipt of second payment of Rs. 16,09,668/-, they did not lodge any written protest with the Insurance Company/higher authorities regarding the compensation paid to them nor they contacted them. He has also admitted categorically that at the time of issuance of receipt they were not threatened. Volunteered that they were told that they be only made the payment if the form Ex.PW-4/B is signed by them. He has never refused to accept the payment. According to him, he has signed blank papers. His qualification was B.Com and he knew the consequences of signing the blank papers. He has also admitted that it was not pleaded in the claim petition that form Ex.PW-4/B was got signed from them. As noticed hereinabove, no objection has been taken in Ex.CR-1 and Ex. CR-2 in the claim petition and also in the affidavit filed with the claim petition. Appellant Sanjay Madan is B.Com graduate. It is not expected that a graduate person would sign the blank papers. He has admitted that he was not threatened at the time of receipt of payment nor they have lodged complaint with the higher authorities. Thus, the learned Single Judge has rightly come to the conclusion that Ex.PW-4/C was not the outcome of coercion, fraud and misrepresentation. Appellant Sanjay Madan has not uttered even a single word that Ex.PW-4/C was the outcome of coercion while appearing as AW-4. We have also noticed that as per Ex.PW-4/C, the money has been received by the appellants as full and final settlement of their claim arising out of fire incident dated 21.2.1992. Thus, they have been given complete discharge to the respondent Insurance Company in regard to liability of insurance policy. Once the Insurance Company has given complete discharge, as noticed by the learned Single Judge as per receipt Ex.PW-4/C, there was no dispute subsisting which was required to be referred to the Arbitrator under the insurance policy. The learned Single Judge has correctly appreciated the oral as well as documentary evidence and has come to a right conclusion that the Arbitrator has come to a wrong conclusion that receipt Ex.PW-4/C was the result of coercion.

12. Mr. K. D. Sood, learned Senior Advocate has vehemently argued that the claimants have received the payment under protest as per receipt Ex.PW-4/C. Merely writing words “WP” would not entitle the appellants to re-agitate the claim when they had executed Ex.PW-4/C in which it is clearly and specifically written that the money has been received as full and final settlement of their claim arising out of the incident under insurance policy.

13. Their Lordships of the Hon’ble Supreme Court in ***State of Maharashtra*** vs. ***Nav Bharat Builders***, 1994 Supp (3) SCC 83 have held that when the contractor acknowledged the receipt of the amount paid to him and stated that he was unconditionally withdrawing his claim in the suit in respect of labour escalation, there was full and final settlement of the claim and thereby there was no arbitral dispute in respect of labour escalation. Their Lordships have held as under:

> **“4. It is seen that as regards the escalation of labour claims are concerned, the report of the sub-committee constituted by the government expressly mentioned in paragraph 8 thus:**

"This decision is also subject to the following conditions:

(I) The contractor shall furnish to government a letter of acceptance in the prescribed form to the effect that the contractor agrees to accept the amount offered to him in full and final settlement of the said claim and by way of mutual arrangement between the contractor and government on the terms and conditions herein contained.

(II) The letter of acceptance shall form part and shall always be deemed to have formed part of the contract.

(III) Irrespective of the fact whether the contractor accepts this offer of government or not, in no event the contractor, shall be entitled to claim or take a plea in any dispute that the contractor may raise before the arbitrator, court or any authority in respect of the said claim to the effect that the sum offered by the government under this letter is the one agreed to be paid by the government to the contractor or to treat that sum as basis for adjudicating the claim by the said arbitrator, court or authority.

(IV) The offer shall be open for acceptance by the contractor till 10/3/1989. If the contractor fails to communicate acceptance or rejection of offer by him in writing to the secretary (I) I.D., Government of Maharashtra on or before 10/3/1989 then the same shall automatically lapse on the aforesaid date and shall not be binding on Government vis-a-vis the contractor thereafter.

(V) The final amount to be paid to the contractor shall be arrived at only after actual calculations to be made on the basis of the principles enunciated in para 7 above. The amount that would be payable to the contractor in future shall also be regulated accordingly.

(9) You are requested to consider the offer and communicate your decision regarding acceptance or otherwise of the offer to the secretary (1 Irrigation Department, government of Maharashtra on or before the aforesaid date in the prescribed form annexed hereto. As soon as your acceptance letter is received by government, payment will be made after calculation of the actual amount of claim as aforesaid."

Pursuant thereto in paragraph 9, when an option was given to the respondent to consider the offer and communicate his decision regarding acceptance or otherwise of the offer, in his letter dated 3/3/1989, he specifically stated that:

"I agree to receive such amount for the price escalation on account of labour component as would be worked out on the principles as offered under the aforesaid government letter as and by way of full and final settlement of my claim submitted by me under my letter No. NBB/Dimbhe/1013/322/864, dated 18/9/1986 for the payment of the price escalation towards the labour component based on minimum wages. I further agree to accept the payment as decided by government till completion of the work."

Thereafter the amount was paid and he acknowledged the receipt of the amount and also stated as earlier that unconditionally he was withdrawing his claim in the suit in

respect of labour escalation. Thus we hold that there is full and final settlement of the claim and the respondent has accepted the accord and satisfaction, thereby there is no arbitrable dispute in respect of labour escalation.

6. Shri Madhava Reddy, learned Senior Counsel for the appellant contended that in view of the letter dated 3/3/1989 the respondent had accepted to withdraw the entire claim in respect of Item 1 and that therefore there is no arbitrable dispute in that behalf. We find no substance in the contention. In all the letters the respondent had specifically referred at various stages that his acceptance was only in respect of labour escalation. Therefore, any other claims which the respondent made in the suit, the court is to consider whether arbitrable disputes arose under the contract for reference to arbitration and if so whether the respondent is entitled to any amount so claimed. These are the matters to be gone into. Accordingly, the appeal is allowed in part as stated earlier, but in the circumstances, the parties are directed to bear their own costs."

14. Their Lordships of the Hon'ble Supreme Court in ***M/s. P.K. Ramaih and Company*** vs. ***Chairman and Managing Director, National Thermal Power Corporation***, 1994 Supp (3) SCC 126 have held that when there is voluntary and unconditional written acceptance of payment in full and final settlement of the contract, subsequent claim for further amounts in respect of the same work is not arbitrable dispute. Their Lordships have held as under:

"6. The reading of the above arbitration clause would clearly establish that all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claims, right, matter or things whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the General Manager of the N.T.P.C. Ltd. On his inability or unwillingness, another arbitrator appointed by C.M.D. alone has to arbitrate the dispute. Thus it is clear that if there is an arbitrable dispute, it shall be referred to the named arbitrator. But there must exist a subsisting dispute. Admittedly the appellant acknowledged in writing accepting the correctness of the measurements as well as the final settlement and received the amount. Thereafter no arbitrable dispute arises for reference.

8. On those facts, this court held that although there was alleged payment as final satisfaction of the contract, yet as the respondent did not give any receipt accepting the settlement of the claim, the payment was unilateral, so the dispute still subsisted and therefore it was arbitrable dispute and the reference was valid. In Bhan Prakash case also there was no full and final settlement and payment was not received under a receipt. In L.K. Ahuja & Co. case this court while laying the general law held that if the bill was prepared by the department, the claim gets weakened. That was not a case of accord and satisfaction but one of pleading bar of limitation without prior rejection of the claim. Therefore, the ratio therein is of little assistance. The Calcutta High court merely followed the statement of law laid in Ahuja & Co. case .It is not shown to us that the Chief Construction Manager was competent to acknowledge the liability or an authority to refer the dispute for

arbitration. So neither his letter binds the respondent nor operates as an estoppel. Admittedly the full and final satisfaction was acknowledged by a receipt in writing and the amount was received unconditionally. Thus there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an afterthought and a devise to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given. In Russell on Arbitration, 19th Edn., p. 396 it is stated that "an accord and satisfaction may be pleaded in an action on award and will constitute a good defence". Accordingly, we hold that the appellant having acknowledged the settlement and also accepted measurements and having received the amount in full and final settlement of the claim, there is accord and satisfaction. There is no existing arbitrable dispute for reference to the arbitration. The High court is, therefore, right in its finding in this behalf. The appeals are dismissed but in the circumstances without costs."

15. Their Lordships of the Hon'ble Supreme Court in ***Nathani Steels Ltd.*** vs. ***Associated Constructions***, 1995 Supp (3) SCC 324 have again reiterated that once there is a full and final settlement in respect of any particular dispute or difference in relation to a matter covered under the arbitration clause in the contract and that dispute or difference is finally settled by and between the parties, such a dispute or difference does not remain to be an arbitrable dispute and the arbitration clause cannot be invoked even though for certain other matters, the contract may be in subsistence. Their Lordships have held as under:

"3 .The appellant has invited our attention to two decisions of this court. The first dated 1/10/1993 in P.K. Ramaiah and Co. v. Chairman & Managing Director, National Thermal Power Corpn and second, dated 4/2/1994 in State of Maharashtra v. Nav Bharat Builders'. In the first mentioned case the parties had resolved their disputes and differences by a settlement pursuant whereto the payment was agreed and accepted in full and final settlement of the contract. Thereafter, brushing aside that settlement the Arbitration clause was sought to be invoked and this court held that under the said clause certain matters mentioned therein could be settled through Arbitration but once those were settled amicably by and between the parties and there was full and final payment as per the settlement, there existed no arbitrable dispute whatsoever and, therefore, it was not open to invoke the Arbitration clause. In the second mentioned case the respondent-contractor acknowledged the receipt of the amount paid to him and stated that there was unconditional withdrawal of his claim in the suit in respect of the labour escalation. There was, thus, full and final settlement of the claim and it was contended that no arbitrable dispute survived in relation thereto. Other claims, if any, and which were not settled by and between the parties could be raised and it would be open to consider whether the arbitrable dispute arose under the contract necessitating reference to arbitration. Dealing with this question also this court after referring to the decision in P.K. Ramaiah case concluded that in relation to the claim under the head 'labour escalation' there did not remain any arbitrable dispute which could be referred to arbitration. It would thus be seen that once there is a full and final settlement in respect of any particular dispute or difference in relation to a matter covered under the Arbitration clause in the contract and that dispute or difference is finally settled by and between the parties, such a dispute or difference does not remain to be an arbitrable dispute and the Arbitration clause cannot be invoked even though for certain other matters, the

contract may be in subsistence. Learned counsel for the respondent, however, placed great emphasis on an earlier decision of this court in Damodar Valley Corpn. v. K.K. Kar and in particular to the observations made in paras 11 to 13 of the judgment. It may, at the outset, be pointed out that a similar argument was advanced based on the observations made in this decision, in Ramaiah case also (vide para 7 but the same was rejected holding that on the facts since the , respondent did not give any receipt accepting the settlement of the claim, the payment made by the other side was only unilateral and hence the dispute subsisted and the Arbitration clause in the contract could be invoked. Therefore, that decision can be distinguished on facts. Even otherwise we feel that once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or the difference is amicably settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the Arbitration clause. If this is permitted the sanctity of contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside. In the circumstances, we think that in the instant case since the dispute or difference was finally settled and payments were made as per the settlement, it was not open to the respondent unilaterally to treat the settlement as non est and proceed to invoke the Arbitration clause. We are, therefore, of the opinion that the High Court was wrong in the view that it took."

16. Their Lordships of the Hon'ble Supreme Court in ***United India Insurance*** vs. ***Ajmer Singh Cotton and General Mills and others***, (1999) 6 SCC 400 have held that mere execution of the discharge voucher would not always deprive the consumer from preferring claim with respect to the deficiency in service or consequential benefits arising out of the amount paid in default of the service rendered. Despite execution of the discharge voucher, the consumer may be in a position to satisfy the Tribunal or the Commission under the Act that such discharge voucher or receipt had been obtained from him under the circumstances which can be termed as fraudulent or exercise of undue influence or by misrepresentation or the like. Their Lordships have held as under:

"6. We have heard learned counsel for the parties and perused the record. It is true that the award of interest is not specifically authorised under the Consumer Protection Act, 1986 (hereinafter called 'the Act') but in view of our judgment in Sovintorg (India) Ltd. v. State Bank of India (Civil Appeal No. 823 of 1992) decided on 11th August, 1999 (reported in 1999 AIR SCW 2878) we are of the opinion that in appropriate cases the forum and the commissions under the Act are authorised to grant reasonable interest under the facts and circumstances of each case. The mere execution of the discharge voucher would not always deprive the consumer from preferring claim with respect to the deficiency in service or consequential benefits arising out of the amount paid in default of the service rendered. Despite execution of the discharge voucher, the consumer may be in a position to satisfy the Tribunal or the Commission under the Act that such discharge voucher or receipt had been obtained from him under the circumstances which can be termed as fraudulent or exercise of undue influence or by misrepresentation or the like. If in a given case the consumer satisfies the authority under the Act that the discharge voucher was

obtained by fraud, misrepresentation under influence or the like, coercive bargaining compelled by circumstances, the authority before whom the complaint is made would be justified in granting appropriate relief. However, where such discharge voucher is proved to have been obtained under any of the suspicious circumstances noted hereinabove, the tribunal or the Commission would be justified in granting the appropriate relief under the circumstances of each case. The mere execution of the discharge voucher and acceptance of the insurance claim would not estop the insured from making further claim from the insurer but only under the circumstances as noticed earlier. The Consumer Disputes Redressal Forums and Commissions constituted under the Act shall also have the power to fasten liability against the insurance companies notwithstanding the issuance of the discharge voucher. Such a claim cannot be termed to be fastening the liability against the insurance companies over and above the liabilities payable under the contract of insurance envisaged in the policy of insurance. The claim preferred regarding the deficiency of service shall be deemed to be based upon the insurance policy, being covered by the provisions of Section 14 of the Act."

17. Their Lordships of the Hon'ble Supreme Court in ***National Insurance Company Limited*** vs. ***Sehtia Shoes***, (2008) 5 SCC 400 have held that filing of claim after settlement is not barred when the amount is received as final settlement of claim, but it has to be proved that agreement to accept a particular amount was on account of coercion. Their Lordships have held as under:

"8. Filing of a complaint is, therefore, not barred; but it has to be proved that agreement to accept a particular amount was on account of coercion. In the instant case, this relevant factor has not been considered specifically by the District Forum, State Commission and the National Commission. Though plea of coercion was taken by claimant-respondent, same was refuted by the appellant. There is no dispute that the discharge voucher had been signed by the respondent. There has to be an adjudication as to whether the discharge voucher was signed voluntarily or under coercion. We remit the matter to the District Forum for fresh consideration. It would do well to dispose of the matter as early as practicable, preferably by the end of September, 2008."

18. In the instant case, as we have already discussed, the appellants have failed to prove that the receipt was obtained from them under the circumstances, which could be termed as undue influence, fraud or misrepresentation.

19. Their Lordships of the Hon'ble Supreme Court in ***Union of India and others*** vs. ***Hari Singh***, 2010 (10) Scale 205 have held that when the parties by a supplementary agreement obtained a full and final discharge after paying the entire amount, which was due and payable to the contractor, thereafter the contractor would not be justified in invoking arbitration because there was no arbitral dispute for reference to the arbitration. Their Lordships have held as under:

"14. In this case the court relied on earlier judgments of this court and reiterated the legal position which has been crystallized by a series of judgments where both the parties to a contract confirmed in writing that the contract has been fully and finally discharged by the parties and there was no outstanding claim or dispute and thereafter the matter could not have been referred to the arbitration.

15. In a celebrated book, Russell on Arbitration, 19th Edn., p.396, it is stated that "an accord and satisfaction may be pleaded in an action on award and will constitute a good defence".

16. In our considered view, on the basis of the above settled legal position that when the parties by a supplementary agreement obtained a full and final discharge after paying the entire amount, which was due and payable to the contractor, thereafter the contractor would not be justified in invoking arbitration because there was no arbitral dispute for reference to the arbitration."

20. Learned Single Judge of ***Delhi High Court in M/s Vaish Brothers and Co.*** vs. ***Union of India and another***, AIR 1999 Delhi 105 has held that when the dispute is settled finally, arbitration clause cannot be invoked in respect of such dispute, even though other disputes subsist. Their Lordships have held as under:

"2. Ms. Jyoti Singh learned counsel appearing on behalf of the respondent arguing on the first point contended that the contractor having signed the final bill and having received payment in full satisfaction of its claim could not later on raise a dispute. She has placed reliance upon the judgments reported as Nathani Steels Limited Vs. Associated Constructions, 1995 Supp(3) SCC 324, M/s P.K.Ramaiah & Co. Vs. Chairman & Managing Director, National Thermal Power Corporation, 1994 (1) SCALE 1, State of Maharashtra Vs. Navbharat and State of Maharashtra Vs.Nav Bharat Builders, 1994 Supp (3) 83 in support of her contention that once there was a full and final settlement in respect of any particular dispute or difference in relation to a matter covered under the arbitration clause in the contract and that dispute or difference is finally settled by and between the parties, such a dispute or difference does not remain to be dispute and the arbitration clause could not be invoked even though for certain other matters the contract may be in subsistence. Once the parties had arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or difference is amicably settled by way of a final settlement for and between the parties, unless that settlement was set aside in proper proceedings it could not lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and to proceed to invoke the arbitration clause. If this was permitted the sanctity of the contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then question the same on the ground of mistake without having the settlement set aside."

21. Mr. K.D. Sood, learned Senior Advocate has placed strong reliance on ***National Insurance Co. Ltd.*** vs. ***M/s Boghara Polyfab Pvt. Limited***, AIR 2009 SC 170. In this case, the discharge voucher was handed over to respondent on 21.3.2006. It was signed and delivered to the appellant immediately thereafter acknowledging that a sum of Rs. 2,33,94,964/- has been received from the insurer in full and final settlement and that in consideration of such payment, the respondent absolved the appellant from all liabilities, present and future, arising directly or indirectly, out of loss or damage under the policy. Admittedly, on the date when such discharge voucher was signed and given by the respondent, the payment of Rs. 2,33,94,964/- had been made. It was made after receiving the voucher.

22. In the case in hand, the amount has been specifically mentioned in receipts Ex.PW-4/C and Ex.PW-4/D. Thus, the judgment (supra) relied upon

by Mr. K.D. Sood is not applicable to the facts and circumstances of the present case.

23. Accordingly, in view of analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application, if any, also stands disposed of. No costs.

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

State of H.P. .....Appellant.
Versus
Deepak Chauhan .....Respondent.

Cr. Appeal No. 4073 of 2013.
Reserved on: December 24, 2014.
Decided on: December 29, 2014.

Indian Penal Code, 1860- Section 376- Prosecutrix was married- difference arose between the prosecutrix and her husband- she started residing separately with her parents- she met the accused who pretended to be unmarried and offered to marry her- accused had physical relation with the prosecutrix- she came to know subsequently that accused was married- held, that family of the prosecutrix and the family of the accused had strained relation – they had filed cross cases against each other- it was difficult to believe that she did not know about the marital status of the accused- she was consenting party and accused cannot be held liable for the commission of rape. (Para-15 to 16)

For the appellant: Mr. Ramesh Thakur, Asstt. AG.
For the respondent: Mr. Devinder Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The State has instituted this appeal against the judgment dated 20.3.2013, rendered by the learned Sessions Judge, Mandi, H.P. in Sessions Trial No. 4 of 2013, whereby the respondent-accused (hereinafter referred to as the accused) who was charged with and tried for offences under Sections 376 and 417 IPC, was acquitted by the learned trial Court.

2. The case of the prosecution, in a nut shell, is that the prosecutrix was married with one Shri Puneet Kumar of Village Garsa, Kullu on 28.4.2006. The differences arose between the husband and wife. She started living separately since 2009 with her parents. She met the accused. The accused pretended to be unmarried and offered proposal to marry her. He also requested the prosecutrix to take divorce from her husband. The prosecutrix got job at Shimla. She served there w.e.f. August 2010 to July, 2011. The accused used to visit her at Shimla. He developed physical relations with the prosecutrix. The prosecutrix filed petition for mutual divorce on 18.4.2012 in the Court of P.O. Fast Track Court, Mandi. The case was decided on 17.11.2012. The accused took the prosecutrix to Chandigarh and other places. She came to know on 15.5.2012 that the accused was married. In these circumstances, FIR No. 74 of 2012 dated 15.5.2012 was lodged at Police Station, Jogindernagar. The prosecutrix was medically examined by Dr. Suman Bist (PW-1). The matter was investigated and challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 13 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. He denied the entire case of the prosecution and took the plea that his father has lodged certain complaints against the prosecutrix as well as her parents. The learned Trial Court acquitted the accused on 20.3.2013. Hence, the present appeal.

4. Mr. Ramesh Thakur, learned Asstt. Advocate General has vehemently argued that the prosecution has proved its case. On the other hand, Mr. Davinder Sharma, Advocate, appearing for the accused has supported the judgment of the learned trial Court dated 20.3.2013.

5. We have gone through the impugned judgment dated 20.3.2013 and records of the case carefully.

6. PW-1 Dr. Suman Bist has examined the prosecutrix on 15.5.2012. She has issued MLC Ext. PW-1/B. There was no injury, bruises and bite marks or any evidence of any external injury on abdomen and thigh of the prosecutrix. According to her final opinion, the prosecutrix was found habitual of intercourse and there was evidence of previous delivery. According to her, on 19.7.2012, the police produced the report of FSL Ext. PA before her and after perusing the said report she had given report Ext. PW-1/C.

7. PW-2 Subhash Chandel, has produced the bill Ext. PW-2/A, whereby the accused has stayed in hotel on 17.1.2012 and checked out on 18.1.2012 at 9:21 AM.

8. PW-3 is the prosecutrix. According to her, she was married with Puneet Kumar in the year 2006. She stayed in her matrimonial home up to 2009. Thereafter, the differences arose between her and husband. She started living separately with her parents at Jogindernagar. She visited the shop of the accused in order to get the document photo-copied. The accused pretended before her that he was unmarried. She also disclosed the marital status to the accused. The accused assured her to marry her. He also insisted her to take divorce from her husband. She got job at Shimla and worked there from August, 2010 to July, 2011. Accused used to visit her at Shimla. He developed physical relations with her on the pretext of marrying her. The accused insisted to accompany him to Chandigarh. She went to Chandigarh with him. They stayed in hotel at Panchkula. They also stayed in Metro Hotel, Chandigarh. They also stayed at Surya Hotel at Delhi. As and when, she used to come back to Jogindernagar, they used to stay at Uhl hotel in Jogindernagar. The accused told her on 15.5.2012 that he was already married and having a daughter aged about 7 years. On this, she narrated the whole story to her parents. She alongwith her father visited S.P.Office Mandi and moved the application Ext. PW-3/A before the Addl. S.P., Mandi. The application was returned to her with the endorsement and direction to take the same to SHO, PS, Jogindernagar. She produced the application before the SHO, PS Jogindernagar, where FIR was registered against the accused. She was also medically examined. In her cross-examination, she testified that she came to know about the marital status of the accused only on 15.5.2012. Her parents came to know about the whole incident on this date only. She admitted that Jogindernagar is a small town. She admitted that the bus stand Jogindernagar is situated at a distance of five meters from the Chowk known as Pathankot Chowk at Jogindernagar. Near the bus stand, the accused was having a double storied shop on the main road. He admitted that on the ground floor of the shop there was a jewelery shop and Photostat shop was on the first floor. Her father is a tailor by profession and he also used to work as traditional cook (*Boati*). Her father's tailoring shop is situated at a distance of 100 meters. The distance between the shop of the accused as well as her house could be covered within a period of 8 minutes walk. She also admitted that the father of the accused is known to everyone in Jogindernagar. The accused is the only son of his father. She did not know

about the fact whether the name of the wife of the accused was Anju Bala alias Nandni or not. Voluntarily stated that accused disclosed her that Anju was his sister. She also admitted that her father has lodged case against the accused on 28.10.2011.

9. Statement of PW-4 HC Chander Shekhar is formal in nature.

10. PW-5 HC Rajmal has proved memo Ext. PW-5/A and final bill of Surya Hotel Ext. PW-5/B alongwith identity proof of the accused and the prosecutrix vide Ext. PW-5/C and PW-5/D and the proof of payment through credit card Ext. PW-5/E.

11. Statements of PW-6 to PW-11 are formal in nature.

12. PW-12 Dr. Jiwan Kumar has medically examined the accused on 15.5.2012. He issued MLC Ext. PW-12/B.

13. PW-13 ASI Ashok Kumar was the I.O. He recorded the statement of the prosecutrix and her parents. He moved an application Ext. PW-1/A before the M.O., CHC Jogindernagar with request to conduct the medico legal examination of the prosecutrix. She was medically examined vide MLC Ext. PW-1/B and report of doctor after perusing the report of RFSL was Ext. PW-1/C. He also obtained the record from the Uhl Hotel on 28.5.2012.

14. Sh. O.P. Chauhan, has appeared as DW-2. He has deposed the manner in which the complaints were lodged against each other by the families of the prosecutrix and the accused.

15. What emerges from the facts enumerated hereinabove, is that the prosecutrix was about 20 years of age at the time of the incident. She was married with one Puneet Kumar. She has obtained the divorce from her husband on 17.11.2012. The prosecutrix had started living at Shimla. The accused also used to visit her at Shimla. She has accompanied the accused voluntarily to Chandigarh and Delhi. The distance between her house and shop of the accused was about 8 minutes walk. The prosecutrix main thrust is that the accused had assured her to marry her. She did not know about the marital status of the accused. She came to know about the marital status of the accused only on 15.5.2012. The prosecutrix has admitted in her cross-examination that her mother had lodged report against the mother and wife of the accused on 28.4.2012. The distance between the shop of the father of the prosecutrix and the accused was only 100 meters. The prosecutrix has threatened the family of the accused to rope them in other cases and to this effect, *rapat* No. 22 dated 2.11.2011 Ext. PW-2/E, was brought on record. The father of the accused has also lodged report against the prosecutrix on 17.4.2012 under Sections 294, 509, 504 and 506 IPC. She was arrested and remanded to police custody for two days. The prosecutrix knew about the marital status of the accused. It is thus, established from the record that the relations between the family of the prosecutrix and the accused were strained and cross-FIRs were also registered against each other. The prosecutrix is a young lady and was aware of all the consequences. It is not believable that she did not know about the marital status of the accused as per her own statement and the other material brought on record. She also stayed with accused at Shimla, Chandigarh and Delhi voluntarily. The prosecutrix had sex with the appellant with her consent and hence there was no offence committed by the appellant under Section 376 IPC because sex with women above the age of 16 years of age with consent is not rape.

16. It has come in the statement of PW-1 Dr. Suman Bist that the prosecutrix was found to be habitual of intercourse and there was evidence of previous delivery also. The prosecution has failed to prove the case against the accused under Sections 376 and 417 IPC. The prosecutrix despite knowing the marital status of the accused had developed physical relations with him. She

was throughout a consenting party. Thus, the prosecution has miserably failed to prove the case against the accused.

17. 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 20.3.2013.

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

Suraj Kumar Walia .....Petitioner.
Versus
Smt. Punam Walia & ors. .....Respondents.

CMPMO No. 425 of 2014.
Decided on: 30.12.2014.

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff filed an application seeking an amendment to the plaint- held, that the Court has a discretion to grant permission to a party to amend his pleading and Court can be exercise the discretion in two conditions- firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for determining the real controversy between the parties- no application for amendment can be allowed after the commencement of the trial unless the Court concludes that the party could not have raised the matter before the commencement of trial despite exercise of due diligence- plaintiff could not establish as to why he could not move the application for seeking the amendment of the plaint- application dismissed. (Para-5 to 7)

Case referred:
J. Samuel and ors. Vrs. Gattu Mahesh and others, (2012) 2 SCC 300

For the petitioner: Mr. Karan Singh Kanwar, 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 14.11.2014 rendered by the learned Civil Judge (Sr. Divn.), Court No. 1, Paonta Sahib, District Sirmaur, H.P., in Civil Suit No. 55/1 of 09/08.

2. Key facts, necessary for the adjudication of this petition are that the petitioner-plaintiff (hereinafter referred to as the 'plaintiff' for convenience sake) has instituted a Civil Suit bearing No. 55/1 of 2009 against the respondents-defendants (hereinafter referred to as the 'defendants' for convenience sake) for declaration to the effect that the Will and General Power of Attorney dated 4.2.2003, registered in the office of Sub-Registrar, Paonta Sahib on 4.2.2003 by late Sh. Dalip Singh Walia was null and void and any sale or transfer made on the basis of alleged Will and General Power of Attorney, particularly the property comprised of double storey building consisting of residential house-cum- 7 shops etc. bearing M.C. Patiala (Pb.) No. 302/1 to 309/1 situated at Gau-Shala Road Patiala, Panjab or any other transactions made by defendants on the basis of such documents be declared null and void and not binding upon the plaintiffs and the property subsequently purchased from the income/sale proceeds of the above mentioned transfers made on the basis of forged and fictitious Will and G.P.A. dated 4.2.2003 by the defendants in connivance with each other, particularly the land comprised in Khewat No.

164 min, Khatoni No. 378 min, Kh. No. 156 measuring 341.25 sq. mtrs., situated at Mauza Paonta Sahib, as per *Jamabandi* for the year 2002-03, be declared properties of the plaintiff and defendant No. 3. They be declared owners of all movable and immovable properties left behind by late Sh. Dalip Singh father of plaintiff No. 1 and defendant No. 3 to the extent of 1/2 share each with consequential relief of restraining the defendants from further alienating, encumbering the said property in any manner.

3. The suit was contested by the defendants by filing Written Statement. The plaintiff has moved an application under Order 1 Rule 10 CPC for impleading the vendees. The application was rejected on 16.2.2013. The plaintiff filed CMPMO No. 111 of 2013. The same was dismissed by this Court on 12.11.2013. The plaintiff moved applications under Order 14 Rule 5 CPC and Order 6 Rule 17 CPC. The application under Order 14 Rule 5 CPC was partly allowed by framing additional issues i.e. issue Nos. 10-A, 10-B & 10-C.

4. According to the plaintiff, issue No.3 was wrongly framed. According to the defendants, issue No. 3 was rightly framed. The fact of the matter is that issues were framed on 8.2.2010. The application under Order 14 Rule 5 CPC was filed very belatedly. It is evident from the pleadings of the parties that Sh. Dalip Singh was the common ancestor of the parties. The plaintiff has claimed ½ share in the suit property. The learned Civil Judge (Sr. Divn.), Court No. 1, Paonta Sahib, District Sirmaur, H.P., has rightly come to the conclusion that issue No. 3 was rightly framed on the basis of the pleadings of the parties.

5. Now, as far as the application preferred by the plaintiff under order 6 Rule 17 is concerned, the same was rejected by the learned Civil Judge (Sr. Divn.), Court No. 1, Paonta Sahib, District Sirmaur, H.P. on 3.12.2014 in entirety. According to the plaintiff the sale deeds were illegal and void as well as Will in favour of Gagan Deep Kaur was also null and void. This application was also contested by the defendants. The sale deeds were effected during the time of Sh. Dalip Singh Walia. The application has been filed belatedly and that too after the commencement of the trial. The application has been filed merely to delay the trial. Rather, the application filed under Order 6 Rule 17 CPC was mis-conceived.

6. Their lordship in the case of ***J. Samuel and ors. Vrs. Gattu Mahesh and others,*** reported in ***(2012) 2 SCC 300,*** have held that the Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. Thereafter, their lordships have referred to the proviso which provides that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. Their lordships have further held that the term `due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial. A party requesting a relief stemming out of a claim is required to exercise due diligence. This requirement cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit. Their lordships have held as under:

> "12) The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The Court's discretion to grant permission for a party to amend his pleading

lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that: no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

13) Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term `Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

14) A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit."

7. In the instant case, the applicant has failed to prove that why despite exercising "due diligence" he could not move the application for seeking amendment earlier. There is no illegality or perversity in the order of the learned Civil Judge (Sr. Divn.), Paonta Sahib, Distt. Sirmaur, H.P., dated 14.11.2014.

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

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

Devinder Kumar (died) through his LRs ...Appellants.

Versus

Kabul Singh and others. ...Respondents.

RSA No. 288/2004
Reserved on: 23.12.2014
Decided on: 31.12. 2014

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 104- Order of eviction was passed by Land Reforms Officers – there was no evidence that notice was issued to the tenant- 'R' was not present at the time of passing of the order- held, that order is required to be passed in the presence of both the parties- even the mutation did not record the presence of the plaintiff- hence, order passed by Land Revenue Officer is not sustainable. (Para-11 to 13)

Case referred:
Besru vs. Shibu, 1999 (1) S.L.J 195

For the Appellants: Mr. Sanjeev Kuthiala, Advocate.
For the Respondents: Mr. N.K. Thakur, Sr. Advocate with
Mr. Ramesh Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is directed against the judgment and decree dated 7.4.2004 rendered by the District Judge, Una in Civil Appeal No. 77 of 2001.

2. "Key facts" necessary for the adjudication of this appeal are that respondent-plaintiff filed a suit to the effect that the land measuring 0-45-32 hectares comprised in Khewat No.239, Khatauni No.452 and 453 and at present Khasra Nos. 415, 612, 451 and 451/1 situated in village Ambota, Tehsil Amb, District Una is owned and possessed by the plaintiff and change of the revenue entries in the name of defendants as owners and in the name of Ram Lok, predecessor-in-interest of defendants No.3 to 17, of the land measuring 0-20-86 hectares comprised in Khewat No.452 and Khasra Nos. 415, 451/1 and 612 as well as the order of the Land Reforms Officer, Amb dated 14.1.1976 Ex.D-2 were absolutely wrong, false, frivolous, baseless, illegal and without following proper procedure and jurisdiction and null and void with a decree for permanent injunction restraining the defendants from interfering in any manner whatsoever, raising any construction and cutting and removing any trees from the suit land. Kalu Ram son of Gokal was in possession of 11 kanals 15 marlas of land, which corresponding to the suit land as non-occupancy tenant under Ram Lok, who was predecessor-in-interest of defendants No.3 to 17 on payment of rent. Kalu Ram became owner of the land when H.P. Tenancy and Land Reforms Act came into force. During settlement operation new Khasra Nos. 451, 451/1 and 415 were carved out from old Khasra No.4399 and new Khasra No.612 was carved out from old Khasra No. 4428. Kalu Ram died in the year 1978. He was succeeded by his widow Janki Devi. She died in the year 1990. The plaintiff succeeded to the estate of Janki on the basis of registered "will" dated 22.1.1986. Thereafter, mutation was also sanctioned in favour of the plaintiff. Defendants during the course of consolidation in connivance with the revenue staff got changed the entries of the land measuring 0-20-86 hectares comprised in Khasra No.415, 451/1 and 612 in their names as owners as well as in the name of Ram Lok. The plaintiff or his predecessor never relinquished their possession over the entire land nor were they ejected from the suit land. No proper procedure has been followed before making such entries nor was any opportunity given to Kalu Ram, predecessor-in-interest of the plaintiff.

3. The suit was contested by defendant No.2, namely, Devinder Kumar son of Mansha Ram. It has been alleged in the written statement that Khasra No.4428 and 4339 were carved out of old Khasra Nos. 6404 and 6485 min, respectively during consolidation operation which commenced in the year 1976-77. Kalu Ram was coming as tenant over the suit land. In fact, he was in possession of half of the share of the land measuring 24 kanals 15 marlas. The other land has been coming in possession of the co-sharers. According to Jamabandi for the year 1980-81, Kalu Ram was recorded as non-occupancy tenant under the owner Ram Lok whereas mutation No.5883 regarding conferment of proprietary rights was wrongly and illegally sanctioned at the back of defendants in favour of Kalu Ram in respect of entire land. Ram Lok was a small land owner and had applied for resumption of land before the Land Revenue Officer on 3.12.1975. The Land Revenue Officer passed order for resumption of half of the share of the land on 14.11.1973. Thereafter, Kalu Ram left half share which was given to the land owner. The application was moved before the District Collector, Una, who called the report of Naib Tehsildar after conducting inquiry on the spot. Mutation No. 4909 was reviewed and land measuring 5 Kanals 11 Marlas out of Khasra No.4428 and 4399 was shown to be owned and possessed by the defendants.

4. Replication was filed by the plaintiff. The trial court framed issues. The trial court decreed the suit on 14.9.2001. Defendant No.2, namely,

Devinder Kumar filed an appeal against the judgment and decree dated 14.9.2001 before the District Judge, Una. He dismissed the appeal on 7.4.2004. Hence, the present Regular Second Appeal. It was admitted on the following substantial question of law:

> **"Whether a co-owner who has inducted a tenant on his parcel of land is competent to give tenancy rights with respect to the land of the other co-owner and whether such tenant can have any right over the land on which such tenant has not been inducted and claim conferment of ownership on the basis of wrong entries incorporated without any order of a competent court or authority?"**

5. Mr. Sanjeev Kuthiala, on the basis of substantial question of law framed, has vehemently argued that proprietary rights were wrongly and illegally conferred in favour of Kalu Ram in respect of the entire land over which he was shown as tenant by ignoring the order of resumption Ex.D-2 dated 14.1.1976.

6. Mr. N.K. Thakur, learned Senior Counsel has supported the judgments and decrees passed by both the courts below.

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

8. Plaintiff has appeared as PW-2. According to him, the suit land was previously possessed by Kalu Ram, as tenant under the ownership of Ram Lok. The rent was paid. Kalu Ram became owner of the suit land by operation of law. His widow came into possession of the suit land as owner after the death of Kalu Ram. She executed a "will" in his favour. He became owner in possession of the suit land.

9. The contesting defendant Devinder Kumar has appeared as DW-1. According to him, he was in possession of 5 kanal land alongwith defendants as owner and the suit land was in his possession since 1975. The possession of the suit land was delivered to him by Kanungo. In his cross-examination, he has admitted that disputed land originally belonged to Ram Lok. He has also admitted that Kalu Ram was tenant on the share of deceased Ram Lok.

10. The "will" is Ex.PW-3/A. It was scribed by Kulwant Singh. Joginder Singh and Harnam Singh were marginal witnesses. Scribe Balwant Singh and witness Joginder Singh have died. PW-3 Basdev has identified the signatures of Joginder Singh on Ex.PW-3/A. He is brother of Joginder Singh. PW-3 Basdev has also proved the signatures of scribe Balwant Singh on the "will". The scribe was his father-in-law. He was conversant with his signatures. PW-5 Harnam Singh has deposed that he signed the "will" Ex.PW-3/A. The same was scribed by Balwant Singh, Petition Writer. The "will" was executed by Janki Devi. It was read over to her. She admitted the contents of "will" to be correct and thereafter put her thumb impression on the same in presence of witnesses. The plaintiff has duly proved the execution of "will" Ex.PW-3/A.

11. Both the courts below have rightly come to the conclusion that the order of resumption Ex.D-2 has been passed in a very perfunctory manner. Ram Lok was not present at the time of passing of order when the application was listed for hearing on 14.1.1976. There is nothing on record to suggest that a notice was given to tenant Kalu Ram or his family members when order of resumption Ex.D-2 was passed by the Land Reforms Officer. The order was required to be passed by the Land Reforms Officer in presence of the parties. Even after the order dated 14.1.1976 Ex.D-2, Kalu Ram was shown in possession of the suit land even in the Jamabandi for the year 1980-81. The proprietary rights were conferred upon the plaintiff and the mutation was also attested. Mutation No. 4909 dated 19.1.1992 was against law. The presence of plaintiff was not reflected in Ex.D-3. The civil court had the jurisdiction since the orders were in violation of principles of natural justice. The legal heirs of

Ram Lok, arrayed as parties, have neither chosen to contest the suit nor did they come forward to depose.

12. This Court in ***Besru*** vs. ***Shibu***, 1999 (1) S.L.J 195 has held that the mutation under section 104 of the Act has to be attested in the presence of parties and the affected parties are required to be served personally or in any other mode of service permissible under the law.

13. What emerges from the facts enumerated hereinabove is that the proprietary rights were rightly conferred upon the plaintiff. Order Ex.D-2 dated 14.1.1976 was illegal.

14. In view of the analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Himachal Pradesh State Forest Corporation Limited. ...Appellant.

Versus

Hem Raj. ...Respondent.

RSA No. 207/2003
Reserved on: 29.12.2014
Decided on: 31.12. 2014

Indian Contract Act- Section 10- Corporation invited short term tenders for supply of 55,000 empty tins at Karsog depot and 6,000 empty tins at Panarsa depot- defendant participated in the tendering process- the agreement was executed between the parties- defendant supplied 29,472 tins at Karsog depot and 1045 tins at Panarsa depot – he was asked to supply remaining tins immediately- Corporation had to purchase tins at a higher rate for Karsog Depot and Panarsa depot- held, that defendant had supplied 30,000 tins to plaintiff-corporation at Karsog depot and 3200 tins at Panarsa depot- he applied for extension of time which was granted- plaintiff invited another short term tender notice -corporation entered into agreement with 'P' and 'S' at higher rate- plaintiff-corporation should have waited for the supply to be made by the defendant on the basis of extension- there was no necessity for floating short term tender notice- the short tender had raised the price of tins making it difficult for the defendant to supply tins at the quoted price- defendant had not voluntarily and intentionally infringed or breached the terms of agreement. (Para-12 to 14)

For the Appellants: Mr. Bhupender Pathania, Advocate.
For the Respondents: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is directed against the judgment and decree dated 4.3.2003 rendered by the District Judge, Kangra at Dharamshala in Civil Appeal No. 85-D/XIII-2001.

2. "Key facts" necessary for the adjudication of this appeal are that appellant-plaintiff (hereafter referred to as the "plaintiff" for convenience sake) filed a suit for recovery against the respondent-defendant (hereinafter referred to as the "defendant" for convenience sake). Plaintiff-corporation invited short

term tender for supply of 55,000 empty tins at Karsog depot and 6,000 empty tins at Panarsa depot. Defendant participated in the tendering process. He quoted rate of Rs. 18.95 paise per tin at Karsog depot and Rs. 19.47 paise per tin at Panarsa depot. The agreement was also executed between the parties on 25.6.1991 vide Ex.PW-2/E. The supply was to be made on or before 15.8.1991. Defendant supplied 29,472 tins at Karsog depot by 15.11.1991 and 1045 tins at Panarsa depot by 23.8.1991. Defendant was served with notices dated 8.7.1991, 9.8.1991 and 18.9.1991 whereby he was asked to supply the remaining tins immediately as per agreement. Plaintiff-corporation floated another short term tender on 9.8.1991 vide Ex.PW-2/J for supply of 40,000 tins at Karsog depot and 3,000 tins at Panarsa depot. M/s Pawan Kumar of Ner Chowk and Satish Kumar of Mehatpur quoted rates of Rs. 21.95 paise per tin. The rates were accepted by the respondent-corporation. The respondent-corporation had to purchase 25,528 tins for Karsog depot and 2802 tins for Panarsa depot at a higher rate of Rs. 3/- per tin for Karsog Depot and Rs. 2.40 paisa per tin for Panarsa depot. Plaintiff-corporation suffered a loss of Rs. 83,533/-. Hence, suit for recovery of Rs. 83,533/-.

3. Suit was contested by the defendant. Defendant had applied twice for extension of time on 19.8.1991 and 29.9.1991. However, the extension was granted to him only on 25.10.1991. The supply was to be made within a short period from 25.10.1991 to 15.11.1991. In the meantime, plaintiff-corporation floated short term tender notice on 9.8.1991 for supply of 40,000/- tins for Karsog depot and 3000 tins for Panarsa depot. The agreement for the supply of same was accepted from some other party at the rate of Rs. 21.95 paise per tin. Thus, nobody was ready and willing to supply the tins at the rate of Rs. 19/- or 20/- per tin, respectively.

4. Replication was filed by the plaintiff-corporation. The trial court framed issues on 21.2.1997. Senior Sub Judge decreed the suit on 26.2.2001. Defendant preferred an appeal before the learned District Judge, Kangra at Dharamshala. He accepted the same on 4.3.2003. Hence, the present Regular Second Appeal. It was admitted on the following substantial question of law:

> **"Whether Ex.PW-2/E was sufficient contract in between the parties and contents of the agreement as required under section 2-E and section 10 of the Indian Contract Act were sufficient, so as to give legal right to the appellant/plaintiff to enforce condition No.9 of the agreement through process of law and to recover damages under section 73 of the Indian Contract Act."**

5. Mr. Bhupender Pathania, on the basis of substantial question of law framed, has vehemently argued that the first appellate court has not correctly construed condition No.9 of the agreement Ex.PW-2/E entered into between the parties on 25.6.1991.

6. Mr. G.R. Palsra, has supported the judgment and decree passed by the first appellate court.

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

8. PW-1 O.P. Sharma, Conservator of Forest Corporation has testified that in the year 1993 he was posted as Director (North) State Forest Corporation, Dharamshala. The suit was filed by him. According to him, defendant had agreed to supply empty tins to plaintiff-corporation at Karsog depot and Panarsa depot. Defendant failed to supply the agreed quantity of tins as per agreement entered into between the parties. Plaintiff-corporation had to purchase tins at the higher rate. Thus, plaintiff-corporation incurred loss of Rs. 83,533/-.

9. PW-2 S.C. Gupta, Conservator of forest has testified that tenders were floated vide Ex.PW-2/C for the supply of tins at Karsog and Panarsa depots. Defendant filled in tender form Ex.PW-2/D. Defendant agreed to supply 55,000 tins at Karsog depot at the rate of Rs. 18.95 paise per tin and 6,000/- tins at Panarsa depot at the rate of Rs. 19.47 paise per tin. Terms and conditions of the agreement were accepted by the defendant. He had executed agreement Ex.PW-2/E. Defendant had agreed to supply 60% of the tins by 10.7.1991 and remaining 40% by 15.8.1991. Defendant supplied only 29,472 tins at Karsog depot till 1.12.1991 and 3198 tins by 29.8.1991 at Panarsa depot. Notices were served upon the defendant vide Ex.PW-2/F to Ex.PW-2/H. In the meantime, corporation was in urgent need of tins. Plaintiff-corporation has issued second short term tender notice vide Ex.PW-2/J. Pawan Kumar and Satish Kumar had agreed to supply tins at the rate of Rs. 21.95 per tin. Corporation suffered loss of Rs. 83,533/-.

10. PW-3 Sudershan Kumar, Junior Assistant has testified that he remained posted in the office of H.P.S.F.C. Director (North), Dharamshala during the year 1991-92. An agreement Ex.PW-2/E was executed by the defendant in his presence on 25.6.1991.

11. DW-1 Hem Raj has testified that vide agreement Ex.PW-2/E he had agreed to supply 55,000 tins at the rate of Rs. 18.95 paise per tin at Karsog depot and 6000 tins at the rate of Rs. 19.47 paise per tin at Panarsa depot. These were to be supplied on or before 15.8.1991. He supplied 30,000 tins to plaintiff-corporation at Karsog depot and 3200 tins at Panarsa depot. He applied for extension of time vide letters dated 19.8.1991 and 29.8.1991. Extension of time was given to him on 25.10.1991. Time was extended upto 15.11.1991. In the meantime, plaintiff-corporation invited another short term tender notice on 9.8.1991 for supply of tins. Plaintiff-corporation entered into agreement with Pawan Kumar and Satish Kumar at higher rate of Rs. 21.95 paise. In these circumstances, he could not supply the remaining tins as the tins were lifted by Pawan Kumar and Satish Kumar at higher rates.

12. Conditions No.2, 9 and 11 of the agreement Ex.PW-2/E read as under:

> **"2. That the supplier hereby agrees to supply the purchaser (HP State Forest Corporation Limited) following once used kerosene oil/ newly replaced tops having normal size bung-hole (4-5 cm dia) at one corner with a capacity of 17 kg. or more of resin empty tins, with bright placets inside and outside at the following depots on the rates given against each inclusive of all taxes in accordance with the time schedule fixed for the supply i.e. 60% of the supply by 10.7.91 and balance 40% by 15.8.91: -**
>
> | **Sr. No.** | **Name of Depot.** | **No. of tins required to be supplied** | **Rate per tin Rs.)** |
> |---|---|---|---|
> | **1.** | **Karsog** | **55,000** | **18.95** |
> | | **(Rupees Eighteen & Paise Ninety Five only)** | | |
> | **2.** | **Panarsa** | **6,000** | **19.47** |
> | | **(Rupees Nineteen and Paise Fourty seven only)** | | |
>
> **However, the period of supply can be extended by the Director (North) for any period at the discretion of Director (North) in exceptional circumstances on written request from the supplier keeping in view the progress of supply. The ends of the tins should be intact and free from defects like leakages, rust, broken openings, bends etc. and the tins should be properly secured in bundles of 16 tins each with ban-narial rope.**

9. In the event of the failure to abide by any conditions/ terms of this agreement deed, this indenture shall be cancelled and the earnest money/ security shall be forfeited. In the event of fresh tenders have been invited due to failure on the part of the supplier to complete the supply, the excess amount so occasioned shall be recovered from the supplier through due process of law.

11. In the event of the supplier backing out/ failing to complete the supply as per schedule the earnest money/ security will be forfeited to the H.P. State Forest Corporation."

13. What emerges from the facts enumerated hereinabove is that an agreement was entered between the parties on 25.6.1991. Defendant had agreed to supply tins by 15.8.1991. He had supplied 30,000 tins to plaintiff-corporation at Karsog depot and 3200 tins at Panarsa depot. He applied for extension of time vide letters dated 19.8.1991 and 29.8.1991. Extension of time was given to defendant on 25.10.1991 whereby he had to make the supply of the remaining tins by 15.11.1991. However, surprisingly, in the meantime, plaintiff-corporation floated short term tender notice vide Ex.PW-2/J on 9.8.1991 and entered into agreement with Pawan Kumar and Satish Kumar. They supplied the tins at higher rate of Rs. 21.95 paise per tin. According to DW-1 Hem Raj, rates quoted by defendant were 18.95 paise per tin at Karsog depot and Rs. 19.47 paise per tin at Panarsa depot. However, plaintiff-corporation agreed to buy tins at higher rate of Rs. 21.95 per tin from Pawan Kumar and Satish Kumar. In these circumstances, he could not supply the tins as the same were not available in the market. It is evident from the plain language of condition No.9 of the agreement that in the event of the failure to abide by any conditions/terms of the agreement deed, the indenture was to be cancelled and the earnest money was to be forfeited and in the event of fresh tenders floated due to failure on the part of the supplier to complete the supply, the excess amount so occasioned was to be recovered from the supplier through due process of law. According to condition No.11 of the agreement, in the event of supplier backing out to complete the supply as per schedule, the earnest money was to be forfeited to the plaintiff-corporation. However, as per condition No.2, the period of supply could be extended by the Director (North) for any period at his discretion in exceptional circumstances on written request from the supplier keeping in view the progress of supply.

14. In the instant case, defendant has made supply of 30,000 tins to plaintiff-corporation at Karsog depot and 3200 tins at Panarsa depot by 15.8.1991. Defendant had sent letters to plaintiff-corporation on 19.8.1991 and 29.8.1991 for extension of time. Time, as noticed above, was extended upto 15.11.1991. Plaintiff-corporation should have waited for the supply to be made by the defendant by 15.11.1991 on the basis of extension given to him on 25.10.1991. The agreement entered into between the parties has been cancelled only on 21.2.1992. There was no necessity for the corporation to float short term tender notice since the extension was sought for by the defendant on 19.8.1991 and 29.9.1991. The short term tender notice floated on 19.8.1991 vide Ex.PW-2/J was also for supply of tins to Gowali, Pandoh, Shahpur, Nurpur and Bilaspur depots. The time had been extended strictly as per condition No.2 of the agreement Ex.PW-2/E vide permission Ex.PW-1/B. Defendant, in these circumstances, has not deliberately, voluntarily and intentionally infringed or breached the terms of agreement dated 25.6.1991. Act of plaintiff-corporation has made the availability of tins scare. In these circumstances, defendant has failed to supply the remaining tins. Conditions No.2, 9 and 11 are to be read harmoniously of the agreement dated 25.6.1991 (Ex.PW-2/E).

15. Learned first appellate court has correctly appreciated the terms and conditions of the agreement. Substantial question of law is answered accordingly.

16. In view of the analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Kehar Singh and others. ...Petitioners.

Versus

Himachal Pradesh State Electricity Board Limited ...Respondent.

CWP No. : 6218/2014
Reserved on : 24.12.2014
Decided on: 31.12. 2014

Constitution of India, 1950- Article 226- Electricity board issued an advertisement for appointment for various posts on contract basis for a period of two years as per marks obtained by the candidates in matriculation and I.T.I. examinations – they were offered appointment as Electrician Linemen and S.S.A. as contractual trainees on fixed monthly salary of Rs. 4,500/- in normal areas and Rs. 5,500/- in tribal/hard areas- petitioners contended that the appointment was in violation of the Recruitment and Promotion Rules as there was no mention of trainee in the rules- Board contended that the decision was taken in meeting to fill up the posts as trainee and it was mentioned in the appointment letters that appointment would be made as trainee- petitioners accepted the offer and they are estopped from challenging the same- held, that it was provided in the rules that appointment could be made either on regular basis or on contractual basis- there was no mention of the trainee in the Rules- Board had also filled up the posts of linemen through H.P. Subordinate Services Selection Board- a person appointed through H.P. Subordinate Services Selection Board would be entitled to regularization after 6 years while petitioners would be entitled to regularization after 8 years- there is no distinction between the duties discharged by the petitioners and those discharged by the persons appointed through Selection Board- Board had wrongly treated the petitioners as trainees- there cannot be any estoppel against the constitutional right- hence, petition allowed and it is directed that petitioners are deemed to be appointed on contract basis from the date of their appointment. (Para-4 to 11)

For the petitioners : Mr. Sanjeev Bhushan, Advocate.
For the Respondent : Mr. Rajpal Singh, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

An amendment was carried out in the existing Recruitment and Promotion Regulations for direct recruitment Class-II, III and IV posts vide notification dated 7.12.2007 whereby after the relevant column of Method of Recruitment of all Class-II, III and IV direct recruitment posts notified by the Board, the following columns were inserted:

Selection for appointment to the post of contract appointment.	(1) (a) Selection on contract basis shall be made through the HPSSSB or the prescribed recruiting agency including Departmental Recruitment Committee constituted by the Board from time to time. (b) the Cadre controlling Authority after obtaining the approval of the Whole Time Members of the Board to fill the

vacant posts on contract basis will place requisition with employment exchanges in the Pradesh in term of The Employment Exchanges (Compulsory Notification of Vacancies) Act 1959 (Act no. 31 of 1959) and also advertise the posts in two leading newspapers and invite applications from candidates having the prescribed qualifications and fulfilling the other eligibility conditions as prescribed in these Rules.

(c) Candidate selected for appointment on contract basis will be initially appointed for one year which could be extended further depending upon requirement of the services of such appointees and further subject to high standard of work conduct and performance of such appointees. However, their services may be terminated even prior to the completion of contract period by issuing of one month notice or payment of one month wages in lieu of the notice. If their services are not required due to non-availability of work, for which principle of first come last go shall be followed. Their services may also be terminated during the contract period if their conduct and performance is not found satisfactory for which notice with due opportunity of being heard shall be given.

(d) The Contract appointee will be paid monthly emoluments in initial of the pay scale of the post plus dearness pay therein, if any.

(e) Contract appointee so selected under these Rules will not have any right to claim regularization or permanent absorption in HPSEB.

(f) (i) The appointment is liable to be terminated in case the performance/ conduct of the contract appointee is not found good.

(ii) Contract appointee will be entitled for one day casual leave after putting one month service. This leave can be accumulated upto one year. No leave of any other kind is admissible to the contract appointee. He/she shall not be entitled for medical reimbursement & LTC etc. Only maternity leave will be given as per rules.

(III) Un authorized absence from the duties without the approval of the controlling officer shall automatically lead to the termination of the contract. Contract appointee shall not be entitled for wages for the period of absence from duty.

(iv) Contract appointments will be made against vacant posts in difficult and tribal areas or any other specific jobs as per requirement. Transfer of contract appointee will not be permitted from one place to another. However, at the time of renewal of contract if any, such appointee can be appointed at different place or office on administrative grounds.

(v) Selected candidate will have to submit a certificate of his/her fitness from a Govt./Registered Medical Practitioner. Women candidate, pregnant beyond 12 weeks will be considered temporarily unfit till the confinement is over. The women candidates will be re-examined for the

fitness by an authorized Medical Officer/Practitioner.

(vi) Contract appointee will be entitled to TA/DA if required to go on tour in connection with his/her official duties at the same rate as applicable to regular staff members.

(vii) After selection of a candidate for appointment, he shall have to sign an agreement as laid down by the department attached as Annexure-"I" to these rules as amended from time to time.

2. Thereafter, vide Agenda item 356.10 in the 356th meeting of Whole Time Members of the respondent-Board held on 3.4.2008, the following decision was taken:

"The Board resolved that a total of 200 critical posts as per the following details may be filled up as Trainees for a contractual period of two years:

1.	Lineman	= 100 Nos.
2.	S.S.A.	= 50 Nos.
3.	Electrician	= 35 Nos.
4.	Electrician P/House (E)	= 15 Nos.

It was further resolved that CE (Op.) North may be made incharge of this Departmental Recruitment Committee. The details of selection and other criteria may be worked out by Member (O) for this recruitment which has been decided to be sub-divisional specific appointment. It was further resolved that these Trainees will be given contractual amount of Rs. 4500/- per month in normal arrears and Rs. 5500/- in tribal/hard areas."

3. It is, thus, evident that 200 posts were to be filled up. Appointment notices were published in various leading newspapers vide Annexures A-4, A-5 and A-6, i.e. ***The Tribune, Amar Ujala and Divya Himachal*** dated 26.6.2008. Respondent-Board has issued interview notices vide Annexure P-1 dated 1.12.2008 whereby the petitioners and similarly situate persons were informed that the posts were to be filled up on contract basis for a period of two years as per marks obtained by the candidates in matriculation and I.T.I. examinations. The petitioners and similarly situate persons were issued interview letter vide Annexure P-2 whereby they were asked to appear before the Departmental Selection Committee alongwith original and photocopies of the certificates in the office of Chief Engineer (OP), HPSEB, Dharamshala at 10.00 A.M. on 9.9.2008. In the interview letters, it is mentioned that the posts were to be filled up for a period of two years on batch-wise basis. In sequel to Annexures P-2 and P-3, respectively, petitioners and similarly situate persons were interviewed as per marks obtained in matriculation and I.T.I. examinations. However, fact of the matter is that the petitioners and similarly situate persons were offered appointment of Electrician, Linemen and S.S.A. as contractual trainees on fixed monthly amount of Rs. 4,500/- only in normal areas and Rs. 5,500/- in tribal/hard areas in Himachal Pradesh. Petitioners joined their duties.

4. Mr. Sanjeev Bhushan, learned counsel for the petitioners, has vehemently argued that the appointment of the petitioners as contractual trainees for a contractual period of two years was in violation of the Recruitment and Promotion Regulations framed by the Board. He has also contended that in Annexures P-1 and P-2 there is no mention of "expression" trainee. He has further contended that it was only in the year 2008 that the appointments were

made as contractual trainees for a period of two years and thereafter the posts have been filled up on contractual basis by the respondent-Board.

5. Mr. Rajpal Singh, learned counsel for the respondent, has strenuously argued that in fact the decision was taken by the Whole Time Members of the respondent-Board in the meeting held on 3.4.2008 to fill up the posts as trainees for a contractual period of two years. Even in the appointment letters there is also a reference of trainee. He has also contended that the petitioners have accepted the offer and have joined the duties and now they are stopped from challenging the same. He has lastly contended that the petitioners and similarly situate persons would be regularized after completion of eight years' regular service.

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

7. What emerges from the facts enumerated hereinabove is that though the decision was taken to fill up the posts as trainees for a contractual period of two years, but as per Annexures P-1 and P-2, the posts were to be filled up on contract basis for a period of two years.

8. Mr. Rajpal Singh has failed to point out any provision in the Recruitment and Promotion Regulations whereby the petitioners could be appointed as trainees. There is only provision of regular appointment and on contract basis as per insertion carried out in the Recruitment and Promotion Regulations on 7.12.2007. The petitioners have completed their training period as contract employee, as is evident from Annexure A-10 dated 29.3.2011. It has been specifically averred in para 6 (c) of the petition that in all the subsequent appointments which were made either by way of direct recruitment or by batch-wise basis, same were either made on regular basis or on contract basis. The respondent-Board in para 6 (c) of the reply has admitted that 16 posts of Electrician/Electrician (PH) (E) and 40 posts of Linemen have been filled up by the respondent-Board direct on contract basis during June, 2011 and September, 2012, respectively through H.P. Subordinate Services Selection Board Hamirpur. Thus, the petitioners have been discriminated against by the respondent-Board. The employer is the same. The petitioners had appeared before the interview board, being in possession of minimum essential qualification. They have been appointed on temporary basis on contract basis for a period of two years as trainees and the persons, who have been recruited through H.P. Subordinate Services Selection Board, Hamirpur have been appointed on contract basis for a period of two years. The petitioners will have to wait for eight years to get regularization and the persons, who have been appointed through H.P. Subordinate Services Selection Board, Hamirpur would be regularized after a period of six years. The petitioners have been discharging the duties, which are being discharged by the persons appointed by way of direct recruitment. Few of the petitioners are also manning the Sub-Stations independently. The petitioners cannot be discriminated only on the basis of source of recruitment.

9. Mr. Rajpal Singh has vehemently argued that the petitioners on completion of their successful training were issued certificate as per Annexure A-11. The nomenclature of trainee has been adopted by the respondent-Board to deprive the petitioners to get the salary equivalent to persons appointed on contract basis. It is merely a misnomer. It also amounts to unfair labour practice. The entire exercise undertaken by the respondent-Board to appoint the petitioners as trainees on contract basis is arbitrary and thus violative of Articles 14 and 16 of the Constitution of India. The respondent-Board is a State within the meaning of Article 12 of the Constitution of India and should have alive to its responsibilities strictly in letter and spirit of the Constitution of India.

10. Mr. Rajpal Singh has also argued that the petitioners have joined their duties after their selection as trainees. There cannot be any estoppel against the fundamental and constitutional rights. The petitioners have been appointed strictly as per Recruitment and Promotion Regulations and not as trainees on contractual basis for a period of two years. Petitioners' suitability has been adjudged by the Departmental Selection Committee either by way of direct recruitment or on batch-wise basis. We have seen that the minimum marks required were obtained by the petitioners as per Annexure P-1. The minimum marks required by general category for the post(s) of Lineman, S.S.A., Electrician and Electrician (P/H) were 70.55, 71.85, 73.15 and 71, respectively and for the category of general I.R.D.P were 68.40, 70.40, 73.10 and 66.60, respectively. Even the marks required by Scheduled Caste category were 69.50, 70.35, 73.30 and 70.80, respectively in matriculation and I.T.I. examinations.

11. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is allowed. The petitioners would be deemed to have been appointed on contract basis from the date of their initial appointments as Linemen, S.S.A., Electrician and Electrician (P/H). They shall also be entitled to initial pay scale of the post(s) alongwith Dearness Allowance for a period of two years. The seniority of the petitioners shall be counted from the date of their initial date of appointment for regularization. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

****

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

Krishan Chand & ors. .....Appellants.

Versus

Anil Kumar & others .....Respondents.

RSA No. 514 of 2002.
Reserved on: 16.12.2014.
Decided on: 31.12.2014.

Hindu Succession Act, 1956 - Section 14- 'N' minor widow of 'J' succeeded to his share on his death- she re-married 'K'- plaintiff contended that she forfeited her right in the property upon her re-marriege- held, that plaintiff had failed to prove the marriage of 'N' with 'K' after the death of 'J'- she was shown to be the owner in possession in revenue record, which carried with it a presumption of truth- presumption was not rebutted by the plaintiff- interest of the husband devolved upon the widow immediately on the date of his death and she became full owner on the commencement of Hindu Succession Act- her right cannot be forfeited by her subsequent marriage. (Para-23 to 34)

Cases referred:

Kanuri Sri Sankara Rao vrs. Kanuri Rajyalakshamma, AIR 1961 Andhra Pradesh 241

Eramma vrs. Veerupana and others, AIR 1966 SC 1879

Punithavalli Ammal vrs. Minor Ramalingam and another, AIR 1970 SC 1730

Jagdish Mahton vrs. Mohammad Elahi and ors., AIR 1973 Patna 170

Vaddeboyina Tulasamma and ors. Vrs. Vaddeboyina Sesha Reddi (dead) by LRs., AIR 1977 SC 1844

Sulochana Dei vrs. Khali Dei and ors., AIR 1987 Orissa 11

Velamuri Venkata Sivaprasad vrs. Kothuri Venkateshwarlu, AIR 2000 SC 434

Cherotte Sugathan vrs. Cherotte Bharathi & ors., BI AIR 2008 SC 1467

Jayaram Govind Bhalerao vrs. Jaywant Balkrishna Deshmukh & ors., AIR 2008 Bombay 151

Baliram Atmaram Dhake vrs. Rahubai alias Saraswatibai, AIR 2009 Bombay 57

For the appellant(s):	Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Neeraj Gupta, Advocate.
For the respondents:	Mr. K.D.Sood, Sr. Advocate, with Mr. Mukul Sood, 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, Solan, H.P. dated 19.9.2002, passed in Civil Appeal No.15-S/13 of 2002.

2. Key facts, necessary for the adjudication of this regular second appeal are that the appellants-plaintiffs (hereinafter referred to as the plaintiffs) have instituted suit against the respondents-defendants (hereinafter referred to as the defendants), for declaration in the Court of learned Sub Judge, Ist Class, Arki, Distt. Solan, H.P. According to the plaintiffs, the suit land was 'Bhentdari' in the possession of Sh. Masadi. He has three sons, namely, Sh. Dhani Ram Kanshi Ram and Jiwa Nand alias Jawala. The land was inherited by them in equal shares. Sh. Dhani Ram was the predecessor-in-interest of the plaintiffs and Sh. Kanshi Ram was the predecessor-in-interest of proforma defendant No. 3. Sh. Jiwa Nand had died in the year 1933. Smt. Nardu was his widow. Within one year of the death of Sh. Jiwa Nand, Smt. Nardu married with Sh. Kanshi Ram in accordance with local custom prevalent in the area and became his legally wedded wife from 1934 onwards. She gave birth to proforma defendant No. 3 namely, Sh. Daulat Ram and four daughters. Kanshi Ram died in the year 1970-71. His estate was inherited by his son, daughters and Smt. Nardu. A family partition took place in between 1940 to 1945, whereby Sh Dhani Ram and Kanshi Ram both got half share each in the suit land. They came in possession of their respective ½ share exclusively to the exclusion and complete ouster of 1/3rd share of their third brother Sh. Jiwa Nand. Sh. Jiwa Nand died issueless. Thus, according to them, mutation No. 3 was illegal, null and void. The subsequent entries on the basis of aforesaid mutation was also wrong, illegal and bad in law. Smt. Nardu died in the year 1991. The unregistered Will was executed in favour of defendants No. 1 & 2 on 15.7.1991 by Smt. Nardu Devi. According to them, the inheritance qua 1/3rd share of Sh. Jiwa Nand which opened in the year 1933, the rights of Nardu got extinguished on her remarriage with Kanshi Ram. According to them, the widow had only limited right of maintenance. There was a complete ouster to the extent of 1/3rd share of Sh. Jiwa Nand because the father of the plaintiffs and proforma defendant were in peaceful, continuous un-interrupted and hostile possession to the knowledge of whole world.

3. The suit was contested by defendants No. 1 & 2. According to them, Nardu being tenant had a right to acquire the suit land by operation of law. They have denied that any family partition had taken place. The plea of adverse possession was also denied. According to them, the Will was valid. There was no ouster of Smt. Nardu qua share of her husband Jiwa Nand. Defendant No. 3 also contested the suit. According to him, the revenue entries were correct and presumption of truth was attached to them. According to him, Nardu was the widow of Sh. Jiwa nand who had succeeded him before 1956. She became full owner after 1956.

4. The issues were framed by the learned Sub Judge, Ist Class, Arki. He dismissed the suit on 30.1.2002. The appellants-plaintiffs, feeling aggrieved by the judgment and decree dated 30.1.2002, filed an appeal before the learned

District Judge, Solan. The learned District Judge, Solan also dismissed the same on 19.9.2002. Hence, this regular second appeal.

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

> "1. Whether the courts below have wrongly held Smt. Nardoo to be absolute owner of the property by misapplying the provisions of Section 14(1) of the Hindu Succession Act?
>
> 2. Whether the findings of both the courts below are illegal, erroneous and perverse in upholding the Will alleged to have been executed by Smt. Nardoo in favour of defendants No. 1 & 2 when she had no right, title or interest of any kind in the suit land, further in the absence of proper proof of attestation and execution of the alleged Will and removal of the suspicious circumstances?
>
> 3. Whether the trial Court has wrongly applied the provisions of rule of estoppel in dismissing the suit of the plaintiff-appellants by ignoring the provisions of Evidence Act?"

6. Mr. Bhupinder Gupta, learned Sr. Advocate, on the basis of the substantial questions of law framed, has vehemently argued that the findings recorded by both the Courts below have wrongly applied the provisions of Section 14(1) of the Hindu Succession Act, 1956. According to him, the Will was not proved in accordance with law. Both the courts below have not correctly appreciated the oral as well as documentary evidence by ignoring the provisions of The Indian Evidence Act. He also contended that the Courts below have mis applied the provisions of Punjab Tenancy Act and H.P. Abolition of Big landed Estate and Land Reforms Act and Hindu Widow Re-marriage Act, 1856. On the other hand, Mr. K.D.Sood, learned Sr. Advocate, has supported the judgments and decrees passed by both the Courts below.

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

8. Since the substantial questions of law are interconnected, these were taken up together for discussion to avoid repetition of evidence.

9. PW-1 Krishan Chand testified that the suit land was 'Bhentdari' land. Masadi was his grandfather. His estate was inherited by his father Sh. Dhani Ram, Kanshi Ram and Jiwa Nand alias Jawala about 70 years back. The inheritance of land by Nardu Devi of Jiwa Nand was wrong. This land was divided between Dhani Ram and Daulat Ram about 50 years back and since then they are having ½ share each. Kanshi Ram died about 30 years back. The land was inherited by his son in village Chheta while in villages namely Pansoda and Thathali, he was succeeded by his daughters and wife Nardu. In the year 1979, Nardu had filed a partition case against the plaintiffs which was contested by them and the same was dismissed. The defendants were directed to go to Civil Court regarding the share of Jiwa Nand but the defendants did not file any Civil Suit. In the year 1982, the plaintiffs deposited the half compensation qua the suit land. His father had filed a civil suit No. 97/1 of 1992 in the year 1992 which was withdrawn on 26.5.1995. His father died and the plaintiffs filed this suit in the year 1996. Smt. Nardu died about 10 years back. Smt. Nardu had executed Will in the year 1990 in favour of Anil Kumar and Shashi Kumar qua the share of Sh. Jiwa Nand.

10. PW-2 Nandu Ram has supported the version of PW-1.

11. PW-3 Ram Dev has testified that in the year 1991, he was the ward member of Gram Panchayat Navgaon. He was never summoned by Sh. Daulat Ram etc. to write a Will. Sh. Lal Chand was the ward member of

Navgaon and Sh. Chet Ram was the ward member of Kothi and Shamkoh. Lal Chand is resident of village which is distance of 3 kms.

12. PW-4 Smt. Nirmala was the Secretary of Gram Panchayat Navgaon. She was also summoned by the plaintiffs to prove documents Ext. PW-4/A to Ext. PW-4/O.

13. DW-1 Gopal Chand Gupta, has proved Ext. DW-1/A.

15. DW-2 Sh. Khajana Ram deposed that Sh. Jiwa Nand died about 50 years back. His property was succeeded by Smt. Nardu. Kanshi Ram, Jiwa Nand and Dhani Ram were real brothers. At the time of mutation qua the inheritance of Sh. Jiwa nand, Sh. Dhani Ram was also present. Kamla was the legally wedded wife of Sh. Kanshi Ram. They remained husband and wife till the year 1962. Thereafter, divorce took place between them as per the custom and then Kamla married to another person in village Chhamla. From the year 1962 onwards, Nardu started living with Sh. Kanshi Ram as his wife. Kanshi Ram died about 30-35 years back and after his death, he was inherited by Smt. Nardu. Smt. Nardu gave birth to one Daulat Ram and three daughters.

16. DW-3 Dhani Ram testified that he remained Pradhan of Gram Panchayat from 1956. Jiwa Nand was known to him. He died 50 years back. Jiwa Nand was succeeded by Smt. Nardu. He was present at the time of attestation of mutation qua inheritance of Jiwa Nand in favour of Nardu. The wife of Kanshi Ram was Smt. Kamla. She remained with him till the year 1962. Thereafter, divorce took place between them as per custom. Kanshi Ram died 20-25 years back.

17. DW-4 Sant Ram has supported the version of DW-3.

18. DW-5 Jagar Nath and DW-6 Chet Ram were the marginal witnesses of Will Ext. DW-5/A. According to them, the Will was executed at the instance of Smt. Nardu who was in a sound disposing mind and had put the thumb impression on the Will. They have also identified their signatures on the Will.

19. According to 'Missel Haquiyat' Ext. P-8, at the time of consolidation, the suit land was in possession of Smt. Maltu widow of Sh. Masadi. Dhani Ram, Kanshi Ram and Nardu were in possession of equal shares as 'bhentdaran'. According to 'shajra nasab' Ext. PW-1/P, Sh. Masadi was having three sons, namely, Dhani Ram, Kanshi Ram and Jiwa Nand. The land of Jiwa Nand was inherited by his widow Nardu. Document Ext. P-5 is the mutation No. 3 of 1990. Jiwa Nand had died issueless. The land has been shown as 'bhentdaran'.

20. Now, as far as the alleged marriage of Nardu with Kanshi Ram is concerned, the plaintiffs have produced PW-2 Nandu Ram as witness. According to him, Kanshi Ram, Hiru and Nambardar and some other persons were present at the time of marriage. He himself was not present at the time of marriage. No other person has been produced to prove the marriage. This witness belongs to some other village i.e. Rundal. He has visited the village after 15-20 years after the death of Nardu. He was not aware what happened in these years. He has admitted that Nardu had legally married with Jiwa Nand. PW-1 Krishan Chand has no personal knowledge about the marriage since his date of birth is 24.9.1967. They have not produced any documentary evidence to prove the marriage of Nardu with Kanshi Ram prior to coming into force of Hindu Succession Act, 1956. According to the witnesses produced by the defendant, the marriage between Nardu and Kanshi Ram had taken place after the divorce between Kanshi Ram and Kamla. In the present case the general law of succession would apply. Smt.Nardu has succeeded her husband in the year 1933. There was no provision in Punjab Tenancy Act, 1877 to deal with succession to the tenancy rights of tenants.

21. Now, as far as the plea of partition is concerned, the same has not been proved by the plaintiffs. PW-2 Nandu Ram had no personal knowledge about the partition. Rather, in his cross-examination, he admitted that the land was being cultivated in the same manner as it was during the life time of Jiwa Nand. In case there had been any private partition, the same would have been recorded in the revenue record.

22. As far as the plea of adverse possession is concerned, the same has to be pleaded and proved. The plaintiffs have not proved the ingredients of adverse possession.

23. In the case of ***Kanuri Sri Sankara Rao vrs. Kanuri Rajyalakshamma,*** reported in ***AIR 1961 Andhra Pradesh 241,*** the learned Single Judge has held that under the terms of sub Sections (2) and (3) of Section 3, the interest of the husband devolves upon the widow immediately on the date of his death. It has been held as follows:

> "6. The question for consideration is whether, on a true construction of Section 3, Sub-sections (2) and (3) of the Hindu Women's Rights to Property Act, the widow acquires no rights as on the actual date of death of Venkatasiva Rao viz. 7-6-1956. Subsection (2) of Section 3 is quite clear that when a Hindu governed by Mitakshara school of Hindu Law dies having at the time of his death an interest in a Hindu joint family property, his widow shall have in the property the same interest as he himself had.
>
> Sub-section (3) provides that in respect of the interest which devolves on her under Sub-section (2) she shall have the limited interest known as the Hindu Women's estate and it further enacts that she shall have the same right of claiming partition as a male owner. It does not expressly or impliedly enact that the Hindu governed by the Mithakshara school of Hindu Law is deemed to live till his widow claims a right of partition.
>
> It is significant to note that under the terms of Sub-sections (2) and (3) of Section 3, the interest of the husband devolves upon the widow immediately on the date of his death. No legal fiction is imported in the section and the legislature does not provide that the husband is deemed to live till she claims partition or files a suit for working out her rights."

24. In the case of ***Eramma vrs. Veerupana and others,*** reported in ***AIR 1966 SC 1879,*** their lordships of the Hon'ble Supreme Court have held Section 14(1) of the Act contemplates that a Hindu female, who in the absence of this provision, would have been limited owner of the property, will now become full owner of the same by virtue of this section. The object of the section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu Law and to make a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property will all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder. Their lordships have held as under:

> **"7.** It is true that the appellant was in possession of Eran Gowda's properties but that fact alone is not sufficient to attract the operation of S. 14. The property possessed by a female Hindu, as contemplated in the section is clearly property to which she has acquired some kind of title whether before or after the commencement of the Act. IT may be noticed that the Explanation to S. 14 (1) sets out the various modes of acquisition of the property by a female Hindu and indicates that the section applies only to property to which the female Hindu has acquired some kind of title, however restricted the nature of her interest may be. The words "as full owner thereof and not as a limited owner as given in the last portion of sub-section (1) of S. 14 clearly suggest that the legislature intended that the limited ownership of the Hindu female should be changed into

full ownership. In other words, S. 14 (1) of the Act contemplates that a Hindu female, who, in the absence of this provision, would have been limited owner of the property will now become full owner of the same by virtue of this section. The object of the section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu law and to make a Hindu woman, who under the old law would have been only a limited owner a full owner of the property with all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder. The Explanation to sub-section (1) of S. 14 defines the word 'property' as including "both movable and immovable property acquired by a female Hindu by inheritance or devise ... ". Sub-section (2) of S. 14 also refers to acquisition of property. IT is true that the Explanation has not given any exhaustive connotation of the word 'property' but the word 'acquired' used in the Explanation and also in sub-s. (2) of S. 14 clearly indicates that the object of the section is to make a Hindu female a full owner of the property which she has already acquired or which she acquires after the enforcement of the Act. IT does not in any way confer a title on the female Hindu where she did not in fact possess any vestige of title. IT follows, therefore, that the section cannot be interpreted so as to validate the illegal possession of a female Hindu and it does not confer any title on a mere trespasser. In other words the provisions of S. 14 (1) of the Act cannot be attracted in the case of Hindu female who is in possession of the property of the last male holder on the date of the commencement of the Act when she is only a trespasser without any right to property."

25. In the case of ***Punithavalli Ammal vrs. Minor Ramalingam and another,*** reported in ***AIR 1970 SC 1730,*** their lordships of the Hon'ble Supreme Court have held that the rights conferred on a Hindu female under s. 14(1) of the Act are not restricted of limited by any rule of Hindu law. The section plainly says that the property possessed by a Hindu female on the date the Act came into force whether acquired before or after the commencement of the Act shall be held by her as full owner thereof. The provision makes a clear departure from the Hindu law texts or rules. Their lordships have held as under:

"6. The explanation to the section is not necessary for our present purpose. It was conceded at the bar that Sellathachi was in possession of the property in dispute on the date the Act came into force. By virtue of the aforesaid provision, she became the 'full owner of the property on that date From a plain reading of s. 14(1), it is clear that the estate taken by a Hindu female under that provision is an absolute one and is not defeasible under any circumstance. The ambit of that estate cannot be cut by any text, rule or interpretation of Hindu law. The presumption of continuity of law is only a rule of interpretation. That presumption is inoperative if the language of the -concerned statutory provision is plain and unambiguous. The fiction mentioned earlier is abrogated to the extent it conflicts with the rights conferred on a Hindu female under s. 14(1) of the Act. In Sukhram and anr. v. Gauri Shankar and anr.(1) this Court held that though a male member of a Hindu family governed by the Benaras School of Hindu law is subject to restrictions qua alienation of his interest in the joint family property but a widow acquiring an interest in that property by virtue of Hindu Succession Act is not subject to any such restrictions. This Court held in S. S. Munna Lal v. S. S. Rajkumar and ors. (2) that by virtue of s. 4 of the Act the legislature abrogated the rules of Hindu law on all matters in respect of which there is an express provision in the Act. In our opinion the rights conferred on a Hindu female under s. 14(1) of the Act are not restricted or limited by any rule of Hindu law. The section plainly says that the property possessed by a

Hindu female on the date the Act came into force whether acquired before or after the commencement of the Act shall be held by her as full owner thereof. That provision makes a clear departure from the Hindu law texts or rules. Those texts or rules cannot be used for circumventing the plain intendment of the provision.

7. In our judgment the learned judges of the Madras High Court were not right in limiting the scope of s. 14:(1) by taking the aid of the fiction mentioned earlier. That in our opinion is wholly impermissible. On the point -under consideration the decision of the Bombay High Court in Yamunabai and anr. v.Ram Maharaj Shreedhar Maharaj and anr. (AIR 1960 Bom 463) lays down the law correctly."

26. In the case of ***Jagdish Mahton vrs. Mohammad Elahi and ors.,*** reported in ***AIR 1973 Patna 170,*** the Division Bench has held that there is nothing in Section 14 of the Hindu Succession Act that once a widow succeeds to the property of her husband and acquires absolute right over the same, she would be divested of that absolute right on her re-marriage. Their lordships have further held that the full ownership conferred on a Hindu widow under Section 14 of the Hindu Succession Act cannot be divested by her subsequent re-marriage. If Section 2 of the Hindu Widows' Re-marriage Act was to apply to cases where a Hindu widow has got an absolute interest in her deceased husband's property, that will be inconsistent with the provisions of the Hindu Succession Act and, therefore, invalid to the extent of inconsistency by virtue of the provisions of Section 4 (l) (b) of the Hindu Succession Act. Their lordships have held as under:

"8. The main point for consideration in this case is whether by reason of the provision of Section 2 of the Hindu Widows' Re-marriage Act, a widow, who has acquired absolute interest in the property of her deceased husband by operation of Section 14 of the Hindu Sucession Act would be divested of that interest by subsequent re-marriage. Section 2 of the Hindu Widows' Re-marriage Act, 1856 has the effect of divesting the estate inherited by a widow from her deceased husband as a result of her remarriage. By her second marriage the widow forfeits the interest taken by her in her husband's estate and it passed to the next heirs of her husband as if she was dead. Section 14 of the Hindu Succession Act, 1956, lays down "Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner." The only condition which has to be fulfilled for the acquisition of the absolute right of the widow over the property of her husband is that she must be in possession over the said property at the time of the death of her husband. Section 4 (1) (b) of the Hindu Succession Act, 1956 lays down:

"Save as otherwise expressly provided in this Act--any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act".

It appears that the Hindu Succession Act has brought about radical changes in the law of succession and that this Act will supersede all rules of succession contained in any previous enactment or elsewhere which are inconsistent with any provision contained in the Hindu Succession Act. The Hindu Widows' Re-marriage Act which provides that a widow on re-marriage would be divested of her interest in her husband's property was a previous enactment regulating succession to the property and it was clearly the law on the subject immediately before the Hindu Succession Act came into force. The effect of passing of the Hindu Succession Act is that all other laws in force prior to the passing of the

Hindu Succession Act shall cease to apply to the Hindus so far as they are inconsistent with any provision of the Hindu Succession Act.

13. Even if it be accepted for the sake of argument as found out by the courts below that Most Jogni remarried Budhari Koeri, this remarriage must have taken place after the death of Ram Sahay Mahto because there is no case of any of the parties that Most. Jogni remarried Budhan Koeri during the lifetime of Ram Sahay Mahto. In this circumstance, the condition for the application of Section 14 of the Hindu Succession Act, namely, that Most. Jogni was in possession over the property of her husband Ram Sahay Mahto at the time of his death, has been fulfilled in this case and, as such, she acquired 'absolute right over the property of her husband. There is nothing in Section 14 of the Hindu Succession Act that once a widow succeeds to the property of her husband and acquires absolute right over the same, she would be divested of that absolute right on her re-marriage. This view of mine finds corroboration in the decision in the case of Chinnappavu Naidu v. Meenakshi Ammal, AIR 1971 Mad 453. There is also nothing in Section 24 of the Hindu Succession Act which is contrary to Section 14 of the same Act which confers absolute right to a widow on her husband's property, if she was possessed of the same at the time of his death. The disqualification of a widow to inherit as envisaged in Section 24 of the Hindu Succession Act does not apply where a widow remarries after the succession had opened. In the instant case, the succession opened immediately on the death of Ram Sahay Mahto and so his widow Most. Jogni acquired absolute interest over the property of her husband. She could not be divested of this interest by her subsequent remarriage.

Section 2 of the Hindu Widows' Remarriage Act will have no application in the instant case by reason of the application of Section 4 (1) (b) of the Hindu Succession Act because the law embodied in Section 2 of the Hindu Widows' Re-marriage Act about the forfeiture of the right of the widow to hold the property of her previous husband on her subsequent remarriage is inconsistent with the provisions of law contained in Section 14 of the Hindu Succession Act conferring absolute right on a widow in respect of the property over which she is in possession at the time of the death of her husband. The full ownership conferred on a Hindu widow under Section 14 of the Hindu Succession Act cannot be divested by her subsequent re-marriage. Although not exactly on the same point but the principle of law enunciated by their Lordships of the Suprme Court in the case of Punithavalli Ammal v. Minor Ramalingam, AIR 1970 SC 1730 may also be usefully applied to the instant case. It was held in the aforesaid case that the estate taken by a Hindu widow under Section 14 (1) of the Hindu Succession Act is an absolute one and not defeasible by the subsequent adoption made by her to her deceased husband after the Act has come into force.

16. I am in entire agreement with my learned Brother Mukharji, J. that Section 2 of the Hindu Widows' Re-marriage Act is inconsistent with Section 14 of the Hindu Succession Act, and, therefore, in cases, where a Hindu widow gets absolute right by inrcritanee in her husband's property, she cannot be divested of that right by virtue of Section 2 of the Hindu Widows' Re-marriage Act. In my opinion, Section 2 aforesaid merely divests a Hindu widow on re-marriage of limited interest held by her. It has been expressly so stated with regard to her husband's property coming to her by virtue of any Will or testamentary disposition. If the interest conferred upon her in her husband's property by virtue of will or testamentary disposition is not limited but absolute, the section has got no application. It appears that the section has also got no application where she gets her deceased husband's property by virtue of

a non-testamentary disposition. Rights and interest acquired by her in her husband's property by inheritance, to her husband or to his lineal successors were limited interest before the passing of the Hindu Succession Act.

Rights and interest acquired by her in her deceased husband's property by way of maintenance except by a grant conferring upon her absolute right were also a limited interest. In view of the fact that the section was not made applicable to her deceased husband's property coming through non-testamentary disposition, it is doubtful whether the properly given to her by way of maintenance by a grant conferring absolute right on her could be divested on her remarriage. For the purpose of decision of the appeal, that point need not be examined in any further detail and, be that as it may, ordinarily Section 2 of the Hindu Widows' Remarriage Act was not intended to apply to cases where a widow acquired an absolute interest in her deceased husband's property.

17. After the passing of the Hindu Succession Act, by virtue of Section 14 of that Act, a widow gets an absolute interest in her deceased husband's property possessed by her. If Section 2 of the Hindu Widows' Re-marriage Act was to apply to cases where a Hindu widow has got an absolute interest in her deceased husband's property, that will be inconsistent with the provisions of the Hindu Succession Act and, therefore, invalid to the extent of inconsistency by virtue of the provisions of Section 4 (l) (b) of the Hindu Succession Act. Learned Counsel for the appellant placed reliance on Section 15 of the Hindu Succession Act, according to which, in absence of the heirs expressly mentioned in Clause (a) of Sub-section (11. the property inherited by a female Hindu from her father or mother was on her dying intestate to devolve on the heirs of her father while the property inherited by a female Hindu from her husband was to devolve upon the heirs of the husband. According to him, this showed that the intention of the makers of the Hindu Succession Act was that the property in the hands of a Hindu female should not go out of the hands of the branch to which it originally belonged. Section 15 applies only to cases where a female Hindu dies intestate.

It implicdly shows that she has been given full power in respect of the property possessed by her, be that of her father or mother or of her husband, to give it to any one she likes by a testamentary or non-testamentary disposition. It cannot, therefore, be said that the framers of the Hindu Succession Act intended to divest a Hindu female of absolute right acquired by her in case of re-marriage or any other contingency. Section 23 of the Hindu Succession Act imposes some restriction on the power of a Hindu widow in respect of dwelling houses. Section 24 debars the widow of a pre-deceased son, widow of a pre-deceased son of a pre-deceased son or the widow of a brother from succession to the property of a Hindu dying intestate as such widow, If on the date the succession opens, she has re-married. Had the framers of the Act intended to divest a Hindu widow of the property inherited by her and possessed by her on ground of re-marriage, they would have made specific provisions for that in the Act itself. Sections 25 and 26 of the said Act also make provisions which are applicable to both males and females debarring them from succession or inheritance in certain cases and, thereafter, comes Section 28 which says that no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity or save as provided in the Act on any other ground whatsoever.

In my opinion, therefore, it is manifest from the provisions of the Act that the framers thereof never intended to divest a Hindu Widow of her interest in her deceased husband's property on the ground of remarriage and Section 2 of the Hindu Widows" Re-marriage Act is inconsistent with

the provisions of the Act. This view is directly supported by a Bench decision of the Madras High Court in ATR 1971 Mad 433 and impliedly supported by the decision of the Supreme Court in AIR 1970 SC 1730 wherein it has been held that the estate taken by a Hindu widow under Section 14 (1) of the Hindu Succession Act is not defeasible by the subsequent adoption made by her to her deceased husband. My learned Brother Mukherji, J., has already referred to these two decisions and T need not refer to them in any further detail."

27. In the case of ***Vaddeboyina Tulasamma and ors. Vrs. Vaddeboyina Sesha Reddi (dead) by LRs.,*** reported in ***AIR 1977 SC 1844,*** their lordships have held that sub-section (1) of section 14 is large in its amplitude and covers every kind of acquisition of property by a female Hindu including acquisition in lieu of maintenance and where such property was possessed by her at the date of commencement of the Act or was 'subsequently acquired and possessed, she would become the full owner of the property. Their lordships have held as under:

"3. Since the determination of the question in the appeal turns on the true interpretation to be placed on sub-section (2) read in the context of sub-section (1) of section 14 of the Hindu Succession Act, 1956, it would be convenient at this stage to set out both the sub-sections of that section which read as follows:

"14(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.---In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheri- tance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner what- ever, and also any such property held by her as stridharas immediately before the commence- ment of this Act.

(2) Nothing contained in sub-section (1) shah apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

Prior to the enactment of section 14, the Hindu law, as it was then in operation, restricted the nature of the interest of a Hindu female in property acquired by her and even as regards the nature of this restricted interest, there was great diversity of doctrine on the subject. The Legislature, by enacting sub-section (1) of section 14, intended, as pointed by this Court in S.S. Munna Lal v.S.S. Raikumar(1) "to convert the interest which a Hindu female has in property, however, restricted the nature of that interest under the Sastric Hindu law may be, into absolute estate". This Court pointed out that the Hindu Succession Act, 1956 is a codifying enactment and has made far-reaching changes in the structure of the Hindu law of inheritance, and succession. The Act confers upon Hindu females full rights of inheritance and sweeps away the traditional limitations on her powers of disposition which were regarded under the Hindu law as inherent in her estate". Sub-section (1) of section 14, is wide in its scope and ambit and uses language of great amplitude. It says that any property possessed by a female Hindu,. whether acquired before or after the commencement of the Act, shall be held by her as full owner thereof and not as a limited owner. The words

"any property" are, even without any amplification, large enough to cover any and every kind of property, but in order to expand the reach and ambit of the section and make it all-comprehensive, the Legislature has enacted an explanation which says that property would include "both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatever, and also any such property held by her as stridhana immediately before the commencement" of the Act. Whatever be the kind of property, movable or immovable, and whichever be the mode of acquisition, it would be covered by subsection (1) of section 14, the object of the Legislature being to wipe out the disabilities from which a Hindu female suffered in regard to ownership of property under the old Sastric law, to abridge the stringent provisions against proprietary rights which were often regarded as evidence of her perpetual tutelege and to recongnize her status as an independent and absolute owner of property. This Court has also in a series of decisions given a most expansive interpretation to the language of sub-section (1) of section 14 with a view to advancing the social purpose of the legislation and as part of that process, construed the words 'possessed of' also in a broad sense and in their widest connotation. It was pointed out by this Court in Gummalepura Taggina Matada Kotturuswami v. Setra Veeravva(1) that the words 'possessed of mean "the state of owning or having in one's hand or power". It need not be actual or physical possession or personal occupation of the property by the Hindu female, but may be possession in law. It may be actual or constructive or in any form recognized by law. Elaborating the concept, this Court pointed out in Mangal Singh v. Rattno(2) that the section covers all cases of property owned by a female Hindu al- though she may not be in actual, physical or constructive possession of the property, provided of course, that she has not parted with her rights and is capable of obtaining possession of the property. It will, therefore, be seen that sub-section (1) of section 14 is large in its amplitude and covers every kind of acquisition of property by a female Hindu including acquisition in lieu of maintenance and where such property was possessed by her at the date of commencement of the Act or was 'subsequently acquired and possessed, she would become the full owner of the property.

4. Now, sub-section (2) of section 14 provides that nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property. This provi sion is more in the nature of a proviso or exception to sub-section (1) and it was regarded as such by this Court inBadri Pershad v. Smt. Kanso Devi(1). It excepts certain kinds of acquisition of property by a Hindu female from the operation of sub-section (1) and being in the nature of an exception to a provision which is calculated to achieve a social purpose by bringing about change in the social and economic position of women in Hindu society, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-section (1). It cannot be interpreted in a manner which would rob sub-section (1) of its efficacy and deprive a Hindu female of the protection sought to be given to her by sub-section (1). The language of sub-section (2) is apparently wide to include acquisition of property by a Hindu female under an instrument or a decree or order or award where the instrument, decree, order or award pre- scribes a restricted estate for her in the property and

this would apparently cover a case where property is given to a Hindu female at a partition or m lieu of maintenance and the instrument, decree, order or award giving such property prescribes limited interest for her in the property. But that would virtually emasculate sub-section (1), for in that event, a large number of cases where property is given to a Hindu female at a partition or in lieu of maintenance under an instrument, order or award would be excluded from the operation of the beneficent provision enacted in sub-section (1), since in ,most of such cases, where property is allotted to the Hindu female prior to the enactment of the Act, there would be a provision, in consonance with the old Sastric law then prevailing, prescribing limit- ed interest in the property and where property is given to the Hindu female subsequent to the enactment of the Act, it would be the easiest thing for the dominant male to provide that the Hindu female shall have only a restricted interest in the property and thus make a mockery of sub-section (1). The Explanation to sub-section (1) which includes within the scope of that sub-section property acquired by a female Hindu at a partition or in lieu of maintenance would also be rendered meaningless, because there would hardly be a few cases where the instrument, decree, order or award giving property to a Hindu female at a partition or in lieu of maintenance would not contain a provision prescribing re- stricted estate in the property. The social purpose of the law would be frustrated and the reformist zeal underlying the statutory provision would be chilled. That surely could never have been the intention of the Legislature in enacting sub-section (2). It is an elementary rule of construction that no provision of a statute should be construed in isolation but it should be construed with reference to the con- text and in the light of other provisions of the statute so as, as far as possible, to make a consistent enactment of the whole statute. Sub-section (2) must, therefore, be read in the context of sub-section (1) so as to leave as large a scope for operation as possible to sub-section (1) and so read, it must be confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right, under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property. This constructional approach finds support in the decision in Badri Prasad's case (supra) where this Court observed that sub-section (2) "can come into operation only if acquisition in any of the methods enacted therein is made for the first time without there being any pre-existing right in the female Hindu who is in possession of the property". It' may also be noted that when the Hindu Succession Bill 1954, which ultimately culminated into the Act, was referred to a Joint Committee of the Rajya Sabha, clause 15(2) of the Draft Bill, corresponding to the present sub- section (2) of section 14, referred only to acquisition of property by a Hindu female under gift or will and it was subsequently that the other modes of acquisition were added so as to include acquisition of property under an instrument, decree, order or award. This circumstance would also seem to indicate that the legislative intendment was that sub-section (2) should be applicable only to cases where acquisition of property is made by a Hindu female for the first time without any pre-existing right-a kind of acquisition akin to one under gift or will. Where, however, property is acquired by a Hindu female at a partition or in lieu of right of maintenance, it is in virtue of a pre-existing right and such an acquisition would not be within the scope and ambit of sub-section (2), even if the instrument, de cree, order or award allotting the property prescribes a restricted estate in the property.

8. In the circumstances, we reach the conclusion that since in the present case the properties in question were acquired by the appellant under the compromise in lieu or satisfaction of her right of maintenance,

it is sub-section (1) and not sub-section (2) of section 14 which would be applicable and hence the appellant must be deemed to have become full owner of the properties notwithstanding that the compromise prescribed a limited interest for her in his properties. We accordingly allow the appeal, set aside the judgment and decree of the High Court and restore that of the District Judge, Nellore. The result is that the suit will stand dismissed but with no order as to costs."

28. In the case of ***Sulochana Dei vrs. Khali Dei and ors.,*** reported in ***AIR 1987 Orissa 11,*** the Division Bench has held that when the death of the husband took place in 1954 and the property had devolved upon the wife and wife remarriages in 1958, the wife would be exclusive owner of property devolved on her. It has been held as under:

"10. We find that the trial Court has correctly concluded that the respondent 1 had acquired exclusive title over the 'A' schedule properties on the coming into force of the Act, had remarried the respondent 1(a) in May, 1958 and had, for legal necessity and consideration, sold schedule 'A' properties in favour of the respondent 2 for Rs. 2,000/-. In an affirming judgment, we do not feel ourselves called upon to re-state and reiterate the reasons given by the Trial Court in support of these conclusions as it was not necessary to do so. (See AIR 1967 SC 1124 Girijanandini Devi v. Bijendra Narayan Choudhury)."

29. In the case of ***Velamuri Venkata Sivaprasad vrs. Kothuri Venkateshwarlu,*** reported in ***AIR 2000 SC 434,*** their lordships of the Hon'ble Supreme Court have held that The Hindu Widow's Re-marriage Act of 1856 has its full play on the date of re-marriage itself, as such Succession Act could not confer the widow who has already re-married, any right in terms of S. 14(1) of the Act of 1956. Their lordships have held as under:

"16. The Division Bench of the Andhra Pradesh High Court unfortunately has not been able to appreciate the admitted re-marriage of Lakshmamma in the year 1953. Re-marriage is a fact which ought to be taken note of in the matter under consideration and it is this change of status, by reason of remarriage, falls for determination in the present appeal. While there is no amount of doubt that by reason of the well settled law as laid down by this Court, to the effect that a limited right of maintenance permeated into an absolute right under Section 14 (1) of the Hindu Succession Act but would the effect be the same, in the event of there being a re-marriage of the widow prior to 1956? The Act of 1956, incidentally is prospective in its operation and no element of retrospectivity can be attributed therein. The effect of remarriage is available in the Act of 1856. Section 2 thereof reads as below:

"2. 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 re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage 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."

48. Be that as it may the law as declared by Privy Council has been consistently followed that subsequent unchastity will not make a widow forfeit the property which she has succeeded to her husband on his death neither we express any contra view in regard thereto. In the contextual facts of the matter under consideration however, and since the factual situation of re-marriage of Lakshmamma in the year 1953, stands

proved, it has to be held that Section 2 of the Hindu Widow's Re-marriage Act, 1956 gets attracted. As a result thereof, Defendant No.l's right to get maintenance from their deceased husband's property came to an end on civil death qua her ex-husband's estate latest by 1953. Hence there was no subsisting legal right of maintenance available to Defendant No.l qua her deceased husband's estate in any of his properties nor was there a subsisting limited interest of hers in any of those properties which get matured into full ownership under Section 14(1) of the Hindu Succession Act when it came into force. As such the legal situation is different in the present case and the law as laid down and as noticed above does not render any assistance to the Respondent herein. Similar is the situation in regard to another decision of the Madras High Court in the case of Chinnappavu Naidu v. Meenakshi Ammal and another, AIR (1971) Mad.453. The decision last noted dealt with the effect of Section 2 of the Hindu Widows Re-marriage Act, 1856 and the Division Bench of the Madras High Court came to a conclusion that by reason of Section 4(1)(b) of the latter Act, of the Hindu Succession Act, 1956. Section 14 prevails over Section 2 of the 1856 Act and as such re-marriage will not create any divestation. The re- marriage spoken of in the Madras High Court decision however, did take place after introduction of the Succession Act of 1956, as such this decision also does not lend any assistance to the respondent by reason of the factual differentiation in the matter presently before us."

30. In the case of ***Cherotte Sugathan vrs. Cherotte Bharathi & ors.,*** reported in BI AIR 2008 SC 1467, their lordships of the Hon'ble Supreme Court have held that widow inheriting property of her husband on his death becomes its absolute owner and subsequent remarriage does not divest her of property in view of Sections 24 and 14. Their lordships have held as under:

"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, 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 1956 Act, thus, shall prevail over the text of any Hindu Law or the provisions of 1856 Act. Section 2 of the 1856 Act would not prevail over the provisions of the 1956 Act having regard to Section 4 and 24 thereof."

31. In the case of ***Jayaram Govind Bhalerao vrs. Jaywant Balkrishna Deshmukh & ors.,*** reported in ***AIR 2008 Bombay 151,*** the learned Single Judge has held that in view of the provisions of Section 3(2) of the Hindu Women's Rights to Property Act, the widow was entitled to get same interest in joint family as was her husband had at the time of his death. The learned Single Judge has further held that since the Hindu widow in question got interest of her husband in coparcenary property 1942 as a limited estate but she became full owner of that interest in 1956 and by virtue of Section 30, she could bequeath her share or interest by executing a Will. It has been held as follows:

"6. From the facts noted above, it is clear that the husband and brother-in-law of Sitabai were members of the Joint Hindu Family along with their father. Sitabai was married in 1938 and her husband had died in 1942 during the lifetime of his father. In 1945, his father also died and thus the Joint Family property of the coparcener was in the hands of Balkrishna. There is no dispute that the coparcenery had joint family property shown in Schedules "A", "B" and "C" in the plaint. Admittedly, under the old Mitakshara Hindu Law, on death of the father and brother, when there was no other male member in the family except Balkrishna,

he alone would get whole of the property by survivorship and the female members would be entitled only to maintenance from that property. However, a drastic change was brought in the law by Hindu Women's Rights to Property Act, 1937 (hereinafter referred to as "the said Act"). Under Section 3(2) of the said Act, when a Hindu governed by any school of Hindu Law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu Joint Family property, his widow shall, subject to the provisions of Sub-section (3) have in the property same interest as he himself had. Sub-section (3) only declares that the Hindu widow would get only a limited interest known as a Hindu woman's estate, provided however that she shall have the right of claiming partition as a male owner. It means she could claim partition, get possession and enjoy the property, but she could not dispose of the property except in special circumstances. In 1942, when Narayan, husband of Sitabai died, he had an interest in the Joint Hindu Family property and admittedly the properties were governed by Mitakshara School of Hindu Law as applicable in Maharashtra. In view of the provisions of Sub-section 3(2) of the said Act, Sitabai would get the same interest in the Joint Hindu Family property as her husband had at the time of her death, but that interest was a limited interest. As the partition did not take place, after death of her husband or after the death of father-in-law, the joint family and the joint family property continued till Hindu Succession Act, 1956 was enacted.

7. Section 14 of the Hindu Succession Act, 1956 reads as under:

14. Property of a female Hindu to be her absolute property -(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. Explanation - In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in Sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

From this it is clear that any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner and not as a limited owner. The preamble of this Act clearly shows that the Hindu Succession Act was enacted to amend and codify the law relating to inteste. Thus, Section 14 amended the Hindu Law in relation to the intestate succession in respect of female Hindus. Thus, what Sitabai had received as the limited estate on death of her husband in 1942 by virtue of Section 3(2) of the said Act, she became full owner of the same by virtue of Section 14(1) of the Hindu Succession Act, 1956. Admittedly, in view of this legal provision, her suit for partition and separate possession was decreed in respect of the property shown in Schedules "B" and "C". She was required to prefer an appeal only in respect of the properties mentioned in Schedule "A" about which the suit was dismissed on the ground that the property was not possessed by the family and it was already acquired by the Government. It is not necessary to enter into the merits of that appeal. Possibly, she would get share in

the compensation received from the Government in the same ratio in which she had share in the joint family property.

8. According to the appellant, Sitabai had executed a Will bequeathing her property to him. After her death, on the basis of that Will, the appellant had made an application before the appellate Court to implead him or to bring him on record as legal heir of the appellant -Sitabai. That appeal came to be rejected by the learned appellate Court relying on M.N. Aryamurthi (supra) and Addagada Raghavamma and other (supra) in which it was held that a Hindu cannot bequeath his share or interest in the joint family property by executing a Will. Mr. Walawalkar, learned Senior Counsel for the appellant pointed out that if these two judgments are carefully read, it would become clear that in both these matters, interest in the Joint Hindu Family property was sought to be bequeathed by executing a Will prior to the enactment of the Hindu Succession Act, 1956. He rightly pointed out that Section 30 of the Hindu Succession Act has made important departure from the legal position as it prevailed prior to the enactment of the Hindu Succession Act, 1956. Section 30 of the said Act reads as follows:

30. Testamentary succession - Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.

Explanation - The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhiillom, kutumba or kavaru shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section.

It will be useful to quote following observations from Mulla on Hindu Law 17th Edition, Vol. II page 374, in respect of the effect of Section 30:

According to Mitakshara law, no coparcener, not even a father, can dispose of by will his undivided coparcenary interest even if the other coparceners consent to the disposition, the reason being that at the moment of the death the right of survivorship (of the other coparceners) is in conflict with the right by device. Then the title by survivorship, being the prior title, take precedence to the exclusion of that by device. That rule of Mitakshara law is now abrogated by the Explanation which lays down in explicit terms that such interest is to be deemed to be property capable of being disposed of by will notwithstanding anything contained in any provision of the Act or any other law for the time being in force....

Prior to the coming into force of this Act neither under Mitakshara nor under Dayabhaga law could a widow or other limited female heir in any case dispose of by will any property inherited by her or any portion thereof, whether the property was movable or immovable. The effect of Section 14 of this act inter alia is to abrogate that traditional limitation. She is now full owner of all property howsoever acquired and held by her and can dispose of it by will....

From this, it is clear that inspite of the restrictions on the disposition of undivided coparcenary interest by coparcener or by a widow by will under the Mitakshra School of law, in view of the drastic change brought in by Section 30 and particularly Explanation to Section 30 of the Hindu Succession Act, the interest of a male Hindu in a Mitakshara coparcenary property shall be deemed to be property capable of being disposed of by a male or female within the meaning of this Section.

> 9. As pointed out earlier, Sitabai got interest of her husband in the coparcenary property in 1942 as a limited estate but she became full owner of that interest in 1956 and by virtue of Section 30, she could bequeath her share or interest by executing a will. It appears that this legal position was not brought to the notice of the learned appellate Court and the learned appellate Court rejected the application of the applicant holding that Sitabai could not bequeath her interest in the joint family property by a will in view of the above referred two authorities. As Their Lordships were concerned with the disposition of property by a Will executed prior to the enactment of the Hindu Succession Act, 1956 those authorities could not have been made applicable to the facts of the present case. I find support to this view from Gopal Singh and Anr. v. Dile Ram (Dead by Lrs. and Ors. wherein the Supreme Court held that the effect of the Hindu Succession Act, 1956 was that a female can transfer her property by will and since that case was subsequent to 1956, she had absolute estate and full capacity to make the Will. This legal position was also followed in several authorities by the Supreme Court, including Pavitri Devi v. Darbari Singh."

32. In the instant case, Smt. Nardu executed Will in favour of defendants No. 1 & 2. The Will has been duly proved by defendants by producing marginal witnesses. The marginal witnesses have deposed that they have signed the Will as marginal witnesses on the Will and Smt. Nardu had also put her thumb impression on the same.

33. The learned Single Judge in the case of ***Baliram Atmaram Dhake vrs. Rahubai alias Saraswatibai,*** reported in ***AIR 2009 Bombay 57,*** have held that the widow inherits the property of her husband becomes absolute owner and her remarriage would not divest her of the property. It has been held as follows:

> "10. The fact that in the year 1962 the plaintiff/respondent remarried would not divest her of her rights vested in her by virtue of Section 14 of the Hindu Succession Act, 1956. In support of this proposition the learned advocate for the respondent Shri Sangeet, advocate relied upon the case of Cherotte Sugathan (D) by L.Rs. and others vs Cherotte Bharathi and others [2008 AIR SCW 1525]. Their Lordships of the Supreme Court clearly laid down that widow inheriting property of her husband on his death would become absolute owner and subsequent remarriage would not divest her of property in view of Sections 24 and 14 of the Hindu Succession Act, 1956. It is also observed that Hindu Succession Act, 1956 overrides provisions of Hindu Widow's Remarriage Act, 1856."

34. DW-5 Jagar Nath and DW-6 Chet Ram were the marginal witnesses of Will Ext. DW-5/A. According to them, the Will was executed at the instance of Smt. Nardu who was in a sound disposing mind and had put the thumb impression on the Will. They have also identified their signatures on the Will. The plaintiffs have failed to prove that Nardu Devi has re-married Kanshi Ram prior to coming into force of the Hindu Succession Act, 1956. The Courts below have correctly applied Section 14(1) of the Act to come to the conclusion that the widow Nardu Devi has acquired full right in the property after coming into force of the Hindu Succession Act, 1956. The substantial questions of law are answered accordingly.

35. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Sh. Sadhu Singh .....Appellant.
Versus
Smt. Kaushalya Devi & anr. .....Respondents.

RSA No. 178 of 2003.
Reserved on: 24.12.2014.
Decided on: 31.12.2014.

Transfer of Property Act, 1882- Section 60- Father of the plaintiff had mortgaged the shop with possession to the defendant vide registered mortgaged deed for Rs. 800/- and Rs. 700/- - mortgagee inducted a tenant over the shop vide rent note dated 7.7.1982- held, that termination of the mortgage terminates the tenancy - provisions of Rent Restriction Act will not apply to such tenancy- plaintiff is entitled to redeem the mortgage and to get possession of the shop. (Para-33 to 42)

Cases referred:
The All India Film Corporation Ltd., and others, vrs. Sri Raja Gyan Nath and others, 1969 (3) SCC 79
M/S Sachalmal Parasram vrs. Mst. Ratanbai and others, AIR 1972 SC 637
Om Prakash Garg vrs. Ganga Sahai and ors. AIR 1988 SC 108
Ishwar Dass Jain vrs. Sohan Lal, AIR 2000 SC 426
2008(2) Shim. LC 388, titled as Shri Shiv Charan Verma vrs. Shri Shiv Parshad
Joginder Singh and another vrs. Smt. Jogindero and ors., AIR 1996 SC 1654
Janta Travels Pvt. Ltd. Vrs. Raj Kumar Seth, AIR 1997 Rajasthan 1
Thakar Singh vrs. Sh. Mula Singh, 2014(2) RCT (Rent) 371

For the appellant(s): Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Neeraj Gupta, Advocate.
For the respondents: Mr. Ajay Kumar Sr. Advocate, with Mr. Dheeraj K. Vashista, 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, Una, H.P. dated 31.01.2003, passed in Civil Appeal No. 21 of 2000.

2. Key facts, necessary for the adjudication of this regular second appeal are that the appellant-plaintiff (hereinafter referred to as the plaintiff) has filed suit for possession through redemption of the shop consisting of two rooms situated in Una town detailed in headnote of the plaint on payment of Rs. 1500/- principle mortgage money. According to the averments made in the plaint, Wattan Singh alias Hari Kishan Singh son of Hakam Singh, the father of the plaintiff, was owner in possession of shop in dispute. The shop was situated in Kh. No. 1039/1 entered in jamabandi for the year 1976-77. Sh. Wattan Singh has mortgaged with possession the shop to respondent-defendant (hereinafter referred to as the defendant No.1) vide two registered mortgage deeds dated 27.1.1977 and 14.12.1977 for consideration of Rs. 800/- and Rs. 700/-, respectively. The mortgagor has not authorized the mortgagee to induct tenant over the disputed shop however the mortgagee has inducted respondent No. 2, namely Sh. Gian Chand as tenant vide rent note dated 7.7.1982. Sh. Wattan Singh died on 17.3.1983. The plaintiff succeeded to his estate. He requested the defendant several times to deliver the possession of the shop in

dispute to him through redemption on payment of Rs. 1500/-. However, the defendant No. 1 refused to admit his claim.

3. The defendant No. 1 has admitted his claim. It was admitted that the shop in dispute was mortgaged vide two registered mortgage deeds. He rented out the shop in dispute to defendant No. 2 vide rent note dated 7.7.1982 on payment of rent of Rs. 800/- per month. Defendant No. 2 did not pay the rent of the suit premises from September, 1986.

4. The suit was contested by defendant No. 2. According to defendant No. 2, the shop in dispute was given to him in the month of July, 1982 by Sh. Wattan Singh. He had been paying rent earlier to Wattan Singh and after his death to the plaintiff. Rent upto July, 1989 has already been paid. Due to cordial relations between the father of the plaintiff and defendant No. 2, the father of the plaintiff had not been issuing any receipt with respect to the rent, Due to this, the father of the plaintiff obtained signatures of defendant No. 2 on a document purporting to be a rent note in favour of Shanti Sarup who was his close relative by telling that it was required for avoiding some income tax problem. The alleged rent note was got executed with ulterior motive to defeat the provisions of H.P. Urban Rent Control Act. He was never inducted tenant by defendant No. 1 but he was put in possession over the shop in dispute as tenant by Wattan Singh. According to him, the mortgage deed in favour of the defendant No. 1 was collusive and nonest in the eyes of law.

4. Replication was filed by the plaintiff. The trial Court framed the issues on 5.12.1990. The learned Sub Judge, Ist Class, Una dismissed the suit on 29.12.1999. The plaintiff, feeling aggrieved by the judgment and decree dated 29.12.1999, filed an appeal before the learned District Judge, Una. The learned District Judge, Una also dismissed the same on 31.1.2003. Hence, this regular second appeal.

5. The regular second appeal was admitted on 14.8.2003 on the following substantial question of law:

> "1. Whether the judgment and decrees of the two Courts below are vitiated on account of misreading and misunderstanding of the pleadings, misconstruing and misapplication of correct proposition of law on the facts and in the circumstances of the case?"

6. Mr. Bhupinder Gupta, learned 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. According to him, both the courts below have misapplied the provisions of Section 23 of the Indian contract Act. According to him, defendant No. 2 was totally stranger to the mortgage. The rent note was executed by defendant No. 2 with defendant No. 1 on 7.7.1992 and the same was not against the public policy. He also contended that the courts below have overlooked the provisions of Section 116 of the Indian Evidence Act. He lastly contended that the defendant No. 2 was inducted tenant by the mortgagee and not by the mortgagor. On the other hand, Mr. Ajay Kumar, Advocate, has supported the judgments and decrees passed by both the Courts below.

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

8. There is no dispute about the execution of two mortgage deeds dated 27.1.1977 Ext. P-2 and 14.12.1977 Ext. P-3 for a sum of Rs. 800/- and Rs. 700/-, respectively. Defendant No. 1 Shamsher Singh has died and his legal heir Kaushalya Devi was ordered to be brought on record during the trial.

9. PW-1 Sadhu Singh deposed that his father was in possession of the disputed shop. He mortgaged it with possession with defendant No. 1 for a consideration of Rs. 1500/- vide two mortgage deeds dated 27.1. 1977 and

14.12.1977. His father died on 17.3.1983. He succeeded to his estate. He asked defendant No. 1 to deliver back the possession of the shop in dispute to him by way of redemption of mortgage but the defendants refused to admit his claim. Defendant No. 1 has unauthorisedly inducted defendant No. 2 as tenant over the suit premises on 7.7.1982. He admitted the close relationship with defendant No. 1. He also admitted that his father has mortgaged two shops with Tilak Raj and those shops were also in possession of tenants.

10. PW-2 Surjit Singh has proved the site plan Ext. P-1.

11. PW-3 Diwan Singh has testified that his father was a Petition Writer. He died in 1982. He produced the record of his father.

12. PW-4 Vijay Puri testified that he was acquainted with the handwriting of Ganpat Rai, Petition Writer. The mortgage deed dated 27.1.1977 was in the handwriting of Ganpat Rai. He proved the mortgage deed Ext. P-2 dated 27.1.1977 and also proved the mortgage deed Ext. 14.12.1977 as Ext. P-3 which had also been scribed by Ganpat Rai.

13. PW-5 Som Nath deposed about the scribing of rent note Ext. P-4 vide which, defendant No. 1 inducted defendant No. 2 as a tenant over the disputed shop on payment of monthly rent of Rs. 800/-. According to him, rent note was written by him on the instructions of the parties and was read over and explained to them. The parties put their signatures on the rent note admitting its contents to be correct. The rent note was entered in his register at Sr. No. 135 dated 7.7.1982.

14. PW-6 Shamsher Singh is a witness of mortgage deed Ext. P-2. According to him, mortgage deed was scribed by Ganpat Rai, Document Writer. He read over and explained to the parties the contents of the same and parties have put their signatures over the mortgage deed.

15. PW-7 Daulat Ram, is also a witness to mortgage deed Ext. P-3 dated 14.12.1977. According to him, the mortgage deed was read over and explained to the parties and the parties have put their signatures over the mortgage deed.

16. PW-8 Kartar Singh Gill is also the attesting witness to mortgage deed Ext. P-3. According to him, the deed was scribed on the instructions of the parties. It was read over and explained to the parties and the parties have put their signatures over the mortgage deed admitting its contents to be correct. He has also proved his signatures on rent note Ext. P-4. The contents of the rent note were also read over and explained to the parties.

17. PW-9 Jagdish Ram proved the site plans Ext. P-5 and P-6.

18. PW-10 Sohan Lal has produced the summoned record.

19. PW-11 Gurbachan Singh deposed that he was working as a Stamp Vendor at Una. He had sold the stamp paper of rent deed Ext. P-4 to Gian Chand on 7.7.1982.

20. PW-12 R.S.Chauhan, has brought the summoned record and proved the mortgage deed dated 19.2.1976 executed by Jagat Ram in favour of Swaran Singh as Ext. PW-12/A and attached site plan Ext. PW-12/B.

21. DW-1 Kaushalya Devi testified that the front portion of the shop in dispute was mortgaged with her husband for Rs. 800/- and the rear portion was mortgaged with her husband for Rs. 700/-. Earlier her husband had given in dispute on rent to Darshan Singh and later on it was given to defendant No. 2 on payment of monthly rent of Rs. 800/-. According to her, defendant No. 2 was not paying the rent of the shop in dispute for the last about 8 years and her husband had filed a suit for recovery of rent. According to her, plaintiff had

mortaged his one shop with her for Rs. 2000/- and she had given that shop on rent to some cloth merchant.

22. DW-2 Bal Krishan has brought the record from M.C. Una to prove the certified copy of the assessment order for the year 1984-85 as Ext. DW-1/A and also proved Ext. DW-1/B.

23. DW-3 Kishan Singh deposed that he had taken on rent one shop from Wattan Singh on payment of monthly rent of Rs. 600/- He stated that he had left that Dhabba in July, 1982 and thereafter Wattan Singh had let out the shop to Gian chand on payment of rent of Rs. 800/-.

24. DW-4 Chaman Lal stated that he had taken one shop on rent from plaintiff Sadhu Singh on payment of monthly rent of Rs. 250/- and he had left that shop after about two months. He stated that Sadhu Singh had prepared some papers of mortgage in respect of that shop.

25. DW-5 Manjit singh stated that he was tenant under the plaintiff Sadhu Singh. He was paying rent to him @ 900/- per month. The shop was in his possession as tenant, has been shown to have been mortgaged with one Nirmal Singh.

26. DW-6 Mohinder Pal stated that the plaintiff Sadhu Singh had mortgaged some land to him for Rs. 1000/-. But, he was paying rent of that land to him @ Rs. 300/- per month.

27. DW-8 Sohan Lal has brought the summoned record and proved the certified copy of mortgage deeds as Ext. DW-8/A to DW-8/R.

28. DW-9 R.S.Chauhan, has proved certified copy of sale deed dated 31.5.1996 as DW-9/A.

29. DW-11 Rup Lal brought the GPF record of the plaintiff as DW-11/A.

30. DW-12 Rakesh Kumar proved the copy of inquiry report Ext. DW-12/A. He proved the copy of orders Ext. DW-12/B to DW-12/E.

31. Defendant No. 2 has appeared as DW-13. According to him, he had taken shop in dispute on rent from Wattan Singh in Feburary, 1982 on payment of rent of Rs. 800/- per month. He paid rent to Wattan Singh and plaintiff Sadhu Singh upto 1989. They did not give any receipt to him. According to him, the plaintiff has fictitiously shown his all shops to have been mortgaged. He has never paid any rent to defendant No. 1 nor he was inducted as tenant over the shop in dispute by defendant No. 1. The contents of rent note were never read over and explained to him. There was no entry of mortgage of the shop in dispute in Municipal record. He has proved Ext. D-1 & D-2, Missal Haquiat of the property of the plaintiff for the year 1997-98.

32. What emerges from the facts enumerated hereinabove is that Wattan Singh, father of the plaintiff has mortgaged shops to defendant No. 1. Defendant No. 1 has inducted defendant No. 2 as tenant on 7.7.1982 vide rent note Ext. P-4. The mortgage deeds are dated 27.1.1977 and 14.12.1977. the mortgage amount was Rs. 800/- and Rs. 700/-, respectively. Sh. Wattan Singh has died on 17.3.1983. his estate was succeeded by the plaintiff. PW-4 Vijay Puri has identified the handwriting of Ganpat Rai Petition Writer. He has proved the mortgage deed Ext. P-2 dated 27.1.1977 and also proved the mortgage deed Ext. 14.12.1977 as Ext. P-3. These were scribed by Ganpat Rai. PW-5 Som Nath has deposed that rent note Ext. P-4 was scribed, vide which, defendant No. 1 inducted defendant No. 2 as a tenant over the disputed shop on payment of monthly rent of Rs. 800/-. According to him, rent note was scribed on the instructions of the parties and was read over and explained to them. The parties put their signatures on the rent note admitting its contents to be correct.

The rent note was entered in his register at Sr. No. 135 dated 7.7.1982. PW-6 Shamsher Singh is a witness of mortgage deed Ext. P-2. According to him, mortgage deed was scribed by Ganpat Rai, Document Writer. He read over and explained to the parties the contents of the same and parties have put their signatures over the mortgage deed. PW-7 Daulat Ram, is also a witness to mortgage deed Ext. P-3 dated 14.12.1977. According to him, the mortgage deed was read over and explained to the parties and the parties have put their signatures over the mortgage deed. PW-8 Kartar Singh Gill is also the attesting witness to mortgage deed Ext. P-3. According to him, the deed was scribed on the instructions of the parties. It was read over and explained to the parties and the parties have put their signatures over the mortgage deed admitting its contents to be correct. He has also proved his signatures on rent note Ext. P-4. The contents of the rent note were also read over and explained to the parties.

33. DW-1 Kaushalya Devi has also admitted that the shops were mortgaged with her husband for a sum of Rs. 800/- and Rs. 700/-, respectively. The plaintiff has duly proved the execution of mortgage deeds dated 27.1.1977 and 14.12.1977, vide Ext. P2 and P-3. The rent note has been proved by PW-5 Som Nath and PW-8 Kartar Singh Gill. According to PW-5 Som Nath and PW-8 Kartar Singh Gill, the contents were read over and explained to the parties and thereafter the parties have put their signatures over the same. The plea raised by defendant No. 2 that he was made to sign the rent note dated 7.7.1982 to defeat the provisions of H.P. Urban Rent Control Act, cannot be believed. Defendant No. 2 has been inducted as tenant by defendant No. 1 and not by father of the plaintiff. The Courts below have come to the wrong conclusion that the rent note was collusive and sham transaction. The shops have been mortgaged by Wattan Singh in favour of defendant no. 1. The tenancy created by defendant No. 1 in favour of defendant No. 2 would come to an end after the redemption of the mortgage. Infact, the shop has been mortgaged by the plaintiff's father with possession with Shanti Sarup. The learned Courts below have given undue importance to Exbts. DW-8/A to DW-8/R, whereby the plaintiff's father has mortgaged the property and the mortgagees have further inducted the tenants. There is no bar under the law that the mortgagor cannot mortgage the property with his relatives. Merely that the property has been mortgaged would not defeat the provisions of H.P. Urban Rent Control Act. The findings given by both the courts below that mortgage deeds Ext. P-2 and P-3 were fictitious transactions are liable to be set aside. The Courts below have also come to the wrong conclusion that the mortgage deeds Ext. P=2 and P-3 were in breach of Section 23 of the Indian Contract Act. The Courts below have also given undue importance to the fact that the shops in question were mortgaged for a sum of Rs. 1500/- and the rent was Rs. 800/-.

34. Their lordships of the Hon'ble Supreme Court in the case of ***The All India Film Corporation Ltd., and others, vrs. Sri Raja Gyan Nath and others,*** reported in ***1969 (3) SCC 79,*** have held that the termination of mortgagee interest terminated the relationship of landlord and tenant and it could not, in the circumstances, be said to run with the land. Their lordships have further held that there being no landlord and no tenant, the provisions of the Rent Restriction Act could not apply any further. It has been held as follows:

> "11. The respondents attempted to argue that the Rent Restriction Act defines landlord and tenant with reference to the payment of rent. A landlord means a person entitled to receive rent and a tenant means any person by whom or on whose account rent is payable. These definitions apply if the tenancy, either real or statutory, could be said to survive after the termination of the mortgage. The scheme of s. 10 of the Evacuee Interest (Separation) Act, 1951 is that in the case of a mortgagor or a mortgagee, (a) the Competent Officer may pay to the Custodian or the claimant the amount payable under the mortgage debt and redeem the

property, or (b) the Competent Officer may sell the mortgaged property for satisfaction of the mortgage debt and distribute the sale proceeds thereof, or (c) the Competent Officer may partition the property between the mortgagor and the mortgagee proportionate to their shares, or (d) adopt a combination of any of these measures. It is obvious that method Co) was followed. The property was sold and the mortgage was satisfied. This led to the extinction of the mortgagees' interest and the purchaser acquired full title to the property. The termination of the mortgagee interest terminated the relationship of landlord and tenant and it could not, in the circumstances, be said to run with the land. There being no landlord and no tenant, the provisions of the Rent Restriction Act could not apply any further. Nor could it be said that when the mortgagor cancelled the rent note and authorised the mortgagee to find any other tenant, the intention was to allow expressly a tenancy beyond the term of the mortgage. In this view of the matter the decision of the High Court and the court below cannot be said to be erroneous."

35. Their lordships of the Hon'ble Supreme Court in the case of ***M/S Sachalmal Parasram vrs. Mst. Ratanbai and others,*** reported in ***AIR 1972 SC 637,*** have held that tenancy created by mortgagee in possession does not survive the termination of the mortgagee's interest. The termination of the mortgagee's interest terminates the relationship of landlord and tenant. There being no landlord and tenant, the tenant cannot claim the protection of Rent Control Legislation (in this case M.P. Accommodation Control Act, 1961). It has been held as under:

"[4] The points raised by Mr. Naunit Lal are concluded by the decision of this Court in All India Film Corporation Ltd. v. Raja Gyannath, 1969-3 SCC 79 = 1970-2 SCR 581 = (AIR 1969 NSC 185) which decision was unfortunately not brought to our notice during the course of the hearing. In this case the facts were similar. A mortgagee in possession had let out the premises, which was a cinema house, and the lessee had further sublet the same, to sub-lessees. On redemption the purchaser of the interest of the mortgagor filed a suit for possession of the property from the head lessee and the sub-lessees. The sub-lessees claimed the benefit of East Punjab Urban Rent Restriction Act, 1949 (3 of 1949). In this High Court three points were raised. One of the points urged was whether the defendants were protected by the East Punjab Urban Restriction Act. This Court first considered the question; Did the tenancy create by the mortgagee in possession survive the termination of the mortgagee interest so as to be binding on the purchaser? This Court concluded :

"The relationship of Iessor and Lessee cannot subsist beyond the mortgagee's interest unless the relationship is agreed to by the mortgagor or a fresh relationship is recreated. This the mortgagor or the person succeeding to the mortgagor's interest may elect to do. But if he does not, the lessee cannot claim any rights beyond the term of his original lessor's interest. There propositions are well-understood and find support are well-understood and find support in two rulings of this Court in Mahabir Gope v. Harbans Narain Singh, 1952 SCR 775 = (AIR 1952 SC 205) and Asaram v. Mst. Ram Kali, 1958 986 = (AIR 1958 SC 183)."

[7] This Court then examined the question whether the tenants could take advantage of the provisions of the East Punjab Urban Rent Restriction Act, 1949. The Court answered the question in the following words:

"The respondents attempted to argue that the Rent Restriction Act defines landlord and tenant with reference to the payment of rent. A landlord means a person entitled to receive rent and a tenant means any person by whom or on whose account rent is payable. These definitions

apply if the tenancy, either real or statutory, could be said to survive after the termination of the mortgage..... The termination of the mortgagee interest terminated the relationship of landlord and tenant and it could not, in the circumstances, be said to run with the land. There being no landlord and no tenant, the provisions of the Rent Restriction Act would not apply any further."

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

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

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

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

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

conclusion was omitted or if inadmissible evidence was relied upon which if omitted, could have led to a different conclusion?

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

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

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

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

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

(7) What relief?

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

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

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

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

The reason given by the defendant appears to us rather curious. One can understand a debtor incurring a debt and executing a deed as collateral security. There is no such situation here. Further, if it is a deed of collateral security by defendant, then the defendant would have had to execute a deed in favour of the plaintiff and not vice-versa. Here the plaintiff-owner has mortgaged his shop to the defendant, as security. The plea and evidence of collateral security offered by the defendant appears to us not to fit into a situation where the plaintiff has executed the mortgage. Obviously, if the plaintiff wanted to secure something by way of an additional security from the defendant, the normal course would have been to ask the defendant to give such a security and to for the plaintiff to execute a mortgage. Thus the reason mentioned and evidence

given by the defendant as to why a sham document was executed falls to the ground.

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

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

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

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

38. The ratio of ***Ishwar Dass Jain's case (supra)*** was relied upon by this Court in ***2008(2) Shim. LC 388, titled as Shri Shiv Charan Verma vrs. Shri Shiv Parshad.***

39. In the case of ***Joginder Singh and another vrs. Smt. Jogindero and ors.,*** reported in ***AIR 1996 SC 1654,*** their lordships of the Hon'ble Supreme Court have held that tenant cannot deny the title of land lord. It has been held as follows:

"6. Late Surain Singh and Respondent Bur Singh did not seriously dispute that they were not tenants under Smt. Soman in respect of the land in dispute and adduced no evidence in that behalf. On the contrary Khasra Girdawari Ext.P.6 clearly indicated that the deceased Surain Singh (who is represented by his legal representatives in this appeal) and Bur Singh were tenants under Smt. Soman with regard to the land in suit. This being the position the tenants could not be permitted to deny or dispute the title of the owner. This is a settled view that having regard to the provisions of Section 116 of the Evidence Act no tenant of immovable property or person claiming through such tenant shall,

during the continuance of the tenancy, be permitted to deny the title of the owner of such property. In this connection it would be relevant to make a reference to the decision of this Court in Veerraju Vs. Venkanna [1966 (1) SCR 831 (839) = AIR 1966 SC 629] wherein this Court, with reference to the decision of Privy Council took the view as under:-

"A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord".

40. In the case of ***Janta Travels Pvt. Ltd. Vrs. Raj Kumar Seth,*** reported in ***AIR 1997 Rajasthan 1,*** the learned Single Judge has held that it is not open to the tenant to dispute the title of the landlord in a case where a lease deed is duly executed and proved on the record. It would not be open to the tenant to advance pleas contrary to the spirit of the agreement.

41. In the case of ***Thakar Singh vrs. Sh. Mula Singh,*** reported in ***2014(2) RCT (Rent) 371,*** their lordships of the Hon'ble Supreme Court have held that after redemption tenants of mortgagee do not become tenants of mortgagor even though mortgagor received rent from the tenants.

42. The substantial question of law is answered accordingly. The Regular Second Appeal is allowed. The judgments and decrees passed by both the Courts below are set aside. The suit is decreed for redemption. The plaintiff is held entitled to redeem the mortgage and get possession of the suit shop from defendant No. 2 if the plaintiff deposits a sum of Rs. 1500/-, in the trial Court, within three months from today. Thereafter on such deposit of Rs. 1500/-, the defendant No. 1 will produce the mortgage deed before the Court for cancellation. Immediately on deposit, as stated hereinabove, the defendant No. 2 shall hand over the vacant possession to the plaintiff.

****

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

Sh. Sadhu Singh .....Appellant.

Versus

Sh. Tilak Raj Dhillon & ors. .....Respondents.

RSA No. 179 of 2003.
Reserved on: 24.12.2014.
Decided on: 31.12.2014.

Transfer of Property Act, 1882- Section 60- Father of the plaintiff had mortgaged the shop with possession to the defendant vide registered mortgaged deed for Rs. 4,000/-mortgagee inducted defendant No. 2 as a tenant on 6.8.1981 on the payment of Rs. 6,00/- and defendant No. 3 as a tenant on 3.9.1982 on the payment of Rs. 700/-- held, that termination of the mortgage, terminates the tenancy - provisions of Rent Restriction Act will not apply to such tenancy- plaintiff is entitled to redeem the mortgage and to get possession of the shop. (Para-12 to 20)

Cases referred:

The All India Film Corporation Ltd., and others, vrs. Sri Raja Gyan Nath and others, n 1969 (3) SCC 79

M/S Sachalmal Parasram vrs. Mst. Ratanbai and others, AIR 1972 SC 637

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

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

Shri Shiv Charan Verma vrs. Shri Shiv Parshad 2008(2) Shim. LC 388,

Joginder Singh and another vrs. Smt. Jogindero and ors., AIR 1996 SC 1654

Janta Travels Pvt. Ltd. Vrs. Raj Kumar Seth, AIR 1997 Rajasthan 1
Thakar Singh vrs. Sh. Mula Singh, 2014(2) RCT (Rent) 371

For the appellant(s): Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Neeraj Gupta, Advocate.
For the respondents: Mr. Ajay Kumar Sr. Advocate, with Mr. Dheeraj K. Vashista, 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, Una, H.P. dated 31.01.2003, passed in Civil Appeal No. 22 of 2000.

2. Key facts, necessary for the adjudication of this regular second appeal are that the appellant-plaintiff (hereinafter referred to as the plaintiff) has filed suit for possession by way of redemption of the shops consisting of two rooms situated in Una town detailed in head-note of the plaint on payment of Rs. 4000/- principle mortgage money. According to the averments made in the plaint, Wattan Singh alias Hari Kishan Singh son of Hakam Singh, the father of the plaintiff, was owner in possession of shops A & B. The shops were situated in Kh. No. 1039/1 entered in jamabandi for the year 1976-77. The father of the plaintiff has mortgaged with possession the shops to defendant No. 1, vide registered mortgage deed dated 4.8.1981 for consideration of Rs. 4000/-. The mortgagor has not authorized the mortgagee to induct defendant No. 2 as tenant over the disputed shop-A vide rent deed dated 6.8.1981 Ext. P-2 and also inducted defendant No. 3 as tenant over shop-B vide rent deed dated 3.9.1982, Ext. P-3. The plaintiff succeeded to the estate of his father. He requested the defendants several times to deliver the possession of the shops in dispute to him through redemption.

3. Defendant No. 1 has filed written statement. Defendant No. 1 admitted that Wattan Singh, father of the plaintiff had mortgaged with possession, two shops to him for a consideration of Rs. 4000/- vide registered deed dated 4.8.1981 Ext. P-4. He also admitted to have rented out shop 'A' to the defendant No. 2 on payment of Rs. 600/- per month vide rent deed dated 6.8.1981. Defendant No. 2 did not pay the rent to him so he had filed suit for recovery of rent. He also admitted to have inducted defendant No. 3 as tenant over shop 'B' on monthly rent of Rs. 700/-. Defendant No. 3 has not paid the rent from March 1987, so he had filed civil suit for recovery of rent.

4. The suit was contested by defendants No. 2 & 3. According to defendant No. 2, he was tenant of shop on payment of monthly rent of Rs. 600/- under the plaintiff. The shop was taken on rent by defendant No. 2 from late Sh. Wattan Singh on monthly rent of Rs. 150/-. Thereafter, Wattan Singh constructed the *pucca* shop and it was let out to defendant No. 2 on monthly rent of Rs. 600/-. He has been paying the rent previously to Wattan Singh and after his death to the plaintiff Sadhu Singh. Similarly, defendant No. 3 stated that he had taken one shop from Wattan Singh on payment of rent of Rs. 700/-. He has been paying rent to Wattan Singh and after his death to the plaintiff Sadhu Singh. The plaintiff's father was not issuing receipts to them. The father of the plaintiff had obtained their signatures on documents purporting to be rent note in favour of Tilak Raj defendant No. 1 in the month of September/August, 1981. They have never paid any rent to defendant No. 1.

5. Replication was filed to the written statement filed by defendants No. 2 & 3. The trial Court framed the issues on 5.12.1990. The learned Sub Judge, Ist Class, Una dismissed the suit on 29.12.1999. The plaintiff, feeling aggrieved by the judgment and decree dated 29.12.1999, filed an appeal before

the learned District Judge, Una. The learned District Judge, Una also dismissed the same on 31.1.2003. Hence, this regular second appeal.

6. The regular second appeal was admitted on 14.8.2003 on the following substantial question of law:

> "1. Whether the judgment and decrees of the two Courts below are vitiated on account of misreading and misunderstanding of the pleadings, misconstruing and misapplication of correct proposition of law on the facts and in the circumstances of the case?"

7. Mr. Bhupinder Gupta, learned 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. According to him, both the courts below have misapplied the provisions of Section 23 of the Indian contract Act. According to him, defendants No. 2 & 3 were totally stranger to the mortgage. The rent note was executed by defendants No. 2 & 3 with defendant No. 1 on 6.8.1981 and 3.9.1982, respectively and the same were not against the public policy. He also contended that the courts below have overlooked the provisions of Section 116 of the Indian Evidence Act. He lastly contended that the defendants No. 2 & 3 were inducted tenants by the mortgagee. On the other hand, Mr. Ajay Kumar, Advocate, has supported the judgments and decrees passed by both the Courts below.

8. I have heard the learned Senior Advocates for the parties and gone through the records of the case carefully.

9. The plaintiff has appeared as PW-8. According to him, his father was in possession of the disputed shops. He mortgaged it with possession with defendant No. 1 vide mortgage deed Ext. P-4 on the condition that the mortgagee would not induct tenant over those shops. But despite that the mortgagee inducted defendants No. 2 & 3 as tenants over the disputed shops. The plaintiff also proved Jamabandi for the year 1976-77 as Ext. P-6. PW-1 Surjit Singh, Draftsman has proved site plan Ext. P-1. PW-2 Maggar Ram was a witness to rent note dated 6.8.1981. He proved the rent note Ext. P-2. PW-3 Kalia Ram was also an attesting witness to rent note Ext. P-2. PW-4 Vijay Puri testified that his father Naranjan Dass was a Document Writer. He was acquainted with the handwriting of his father. He proved the rent note dated 3.9.1982 as Ext. P-3, which was in the handwriting of his father. He deposed that this rent note was entered in the Register maintained by his father at Sr. No. 520 dated 3.9.1982. He also proved mortgage deed dated 4.8.1981 scribed by Ganpat Ram, Document Writer. PW-5 Joginder Singh was a witness to rent note Ext. P-3, vide which Tilak Raj mortgagee let out one disputed shop to defendant No. 3 on payment of rent of Rs. 700/- per month. PW-6 Kishan Chand identified the signatures of attesting witness Mansha Ram, Nambardar on mortgage deed Ext. P-4. He was acquainted with the handwriting of Mansha Ram. PW-7 Jagdish Ram testified that his father Durga Dass was a draftsman who has died. He proved site plan Ext. P-5 which was prepared by his father Durga Dass. PW-9 Pardeep Kumar brought the summoned record from Canara Bank, Una. He has proved copy of cheque as Ext. PW-9/A which was issued by defendant No. 2. PW-10 Vijay Puri, Stamp Vendor testified that as per entry at Sr. No. 1730 dated 31.8.1982, he had sold a stamp paper of Rs. 120/- to Manohar Lal son of Dharam Chand. He proved the entry at the back of the stamp paper as Ext. PW-10/A. He also proved entry in his register as Ext. PW-10/B. PW-12 Shanti Lal, Stamp Vendor deposed that he had sold a stamp paper of Rs. 105/- on 6.8.1981 to Bal Krishan son of Ram Prakash for execution of rent deed. He proved his entry on the back of the stamp as Ext. PW-12/A and Ext. PW-12/B.

10. Defendant Tilak Raj has appeared as DW-1. He deposed that the shops were mortgaged to him vide mortgage deed Ext. P-4. He has rented out

one mortgaged shop to defendant No. 2 vide rent note Ext. P-2 and also had let out one mortgaged shop to defendant No. 3 vide rent note Ext. P-3. DW-2 Chaman Lal deposed that he had taken one shop on rent from the plaintiff in the year 1985. He left that shop after about two months. DW-3 Bal Krishan, Executive Officer, M.C. Una has proved the certified copy of assessment as Ext. DW-3/A. DW-4 Kishan Singh deposed that he had taken one shop on rent from Wattan Singh on payment of monthly rent of Rs. 600/-. DW-5 Manjit Singh deposed that he was running a shop at Una which was owned by plaintiff Sadhu Singh. The said shop was mortgaged with Nirmal Singh but he was paying rent of that shop to plaintiff Sadhu Singh @ Rs. 900/- per month. DW-6 Mohinder Pal deposed that the plaintiff had mortgaged one shop with him for Rs. 1000/-, but he was paying rent of that shop to him @ Rs. 300/- per month. DW-7 Rakesh Kumar deposed that on 12.4.1979, Bal Krishan had taken loan of Rs. 2000/- from the bank. He stated that the loan had been repaid by the loanee and the records have been destroyed. DW-8 Jodha Singh deposed that previously there were two *'khokhas'* at the site of shops in dispute and defendant No. 2 was running Cigarette shop in one *'khokha'* and Gurdial Singh was running a vegetable shop in another *'khokha'*. He further stated that Gurdial Singh left the *'khokha'* and defendant No. 3 Manohar Lal took that *'khokha'* on rent from the plaintiff in the year 1981-82. DW-10 Gurdial Singh deposed that he was running a vegetable shop in a *'khokha'* which he had taken on rent from the father of the plaintiff in 1979-80. DW-11 Sohan Lal has proved the certified copy of mortgage deed dated 4.8.1981 as Ext. DW-11/A and other mortgage deeds. DW-12 R.S.Chauhan, has proved mortgage deeds dated 27.12.1977 as Ext. DW-12/A and DW-12/B. Roop Lal DW-13 has proved GPF statement of the plaintiff as Ext. DW-13/A. DW-14 Rakesh Kumar has proved copy of inquiry report Ext. DW-14/A and also assessment order dated 31.3.1979 Ext. DW-14/B. Defendant No. 2 has appeared as DW-15. According to him, he has taken the *'khokha'* (one shop) on 5.1.1979 on payment of rent of Rs. 150/- per month from Wattan Singh. He was running Cigarette-Pan Shop in place of *'khokha'* in the year 1981 and rent of his shop was increased to Rs. 600/- per month. He has paid rent to Wattan Singh @ Rs. 600/- per month and after his death to the plaintiff. The plaintiff and his father never issued any receipt of rent to him. In the year 1981, his signatures were obtained by the plaintiff on the pretext that those were required for income tax purpose. The contents of the documents on which his signatures were obtained was never read over and explained to him. He has never taken shop on rent from Tilak Raj and he was not aware that the shop was mortgaged with defendant No.1- Tilak Raj. Defendant No. 3 has appeared as DW-16. According to him, he has taken shop in dispute from the plaintiff in the year 1982 on payment of rent of Rs. 700/- per month. The rent receipts were never issued to him by plaintiff Sadhu Singh.

11. What emerges from the facts enumerated hereinabove is that Wattan Singh mortgaged the shops with defendant No. 1 on 4.8.1981 vide Ext. P-4, deed. He has directed the mortgagee not to induct the tenants. Defendants No. 2 & 3 were inducted as tenants vide rent deed dated 6.8.1981 and 3.9.1982. It has come on record that the mortgage deed was executed in accordance with law. The plaintiff has duly proved the mortgage deed and the rent notes, Ext. P-2 and Ext. P-3. The plea raised by defendants No. 2 & 3 that their signatures were obtained fraudulently cannot be believed. The rent has never been paid to Wattan Singh. Defendant No. 1 was constrained to file suit for recovery of rent against defendants No. 2 & 3. The learned Courts below have come to the wrong conclusion that Ext. P-2, P-3 and P-4 were contrary to provisions of Section 23 of the Indian Contract Act, 1872. The courts below have come to the wrong conclusion that Ext. P-2, P-3 and P-4 were sham transactions to defeat the provisions of H.P. Urban Rent Control Act, 1987. Defendants No. 2 & 3 were totally strangers to mortgage deed dated 4.8.1981. There is no bar under the law that the mortgagor could not mortgage the property with his relatives. The relationship of tenant with the mortgagee would come to an end after

redemption. Merely that the mortgage money was Rs. 4000/- would not make Ext. P-4 deed illegal. The Courts below have also not correctly appreciated Section 116 of the Indian Evidence Act, 1872. The tenant could not deny the relationship with defendant no. 1. The defendants No. 2 & 3 have voluntarily signed the documents Ext. P-2 and P-3 dated 6.8.1981 and 3.9.1982, respectively.

12. Their lordships of the Hon'ble Supreme Court in the case of ***The All India Film Corporation Ltd., and others, vrs. Sri Raja Gyan Nath and others,*** reported in ***1969 (3) SCC 79,*** have held that the termination of mortgagee interest terminated the relationship of landlord and tenant and it could not, in the circumstances, be said to run with the land. Their lordships have further held that there being no landlord and no tenant, the provisions of the Rent Restriction Act, could not apply any further. It has been held as follows:

> "11. The respondents attempted to argue that the Rent Restriction Act defines landlord and tenant with reference to the payment of rent. A landlord means a person entitled to receive rent and a tenant means any person by whom or on whose account rent is payable. These definitions apply if the tenancy, either real or statutory, could be said to survive after the termination of the mortgage. The scheme of s. 10 of the Evacuee Interest (Separation) Act, 1951 is that in the case of a mortgagor or a mortgagee, (a) the Competent Officer may pay to the Custodian or the claimant the amount payable under the mortgage debt and redeem the property, or (b) the Competent Officer may sell the mortgaged property for satisfaction of the mortgage debt and distribute the sale proceeds thereof, or (c) the Competent Officer may partition the property between the mortgagor and the mortgagee proportionate to their shares, or (d) adopt a combination of any of these measures. It is obvious that method Co) was followed. The property was sold and the mortgage was satisfied. This led to the extinction of the mortgagees' interest and the purchaser acquired full title to the property. The termination of the mortgagee interest terminated the relationship of landlord and tenant and it could not, in the circumstances, be said to run with the land. There being no landlord and no tenant, the provisions of the Rent Restriction Act could not apply any further. Nor could it be said that when the mortgagor cancelled the rent note and authorised the mortgagee to find any other tenant, the intention was to allow expressly a tenancy beyond the term of the mortgage. In this view of the matter the decision of the High Court and the court below cannot be said to be erroneous."

13. Their lordships of the Hon'ble Supreme Court in the case of ***M/S Sachalmal Parasram vrs. Mst. Ratanbai and others,*** reported in ***AIR 1972 SC 637,*** have held that tenancy created by mortgagee in possession does not survive the termination of the mortgagee's interest. The termination of the mortgagee's interest terminates the relationship of landlord and tenant. There being no landlord and tenant, the tenant cannot claim the protection of Rent Control Legislation (in this case M.P. Accommodation Control Act, 1961). It has been held as under:

> "[4] The points raised by Mr. Naunit Lal are concluded by the decision of this Court in All India Film Corporation Ltd. v. Raja Gyannath, 1969-3 SCC 79 = 1970-2 SCR 581 = (AIR 1969 NSC 185) which decision was unfortunately not brought to our notice during the course of the hearing. In this case the facts were similar. A mortgagee in possession had let out the premises, which was a cinema house, and the lessee had further sublet the same, to sub-lessees. On redemption the purchaser of the interest of the mortgagor filed a suit for possession of the property from the head lessee and the sub-lessees. The sub-lessees claimed the benefit of East Punjab Urban Rent Restriction Act, 1949 (3 of 1949). In this High

Court three points were raised. One of the points urged was whether the defendants were protected by the East Punjab Urban Restriction Act. This Court first considered the question; Did the tenancy create by the mortgagee in possession survive the termination of the mortgagee interest so as to be binding on the purchaser? This Court concluded :

"The relationship of Lessor and Lessee cannot subsist beyond the mortgagee's interest unless the relationship is agreed to by the mortgagor or a fresh relationship is recreated. This the mortgagor or the person succeeding to the mortgagor's interest may elect to do. But if he does not, the lessee cannot claim any rights beyond the term of his original lessor's interest. There propositions are well-understood and find support are well-understood and find support in two rulings of this Court in Mahabir Gope v. Harbans Narain Singh, 1952 SCR 775 = (AIR 1952 SC 205) and Asaram v. Mst. Ram Kali, 1958 986 = (AIR 1958 SC 183)."

[7] This Court then examined the question whether the tenants could take advantage of the provisions of the East Punjab Urban Rent Restriction Act, 1949. The Court answered the question in the following words:

"The respondents attempted to argue that the Rent Restriction Act defines landlord and tenant with reference to the payment of rent. A landlord means a person entitled to receive rent and a tenant means any person by whom or on whose account rent is payable. These definitions apply if the tenancy, either real or statutory, could be said to survive after the termination of the mortgage..... The termination of the mortgagee interest terminated the relationship of landlord and tenant and it could not, in the circumstances, be said to run with the land. There being no landlord and no tenant, the provisions of the Rent Restriction Act would not apply any further."

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

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

his favour. After hearing the learned counsel, we are not persuaded to take a different view than the one reached by the High Court."

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

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

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

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

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

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

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

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

(7) What relief?

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

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

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

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

The reason given by the defendant appears to us rather curious. One can understand a debtor incurring a debt and executing a deed as collateral security. There is no such situation here. Further, if it is a deed of collateral security by defendant, then the defendant would have had to execute a deed in favour of the plaintiff and not vice-versa. Here the plaintiff-owner has mortgaged his shop to the defendant, as security. The plea and evidence of collateral security offered by the defendant appears to us not to fit into a situation where the plaintiff has executed the mortgage. Obviously, if the plaintiff wanted to secure something by way of an additional security from the defendant, the normal course would have been to ask the defendant to give such a security and to for the plaintiff to execute a mortgage. Thus the reason mentioned and evidence given by the defendant as to why a sham document was executed falls to the ground.

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

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

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

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

1,000/-. In case the defendant does not surrender possession as aforesaid, it will be open to the appellants to seek possession by way of execution."

16. The ratio of ***Ishwar Dass Jain's case (supra)*** was relied upon by this Court in ***2008(2) Shim. LC 388, titled as Shri Shiv Charan Verma vrs. Shri Shiv Parshad.***

17. In the case of ***Joginder Singh and another vrs. Smt. Jogindero and ors.,*** reported in ***AIR 1996 SC 1654,*** their lordships of the Hon'ble Supreme Court have held that tenant cannot deny the title of land lord. It has been held as follows:

"6. Late Surain Singh and Respondent Bur Singh did not seriously dispute that they were not tenants under Smt. Soman in respect of the land in dispute and adduced no evidence in that behalf. On the contrary Khasra Girdawari Ext.P.6 clearly indicated that the deceased Surain Singh (who is represented by his legal representatives in this appeal) and Bur Singh were tenants under Smt. Soman with regard to the land in suit. This being the position the tenants could not be permitted to deny or dispute the title of the owner. This is a settled view that having regard to the provisions of Section 116 of the Evidence Act no tenant of immovable property or person claiming through such tenant shall, during the continuance of the tenancy, be permitted to deny the title of the owner of such property. In this connection it would be relevant to make a reference to the decision of this Court in Veerraju Vs. Venkanna [1966 (1) SCR 831 (839) = AIR 1966 SC 629] wherein this Court, with reference to the decision of Privy Council took the view as under:-

"A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord".

18. In the case of ***Janta Travels Pvt. Ltd. Vrs. Raj Kumar Seth,*** reported in ***AIR 1997 Rajasthan 1,*** the learned Single Judge has held that it is not open to the tenant to dispute the title of the landlord in a case where a lease deed is duly executed and proved on the record. It would not be open to the tenant to advance pleas contrary to the spirit of the agreement.

19. In the case of ***Thakar Singh vrs. Sh. Mula Singh,*** reported in ***2014(2) RCT (Rent) 371,*** their lordships of the Hon'ble Supreme Court have held that after redemption tenants of mortgagee do not become tenants of mortgagor even though mortgagor received rent from the tenants.

20. The substantial question of law is answered accordingly. The Regular Second Appeal is allowed. The judgments and decrees passed by both the Courts below are set aside. The suit is decreed for redemption. The plaintiff is held entitled to redeem the mortgage and get possession of the suit shops from defendants No. 2 & 3 if the plaintiff deposits a sum of Rs. 1500/-, in the trial Court, within three months from today. Thereafter, on such deposit of Rs. 1500/-, the defendant No. 1 will produce the mortgage deed before the Court for cancellation. Immediately on such deposit, as stated hereinabove, the defendants No. 2 & 3 shall hand over the vacant possession of the shops to the plaintiff.

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

Vijay Kumar son of Sh. Balak Ram. ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1324 of 2014
Order Reserved on 12th December, 2014
Date of Order 31st December, 2014

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 302, 307, 326-A, 325, 504 and 506 read with Section 34 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- allegations against the applicant are that applicant had caught hold of husband of deceased so that he could not rescue his wife when the co-accused had poured kerosene oil upon the deceased- this is a grave allegation- further, in case the applicant is released on bail, the trial would be adversely effected- mere granting of bail to female co-accused will not entitle the other accused to claim bail on the principle of parity as female has special right to be released on bail- Bail Application dismissed. (Para-6 to 10)

For the Applicant: Mr. N.S. Chandel, Advocate
For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General with Mr. Puneet Razta, Deputy Advocate General.

The following judgment of the Court was delivered:

P.S. Rana Judge.

Present bail application filed under Section 439 Cr.P.C. in connection with FIR No. 64 of 2014 dated 8.5.2014 registered at Police Station Barmana District Bilaspur H.P. under Sections 302, 307, 326-A, 325, 504 and 506 read with Section 34 Indian Penal Code.

2. It is pleaded that applicant is innocent and has been falsely implicated in the present case. It is further pleaded that applicant has no direct or indirect connection with the alleged crime. It is further pleaded that investigation in the present case is completed it is further pleaded that applicant is only bread earner in the family. It is further pleaded that applicant will not tamper with prosecution evidence in any manner and abide by the conditions imposed by the Court. It is further pleaded that applicant will also join investigation as and when directed to do so by the Investigation Agency. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. There is recital in the police report that deceased Anjana Kumari wife of Kamal Kumar was teacher in Oxford School Barmana and she was preparing herself for going to school between 8.00 to 8.45 a.m. on dated 8.5.2014. There is further recital in the police that deceased and her husband Kamal Kumar used to reside separately from accused persons. There is further recital in the police report that mother-in-law Smt. Ram Pyari father-in-law Sh. Balak Ram and brother-in-law Sh. Vijay Kumar who are residing in the upper portion of the house came down and started abusing to deceased Anjana Kumari and her husband Kamal Kumar. There is further recital in the police report that Balak Ram father-in-law of the deceased Anjana Kumari threw gallon of kerosene oil upon the body of deceased

Anjana Kumari and other co-accused namely Vijay Kumar and Ram Pyari caught hold husband of deceased so that husband of deceased could not save his deceased wife Anjana Kumari from burnt injuries. There is further recital in the police report that after pouring the entire gallon of kerosene oil upon the body of deceased Anjana Kumari co-accused Balak Ram lit fire with match box upon body of deceased Anjana Kumari. There is further recital in the police report that deceased Anjana Kumari sustained 90% burnt injuries and there is further recital in the police report that husband of deceased Sh. Kamal Kumar also sustained injuries. There is further recital in the police report that after registration of case site plan was prepared and burnt clothes of deceased were took into possession vide seizure memo. There is further recital in the police report that co-accused Balak Ram retired from Police Department and he also tried to cause disappearance of evidence. There is further recital in the police report that deceased was referred to IGMC Hospital Shimla. There is further recital in the police report that on dated 24.6.2014 deceased died. There is further recital in the police report that as per post mortem report deceased died as a result of septicemic shock 72% thermal injury case. There is further recital in the police report that relations between deceased and accused were not cordial because deceased married with Kamal Kumar against the consent of parents of Kamal Kumar. There is further recital in the police report that eye witness of the instant case is Kamal Kumar and statement of Kamal Kumar was recorded under Section 164 Cr.P.C. There is further recital in the police report that co-accused Ram Pyari and co-accused Vijay Kumar caught hold Kamal Kumar when co-accused Balak Ram threw kerosene oil upon the body of deceased and when co-accused Balak Ram lit fire with match box upon body of deceased. There is further recital in the police report that co-accused Ram Pyari already stood released on bail by the High Court of Himachal Pradesh and there is further recital in the police report that challan already stood filed in the Court on dated 31.7.2014. There is further recital in the police report that if the applicant is released on bail then applicant will induce and threaten prosecution witnesses. There is further recital in the police report that if the applicant is released on bail trial of the case will be adversely affected. Prayer for rejection of bail application sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the State and also perused the record carefully.

5. Following points arise for determination in this bail application:-

Point No. 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?

Point No. 2

Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and he did not commit any offence cannot be decided at this stage. Same facts will be decided by learned trial Court after giving due opportunity to both the parties to adduce evidence in support of their version.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is completed and applicant will abide by terms and conditions imposed by the Court and applicant did not take any active part on this ground bail application 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. In the present case allegations against the applicant are very heinous and grave in nature. Allegations against the applicant are that applicant had caught hold Kamal Kumar husband of deceased so that Kamal Kumar could not rescue his deceased wife Anjana Kumari when co-accused Balak Ram threw kerosene oil upon the body of deceased Anjana Kumari and when co-accused Balak Ram lit fire upon the body of deceased with match box. There is grave allegation of active participation of the applicant Vijay Kumar in the present case. Court is of the opinion that if the applicant is released on bail at this stage then trial of the case will be adversely affected. Court is of the opinion that if the applicant is released on bail at this stage then interest of State and general public will be adversely affected.

8. Another submission of learned Advocate appearing on behalf of the applicant that co-accused Ram Pyari already stood released on bail and on the concept of parity applicant be also released on bail is rejected being devoid any force for the reasons hereinafter mentioned. It is settled law that there is special provision of bail for women, minors and old age persons. Court is of the opinion that bail was granted to co-accused Ram Pyari in view of the special provision provided for releasing of women on bail even in offence punishable under Section 302 IPC. Court is of the opinion that special privilege which is available for female qua offence punishable under Section 302 IPC is not available to male who has attained majority. It is proved on record that applicant Vijay Kumar is a male accused and it is also proved on record that applicant has attained the age of majority at the time of commission of alleged criminal offence. Hence it is held that it is not expedient in the ends of justice to release the applicant on bail on the ground that other co-accused Ram Pyari female already stood released on bail by the High Court of Himachal Pradesh.

9. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if the applicant is released on bail then applicant will induce and threaten the prosecution witnesses and in view of the gravity of offence punishable under Section 302 bail application filed by the applicant be rejected is accepted for the reasons hereinafter mentioned. Court is of the opinion that applicant is facing criminal trial under Section 302 IPC and in view of the fact that there are grave allegations against the applicant qua commission of offence under Section 302 IPC and the fact that there are grave allegation that applicant actively participated in the commission of grave criminal offence by holding Kamal Kumar so that Kamal Kumar husband of deceased could not save his deceased wife Anjana Kumari when co-accused Balak Ram threw kerosene oil upon the body of deceased and when co-accused Balak Ram lit fire upon the body of deceased with match box which resulted 72% burnt injuries to deceased Anjana Kumari with thermal. Even in the present case dying declaration of Anjana Kumari was recorded by the Investigating Agency. In view of the above stated facts it is held that it is not expedient in the ends of justice to release the applicant on bail at this stage. Point No.1 is answered in negative.

Point No. 2

Final Order

10. In view of my findings on point No.1 bail application filed by applicant under Section 439 Cr.P.C. is dismissed. My observations made in this order will not affect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

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

Vikky son of Sh. Ramesh Chand. ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1407 of 2014
Order Reserved on 19th December, 2014
Date of Order 31st December, 2014

Code of Criminal Procedure, 1973- Section 439- Accused was arrested for the commission of offence punishable under Section 20 of N.D.P.S. Act for possessing 250 grams of charas- challan has already been filed against the accused- 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 view of the fact that investigation is complete and accused was found in possession of less than commercial quantity- applicant is entitled to be released on bail- further, the mere fact that FIR was registered against the applicant is not sufficient for declining bail to him. (Para-6 to 10)

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 (Apex Court), 2012 Criminal Law Journal 702
Manoj Narula vs. Union of India 2014 (9) SCC 122
Ved Ram vs. State of H.P. 2007 (1) Shimla Law Cases page 152

For the Applicant: Mr. Rajiv Rai, Advocate
For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General with Mr. Puneet Razta, Deputy Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application filed for releasing the applicant on bail qua FIR No. 254 of 2014 dated 23.10.2014 registered under Section 20-61 of Narcotic Drugs and Psychotropic Substance Act 1985 at Police Station Sadar District Hamirpur H.P.

2. It is pleaded that applicant is innocent and has been falsely implicated in the present case. It is further pleaded that mother of the applicant is patient of heart disease and is bed ridden and required regular attendant. It is further pleaded that applicant will not tamper with prosecution evidence in any manner and it is further pleaded that applicant will abide by the conditions of bail order. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. There is recital in the police report that on dated 23.10.2014 at 4.00 p.m. applicant came near out gate of bus stand situated at Hamirpur (H.P.) and when applicant saw the police officials he tried to run away. There is further recital in the police that police officials caught the applicant and 240 g. charas was found in the exclusive and conscious possession of the applicant. There is further recital in the police report that charas was took into possession vide seizure memo and site plan was also prepared and statements of prosecution witnesses were recorded under Section 161 Cr.P.C. There is further recital in the police report that the

contraband was re-sealed by SHO and NCB form was also filled. There is further recital in the police report that contraband was sent for chemical examination and as per the report of Chemical Examiner the contraband is cannabis and is sample of charas. There is further recital in the police report that challan already stood filed in the Court on dated 17.12.2014. There is further recital in the police report that if the applicant is released on bail then applicant will induce and threaten prosecution witnesses. Prayer for rejection of bail application is sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the State and also perused the record carefully.

5. Following points arise for determination in this bail application:-

Point No. 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?

Point No. 2

Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and he did not commit any offence cannot be decided at this stage. Same facts will be decided by learned trial Court after giving due opportunity to both the parties to adduce evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that challan already stood filed in the Court and the alleged quantity recovered from the possession of the applicant is less than commercial quantity and applicant will abide by terms and conditions imposed by the Court and on this ground bail application filed under Section 439 Cr.P.C. 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 Criminal Law Journal 702 titled Sanjay Chandra vs. Central Bureau of Investigation*** **(Apex Court)** 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. It is settled law that accused is presumed to be innocent until convicted by competent Court of law and in view of the fact that trial in present case will be concluded in due course of time and in view of the fact that investigation already stood completed as per police report Court is of the opinion that if the applicant is released on bail at this stage then interest of State and general public will not be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if the applicant is released on bail at this stage then applicant will induce and threaten the prosecution witnesses and on this ground bail application filed by applicant be rejected is devoid any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be

granted to the applicant. Court is also of the opinion that if the applicant will flout the terms and conditions of conditional bail order then prosecution will be at liberty to file application for cancellation of bail order in accordance with law.

9. Another submission of learned Additional Advocate General appearing on behalf of non-applicant that applicant already facing trial qua FIR No. 10/12 dated 8.1.2012 registered under Section 20 of the Narcotic Drugs and Psychotropic Substance Act 1985 and on this ground present bail application be rejected is devoid of any force for the reasons hereinafter mentioned. Prosecution did not place on record any document in order to prove that applicant has been convicted by a competent Court of law under Narcotic Drugs and Psychotropic Substance Act 1985. It is well settled law that accused is presumed to be innocent until convicted by the competent Court of law. It was held in case reported ***2014 (9) SCC 122 titled Manoj Narula*** vs. ***Union of India*** that registration of another criminal case is no ground for declining bail to the accused person. It was held that accused is presumed to be innocent until convicted by a competent Court of law. It was held in case reported in ***2007 (1) Shimla Law Cases page 152 titled Ved Ram*** vs. ***State of H.P.*** that if quantity is less than commercial quantity then bail could be granted in NDPS cases. In view of the above stated facts and in view of the fact that alleged quantity recovered from the applicant is less than commercial quantity and in view of the fact that trial in the present case will be concluded in due course of time Court is of the opinion that it is expedient in the ends of justice to release the applicant on bail. In view of the above stated facts point No.1 is answered in affirmative in favour of the applicant.

Point No. 2

Final Order

10. In view of my findings on point No.1 bail application filed by applicant under Section 439 Cr.P.C. is allowed and applicant is ordered to be released on bail subject to furnishing personal bond to the tune of Rs. 5 lacs with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That applicant will join the proceedings of learned trial Court regularly till conclusion of trial in accordance with law and will also join the investigation whenever and wherever directed to do so. (ii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address in written manner to the Investigating Officer and Court. Applicant be released only if he is not required in any other criminal case. Bail application filed under Section 439 Cr.P.C. stands disposed of. My observations made in this order will not affect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

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

Bansi Lal & ors. .....Appellant.

Versus

Ramesh Chand & ors. .....Respondents.

RSA No. 284 of 2003.
Reserved on: 30.12.2014.
Decided on: 01.01.2015.

Transfer of Property Act, 1882- Section 3- Predecessor-in-interest of the defendants No. 1 to 6 had sold the suit land to mother of the plaintiffs No. 2 to 4 for consideration of Rs. 300/- vide registered sale deed dated 8.6.1973- mutation could not be attested due to death of the vendor- subsequently, defendants No.1 to 6 sold the land to defendants No. 7 and 8 vide registered sale deed dated 20.10.1989- held, that after execution of sale deed in favour of the predecessor-in-interest of the plaintiff, defendants were left with no title- plaintiffs were in possession of the suit land – defendants ought to have made an inquiry into the title of the plaintiffs and on failure to do so, they cannot claim to be bonafide purchasers for consideration. (Para-10 to 13)

Cases referred:
R. K. Mohammed Ubaidullah and ors. Vrs. Hajee C. Abdul Wahab and ors., (2000) 6 SCC 402,
Ishwar Singh and another vrs. Rajinder Singh and ors., (2007-2) 146 P.L.R. 137

For the appellant(s): Mr. Ajay Sharma, Advocate.
For the respondents: Mr. H.K.Bhardwaj, 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, Una, H.P. dated 9.5.2003, passed in Civil Appeal No. 89 of 1999.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs) have filed suit for declaration to the effect that they are owner-in-possession of land measuring 0-11 marlas bearing Kh. No. 1304 comprised in *khewat* No. 16, *khatauni* No. 21, as entered in the *jamabandi* for the year 1983-84, situated in Village Rampur, H.B. No. 209 of Tehsil and District Una, being successors of Smt. Nasib Kaur wife of Swarna Ram, plaintiff No. 1 and mother of plaintiffs No. 2 to 4, on the basis of the registered sale deed dated 8.6.1973. The appellants-defendants as arrayed in the original suit (hereinafter referred to as the defendants), have no right, title or interest in the suit land. The entries in the name of defendants No. 1 to 6, as arrayed in the original Civil Suit No. 5 of 1990, in the revenue record are wrong, baseless, unauthorized. The sale deed by defendants No. 1 to 6, as detailed in the original suit, in favour of defendants No. 7 & 8 is wrong, illegal, fictitious and ineffective as against the rights of the plaintiffs. The suit land was earlier owned and possessed by Inder Singh, predecessor-in-interest of defendants No. 1 to 6, as detailed in the original suit. Sh. Inder Singh vide registered sale deed dated 8.6.1973 Ext. PW-2/A had sold the suit land to Smt. Nasib Kaur wife of Swarna Ram and mother of plaintiffs No. 2 to 4 and Smt. Swarni Devi wife of Dhani Ram, for a consideration of Rs. 300/- and delivered the possession of the suit land. After the execution of sale deed, Nasib Kaur alongwith Swarni Devi are in possession of the suit land. After the death of Nasib Kaur, the plaintiffs being successors of Nasib Kaur alongwith Smt. Swarni Devi are in possession of the suit land. The mutation could not be attested due to the death of Inder Singh and non-appearance of his legal representatives. In these circumstances, mutation was sanctioned in favour of defendants No. 1 to 6. Defendants No. 1 to 6 taking undue advantage of wrong entries of their names, being fully aware that the sale deed existed in favour of plaintiffs, have sold the suit land to defendants No. 7 & 8.

3. The suit was contested by only defendants No. 7 & 8, namely, Kishan Chand and Bansi Lal by filing written statement. According to them, they have purchased the suit land in good faith vide registered sale deed dated

20.10.1989 from the owners and physical possession of the suit land was also given to them. Mutation has also been sanctioned in their names. They have raised the construction well before filing of the suit. According to them, Inder Singh remained in physical possession of the suit land till his death and after his death, his LRs remained in possession as owners and now the appellants are in physical possession of the suit land since its purchase.

4. Replication was filed by the plaintiffs. The leaned Sub Judge, Ist Class, Una, framed the issues on 14.2.1994. The learned Sub Judge, Ist Class, Una decreed the suit on 18.3.1999. The appellants herein, feeling aggrieved by the judgment and decree dated 18.3.1999, filed an appeal before the learned District Judge, Una. The learned District Judge, Una also dismissed the same on 9.5.2003. Hence, this regular second appeal.

5. The regular second appeal was admitted on 15.12.2004 on the following substantial question of law:

> "1. Whether the trial Court and the first appellate Court erred in holding that the appellants were not bonafide purchasers for consideration and entitled to protect under Section 53 of the Transfer of Properties Act?

6. Mr. Ajay Sharma, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that his clients are bonafide purchasers. They have verified the revenue record at the time of purchase of the land on 20.10.1989. On the other hand, Mr. H.K.Bhardwaj, Advocate, has supported the judgments and decrees passed by both the Courts below.

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

8. PW-1 Sh. M.K.Vishwamitter was appointed as Local Commissioner by the Court in the year 1990. He has proved his report Ext. PW-1/A and rough sketch Ext. PW-1/B. According to him, the construction work was in progress on the spot. PW-2 Ranjit Singh has proved the document Ext. PW-2/A. PW-3 Ram Singh has identified the signatures of his father. He deposed that his father has died and in his register at Sr. No. 282, the sale deed executed by Inder Singh in favour of Nasib Kaur is entered. His father has scribed the document Ext. PW-2/A. PW-4 Ram Asra is the marginal witness of document Ext. PW-2/A. He deposed that Inder Singh has executed sale deed of Kh. No. 1304 for a consideration of Rs. 300/- in favour of Nasib Kaur and Swarni. He paid Rs. 100/- as expenses of the sale deed, Rs. 200/- to Inder Singh before the Tehsildar. The sale deed was got scribed from Ganpat Rai, Petition Writer by Inder Singh. The contents of the same were read over to Inder Singh. Inder Singh put his signatures over the sale deed after admitting the contents of the same to be correct. He also put his signatures on the sale deed in his presence. Thereafter, the sale deed was produced before the Registrar and the Registrar read over the sale deed to Inder Singh. Inder Singh received Rs. 200/- from him in the presence of the Registrar. The witnesses Sh. Achhar Singh and Dalip Singh have now died. Inder Singh has also expired. In his cross-examination, he denied that he got executed the *Benami* sale deed. He denied the suggestion that during life time of Inder Singh, he remained in possession of the suit land and after his death his LRs came in possession of the suit land. Volunteered that on the date of execution of the sale deed, Inder Singh delivered the possession to Nasibo and Swarni. PW-5 Kartar Singh has identified the signatures of Achhar Singh over Ext. PW-2/A. PW-6 Ramesh Chand deposed that suit land is about 11 marlas. It was situated on Kh. No. 1304. They are owners-in-possession of the same. The land was purchased by Nasibo and Swarni Devi from Inder Singh in the year 1973. Nasib Kaur was his mother and Swarni his Aunt. The suit land was purchased by them for a consideration of Rs. 300/- and after the execution of the sale deed, they came in

possession of the suit land. In the year 1990, the defendants raised the threats to erect a house over the suit land without any right, title or interest.

9. Bansi Lal has appeared as DW-1. According to him, the suit land was about 11 marlas. They have constructed room over it. The suit land was purchased by them in the year 1989 from the LRs of Inder Singh and the mutation also stands sanctioned in their favour. He also deposed that the suit land was earlier in the possession of the LRs of Inder Singh and prior to this, Inder Singh was in possession of the same. Inder Singh was dead. He has proved document Ext. DW-1/A which is written by Harish, Deed Writer. DW-2 Harish, deposed that he has scribed Ext. DW-1/A. The sale deed was written by him at the instance of Kaushalya Devi in favour of Kishan Cand and Bansi Lal. The contents of the deed were read over and explained to the vendors and thereafter they put their signatures on the sale deed in the presence of witnesses after admitting the same to be correct. The sale deed has been entered at Sr. No. 482 dated 20.10.1989. DW-3 Sh. Kehar Singh was marginal witness of document DW-1/A. According to the Jamabandi for the year 1973-74, Ext. P-1 Inder Singh is recorded as exclusive owner-in-possession of the suit land and in the remarks column vide mutation No. 2453, his estate stood mutated in favour of Kaushalya Devi etc. Ext. P-2 is the Jamabandi for the year 1978-79 wherein defendants No. 1 to 6, as detailed in the original suit, were recorded as owners-in-possession of the suit land. Ext. P-3 is the Jamabandi for the year 1983-84. Ext. D-2 is the mutation.

10. Their lordships of the Hon'ble Supreme Court in the case of ***R. K. Mohammed Ubaidullah and ors. Vrs. Hajee C. Abdul Wahab and ors.,*** reported in ***(2000) 6 SCC 402,*** have held that Section 19(b) protects the bona fide purchaser in good faith for value without notice of the original contract. This protection is in the nature of exception to the general rule. Notice is defined in Section 3 of the Transfer of Property Act. It may be actual where the party has actual knowledge of the fact or constructive. A person is said to have notice of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. Explanation II of Section 3 of the Transfer of Property Act, 1963, states that the actual possession is notice of the title in possession. Their lordships have held as under:

> "14. Section 19 of the Specific Relief Act, 1963, to the extent it is relevant, reads:
>
> "19. Relief against parties and persons claiming under them by subsequent title. - Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against --
>
> (a)either party thereto;
>
> (b)any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;
>
> (c).....
>
> (d).....
>
> (e)....."
>
> As can be seen from Section 19 (a) and (b) extracted above specific performance of a contract can be enforced against (a) either party thereto and (b) any person claiming under him by a title arising subsequent to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. Section 19(b) protects the bona fide purchaser in good faith for value without notice of the original contract. This protection is in the nature of exception to the general rule. Hence the onus of proof of good faith is on the purchaser

who takes the plea that he is an innocent purchaser. Good faith is a question of fact to be considered and decided on the facts of each case. Section 52 of the Penal Code emphasizes due care and attention in relation to the good faith. In the General Clauses Act emphasis is laid on honesty.

15. Notice is defined in Section 3 of the Transfer of Property Act. It may be actual where the party has actual knowledge of the fact or constructive. "A person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. Explanation II of said Section 3 reads:

"Explanation II - Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof."

Section 3 was amended by the Amendment Act of 1929 in relation to the definition of 'notice'. The definition has been amended and supplemented by three explanations, which settle the law in several matters of great importance. For the immediate purpose Explanation-II is relevant. It states that actual possession is notice of the title of the person in possession. Prior to the amendment there had been some uncertainty because of divergent views expressed by various High Courts in relation to the actual possession as notice of title. A person may enter the property in one capacity and having a kind of interest. But subsequently while continuing in possession of the property his capacity or interest may change. A person entering the property as tenant later may become usufructuary mortgagee or may be agreement holder to purchase the same property or may be some other interest is created in his favour subsequently. Hence with reference to subsequent purchaser it is essential that he should make an inquiry as to title or interest of the person in actual possession as on the date when sale transaction was made in his favour. The actual possession of a person itself is deemed or constructive notice of the title if any, of a person who is for the time being in actual possession thereof. A subsequent purchaser has to make inquiry as to further interest, nature of possession and title under which the person was continuing in possession on the date of purchase of the property. In the case on hand defendants 2 to 4 contended that they were already aware of the nature of possession of the plaintiff over the suit property as a tenant and as such there was no need to make any inquiry. At one stage they also contended that they purchased the property after contacting the plaintiff, of course, which contention was negatived by the learned trial court as well as the High court. Even otherwise the said contention is self- contradictory. In view of Section 19(b) of the Specific Relief Act and definition of 'notice' given in Section 3 of the Transfer of Property Act read along with explanation II, it is rightly held by the trial court as well as by the High Court that the defendants 2 to 5 were not bona fide purchasers in good faith for value without notice of the original contract."

11. In the instant case, the plaintiffs were in possession of the suit property and the same could not be sold to respondents No. 7 & 8. They have not made necessary inquiries to ascertain the possession of the plaintiffs.

12. Relying upon the decision in ***R. K. Mohammed Ubaidullah's case (supra),*** the learned Single Judge of the Punjab and Haryana High Court in the case of ***Ishwar Singh and another vrs. Rajinder Singh and ors.,*** reported in ***(2007-2) 146 P.L.R. 137,*** has held that subsequent purchaser has

to be vigilant before execution of the sale deed. It was incumbent upon the subsequent purchaser(s) to enquire about the nature of possession of the plaintiff. It has been held as under:

> "[9] Both the Courts below have returned concurrent findings on the basis of documentary as well as oral evidence of the attesting witnesses that defendant Hardwari executed agreement dated 28.8.1991 Ex, PW-6/A and receipt Ex. P6/B in favour of the plaintiff. It has further been held that thumb impressions of Hardwari were not obtained by any misrepresentation or fraud. It is well established that subsequent purchaser has to be vigilant before execution of the sale-deed. It is not disputed that the lease-deed executed in favour of plaintiff was registered document, wherein it had been clearly mentioned that possession of the suit property had been handed over to the plaintiff. In such circumstances it was incumbent upon the subsequent purchaser(s) to enquire about the nature of possession of the plaintiff. Even there is clear recital in the sale-deed Ex. P-1 that plaintiff has been in possession of the suit land on the basis of lease-deed executed for a period of five years. Said recital was a sufficient notice to the appellants and defendant Nos. 4 to 7 that the land was not free from all incumbencies. The Apex Court in the case of R.K. Mohammed Ubaidullah and others v. Hajee C. Abdul Wahab (D) by LRs., 2000 6 SCC 402 has held that actual possession of a person itself is deemed or constructive notice of the title if any person who is for the time being is in actual possession thereof and it is for the subsequent purchaser to make further inquiry in this regard."

13. What emerges from the facts, enumerated hereinabove, is that the successor-in-interest of the plaintiffs and Swarni Devi have purchased land from Inder Singh vide sale deed Ext. PW-2/A on 8.6.1973. The sale deed has been duly proved by the plaintiffs. It is also evident from the language of Ext. PW-2/A that the possession was also delivered in favour of Nasib Kaur and Swarni Devi. It is settled law that a person cannot possess the better title than what he has. In the instant case, the sale deed was executed on 8.6.1973. The mutation could not be attested since Inder Singh has died and his legal representatives have not come on record at the time of attestation of mutation. The mutation does not confer any title. It is only used for fiscal purpose. The sale deed Ext. PW-2/A is valid. The defendants No. 1 to 6, as per array of parties in the original suit, could not sell the land, vide sale deed Ext. DW-1/A dated 20.10.1989 to the appellants herein. The only averment made in the evidence led by the appellants is that they have made inquiries from the record. It has not come on the record that whether they have verified the record of the Sub-Registrar to ascertain whether the land in dispute was free from all encumbrances, as it was already sold to some other persons. The appellants have failed to prove that they were bonafide purchasers of the suit land on the basis of sale deed Ext. DW-1/A dated 20.10.1989. The substantial question of law is answered accordingly.

14. Consequently, there is no merit in this regular second appeal and the same is dismissed.

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

Jaswant Singh and others. …Petitioners.

Versus

State of Himachal Pradesh and others. …Respondents.

CWP No. : 5496/2014
Decided on: 1.1.2015

Constitution of India, 1950- Article 226- Petitioners were engaged as T.G.T. (Non-Medical), P.E.T., Drawing Master and Peon- State took a decision to take over all the 95% getting grant-in-aid schools as on 1.4.2012- services of the petitioners were taken over by the State Government, however, grant-in-aid was not released towards their salary w.e.f. April, 2010 till September, 2012- State contended that strength of the children was less than the prescribed limit- however, State had taken over another school where the strength was less than prescribed limit- salary was paid through grant-in-aid- held, that State could not discriminate against the petitioner by granting the relaxation to one school and not to another- petitioners were similarly situated, therefore, they could not deprived of grant-in-aid- respondent directed to release the salary of the petitioners w.e.f. April, 2010 till September, 2012. (Para-2 and 3)

For the petitioners : Ms. Jyotsna Rewal Dua, Advocate.
For the Respondents : Mr. M.A. Khan, Addl. A.G. with Mr. P.M. Negi, Dy. A.G. and Mr. J.S. Guleria Asstt. A.G. for respondents No.1 to 3.

The following judgment of the Court was delivered:

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

Petitioners were engaged as T.G.T. (Non-Medical), P.E.T., Drawing Master and Peon in Adarsh Middle School, Ghumarwin, District Bilaspur with effect from 1.4.1993, 1.12.1995, 1.9.1997 and 1.10.1995, respectively. State has taken a conscious decision to take over all the 95% getting grant-in-aid schools as on 1.4.2012. Consequently, petitioners' services have also been taken over by the State Government. According to the petitioners, they have not been released grant-in-aid towards their salary with effect from April, 2010 to September, 2012.

2. According to the reply filed, grant-in-aid is regulated under 95% Grant-in-Aid Rules, 1997. The institution should have at least 60 children in Primary Classes and not less than 150 combined with Primary and Middle Classes in the age group of 6-14 years, 200 upto High School level and 350 upto Senior Secondary level. The strength of Adarsh Middle School, Ghumarwin, District Bilaspur was less than the prescribed strength, i.e. 46 for the year 2010-11, 43 for the year 2011-12 and 49 for the year 2012-13. Petitioners have placed on record Annexure P-5 whereby B.R.M.P. Senior Secondary School, Garan. P.O. Gurial Tehsil Nurpur, District Kangra was released grant-in-aid though the strength of the school was less than the prescribed limit as per 95% Grant-in-Aid Rules, 1997. Petitioners have specifically averred in the rejoinder that 17 schools in the year 2011 were granted relaxation as per Annexure P-6 and the teaching and non-teaching staff was paid salary through grant-in-aid. Petitioners were also appointed in Adarsh Middle School, Ghumarwin. The school was 95% aided school. The Adarsh Middle School, Ghumarwin could not be discriminated against by the respondents by relaxing the norms only for B.R.M.P. Senior Secondary School, Garan and 17 other schools, as per the details given in Annexure P-6. Petitioners were similarly situate vis-à-vis persons working in the B.R.M.P. Senior Secondary School and 17 other schools, where the students strength was reduced due to various reasons. The action of the respondents not to release the grant-in-aid to Adarsh Middle School, Ghumarwin is thus, arbitrary and unreasonable besides, being discriminatory.

3. Accordingly, the writ petition is allowed. Respondents No.1 to 3 are directed to release salary (grnat-in-aid), qua the petitioners, with effect from April, 2010 to September, 2012, if necessary, by relaxing the norms, within a period of four weeks from today. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Munish Dulta. .. Appellant.
Versus
Himachal Pradesh University .. Respondent.

LPA No.154 of 2014.
Judgment reserved on 18th December, 2014.
Date of Decision: 1st January, 2015.

Constitution of India, 1950- Article 226- A writ petition was filed by the petitioner for quashing the order, posting him in Himachal Pradesh University Regional Centre at Dharamshala on repatriation from the Department of Public Administration, PG Centre, Shimla- writ petition was dismissed on the sole ground that similar relief was sought by the petitioner earlier in CWP No. 9231 of 2011 which was not granted and therefore, is deemed to have been declined- held, that a Co-ordinate Bench in previously instituted writ petition had directed the respondent-University to examine as to whether there is justification of two Assistant Professors at Regional Centre, Dharamshala and whether the writ petitioner can be permitted to discharge his duties in the Department of Public Administration, PG Centre, Shimla, as a special case- University after due consideration had transferred the petitioner to his place of posting- no relief was granted and only a direction was passed in the writ petition- hence, the relief claimed by the petitioner was deemed to have been declined- moreover, petitioner was appointed in Regional Centre, Dharamshala and, therefore, cannot claim the appointment at Regional Centre, Shimla contrary to his appointment order- consequently, Writ Petition dismissed. (Para-5 to 9)

Case referred:
State Bank of India v. Ram Chandra Dubey and others (2001) 1 SCC 73

For the appellant: Mr. Sanjeev Bhushan, Advocate.
For the respondent: Mr. J.L. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Challenge herein is to the judgment dated July 14, 2014, passed by learned Single Judge in CWP No.7770 of 2013, whereby the writ petition filed by the appellant-writ petitioner, with a prayer to quash the order dated September 20, 2013 (Annexure P-27), qua his posting in Himachal Pradesh University Regional Centre at Dharamshala on repatriation from the Department of Public Administration, PG Centre, Shimla, has been dismissed on the sole ground that similar relief sought by the writ petitioner in CWP No.9231 of 2011 he previously instituted was not granted and as such to be treated to have declined.

2. Complaint is that the order Annexure P-27 sought to be quashed by filing the writ petition has been issued after the decision of previously instituted writ petition, i.e., CWP No.9231 of 2011. Therefore, learned Single Judge should have decided the writ petition on merits in view of there being more than one reason for quashing the same disclosed from the perusal of the writ petition. Also that allowing the incumbent appointed in the year 2004 as Assistant Professor in HP University, Regional Centre Dharamshala to serve in the Public Administration Department of the respondent-University at Shimla at the cost of the writ petitioner, a physically challenged person now repatriated to

Regional Centre, Dharamshala vide order sought to be quashed, is arbitrary and also discriminatory and as such learned Single Judge should have gone into all questions raised in the writ petition. The writ petitioner, a disabled person, on humanitarian ground was entitled to better treatment and in the matter of posting, a station of his choice, but the respondent-University in view of he having approached this Court earlier shown its displeasure and ordered to send him back to Regional Centre, Dharamshala, contrary to the direction of this Court qua his posting in the Department of Public Administration at Shimla. It has further been pointed out that at the time of filing of CWP No.9231 of 2011 cause of action was entirely different and as per order passed in that writ petition, the writ petitioner was posted in the Department of Public Administration, PG Centre, Shimla. Now the cause of action is different, as vide order sought to be quashed in the writ petition, the writ petitioner has been repatriated and ordered to be posted at Regional Centre, Dharamshala.

3. The grouse as brought to the Court in this appeal in a nutshell is that the writ petition should have been decided on merits, being not hit by the principle of res-judicata, by taking a pragmatic approach keeping in view that the writ petitioner, a physically challenged person and the post of Assistant Professor is lying vacant in the Department of Public Administration, HP University Campus, Shimla.

4. The writ petitioner herein has claimed the following reliefs in the writ petition:

> "(i) That writ in the nature of mandamus may kindly be issued and the impugned order 20.9.2013 (Annexure P-27) may kindly be quashed and set aside.
>
> (ii) That writ in the nature of mandamus may kindly be issued directing the respondent University to consider the candidature of the petitioner for appointment as Assistant Professor in the department of Public Administration P.G. Centre, Shimla, with effect from the year 2010 as per the judgment passed by this Hon'ble Court on 28.10.2010 in CWP No.1762 of 2010.
>
> (iii) That the respondent University may kindly be directed to give all the consequential benefits including the arrears of salary, seniority etc. from the year 2010."

5. The perusal of the judgment under challenge makes it crystal clear that learned Single Judge while taking note of the factum of the relief sought in the previously instituted writ petition, i.e., CWP No.9231 of 2011 identical in nature and also the interim order therein passed on November 23, 2011, whereas final order on December 7, 2011, as well as placing reliance on the ratio of the judgment of the Apex Court in ***State Bank of India*** v. ***Ram Chandra Dubey and others (2001) 1 SCC 73,*** has arrived at a conclusion that the relief sought in that writ petition having not been granted, is treated to have declined and no relief, as sought in the subsequent writ petition, dismissed vide judgment under challenge in the present appeal, can be granted. It is the legality and validity of the conclusion so drawn by learned Single Judge is under challenge in the present appeal on the grounds, as highlighted at the very outset.

6. On hearing Shri Sanjeev Bhushan, Advocate, learned Counsel appearing for the appellant-writ petitioner and going through the entire record, we find no illegality or irregularity having been committed by learned Single Judge while dismissing the writ petition for the reason that a Co-ordinate Bench in previously instituted CWP No.9231 of 2011 had directed the respondent-University to examine as to whether there is justification of two Assistant Professors at Regional Centre, Dharamshala or that the writ petitioner can be permitted to discharge his duties in the Department of Public Administration,

PG Centre, Shimla, as a special case. The writ petition ultimately was disposed of vide judgment dated December 7, 2011 in terms of the order to the above effect passed in the interim. It is by virtue of the order so passed in the previously instituted writ petition vide order dated January 4, 2012 (Annexure P-23) to the writ petition, the writ petitioner was permitted to work in the Department of Public Administration, PG Centre, Shimla with immediate effect. He, however, now has been ordered to be sent back to the place of his posting, i.e., HP University Regional Centre, Dharamshala vide order Annexure P-27.

7. A Co-ordinate Bench of this Court in its wisdom deemed it appropriate to direct the respondent-University to consider as to whether the writ petitioner can be permitted to work at Shimla for the time being as a special case in the previously instituted writ petition by him. The relief sought in that writ petition was also that he consequent upon the judgment dated October 28, 2010 in CWP No.1762 of 2010 should have been appointed against the post advertised for the Department of Public Administration, PG Centre Shimla and not at Dharamshala.

8. Division Bench while deciding CWP No.9231 of 2011, however, not deemed it appropriate to grant such relief and rather passed only a direction to consider the posting of the writ petition in PG Centre, Shimla for the time being and as a special case. The writ petitioner has no legal right to remain posted in PG Centre, Shimla, particularly when vide order of his appointment Annexure P-19 to the writ petition he has been appointed as Assistant Professor in Public Administration, Regional Centre, Dharamshala. Admittedly, on his appointment, he had submitted his joining report there. True it is that his application was for appointment as Assistant Professor, Public Administration in PG Centre, Shimla, however, there were no provisions of making reservation to the extent of 3% for physically handicapped person(s), when the advertisement was issued. He filed CWP No.1762 of 2011 for seeking a direction to the respondent-University to make a provision for reservation in the category of physically handicapped person. This Court vide judgment dated October 28, 2010, directed the respondent-University to reserve one of the posts of Assistant Professor in the Department of Public Administration for the category of disabled person(s) and that in case the petitioner is otherwise found suitable, may be considered for appointment against the said post. The respondent-University had taken a decision for providing reservation to physically handicapped category and reserved one post in its Regional Centre at Dharamshala. He was called for interview vide letter Annexure P-15 against the post of Assistant Professor (Public Administration) in Regional Centre, Dharamshala reserved for physically handicapped category. True it is that he made representation(s) to the respondent-University qua his appointment in PG Centre, Shimla, however, was offered appointment vide letter Annexure P-19 in Regional Centre, Dharamshala, which he accepted and even joined duties also.

9. On the basis of the judgment dated October 28, 2010 in CWP No.1762 of 2010 the writ petitioner cannot claim his appointment in PG Centre at Shimla, as it was only a direction to consider him from the category of physically handicapped in that judgment. Above all, the contempt petition he preferred also stands dismissed. True it is that he is physically handicapped person, however, in our considered opinion, he is not entitled to claim his posting at Shimla, particularly when he is appointed in Regional Centre of respondent-University at Dharamshala. The another Assistant Professor appointed in the year 2004 in Regional Centre, Dharamshala and brought to PG Centre, Shimla can not be said to be a circumstance of discrimination as it is for the employer, i.e., respondent-University to utilize the services of the teaching staff in its own way and in the interest of administration to maintain academic standard. The writ petitioner, who has been appointed in Regional Centre, Dharamshala and joined his duties there, cannot be said to have any complaint of arbitrariness and discrimination when the respondent-University in its

wisdom deemed it appropriate to post him in Regional Centre, Dharamshala. True it is that as per the guidelines circulated by Government of India in the matter of posting, the person with disability should be given preference, however, subject to the administrative constraints. Here when the writ petitioner is appointed for Regional Centre, Dharamshala, there is no question of obtaining his preference because vide order Annexure P-27 sought to be quashed he has been posted at the place of his appointment, i.e., Regional Centre, Dharamshala. Therefore, on merits also no case is made out warranting interference in the judgment under challenge in this appeal.

10. In view of what has been said hereinabove, we find no force in the present appeal and the same is accordingly dismissed. Before parting, we would like to observe that the dismissal of appeal will not come in the way of the writ petitioner in case the respondent-University at some later stage otherwise considers his case for transfer to its PG Centre at Shimla. The appeal stands disposed of. Pending application(s), if any also stands disposed of.

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

Sushma Devi .... Petitioner
Versus
State of Himachal Pradesh and others .... Respondents

CWP No. 9788/2014
Decided on 1.1.2015

Constitution of India, 1950- Article 226- Petitioner made a request for her transfer from Government Primary School, Thathal Block Matiana to a place nearby Shimla, being a couple case- her request was accepted and she was ordered to be transferred and posted nearby Shimla against the longer stay- Deputy Director informed the Director that no teacher was available at Shimla or nearby place within a within a radius of 25-30 kms to adjust the petitioner- petitioner sought information under Right to Information Act, 2005 and she was informed that six teachers had completed their tenure - Six teachers were retained on the basis of D.O. Notes "may not be disturbed" – held, that State had given special privilege to twelve teachers- all the employees are equal and should be treated equally- retaining 12 teachers who had completed their normal tenure without public interest/exigency is violative of Articles 14 and 16 of the Constitution of India - employee can neither be transferred nor retained at a particular place on the basis of D.O. Note – petition allowed and the respondent directed to post the petitioner within a radius of 30 kms and to transfer the teachers who had completed more than normal tenure within a radius of 30 kms in Shimla town to a place located beyond 30 kms. (Para-3 to 5)

For the petitioner : Ms. Archna Dutt, Advocate.
For the respondents : Mr. M.A. Khan, Additional Advocate General with Mr. P.M. Negi, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge (oral):

Petitioner made a request for her transfer under 1% quota from District Mandi to District Shimla. Request of the petitioner was acceded to as per Annexure P-3 dated 19.9.2011. Petitioner was transferred from Government Primary School, Bari Jharwar to Government Primary School Thathal, Block

Matiana, District Shimla. Petitioner joined her duties in District Shimla. She made a request for her transfer from Government Primary School, Thathal Block Matiana to a place nearby Shimla, being a couple case. Request of the petitioner was acceded to on 20.9.2013 vide Annexure P-4 by the Director Elementary and the petitioner was ordered to be transferred and posted nearby Shimla against longer stay by clubbing stay in the radius of 25-30 kms. The Deputy Director, Shimla informed the Director Primary vide Annexure P-7 that there was no teacher available at Shimla or nearby place within the radius of 25-30 KMs in order to adjust the petitioner.

2. Petitioner sought information under Right to Information Act, 2005. She was informed vide Annexure P-6 that six teachers have completed more than normal tenure within a radius of 25-30 kms. Six teachers have been retained, though they have completed their normal tenure on the basis of DO Notes "**may not be disturbed**". Letter dated 1.10.2013 Annexure P-7 is contrary to the information supplied to the petitioner vide Annexure P-6.

3. Respondent-State has given a special privilege to 12 teachers who have completed their normal tenure at Shimla and despite that they have not been transferred. The Recruitment and Promotion Rules framed under Article 309 of the Constitution of India and the transfer policy framed governing the transfers must be implemented scrupulously and uniformly. There cannot be a privileged class within the same class. All the employees are equal and they should be treated equally. To retain 12 teachers at Shimla, who have completed their normal tenure, without public interest/exigency, is violative of Articles 14 and 16 of the Constitution of India. The employee can neither be transferred nor retained at a particular place on the basis of D.O. Note. Rule of law and not unfettered discretion should prevail.

4. This Court in **CWP No. 801 of 2013** titled as **Sanjay Kumar vs. State of HP & Others**, decided on 5.7.2013, has deprecated the practice of transfers merely on the basis of DO notes. No teacher has a vested right to remain posted at a particular place after completing his/her normal tenure. Transfers should be effected by way of rotation.

5. Accordingly, the present petition is allowed. Respondents are directed to post the petitioner within a radius of 30 kms as per Annexure P-4. In order to maintain transparency/accountability in the Education Department, teachers who have completed more than normal tenure within a radius of 30 kms in Shimla town are ordered to be transferred beyond the radius of 30 KMs in larger public interest. Necessary orders to this effect be issued within a period of two weeks from today. Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J.

Virender Singh and others ...Appellants.

VERSUS

Himachal Road Transport Corporation and Ors. ...Respondents.

FAO No.384 of 2014
Decided on: January 2, 2015.

Motor Vehicle Act, 1988- Section 166- Motor Accident Claims Tribunal had dismissed the award on the ground that claimant had failed to prove that driver had driven the vehicle at the time of the accident in a rash and negligent manner- Tribunal had taken into consideration the judgment of the acquittal passed by Criminal Court- held, that the acquittal in a criminal case cannot be ground to dismiss the claim petition- case remanded to the Tribunal with the

direction to provide opportunity to the claimants to lead further evidence in support of their case. (Para-3 to 7)

Case referred:
Dulcina Fernandes & Ors. versus Joaquim Xavier Cruz & Anr., reported in 2013 AIR SCW 6014

For the appellants: Mr.G.R. Palsara, Advocate.
For the respondents: Mr.G.S. Rathore, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral):

This appeal is directed against the award, dated 1st August, 2014, passed by Motor Accident Claims Tribunal, Mandi, District Mandi, H.P. (for short, the Tribunal), in MAC Petition No.5/13/2010, titled Virender Singh and others vs. HRTC and others, whereby the Claim Petition came to be dismissed, on the ground that the claimants have failed to prove that respondent No.3 (driver of the offending bus) was driving the offending bus, at the relevant point of time, in a rash and negligent manner.

2. I have gone through the Claim Petition and the impugned award, a perusal whereof shows that FIR No.167 of 2009 was registered in Police Station Baijnath, under Sections 279 and 304-A of the Indian Penal Code against respondent No.3 i.e. the driver of the offending bus and final report i.e. challan was presented before the Magistrate, which resulted in the acquittal of the driver/respondent No.3. The Tribunal also took into consideration the said judgment of acquittal.

3. It is beaten law of the land that acquittal earned in the criminal case cannot be a ground to dismiss the claim petition. The standard of proof in a criminal case and claim petition is altogether different. In a criminal case, the prosecution has to prove its case beyond reasonable doubt. In a claim petition, the claimants are not required to prove their case beyond reasonable doubt, but by preponderance of probability.

4. My this view is fortified by the judgment of the Apex Court in case titled **Dulcina Fernandes & Ors. versus Joaquim Xavier Cruz & Anr.,** reported in **2013 AIR SCW 6014,** wherein it has been held that the issue of negligence was required to be decided by the Tribunal on the touchstone of preponderance of probability and certainly not on the basis of proof beyond reasonable doubt. It is apt to reproduce para 7 of the judgment 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-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."

5. In the present case, the driver of the offending bus (respondent No.3) stepped into the witness box as RW-3 and stated that on the fateful day, he had parked the offending bus at the bus stand and when he started the bus, he heard some noise of dashing someone with the bus on its rear, resulting into injuries to the deceased, who lateron succumbed to the same. This aspect has not been thrashed out by the Tribunal.

6. It is apt to reproduce paragraphs 10 and 15 of the impugned award herein:

"10. In order to prove their plea, the petitioner Virender Singh has stepped into the witness box as PW-4 and has tendered in evidence his affidavit Ext.PW4/A in which he has reiterated that the accident took place due to the rash and negligent driving of the bus in question by respondent No.3 who started reversing the bus in question on the relevant date and time at bus stand without blowing any horn in a rash and negligent manner and hit the deceased who was standing at bus stand and was waiting for a bus due to which the deceased was crushed and she immediately died at the spot on account of the injuries sustained by her. However, in his cross-examination, he has stated that the accident has taken place at bus stand Baijnath and he was not present at the spot at the time of the accident and the accident has not taken place in his presence. He has further stated that he came to know about the accident from one Pinki Devi who is inhabitant of his village and it is thereafter that he went to Civil Hospital, Baijnath where the deceased was declared dead by the Medical Officer.

xxxxxxxxx xxxxxxxxxxx xxxxxxxxxxxx

15. On the other hand, the respondent No.3 has stepped into the witness box as RW-3 and has tendered in evidence his affidavit Ex.RW1/A in which he has stated that he was driver of the bus in question on the relevant date and time which was parked at bus stand Baijnath and besides the bus in question other buses were also parked there and thereafter the driver of bus No.HP-53-0812 which was also parked there requested him to take his bus back as he was to take his bus out of the bus stand, at which he started his bus but in the meantime the passengers rushed towards the bus in question and he heard some noise that some one had struck with the rear portion of the bus and fell down, at which he came out of the bus and saw the deceased lying on the ground and she has died. He is specific that he was not driving the bus at the time of the accident but the deceased died due to her own negligence who struck against the stationary bus when the passengers at the bus stand rushed towards the bus in question and fell down and sustained injuries

in the process. He was cross-examined on behalf of the petitioners, but nothing contrary could be elicited in his cross-examination. He has denied that he was reversing the bus in question without blowing any horn in a rash and negligent manner at the relevant time. He has stated that there were private buses parked on both side of his bus and reiterated that he was asked by the driver of the private bus to take the bus in question back. He has again reiterated that he has not reversed the bus but only started the engine of the bus. He has denied that he was reversing the bus without blow any horn in a rash and negligent manner due to which the bus hit the deceased who was standing there causing injuries to her which resulted into her death. Though, he has admitted that a criminal case was registered against him but he has stated that he has been acquitted in the same case. Thus, the respondent No.3 has fully corroborated/supported the plea of the respondents that the accident took place due to the negligence of the deceased and he was not driving the bus in question in a rash and negligent manner."

7. In view of the above discussion, I am of the opinion that the Tribunal has fallen in an error. Therefore, the impugned award is set aside and the case is remanded to the Tribunal below with a direction to provide opportunity to the claimants to lead further evidence in support of their case and also to the respondents to lead evidence in rebuttal. The Tribunal is directed to conclude the trial and decide the Claim Petition within six months from today.

8. Parties are directed to appear before the Tribunal on 2nd March, 2015. The Registry is directed to send down the records **forthwith**, alongwith a copy of this judgment.

9. The appeal stands disposed of accordingly, alongwith pending CMPs, if any.

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

Sh. Arun Bagai .....Petitioner.

Vs.

State of Himachal Pradesh and another .....Respondents.

Cr. MMO No. 239 of 2014
Date of decision: 05.01.2015

Code of Criminal Procedure, 1973- Section 482- An FIR was lodged against the petitioner for the commission of offences punishable under Sections 279 and 337 of IPC and Section 187 of Motor Vehicle Act- parties compromised the matter- therefore, proceedings pending before the Trial Court are quashed. (Para-2 to 4)

For the petitioner: Mr. George, Advocate.

For the respondents: Mr. Vivek Attri, Deputy Advocate General, for respondent No. 1.
None for respondent No. 2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (*Oral):*

Petitioner herein is alleged to have committed offences under Sections 279 and 337 of the Indian Penal Code and under Section 187 of the Motor Vehicles Act. Through this petition, he seeks quashing of proceedings

launched against him and pending before the learned trial Court, in pursuance to FIR No. 45, dated 16.04.2012, lodged in Police Station, Aut, District Mandi, H.P. During the pendency of proceedings before this Court, the parties arrived at a settlement. The settlement deed arrived at inter se the petitioner herein (accused) and the respondent No. 2 herein (complainant), stands tendered in sequel to their statements recorded in writing before this Court and duly signatured by the accused and the complainant, respectively.

2. A perusal of the statement of the respondent (complainant), discloses the fact of the compromise deed, as tendered by him alongwith the petitioner herein (accused), having been arrived at voluntarily and without any exercise of coercion and undue influence, as such, when its execution is bereft of any compulsion, the disclosure in the compromise deed arrived at *inter se* the petitioner herein and the respondent of the dispute *inter se* the parties, arising out of a motor vehicle accident, which sequelled the constitution of offences against the accused under Sections 279 and 337 of the Indian Penal Code and under Section 187 of the Motor Vehicles Act, having been settled, is to be revered, besides lack of any exercise of any compulsion or duress by any of the executing parties to it, lends it probative force. Therefore, when the settlement deed arrived at *inter se* the complainant and the accused bespeaks of the complainant willing to terminate the proceedings pending against the accused in the trial Court lends aggravated momentum for its vindication by this Court, besides when the injuries which were gained on the person of minor son of the respondent No. 2 (complainant), are simple in nature is also a propellant for inducing this Court to accept the settlement deed arrived at *inter se* the accused and the complainant. The beacon of light in guiding this Court to exercise its jurisdiction vested under Section 482 of the Cr. P.C., inasmuch as to what considerations ought to prevail upon this Court while exercising its jurisdiction, are encapsulated in the judgment of the Apex Court reported in **Gian Singh** Vs. **State of Punjab & Another**, Special Leave Petition (CRL) No. 8989 of 2010, wherein the Apex Court has held as under:

> *"....d. Minor offences under Section 279, IPC may be permitted to be compounded on the basis of legitimate settlement between the parties. Yet another offence which remain non-compoundable in Section 506(II), IPC, which is punishable with 7 years imprisonment. It is the judicial experience that an offence under Section 506 IPC in most cases is based on the oral declaration with different shades of intention. Another set of offences, which ought to be liberally compounded, as Sections 147, 148, IPC, more particularly where other offences are compoundable. It may be added here that the State of Madhya Pradesh vide M.P. Act No. 17 of 1999 (Section 3) has made Sections 506 (II) IPC, 147 IPC and 148, IPC compoundable offences by amending the schedule under Section 320, Cr. P.C.*
>
> *e. The offences against human body other than murder and culpable homicide where the victim dies in the course of transaction would fall in the category where compounding may not be permitted. Heinous offences like highway robbery, dacoity or a case incolving clear-cut allegations of rape should also fall in the prohibited category. Offences committed by Public Servants purporting to act in that capacity as also offences against public servant while the victims are acting in the discharge of their duty must remain non-compoundable. Offences against the State enshrined in Chapter-VII (relating to army, navy and air force) must remain non-compoundable.*
>
> *f. That as a broad guideline the offences against human body other than murder and culpable homicide may be permitted to be compounded when the Court is in the position to*

record a finding that the settlement between the parties is voluntary and fair.

While parting with this part, it appears necessary to add that the settlement or compromise must satisfy the conscience of the Court. The settlement must be just and fair besides being free from the undue pressure, the Court must examine the cases of weaker and vulnerable victims with necessary caution."

To conclude, it can safely be said that there can never be any hard and fast category which can be prescribed to enable the Court to exercise its power under Section 482 of the Cr. P.C. The only principle that can be laid down is the one which has been incorporated in the Section itself, i.e., "to prevent abuse of the process of any Court" or "to secure the ends of justice".

3. Given the factum of the arriving of a voluntary compromise *inter se* the petitioner herein and the respondent No. 2 (complainant) and when given the plentitude of the powers conferred upon this Court under Section 482 of the Code of Criminal Procedure and their exercise being fettered only in the event of the purported culpable act of the accused constituting an offence under Section 302 of the Indian Penal Code or an offence under Section 376 of the Indian Penal Code, whereas, when the offences constituted by the purported culpable act of the petitioner are under Sections 279 and 337 of the Indian Penal Code and under Section 187 of the Motor Vehicles Act, this Court hence in exercise of the powers vested under Section 482 of the Code of Criminal Procedure, is prodded to, given the minimality of the injuries purportedly inflicted on the person of the accused and lack of interdict by the Hon'ble Apex Court against the quashing of criminal proceedings when the culpable act is constituted under the aforesaid provisions of the Indian Penal Code, rather given the free and fair compromise/settlement arrived at inter se the complainant and the accused, with aplomb vindicate the settlement. In aftermath, this Court is propelled to exercise jurisdiction vested under Section 482 of the Code of Criminal Code, its exercise cumulatively for the reasons aforesaid, being not restricted, circumscribed or trammeled, qua the offences constituted in the FIR against the accused. Consequently, to also beget cordiality *inter se* the petitioner and the respondent No. 2 (complainant), the settlement is hence accepted.

4. Accordingly, the petition is also accepted and the criminal proceedings pending trial in case P.C. No. 33-1/13 (14-II/13), titled as State Vs. Arun Bagai, under Sections 279 & 337 of the Indian Penal Code and Section 187 of Motor Vehicles Act in pursuance to FIR No. 45, dated 16.04.2012, lodged in Police Station, Aut, District Mandi, H.P., are quashed and set aside. The petition stands disposed of, so also the pending application(s), if any.

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

Capt. Padam Singh .....Appellant/JD

Versus

Ms. Rajni Sarin and others ...Respondents.

LPA No. 17 of 2006

Date of decision: 5th January, 2015.

Limitation Act, 1965- Section 5- Application for execution was dismissed in default on 2.1.2006- an application for restoration was filed on 25.7.2006- an application under Section 5 of Limitation Act was filed for condoning the delay in filing the application- held, that the provision of Section 5 of Limitation Act is

not applicable to the execution petition and the application was rightly dismissed. (Para-4 to 7)

Case referred:
Damodaran Pillai and others vs. South Indian Bank Ltd. (2005) 7 SCC 300

For the appellant:	Mr.Y.K. Thakur, Advocate.
For the respondents:	Mr.K.D. Sood, Sr. Advocate with Ms. Ranjana Chauhan, Advocate, for respondent No.1. Respondents No. 2 to 6 ex parte.

The following judgment of the Court was delivered:

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

This Letters Patent Appeal is directed against the order dated 21st September, 2006, passed by the learned Single Judge in O.M.P. No. 226/2006, arising out of Execution Petition No. 31 of 2001, whereby the petition for restoration of the objections was dismissed as time barred.

2. The civil proceedings which have given birth to the present LPA have a chequered history. It appears that the decree holders/plaintiffs have been dragged by the appellant from *pillar to post* and *post to pillar.* Finally, a decree was passed, which was not discharged or satisfied, constraining the decree holders to file Execution Petition No. 31 of 2001, in which objections were filed by the judgment debtor, by the medium of application, under Section 47 read with Order 21 Rule 90 and Section 151 of the CPC, for declaring the sale null and void, were dismissed in default three times, i.e., on 7.8.2002, 28.2.2003 and 22.9.2005 and was restored so many occasions. The petition again came to be dismissed in default on 2.1.2006, on the fourth time, and an application for restoration was made on 25.7.2006, alongwith limitation petition, was resisted by the decree holders, before the learned Single Judge, on the ground that it was barred by time.

3. The learned Single Judge/Executing Court examined the said provision of the Limitation Act and Order 21 of the C.P.C, dismissed the applications for condonation of delay and restoration, vide impugned order.

4. The appellant/judgment debtor is caught by his own acts and conduct, the details of which are given in the impugned order. The records of the file do reveal how judgment debtor/appellant has caused the delay in deciding the Execution Petition, the applications and the appeal.

5. The short question involved in this appeal is whether the provisions of Section 5 of the Limitation Act is applicable?

6. While going through the mandate of Section 5 of the Limitation Act, one comes to an inescapable conclusion that Section 5 of the Limitation Act is not applicable to the execution proceedings under Order 21 CPC and the impugned order came to be rightly made. This view is fortified by the apex Court judgment rendered in ***Damodaran Pillai and others vs. South Indian Bank Ltd. (2005) 7 SCC 300***. It is profitable to reproduce paras 6, 16, 17, 20, 21 and 25 of the said judgment herein:

> *"6. Mr. P. Krishnamoorthy, learned Senior Counsel appearing on behalf of the appellant raised a short question in support of this appeal contending that in terms of sub-rule (3) of Rule 106 of Order XXI of the Code of Civil Procedure a restoration application is required to be filed within 30 days from the date of passing of the order and*

not thereafter and for the said purpose Section 5 of the Limitation Act, 1963 is not applicable. It was urged that the Executing Court could not have, thus, condoned the delay in exercise of its inherent power or otherwise.

7-15... ....

16. An application under Section 5 of the Limitation Act is not maintainable in a proceeding arising under Order XXI of the Code. Application of the said provision has, thus, expressly been excluded in a proceeding under Order XXI of the Code. In that view of the mater, even an application under Section 5 of the Limitation Act was not maintainable. A fortiori for the said purpose, inherent power of the court cannot be invoked.

17. In Ayappa Naicker Vs. Subbammal & Anr. [1984 (1) Madras Law Journal Reports 214], Mohan, J. (as His Lordship then was) opined:

"Therefore having regard to the above language, it was permissible to have such a provision wherein the position is clearly changed at present. Section 5 of the present Limitation Act, 1963, states that any appeal or any application under any of the provisions of Order 21, Civil Procedure Code, 1908, may be admitted after the prescribed period if the appellant or the appellant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. The Explanation is omitted as unnecessary. Therefore, with reference to applications under Order 21, Civil Procedure Code, there is the statutory bar in applying section 5 of the Limitation Act. It may also be relevant to note section 32 of the Limitation Act before it was repealed by Central Act LVI of 1974. It is stated under that section that the Indian Limitation Act, 1908 is hereby repealed. Therefore, after 1st January, 1964, sub-rule (4) of rule 105 of Order 21, Civil Procedure Code, could no longer be applied, because of the express language of section 5 of the Limitation Act. That is why the Central Code, in rule 106 of Order 21, Civil Procedure Code, did not make any reference to the same saying that section 5 of the Limitation Act would be applicable. In view of this, the order of the Court below ought to be upheld."

It was further held:

"The question of invoking inherent powers under section 151, Civil Procedure Code, does not arise in this case. That is because of the specific provision contained under rule 106 of Order 21, Civil Procedure Code. If, therefore, there is repugnancy between the Central Code, under rule 106, and the Madras Amendment under sub-rule (4) of rule 105 of Order 21, it is section 97 of the Civil Procedure Code, in relation to repeal and savings that would apply. That says that any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall except in so far as such amendment or provision is consistent with the provisions of the principal Act, as amended by this Act, stand repealed."

We respectfully agree with the said opinion.

18-19… ……. …..

20. The principles underlying the provisions prescribing limitation are based on public policy aiming at justice, the principles of repose and peace and intended to induce claimants to be prompt in claiming relief.

21. Hardship or injustice may be a relevant consideration in applying the principles of interpretation of statute, but cannot be a ground for extending the period of limitation.

22-24…. …… ……

25. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The Appeal is allowed. No costs."

7. The law helps a person, who is vigilant and would not come to the rescue of a person/litigant, who is habitual absentee, remains in deep slumber and plays hide and seek.

8. Having said so, the appeal merits dismissal and is dismissed as such, alongwith pending applications, if any.

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

Dinesh & ors. ……Appellants.
Versus
Madan Lal ……..Respondent.

RSA No. 632 of 2014.
Decided on: 05.01.2015.

Specific Relief Act, 1963- Section 8- Plaintiff instituted a suit for possession against the predecessor-in-interest of the defendant claiming that predecessor-in-interest of the defendant was a tress-passer- predecessor-in-interest of the defendant claimed that suit land was sold to him a long time ago and the possession was also delivered at the time of execution of the sale deed- evidence led by the defendant was contrary to the pleading- original document was not produced before the Court- no specification of the suit land was mentioned in writing produced by the defendant- value of the suit land was more than Rs. 100/- but the writing was not registered- therefore, in these circumstances, version of the defendant was not proved. (Para-14 and 15)

For the appellant(s): Mr. Vipender Roach, Advocate.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge-I, Shimla, H.P. dated 20.09.2014, passed in Civil Appeal No.8-R/13 of 2011.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondent plaintiff (hereinafter referred to as the plaintiff) instituted a suit for possession against the predecessor of the appellants-

defendants (hereinafter referred to as the defendants, for the convenience sake) Bhajan Dass. According to the plaintiff, he is co-owner on the suit land as per *jamabandi* for the year 2000-01. The suit land was in illegal possession of the defendant Bhajan Dass, who was a trespasser. The plaintiff requested the defendant on 20.9.2008 to hand over the vacant possession of the suit land but he refused to do so.

3. The suit was contested by the defendant Bhajan Dass. According to him, the suit land was owned by the father of the plaintiff Sh. Jog Raj. He sold this land to defendant long time ago and has also handed over the possession to the defendant. He was not the trespasser but the owner. He was coming in possession over the suit land for the last 30 years without any interruption.

4. The replication was filed by the plaintiff. The learned Civil Judge (Sr. Divn.), Court No. I, Rohru, framed the issues on 2.12.2009. The suit was decreed by the learned Civil Judge (Sr. Divn.), Court No. I, Rohru, on 16.9.2011. The appellants filed an appeal before the learned Addl. District Judge-I, Shimla against the judgment and decree dated 16.9.2011. The learned Addl. District Judge-I, Shimla, H.P., dismissed the same on 20.9.2014. Hence, this regular second appeal.

5. Mr. Vipender Roach, Advocate, has vehemently argued that both the Courts below have not correctly appreciated the plea of adverse possession raised by the defendant. He also contended that the Courts below have not correctly appreciated the oral as well as the documentary evidence placed on record.

6. I have heard the learned Advocate and gone through the judgments and records of the case carefully.

7. The plaintiff has appeared as PW-1. He has led his evidence by filing affidavit Ext. PW-1/A. He has reiterated all the facts mentioned in the plaint in his affidavit. He denied the suggestion that the defendant came in possession of the suit land prior to his birth. He denied the suggestion that the defendant was in possession of the suit land for the last 50 years. He denied that his grandfather has sold the suit land and one writing was also prepared by Vijay Nand *'Nunberdar'* in this regard. He also denied that one *'tehrirnama'* was prepared between Manohar Dass and Binda Ram in the year 1955. He has shown his ignorance that possession of Bhajan Dass was found since settlement.

8. PW-2 Chaman Lal also led his evidence by filing affidavit Ext. PW-2/A. According to him, the plaintiff Madan Lal alongwith other co-sharers are recorded owners of the suit land and defendant has no concern with the suit land. The possession of the defendant over the suit land is illegal. He has admitted that Madan Lal used to reside at Chopal. He has shown his ignorance that in the year, 1955, Binda Ram (grandfather of the plaintiff) has sold land to the defendant for consideration of Rs. 2500/- and possession was also handed over to Manohar Dass.

9. The defendant has appeared as DW-1. He has led his evidence by filing affidavit Ext. DW-1/A. According to him, the grandfather of the plaintiff, Sh. Binda Ram had sold the suit land to his father in the year 1955 and possession was also handed over on the spot. According to him, the plaintiff alongwith other villagers are having knowledge qua possession of defendant over the suit land. He has stated that after the death of his father, he is coming in possession over the suit land without any objection from any side. He has planted 300 apple plants upon the suit land. During his cross-examination, he stated that portion A to A of his written statement Ext. PA at para No. 1 is wrong and whatever, has been written in para No. 2 of his affidavit Ext. DW-1/A is correct. He was coming in possession of the suit land since 1955. According to

him, writing mark 'X' was written by Vijay Nand and villagers in presence of witness Sadhi Ram.

10. DW-2 Vinod Sharma, is Ahlmad. He has produced the record of writing mark 'X'.

11. DW-3 Birja Nand deposed that he knew how to write and read Urdu. He used to translate Urdu into Hindi. He has translated the document mark 'X' from Urdu to Hind which is Ext. DW-3/A. Hindi translation has been written by Puran Chand at his instance. During his cross-examination, he stated that he has not appended his certificate upon the document Ext. DW-3/a to the effect that he has prepared the same because he has not written the same.

12. DW-4 Vidya Prakash has led his evidence by filing DW-4/A. According to him, defendant Bhajan Dass is his father and he has appointed him as power of attorney. His father has planted apple orchard over the suit land about 20-25 years back. They were coming in possession over the suit land for the last 50 years. Binda Ram has sold this land to his grandfather Manohar Dass and to this effect his father has told him.

13. DW-5 Charan Singh has led his evidence by filing affidavit Ext. DW-5/A. According to him, defendant was coming in possession over the suit land for the last 50 years without any interruption. In his cross-examination, he has stated that the suit land was never demarcated in his presence so he has no knowledge of the boundaries of the land. He heard that Binda had sold the suit land to Manohar Dass. He has also shown his ignorance that plaintiff and other co-sharers are owners of the suit land.

14. According to the jamabandi Ext. PW-1/B, the plaintiff alongwith other co-sharers have been recorded as joint owners of the suit land. However, in the column of possession, defendant Bhajan Dass has been shown in possession over the suit land. PW-1 Madan Lal plaintiff has corroborated the averments contained in the plaint. The statement of PW-1 Madan Lal has been corroborated and supported by PW-2 Chaman Lal. According to the defendant, the father of the plaintiff Jog Raj had sold the land in dispute to the defendant many years back and as such, the defendant is owner of the same. However, when defendant has appeared as DW-1, he deposed that the grandfather of the plaintiff Binda Ram has sold the land in dispute to the father of the defendant and defendant is coming in possession over the suit land from the year 1955. The evidence led by the defendant is contrary to the pleadings.

15. Ext. DW-3/A Writing, has not been proved in accordance with law. The original of writing Ext. DW-3/A has not been produced in the Court nor any witness to the writing has been examined. Even in Ext. DW-3/A, no specification of the suit land has been mentioned in writing nor any description of the adjoining land has been stated therein. The document Ext. DW-3/A was not registered, though the value of the land was more than Rs. 100/-. The defendant, though has taken the plea of adverse possession but the basic ingredients of the same have not been proved. The defendant has failed to connect DW-3/A qua the suit land. The Courts below have correctly appreciated the ocular as well as documentary evidence placed on record by the parties.

16. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Mohan Lal & anr. .....Appellants.
Versus
Wattan Chand .....Respondent.

RSA No. 631 of 2014.
Decided on:05.01.2015.

Malicious Prosecution- Defendant No. 2 filed a suit against the plaintiff which was subsequently withdrawn- defendant also filed a suit for permanent injunction against the plaintiff which was dismissed for non-prosecution- plaintiff claimed damages of Rs.1,20,000/- for the harassment- held, that suit was instituted without any reasonable cause- plaintiff had to incur expenses for defending it- when temporary injunction is sought on insufficient grounds, plaintiff can seek damages - suit for malicious prosecution would lie when the civil proceeding is instituted to harass the parties. (Para-10 to 22)

Cases referred:
P.V. Sriramulu Naidu vrs. Kolandaivelu Mudali AIR 1918 Madras 990
Har Kumar De vrs. Jagat Bandhu De, AIR 1927 Calcutta 247
Lala Babu Ram and another vrs. B. Nityanand Mathur, AIR 1939 Allahabad 168
Nagendra Kumar vrs. Etwari Sahu and others, AIR 1958 Patna 329
Vijai Nath vrs. Damodar Das Chela Shiv Mangal Das and ors., AIR 1971 Allahabad 109
Genu Ganapati Shivale vrs. Bhalchand Jivraj Raisoni and another, AIR 1981 Bombay 170
Filmistan Distributors (India) Pvt. Ltd., Bombay-1 vrs. Hansaben Baldevdas Shivalal and others, AIR 1986 Gujarat 35
Bank of India Vrs. Lakshimani Dass, AIR 2000 SC 1172

For the appellant(s): Mr. Y.P.Sood, Advocate.
For the respondent: Nemo.

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 27.09.2014, passed in Civil Appeal No.85 of 2014.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff) instituted a suit for recovery of Rs. 1,20,000/- alongwith interest @ 12% per annum as compensation against the appellants-defendants (hereinafter referred to as the defendants for the convenience sake). According to the plaintiff, he is a businessman and doing work of interior decorator at Chandigarh. Village *Bathari* is his native place. He visits his village occasionally. Defendant No. 2 Sudesh Kumari, without any *locus standi* had filed civil suit bearing No. 176/2002 against the plaintiff and his brother Sh. Pritam Dass. The plaintiff and his brother had engaged the counsel and faced trial for more than five years. The defendant No. 2 got the civil suit dismissed as withdrawn on 1.5.2007. The defendants also instituted civil suit bearing No. 25 of 2007 for permanent injunction against the plaintiff and his brother Sh. Pritam Dass. On 3.4.2007, the summons was served upon the plaintiff. The civil suit was also dismissed for non-prosecution on 17.11.2008. According to the plaintiff, he and his brother had been dragged into unnecessary litigation. They had to face the trial for more

than six years. The plaintiff had purchased Kh. No. 2407/1 and 2408 through sale deed alongwith *Tatima-Naksha* and these *khasra* numbers were not the subject matter to be partitioned.

3. The suit was contested by the defendants. According to them, when the plaintiff started threatening to raise construction in the joint land, the civil suit was instituted. When the plaintiff again extended threats to raise construction, the defendant also was constrained to file civil suit No. 25 of 2007.

4. The replication was filed by the plaintiff. The learned Civil Judge (Jr. Divn.), II, Una, framed the issues on 5.8.2011. The learned Civil Judge (Jr. Divn.), II, Una, dismissed the suit on 9.9.2013. The plaintiff preferred an appeal before the learned District Judge, Una, against the judgment and decree dated 9.9.2013. The learned District Judge, Una allowed the appeal on 27.9.2014 and decreed the suit for recovery of Rs. 50,000/- as compensation for malicious prosecution. Hence, this regular second appeal.

5. Mr. Y.P.Sood, Advocate, for the defendants has vehemently argued that the learned District Judge, Una has misread and mis-appreciated Ext. PW-1/A, order dated 1.5.2007 and PW-1/B order dated 17.11.2008. According to him, the suits were never decided on merits.

6. I have heard the learned Advocate and gone through the judgments and records of the case carefully.

7. PW-1 Kewal Krishan has produced the record pertaining to Civil Suit No. 176/2002, RBT No. 422/08/07 as well as the copy of order dated 1.5.2007 Ext. PW-1/A and copy of order dated 17.11.2008 Ext. PW-1/B.

8. The plaintiff has appeared as PW-2. He has tendered the evidence by way of affidavit. He has reiterated the entire contents of the plaint. In his cross-examination, he deposed that he is doing business at Chandigarh for the last 40 years. He used to appear alongwith his counsel on each and every date of hearing. He denied that the previous suit was compromised between the parties.

9. DW-1 Mohan Lal has also led his evidence by way of affidavit. In his cross-examination, he testified that he is a Carpenter by profession. He is living at Chandigarh alongwith his family. He admitted that his wife has filed the civil suit against the plaintiff and his brother in the year 2002. His wife has no immoveable property at Village Bathari. According to him, his wife was his Power of Attorney. He denied that civil suit No. 176 of 2002 was instituted by his wife with malafide intention. Volunteered that the suit was withdrawn on 1.5.2007, as compromised.

10. It is duly proved from the record that civil suit No. 176 of 2002 was instituted by defendant No. 2 Sudesh Kumari against the plaintiff and his brother on 1.8.2002. It was withdrawn on 1.5.2007. The explanation given for the withdrawal of the suit was that the matter was compromised. The defendants have not placed on record the copy of alleged compromise. Defendant No. 2 Sudesh Kumari is not the co-owner of the suit land. According to defendant No. 2, she was the Power of Attorney of her husband. However, no such Power of Attorney and copy thereof was placed on record. It is apparent that the suit was withdrawn on the oral submission of the learned counsel for the plaintiff. The defendants have also instituted another civil suit bearing No. 25 of 2007 on 3.4.2007. The suit was dismissed for non-prosecution on 17.11.2008. The defendants have never moved any application for restoration of the suit. The first Appellate Court has rightly come to the conclusion that the suits have been instituted by the defendants against the plaintiff and his brother without any reasonable and probable cause. The plaintiff and his brother have to face trial in the Court for about 6 years. He resides with his family at Chandigarh. Not only this, he had to engage counsel. He has spent his valuable

time for proceedings in the Court being a businessman. He has deposed that he had attended each and every hearing by coming to Una. It cannot be said that civil suit filed by the defendants was frivolous. The loan statement of the plaintiff was never to benefit the case against the defendants. It is the quality what matters and not the number of witnesses cited. The first Appellate Court has correctly appreciated the orders Ext. PW-1/A and PW-1/B dated 1.5.2007 and 17.11.2008, respectively. There is no misreading or mis-appreciation of evidence by the first Appellate Court.

11. In the case of ***P.V. Sriramulu Naidu vrs. Kolandaivelu Mudali*** reported in ***AIR 1918 Madras 990***, the Division Bench has held that a suit for damages for malicious prosecution is not confined to criminal proceedings alone, nor would such an action lie for all criminal prosecutions. The cases for which such a suit lies are those in which there is either (a) damage to man's reputation, or (b) danger to his liberty, or (c) damage to his property. It was held as under:

> ".....Brett, M.E. and Bowen, L.J. accepted the dictum of Lord Holt in Saville v. Roberts (1698) 1 LD. Raym. 374 as practically exhausting the classes of cases for which a suit for malicious prosecution would lie. There must be in the previous proceedings either (a) damage to a man's reputation, or (b) danger to his liberty, or (c) damage to his property. ...."

12. In the instant case, the case has been filed by the defendants for permanent injunction against the plaintiffs and the suit remained pending for more than five years.

13. In the case of ***Har Kumar De vrs. Jagat Bandhu De***, reported in ***AIR 1927 Calcutta 247***, the Division Bench has held that when a temporary injunction is wrongfully obtained on insufficient grounds a suit for damages is maintainable.

14. In the case of ***Lala Babu Ram and another vrs. B. Nityanand Mathur***, reported in ***AIR 1939 Allahabad 168***, the division Bench has held that a suit for damages for malicious prosecution is maintainable though the proceedings complained of are not strictly criminal.

15. In the case of ***Nagendra Kumar vrs. Etwari Sahu and others***, reported in ***AIR 1958 Patna 329***, the Division Bench has held that whenever the law has been set in motion not for the bonafide purpose of vindicating justice, but there is a perversion of the machinery of justice for improper purposes, an action will be maintainable.

16. In the case of ***Bachcha Pandey and another vrs. Mt. Deo Sunder Devi and ors.,*** reported in ***AIR 1968 Patna 248***, the Division Bench has held that suit based on injury to property is maintainable. It has been held as follows:

> "13. Cost is awarded in a civil or a quasi criminal action to compensate the, winning party for the expenses incurred in that action. For a case of vexatious nature there is a provision in the Code of Civil Procedure for award of cost by way of compensation. The cost so allowed is to be taken into account in any suit for damage in respect of such vexatious claim. But in awarding cost no account is taken of any injury to property right. Person suffering injury to property right cannot be left without any remedy. A person, who is deprived of exercising the acts of ownership over his property by a direct act of another person or through a motion in a law court at his instance, is certainly entitled to such damages as are necessary and proximate result thereof. When such act of that other person was intentional it is of no avail to him to urge that he acted bona fide for which he had reasonable ground. It is not necessary for the person injured to prove any malice or want of reasonable or probable

cause. Any person should not be allowed to suffer for an Intentional act of other. All these are based upon sound principles of equity and justice."

17. In the case of ***Vijai Nath vrs. Damodar Das Chela Shiv Mangal Das and ors.,*** reported in ***AIR 1971 Allahabad 109***, the learned Single Judge has laid down the following principles to prove malicious prosecution. It has been held as under:

"17. I will now consider the second ground urged by the learned counsel for the appellant. In the case of Balbhaddar Singh v. Badri Shah reported in AIR 1926 PC 46, it was held that the ingredients to be established for maintaining an action for malicious prosecution are--

(1) That the plaintiff was prosecuted by the defendant.

(2) That the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating.

(3) that the prosecution was instituted against him without any reasonable or probable cause.

(4) That it was due to malicious intention of the defendant and not with a mere intention of carrying the law into effect.

In that case, Balbhaddar Singh plaintiff was accused of having participated in a murder and it was alleged that the prosecution had been initiated at the in stance of Badri Shah. In this connection the Privy Council observed as follows:--

"..... but in their Lordships opinion the Subordinate Judge has a little left out of view that this is not a case which must be determined on a balance of probabilities. The question is not: Did the appellant commit the murder? or Did Badri Shah invent the murder against them? The two queries exhaust the possibilities of the situation. The question is: Have the appellants proved that Badri Shah invented and instigated the whole proceedings for prosecution:..... The appellants must therefore go the whole way. There is no half way point of rest. They must show that Badri Shah invented the whole story as far as it implicated the appellants and tutored Raghunath and Teja to say it. That is a very heavy onus of proof, arid unless they sustained it the appellants must fail."

18. In the case of Devi Atma Nand v. Shambhu Lal, reported in 1965 All LJ 317, Dhawan, J. observed:--

"It is elementary that a plaintiff who claims damages for having been made a victim of malicious prosecution must prove that the defendant prosecut ed him without reasonable or probable cause and was also actuated by malice. The absence of reasonable cause and malice are two separate ingredients to be proved in every suit for malicious prosecution and a plaintiff will not succeed if he proves absence of reasonable cause but not malice or vice versa. The absence of reasonable and probable cause does not lead to any presumption that the person in filing the complaint must have acted maliciously. Of course he may rely on total absence of reasonable cause as part of his evidence that the defendant must have been actuated by wrongful or evil motive in prosecuting him. The Court can regard the absence of reasonable cause as evidence of wrongful motive to be weighed against other evidences on the issue of malice ...."

19. A perusal of the aforesaid authorities clearly brings out that in an action for malicious prosecution, burden of proving the four ingredients pointed out by the Privy Council in AIR 1926 PC 46 is on the plaintiff. Further plaintiff is not required to prove that the allegations made in the

complaint are incorrect. What he is required to make out is that there was no reasonable and probable cause for initiating his prosecution.

20. In the present case it is not disputed that the first two ingredients out of the four ingredients are made out namely that the plaintiffs were prosecuted by the defendant and that the proceedings complained of terminated in favour of the plaintiff. The only controversy between the parties that remains is whether plaintiff has been able to prove that he was prosecuted without any reasonable and probable cause and whether the action of the defendant in initiating the action was malicious. As pointed out by Dhawan, J. in Devi Atma Nand's case, 1965 All LJ 317 absence of reasonable and probable cause and malice are two separate ingredients both of which are to be proved in a suit for malicious prosecution and a plaintiff cannot be expected to succeed if he merely proves absence of reasonable and probable cause and not malice or vice versa. Absence of reasonable and probable cause in all cases does not necessarily lead to an inference of malice. But a total absence of reasonable cause may be relied upon as a piece of evidence for showing that defendant acted wrongfully or with evil motive in prosecuting the plaintiff.

In the case before me, the defendant initiated criminal proceedings on the allegation that the incident of grazing of a sugar-cane field took place in his , presence. Further there was a Marpit in which the plaintiff assaulted him. If the plaintiff is able to prove that the incident of grazing and the Marpit did not take place and that the complaint against him was false, in the absence of any explanation from the defendant court of law would be justified in believing that there was no reasonable and probable cause and that the defendant was actuated by malice in initiating criminal prosecution. At any rate in such circumstances there would be nothing wrong if the Court considers existence of malice and absence of reasonable and probable cause so probable that a prudent man ought to act on this supposition."

18. In the present case, the suit has been instituted by the defendants without any reasonable and probable cause and the same was withdrawn. The suit was not filed with bonafide purpose, reasonable and probable cause. It amounted to gross misuse of the process of the Court. The suit was stated to have been withdrawn on the basis of the compromise but no compromise was placed on record.

19. In the case of ***Genu Ganapati Shivale vrs. Bhalchand Jivraj Raisoni and another***, reported in ***AIR 1981 Bombay 170***, the Division Bench has held that in order to succeed in establishing malicious abuse of civil proceedings, the plaintiff is required to prove a number of ingredients. It has been held as under:

"4. It is the case of defendant No. 2 that even assuming as valid all the findings on facts which have been given by the trial Court against him, the plaintiff's claim must be dismissed with costs. Defendant No. 2 has submitted that the plaintiff has no cause of action against him. In order to appreciate this contention of defendant No. 2, it is necessary to examine the nature of the cause of action which the plaintiff has against defendant No. 2. Essentially, the cause of action of the plaintiff is for damages as a result of malicious abuse of civil proceedings. This cause of action is similar to the cause of action for malicious prosecution. Both these actions are in tort. In order to succeed in establishing malicious abuse of civil proceedings, the plaintiff is required to prove a number of ingredients. (1) In the first place, malice must be proved. (2) Secondly, the plaintiff must allege and prove that the defendant acted without reasonable and probable cause and the entire proceedings against him

have either terminated in his favour or the process complained of has been superseded or discharged. (3) The plaintiff must also prove that such civil proceedings have interfered with his liberty or property or that such proceedings have affected or are likely to affect his reputation. For example, if the civil proceedings have resulted in the arrest of the plaintiff or if they are in the nature of bankruptcy proceedings or winding-up proceedings, they may adversely affect the plaintiff's reputation. The plaintiff must establish that he has suffered damage. Ordinarily, apart from cases involving interference with liberty, it is difficult to establish legal damage. If the malicious action is tried in public, the name and fame of the defendant will be cleared. If the action is not tried, his name is not assailed. Ordinarily, a civil action involves no damage to person. The only damage is ordinarily the expense of fighting such a litigation. Since the order in such civil proceedings for costs adequately compensates the aggrieved party for this damage, an action for malicious abuse of civil proceedings is not normally maintainable. As stated in para 717 at page 367 of Halsbury's Laws of England, 3rd Edn., Vol. 25:

> "The law allows every person to employ its process for the purpose of asserting his rights without subjecting him to any liability other than the liability to pay the costs of the proceedings if unsuccessful."

Hence one seldom comes across an action for malicious abuse of civil proceedings."

20. In the case of ***Filmistan Distributors (India) Pvt. Ltd., Bombay-1 vrs. Hansaben Baldevdas Shivalal and others***, reported in ***AIR 1986 Gujarat 35***, the Division Bench has held that abuse of legal process is the crucial element of tort. The Court further held that the Court grants the interim injunction for proper purpose of protecting the interest of the party seeking injunction. However, if such party were to abuse such injunction for other improper and collateral purpose of oppression or harming the other party, that would be clearly abuse of process of Court. It has been held as under:

> "21. Fleming on Torts under the heading 'abuse of process' has discussed this question. He has first dealt with the question of malicious prosecution in Chap. 24 and held that elements of absence of reasonable and probable cause and malice are necessary ingredients for action on Tort of malicious prosecution. Then under the second head of 'abuse of process' has observed that "Quite distinct, however, are cases where a legal process, not itself devoid of foundation, has been perverted to accomplish some collateral purpose, such as extortion or oppression. Here an action will lie at the suit of the injured party for what has come to be called abuse of process."
>
> After referring to the case of Grainger v. ill (1838) 4 Bing. N. C. 212, in which case the plaintiff was allowed to recover his loss without proof that the proceedings were destitute of reasonable and probable cause, the learned author observed that:
>
> > "Unlike malicious prosecution, the gist of this tort lies not in the wrongful procurement of legal process or the wrongful initiation of criminal proceedings, but in the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. It involves the notion that the proceedings were 'merely a stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate, and it is, therefore, immaterial whether the suit which that process commenced was founded on reasonable cause or even terminated in favour of the

> person initiating it. The improper purpose is the gravamen of liability."

Another learned author Street on Torts has also defined 'abuse of process' thus:

> "It is a tort to use legal process in its proper form in order to accomplish a purpose other than that for which it was designed and thereby cause damage".

He has also relied on the leading case of Grainger v. Hill (supra); and has further observed that:

> "The case decides that in this tort the plaintiff need not prove want of reasonable and probable cause; nor need the proceedings have terminated in his favour. The plaintiff must show that the defendant has used the process for some improper purpose."

Thus, according to both the learned authors 'abuse (in contradiction to proper use) of legal process is the crucial element of tort.' Both the learned authors have emphasised that when legal process has been improperly used (abused) to accomplish some collateral purpose, such as oppression it makes the defendant liable for damages. It is thus the improper purpose which is the gravamen of liability and when that is proved no question of further proof of malice and absence of reasonable and probable, cause arises; and that is not a necessary element to be proved in such cases. It must be borne in mind that such improper purpose is not an act of Court nor does the Court give any judicial sanction to such improper purpose while granting the interim injunction. The Court grants the interim injunction for proper purpose of protecting the interest of the party seeking injunction. However, if such party were to abuse. Such injunction, (which has been granted to protect its interest) for other improper and collateral purpose of oppression or harming the other party, that would be clearly abuse of process of Court. By voluntary acts, of tile party who obtains the interim injunction blame cannot be laid at the door of the Court and the argument cannot be sustained that such improper purpose was sanctioned by the judicial order. It must be emphasised that the gravamen of this tort is the abuse or improper purpose in obtaining the legal process and not the legal process itself. If it was a case of mere legal process resulting in damage to a party, the question of absence of reasonable and probable cause and malice would be relevant and necessary. However, when it is shown that it was not a case of mere legal process causing damage but the improper purpose and abuse of such legal process by a party that has caused damage, no further proof of any other element is required. Now let us consider the various judgments which have been cited and read before us by the learned counsel for the appellant."

21. In the case of ***Bank of India Vrs. Lakshimani Dass***, reported in ***AIR 2000 SC 1172***, their lordships of the Hon'ble Supreme Court have held that where injunction preventing plaintiff from utilizing their premises, could be said to have been obtained on insufficient and improbable grounds, the claim for damages by plaintiff is maintainable. It has been held as under:

> "8. As a general principle where two remedies are available under law one of them should not be taken as operating in derogation of the other. A regular suit will not be barred by a summary and a concurrent remedy being also provided therefor, but if a party has elected to pursue one remedy he is bound by it and cannot on his failing therein proceed under another provision. A regular suit for compensation is not barred by the omission to proceed under summary procedure provided under Section 95, CPC, but if an application is made and disposed of, such disposal

would operate as a bar to regular suit whatever may be the result of the application. There is, however, a difference between conditions necessary for the maintainability of an application under Section 95, CPC and those necessary to maintain a suit. The regular suit is based on tort for abusing the process of Court. Under the law of torts in a suit for compensation for the tort the plaintiff must not only prove want of reasonable or probable cause of obtaining injunction but also that the defendant was attracted by malice which is an improper motive.

9. In justifying a claim for damages apart from Section 95, CPC, a distinction has to be drawn between acts done without judicial sanction and the acts done under judicial sanction improperly obtained. Proof of mal* ice is not necessary when the property to a stranger, not a party to the suit, is taken in execution but if the plaintiff bringing a suit for malicious legal process is a party to a suit proof of malice is necessary. The plaintiff must prove special damage. The claim of a person for damages for wrongful attachment of property can fall under two heads - (1) trespass and (2) malicious legal process. Where property belonging to a person, not a party to the suit, is wrongly attached, the action is really one grounded on trespass. But where the act of attachment complained of was done under judicial sanction, though at the instance of a party, the remedy is an action for malicious legal process. In the case of malicious legal process of Court, the plaintiff has to prove absence of probable and reasonable cause. In cases of trespass the plaintiff has only to prove the trespass and it is for the defendant to prove a good cause or excuse. In the former case plaintiff has to prove malice on the part of the defendant while in the latter case it is not necessary. This position has been succinctly brought out by the decision in K. Syamalambal v. N. Namberumal Chettiar : AIR1957Mad156 .

10. In the present case, the facts ascertained are absolutely clear that the godown had been let out and the firm M/s. Bansidhar Baijnath or its partners could not establish any title, right or interest in the said godown after the decree was passed in the ejectment suit and, therefore, they had no right to possess the said godown either actually or constructively by keeping their goods therein. M/s. Bhagat Oil Mills which was impleaded as a defendant in the suit was the sub-lessee of the disputed premises and Baijnath Bhagat had appeared in the said suit as proprietor and on his death other defendants were substituted in his place. In those circumstances, all defendants were bound by the decree of the execution of which the recovery of possession was delivered to the plaintiffs-respondents by the bailiff of the Court. Defendants Nos. 2 to 4 could not claim any right independent of Banshidhar Baijnath and, therefore, even apart from Section 95, CPC the plaintiffs could institute an independent suit for damages for wrongful use and occupation of the godown in question by defendants Nos. 1 to 4. The decree-holders plaintiffs had no claim whatsoever over the said oil seeds nor did they make any claim at any stage. There was no dispute regarding the fact that the bailiff had kept the goods in the custody of one of the employees of the plaintiffs and it is the defendants who had made an application on the very next day for an injunction and obtained the same.

11. In the background in which the injunction was obtained and the manner in which the defendants prevented the plaintiffs from utilising their premises, it is clear that the same had been obtained on insufficient and improbable grounds. The intention of the parties is very clear that it is only to deprive the defendants of the possession of the premises that such an order was obtained. The bank was pledgee of the goods and could not claim an independent right in respect of the said premises. The suit premises was not in their possession either under licence or by way

of lease. They should not only have ascertained whether the goods belong to the pledge but also should have known as to whether the premises where the goods were kept belonged to them at the time they obtained the pledge. In those circumstances, even the Bank cannot absolve itself of malice arising in the case. Want of pleadings or raising an issue in a suit would arise where any party is put to prejudice. In a case where the facts are writ large and the parties go to trial on the basis that the claim of the other side is clearly known to them, we fail to understand as to how lack of pleadings would prejudice them."

22. There is already a docket explosion in the Courts. The Court can take judicial notice that off late, the unscrupulous litigants have been instituting frivolous civil proceedings. These proceedings are prolonged and cause unnecessary hardship to the litigants on the other side. In all those cases where the civil proceedings have been instituted, not for bonafide purpose but merely to harass the parties, in those cases after the culmination of civil proceedings, the suit for malicious prosecution would lie. It would also reduce the pendency of cases. The person filing frivolous civil proceedings would know that if these are found to be not bonafide and abuse of process of Court, he may have to pay damages for causing injury to the other party.

23. Accordingly, there is no merit in this regular second appeal and the same is dismissed, so also the pending application(s), if any.

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

State of H.P. .....Appellant.
Versus
Rakesh Kumar & anr. .....Respondents.

Cr. Appeal No. 597 of 2008.
Reserved on: January, 02, 2015.
Decided on: January 05, 2015.

Indian Penal Code, 1860- Sections 302, 451, 506 IPC read with Section 34 IPC- Accused inflicted a blow on the head of the husband of the complainant with a danda- he fell on the ground- subsequently, he succumbed to his injuries- there were discrepancies in the testimonies of PW-2 and PW-3- complainant admitted in her cross-examination that her husband had picked up a Darat and the Danda was already lying in the courtyard- Medical Officer noted three injuries on the person of the accused- held, that in these circumstances, accused was acting in a private defence- accused acquitted. (Para-22 to 29)

Cases referred:

The State of Gujarat Vrs. Bai Fatima and another, AIR 1975 SC 1478
Lakshmi Singh and ors. etc. vrs. State of Bihar, AIR 1976 SC 2263
Salim Zia vrs. State of Uttar Pradesh, AIR 1979 SC 391
Yogendra Morarji vrs. The State of Gujarat, AIR 1980 SC 660
Darshan Singh vrs. State of Punjab and another, (2010) 2 SCC 333
Madan Chandra Dutta vrs. The State of Assam, 1977 CRI.L.J. 506

For the appellant: Mr. M.A.Khan, Addl. AG.
For the respondents: Mr.N.S.Chandel, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The State has instituted this appeal against the judgment dated 28.6.2008, rendered by the learned Sessions Judge, Sirmaur District at Nahan, H.P. in Sessions Trial No. 27-ST/7 of 2007, whereby the respondents-accused (hereinafter referred to as the accused) who were charged with and tried for offences under Sections 302, 451, 506 IPC read with Section 34 IPC, were acquitted by the learned trial Court.

2. The case of the prosecution, in a nut shell, is that PW-2 Dharmi Devi was married with Mittar Singh about 12 years back. He was working as labourer. On 13.6.2007, at about 7:00 PM, accused Dinesh who is son of Uncle (Taya) of Mitter Singh came to his house and asked her husband to attend a party at his house in connection with his wedding. Mitter Singh went to the nearby house. At about 10:00 PM, while she was sleeping, she heard the noise of coughing of her husband. She switched on the light and came out. In the meantime, accused Rakesh came there murmuring something and grappling with her husband. Thereafter, accused Dinesh also reached there. She went to the adjoining house of her younger brother-in-law Ranjit Singh and came back with him to the spot. They say accused Dinesh grappling with her husband. Accused Rakesh all of a sudden gave danda (balli) blow on the head of her husband. On account of this blow, her husband fell down on the ground. Thereafter, she and Ranjit Singh saved Mittar Singh from the clutches of both the accused. Both the accused left the place. Mittar Singh succumbed to his injuries on 14.6.2007 at 9:00 AM. The statement of Smt. Dharmi Devi was recorded under Section 154 Cr.P.C. and sent to the Police Station Paonta Sahib on the basis of which FIR No. 209 of 2007 was registered under Sections 302, 451, 506, 34 IPC against the accused persons. The case was investigated by ASI Harjit Singh. He took into possession the Balli, the blood stained clothes of the deceased and accused Rakesh. The post mortem of the deceased was got conducted. The doctor opined that Mittar Singh had died due to direct injury to brain leading to coma and shock and associated contributory factor was left lung injury. The matter was investigated and challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 13 witnesses to prove its case. The accused were also examined under Section 313 Cr.P.C. According to them, they have requested Mittar Singh to join the dinner. He insisted for more liquor. The accused refused to serve more liquor. Accused Rakesh Kumar went to his house requesting him to join them for dinner. Mittar Singh came back to his house. Mittar Singh was angry and he gave three darat blows one after the other on the person of accused Rakesh, which resulted in causing injuries on his left arm, nose and back. When Mittar Singh was about to give fourth blow with Darat accused Rakesh apprehending his death at the hands of Mittar Singh picked up a Danda lying in the courtyard of the house of Mittar Singh. He gave a blow with it to thwart the attack of Darat. The blood was oozing out of the injuries sustained by him due to darat blows given by Mittar Singh. On the next morning i.e. on 14.6.2007, he was taken to a nearby village Nagheta to Dr. Upender, who stitched his two wounds, besides dressing the third wound. The learned Trial Court acquitted the accused on 28.6.2008. Hence, the present appeal.

4. Mr. M.A.Khan, learned Addl. Advocate General has vehemently argued that the prosecution has proved its case. On the other hand, Mr. N.S.Chandel, Advocate, appearing for the accused has supported the judgment of the learned trial Court dated 28.6.2008.

5. We have gone through the impugned judgment dated 28.6.2008 and records of the case carefully.

6. PW-1 Dr. Rakesh Dhiman has conducted the post mortem on the dead body of deceased. He issued report Ext. PW-1/C. According to him, the deceased died due to direct injury to brain leading to coma and shock. Associated contributory factor was left lung injury. The duration of injury and death could not be ascertained and duration between death and post mortem was within 36 hours approximately.

7. PW-2 Dharmi Devi is the wife of deceased Mittar Singh. She testified that at about 7:00 PM, accused Dinesh called her husband and took him to his house where they have arranged some party in lieu of his marriage. Her husband went with accused Dinesh to his house and at about 10:00 PM when she was sleeping in her house, she heard the coughing of her husband in the courtyard. She switched on the light of her room and came out. She saw Rakesh was having scuffle with her husband and accused Dinesh also came on the spot. Dinesh also started giving beatings to her husband with fist blows and were hurling abuses. She immediately rushed to call her brother-in-law Ranjit (Devar). When she and Ranjit Singh reached the spot at that time Dinesh was giving beatings to her husband and Rakesh accused gave danda (balli) blow on the head of her husband and her husband fell down in the courtyard. She and Ranjit Singh rescued her husband from the clutches of accused and both the accused ran away from the spot leaving behind danda. Her statement was recorded under Section 154 Cr.P.C. vide Ext. PW-2/A. Sketch map was prepared. Danda was also taken into possession vide Ext. PW-2/B. She identified danda Ext. P-1 in the Court. In her cross-examination, she deposed that Dinesh Kumar came at about 7:00 PM and took her husband to his house, forcibly to attend the party. There was no dispute till then. She also admitted that her husband came back without taking meals after feeling annoyed. She admitted that her husband had picked up the darat from the Courtyard. Volunteered that Rakesh had given danda blows upon her husband and thereafter he picked the darat. She did not see her husband giving darat blows which hit at the back of accused Rakesh. She did not see her husband giving second blow of darat which hit at the face of accused Rakesh and caused the wound to him. She did not know that her husband gave third blow of darat to Rakesh at that time which hit at left of Rakesh and caused injury to him. She had at that time gone to call Ranjit. She admitted that at the place of incident there were big stones and boulders. She also admitted that Rakesh picked up Ext. P-1 danda from the courtyard and hit her husband. When she and Ranjit reached the courtyard at that time, her husband was already lying on the ground. She admitted that Rakesh hit her husband with Ext. P-1 danda to save himself from her husband. Volunteered that her husband also gave blows to Rakesh to save himself. According to her, Rakesh gave only single blow with Ext. P-1 on account of which her husband fell on the ground. She admitted that Dinesh took his brother Rakesh to Nagetha to a private Doctor to provide him first aid.

8. PW-3 Ranjit Singh deposed that at about 10:00 PM, his brother came back to his house and he heard voice in the courtyard of his brother. PW-1 Dharmi Devi came to his house and informed him that Rakesh was quarrelling with his brother and giving fist blows to her husband. He alongwith PW-1 Dharmi Devi reached the courtyard of the house of his brother where they saw Rakesh was giving beatings to his brother with fist blows. Dinesh accused also reached on the spot and started giving beatings to his brother Mittar Singh with fist blows. Accused Rakesh gave danda blow on the head of his brother. His brother Mittar Singh fell down on the ground. Both the accused ran away from the spot, leaving behind danda Ext. P-1. He admitted in his cross-examination that accused Dinesh invited his brother to the feast and he participated in the dinner at about 7:00 PM on 13.6.2007 in the house of accused. He also admitted that Sh. Mukh Ram and Balbir resident of Kalatha were invited by the accused persons for dinner on 13.6.2007. They also participated in the same. The accused persons disclosed that there was no more liquor in the house and

were requesting for taking dinner. He also admitted that when he arrived on the spot Mittar Singh was lying on the ground and Rakesh was holding him from the clothes near the neck. He also admitted that Rakesh was also bleeding. He also admitted that Rakesh went to private hospital in Negheta for taking first aid.

9. PW-4 Smt. Kamla Devi deposed that Mittar Singh was her son. He was married with Dharmi Devi PW-2 about 12 years back. At about 10 PM, PW-2 Dharmi Devi called Ranjeet Singh from his house and on hearing noise she also woke up and came out from her room and reached in the courtyard of the house of Mittar Singh. In her presence accused Dinesh gave kick and fist blows to Mittar Singh. Accused Rakesh Kumar gave lathi/balli blow on the head of Mittar Singh and Mittar Singh fell on the ground. The blood started oozing out from the wound. She admitted in her cross-examination that her sons had cordial relations with the accused before the incident. She did not notice the blood coming out from the wounds of Rakesh.

10. PW-5 Const. Ved Prakash deposed that on 15.6.2007 ASI harjit Singh deposited with him five parcels duly sealed with seal 'T' allegedly containing blood stained earth, danda and blood stained clothes. He deposited the parcels in the Malkhana and on 18.6.2007. He sent all the parcels through HHC Lal Bahadur vide RC No. 407 to PS Paonta Sahib.

11. PW-6 HHC Lal Bahadur deposed that MHC Ved Parkash handed over with him five sealed parcels duly sealed with seal 'T' and 'H' vide RC No. 407. He deposited the parcels with MHC Police Station Paonta Sahib on the same day.

12. PW-7 HC Raghubir Singh deposed that HHC Lal Bahadur deposited with him five parcel duly sealed with 'T' and 'H' containing blood stained earth, control sample of earth, danda and blood stained clothes.

13. PW-8 HHC Ram Kumar deposed that on 22.6.2007 HC Raghubir Singh handed over to him nine parcels duly sealed with seals 'T', 'H', and 'CH' to be deposited with Chemical Examiner Junga. He deposited the same with Chemical Examiner, Junga.

14. PW-9 Guman Singh deposed that on 15.6.2007, police took into possession blood stained earth from the courtyard of Mittar Singh. These samples were sealed in polythene envelope and sealed with seal 'T' in a parcel. The police also took into possession danda (balli). It was measured and sketch map was prepared and sealed with cloth with seal 'T'. These were taken into possession vide memo Ext. PW-2/B. The police also took into possession the blood stained clothes vide memo Ext. PW-3/S. Accused Rakesh Kumar produced a shirt, *nikkar* and *baniyan* to the police and police took into possession vide memo Ext. PW-9/A.

15. PW-10 Sukhwinder Singh and PW-11 Shyam Chand and PW-13 Insp. Narveer Singh are formal witnesses.

16. PW-12 ASI Harjit Singh has carried out the investigation. He deposed that on 14.6.2007 at about 9:30 PM information was received at Police Post Singhpura that in village Kalath Badhana Masrani, one person has died in suspicious circumstances. The information was reduced into writing. He immediately proceeded to the spot. He recorded the statement of Dharmi Devi vide memo Ext. PW-2/A. He took the photographs of the spot. The inquest papers were prepared vide Ext. PW-1/B. He also prepared the site plan. He took into possession the Balli. In his cross-examination, he admitted that the accused Rakesh Kumar had three wounds i.e. one at the face, another at the arm and third at the back of the left arm. He also admitted that Mittar Singh and accused persons had consumed liquor in the dinner party.

17. DW-1 Dr. Rakesh Dhiman has examined the accused Rakesh Kumar on 15.6.2007. He found following injuries on his person:

> "1. Nose- On left side of nose there was irregular cut lacerated wound size 0.5 cm.
>
> 2. Over left arm-back, there was stitched wound 3.5 cm. shown as wound A in the figure on MLC.
>
> 3. On back there was 7 cm. stitched linear wound shown by mark B in the figure on MLC."

18. DW-2 Dr. Upender Singh deposed that he is RMP. On 14.6.2007, injured Rakesh Kumar came to him. He had three injuries on his person. One on the left shoulder, second on his back and third on his nose. The injuries on the shoulder and the back were bleeding and had deep cut marks whereas the injury on the nose was not carrying deep cut mark. In his cross-examination, he deposed that injury on the back was ½ inch deep and on the shoulder it was still deeper.

19. DW-3 Dr. Brejesh Sharma, has brought the medical record of Rakesh Kumar who was brought to Jail Dispensary on 22.6.2007. There were three injuries one on back and left shoulder, second was on left upper arm and third was found on left side of nose. The first two injuries were stitched.

20. DW-4 Balbir Singh deposed that they were taking liquor till 9 or 9:30 PM. Thereafter they took food. Mittar Singh also took liquor. Mittar Singh was demanding more liquor and Dinesh and Rakesh refused to serve more liquor on account of which he refused to take dinner and left for home. The house of Mittar Singh was at a distance of about 100/150 meters away from the house of Rakesh and Dinesh. After some time, they heard cries for help coming from the side of the house of Mittar Singh. The voice was of Rakesh. He stopped taking food and rushed towards that side. Dinesh, Surat Singh and Mukh Ram also reached there. They saw Rakesh bleeding profusely and Mittar Singh was holding a darat in his hand. He was about to inflict other blow with it on Rakesh Kumar but his attempt was foiled by Rakesh. Rakesh lifted a stick lying nearby and gave a blow on Mittar Singh. Mittar Singh then fell on the stone. Mittar Singh was drunk at that time. Rakesh was brought to his house where Mittar Singh was kept inside his house by his family members. Rakesh was given first aid.

21. DW-5 Mukh Ram has deposed that on 13.6.2007, Dinesh had invited him alongwith Balbir Singh, Surat Singh, Mittar Singh and Rakesh for a dinner party of his marriage in his house. They consumed liquor in the party till 9:30 PM. Mittar Singh was demanding more liquor and Dinesh and Rakesh refused to serve more liquor on account of which he refused to take dinner and left for home. They all asked Rakesh to go and bring back Mittar Singh for dinner. Rakesh went to the house of Mittar Singh. After some time they heard the cries of Rakesh '*bachao bachao*' from the house of Mittar Singh. He alongwith Dinesh, Balbir Singh and Surat Singh left the dinner midway and rushed towards the house of Mittar Singh. They saw Rakesh was bleeding profusely and mittar Singh was having Darat in his hand and was about to hit Rakesh with Darat. In the meantime, Rakesh picked up a danda and hit Mittar Singh in self defence on account of which Mittar Singh fell down.

22. What emerges from the facts, enumerated hereinabove, is that Dinesh had called Mittar Singh at about 7:00 PM. Mittar Singh went with accused Dinesh and came back to his courtyard. According to PW-2 Dharmi Devi, the wife of deceased, her husband came back to his house at 10:00 PM. Dinesh was grappling with him. Rakesh also appeared on the spot. In her examination-in-chief, she deposed that she rushed to call her brother-in-law Ranjit Singh. When she and Ranjit Singh reached the spot, at that time, Dinesh

was giving beatings to her husband. Rakesh gave 'danda' blow on her husband. In her cross-examination, she admitted that her husband has picked up a darat from the courtyard. She admitted that Ext. P-1 danda was lying in the courtyard. She also admitted that when she and Ranjit Singh reached her courtyard, at that time, her husband was already lying on the ground. Similarly, PW-3 Ranjit Singh has deposed that when he arrived on the spot, Mittar Singh was lying on the ground and Rakesh was holding him from the clothes near the neck though, in his examination-in-chief, he deposed that when reached the courtyard of the house of his brother, he saw Rakesh was giving beatings to his brother with fist blows. There is variance in the statements of PW-2 Dharmi Devi and PW-3 Ranjit Singh, the manner in which the incident has taken place. According to PW-2 Dharmi Devi and PW-3 Ranjit Singh, they have seen accused Rakesh giving danda blow on the head of Mittar Singh. In their cross-examination, they deposed that when they reached on the spot, Mittar Singh was already lying on the ground. PW-4 Smt. Kamla Devi has admitted in her cross-examination that her sons had cordial relations with the accused persons before the incident. The defence set by the accused precisely is that Mittar Singh had come to their house. He was served liquor. They offered him food. Mittar Singh refused to accept the food. They went to his house to request him to take dinner. Mittar Singh gave three darat blows one after the another and caused injuries to Rakesh Kumar. He received three injuries. He was taken to private doctor. According to PW-2 Dharmi Devi, her husband has picked up darat from the courtyard. She also admitted that Rakesh hit her husband with Ext. P-1 danda to save himself from her husband. Though, volunteered that her husband also gave blows to save himself. She also admitted that Rakesh has only given one single blow with Ext. P-1 danda. It has come in the statement of DW-1 Dr. Rakesh Dhiman that accused Rakesh Kumar received three injuries as per MLC Ext. DW-1/A. DW-2 Dr. Upender Singh also noticed three injuries on the person of accused Rakesh. DW-3 Dr. Brejesh Sharma, also deposed about the three injuries received by accused on left shoulder, left upper arm and left side of nose. Accused Rakesh Kumar has received three injuries on his person. He was also taken to private hospital of DW-1. DW-4 Balbir Singh deposed that they reached on the spot and saw Rakesh profusely bleeding and Mittar Singh was holding a darat in his hands and was about to inflict other blow with it on Rakesh Kumar but his attempt was foiled by Rakesh by lifting a nearby stick and gave blow on Mittar Singh. Similarly, DW-5 deposed that when they reached on the spot, they saw Mittar Singh having darat in his hands. He was about to hit Rakesh with Darat and in the meantime, Rakesh gave danda blow and Mittar Singh fell down. Rakesh has given danda blow to Mittar Singh in self defence. There is sufficient material on record to come to the conclusion that the accused Rakesh Kumar was hit by Mittar Singh with Darat. PW-2 Dharmi Devi who is the wife of the deceased, as noticed by us hereinabove, has admitted that accused hit her husband with Ext. P-1 danda to save himself. In view of this, it can safely be concluded that Rakesh Kumar has inflicted injury on the head of Mittar Singh to save himself from darat blows given by Mittar Singh. Accused Rakesh Kumar has not exceeded his right of private defence. Darat (sickle) is a sharp edged weapon used by the deceased. The prosecution has not taken into consideration the injuries received by the accused as per the statement of DW-1 Dr. Rakesh Dhiman, DW-2 Dr. Upender Singh and DW-3 Dr. Brejesh Sharma. In the instant case, the three alleged eye witnesses were from the same family. In these circumstances, the injuries on the person of accused assumed much greater importance.

23. Their lordships of the Hon'ble Supreme Court in the case of ***The State of Gujarat Vrs. Bai Fatima and another,*** reported in ***AIR 1975 SC 1478,*** have held that the burden of establishing the plea of right to self defence is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. Their lordships have held as under:

"18. In Munhi Ram and others v. Delhi Administration(1) Hegde, J delivering the judgment of this Court has said at page 458 :

> "It is true that appellants in their statement under section 342 Cr. P.C. had not taken the plea of private defence, but necessary basis for that plea had been laid in the cross-examination of the prosecution witnesses as well as by adducing defence evidence. It is well-settled that even if an accused does not plead self-defence, it is open to the Court to consider such a plea if the same arises from the material on record-see In Re-jogali Bhaige Naiks and another A.I,R. 1927 Mad. 97. The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record."

24. Their lordships of the Hon'ble Supreme Court in the case of ***Lakshmi Singh and ors. etc. vrs. State of Bihar,*** reported in ***AIR 1976 SC 2263,*** have held that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(1) that the prosecution has sup- pressed the genesis and the origin of the occurrence and has thus not presented the true version:

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

Their lordships have held as under:

"11. P.W. 8 Dr. S. P. Jaiswal who had examined Brahmdeo deceased and had conducted the postmortem of the deceased had also examined the accused Dasrath Singh, whom he identified in the Court, on April 22. 1966 and found the following injuries on his person:

> 1. Bruise 3" x 1/2" on the dorsal part of the right forearm about in the middle and there was compound fracture of the fibula bone about in the middle.
>
> 2. Incised wound 1" x 2 m. m. x skin subcutaneous deep on the late ral part of the left upper arm, near the shoulder joint.
>
> 3. Punctured wound 1/2" x 2 m. m., x 4 m. m. on the lateral side of the left thigh about 5 inches below the hip joint.

According to the Doctor injury No. 1 was grievous in nature as it resulted in compound fracture of the fibula bone. The other two injuries were also serious injuries which had been inflicted by a sharp-cutting weapon. Having regard to the circumstances of the case there can be no doubt that Dasrath Singh must have received these injuries in the course of the assault, because it has not been suggested or contended that the injuries could be self-inflicted nor it is believable. In these circumstances, therefore, it was the bounden duty of the prosecution to give a reasonable explanation for the injuries sustained by the accused Dasrath Singh in the course of the occurrence. Not only the prosecution has given no explanation, but some of the witnesses have made a clear statement that they did not see any injuries on the person of the accused. Indeed if the eye-witnesses could have given such graphic details regarding the

assault on the two deceased and Dasain Singh and yet they deliberately suppressed the injuries on the person of the accused, this is a most important circumstance to discredit the entire prosecution case. It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence. This matter was argued before the High Court and we are constrained to observe that the learned Judges without appreciating the ratio of this Court in Mohar Rai v. State of Bihar tried to brush it aside on most untenable grounds. The question whether the Investigating Officer was informed about the injuries is wholly irrelevant to the issue, particularly when the very Doctor who examined one of the deceased and the prosecution witnesses is the person who examined the appellant Dasrath Singh also. In the case referred to above, this Court clearly observed as follows:

> "The trial Court as well as the High Court wholly ignored the significance of the injuries found on the appellants. Mohar Rai had sustained as many as 13 injuries and Bharath Rai 14. We get it from the evidence of P.W. 15 that he noticed injuries on the person of Mohar Rai when he was produced before him immediately after the occurrence. Therefore the version of the appellants that they sustained injuries at the time of the occurrence is highly pro-babilised. Under these circumstances the prosecution had a duty to explain those injuries.... In our judgment the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants."

This Court clearly pointed out that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue: and (2) that the injuries probabilise the plea taken by the appellants. The High Court in the pre-sent case has not correctly applied the principles laid down by this Court in the decision referred to above. In some of the recent cases, the same principle was laid down. In Puran Singh v. The State of Punjab Criminal Appeal No. 266 of 1971 decided on April 25, 1975 : which was also a murder case, this Court, while following an earlier case, observed as follows:

> In State of Gujarat v. Bai Fatima Criminal Appeal No 67 of 1971 decided on March 19, 1975 :) one of us (Untwalia, J., speaking for the Court, observed as follows:
>
> In a situation like this when the prosecution fails to explain the in juries on the person of an accused, depending on the facts of each case, any of the three results may follow:
>
> (1) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self defence.
>
> (2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.
>
> (3) It does not affect the prosecution case at all.

The facts of the present case clearly fall within the four corners of either of the first two principles laid down by this judgment. In the instant case, either the accused were fully justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the deceased the entire prosecution case is doubtful and the genesis of the occurrence is shrouded in deep mystery, which is sufficient to demolish the entire prosecution case. It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

> (1) That the prosecution has sup- pressed the genesis and the origin of the occurrence and has thus not presented the true version:
>
> (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
>
> (3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosedition one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the Court to rely on the evidence of PWs. 1 to 4 and 6 more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court inState of Gujarat v. Bai Fatima Criminal Appeal No. 67 of 1971 decided on March 19, 1975 : Reported in there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises."

25. Their lordships of the Hon'ble Supreme Court in the case of ***Salim Zia vrs. State of Uttar Pradesh,*** reported in ***AIR 1979 SC 391,*** have held that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying a basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence. Their lordships have held as under:

> "11. The appellant has also not established by examining any of the three witnesses alleged by him in his report (Exh. Ka. 13) to be working in the vicinity of the place of occurrence or by eliciting from the eye witnesses produced by the prosecution or summoned and examined by

the Court that Habib deceased-fired any shot at him from revolver (Exh. 4) and that it was only in self defence that he fired the shots from the gun in his possession which resulted in the death of the deceased. Muzammil (P.W.7) has in answer to a question put to him in cross-examination emphatically denied that Habib deceased was armed with a revolver or that he fired any shot in the course of the incident which resulted in his death. Azmat Ali (P.W.1) has also unequivocally stated in cross-examination that Habib deceased did not use any revolver at the spot and that neither he nor Habib committed any theft of the paddy as alleged by the appellant. Even Athar Ali and Mst. Shafiqan who were examined as Court witnesses have clearly stated that Habib did not fire any pistol at the spot. It is, therefore, crystal clear that the Sessions Judge grossly erred in assuming that the appellant was fired at by Habib and that it was in exercise of the right of private defence that he in turn fired at Habib to save his own life."

26. Their lordships of the Hon'ble Supreme Court in the case of ***Yogendra Morarji vrs. The State of Gujarat,*** reported in ***AIR 1980 SC 660,*** have laid down the following principles of private defence of body as under:

"13. The Code excepts from the operation of its penal clauses large classes of acts done in good faith for the purpose of repelling unlawful aggression but this right has been regulated and circumscribed by several principles and limitations. The most salient of them concerned the defence of body are as under? Firstly, there is no right of private defence against an act which is not in itself an offence under the Code; Secondly, the right commences as soon as and not before a reasonable apprehension of danger to the body arises from an attempt or threat to commit some offence although the offence may not have been committed and it is conterminous with the duration of such apprehension (Section 102). That is to say, right avails only against a danger imminent, present and real; Thirdly, it is a defensive and not & punitive or retributive right. Consequently, in no case the right extends to the inflicting of more harm than it is necessary to inflict for the purpose of the defence. (Section 99). In other words, the injury which is inflicted by the person exercising the right should be commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right Every reasonable allowance should be made for the bona fide defender "if he with the instinct of self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the attack." It would be wholly unrealistic to expect of a person under assault, to modulate his defence step by step according to the attack; Fourthly, the right extends to the killing of the actual or potential assailant when there is] a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of Section 100. For our purpose, only the first two clauses of Section 100 are relevant The combined effect of these two clauses is that taking the life of the assailant would be justified on the plea of private defence; if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. In other words, a person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. This principle is also subject to the preceding rule that the harm or death inflicted to avert the danger is not substantially disproportionate to and incommensurate with the quality and character of the perilous act or threat intended to be repelled; Fifthly, there must be no safe or reasonable mode of escape by retreat, for the person

confronted with an impending peril to life or of grave bodily harm, except by inflicting death on the assailent; Sixthly; the right being, in essence, a defensive right, does not accrue and avail where there is "time to have recourse to the protection of the public authorities." (Section 99).

14. Before coming to the facts of the instant case, the principles governing the burden of proof where the accused sets up a plea of private defence, may also be seen, Section 105, Evidence Act enacts an exception to the general rule whereby in a criminal trial the burden of proving everything necessary to establish the charge against the accused beyond reasonable doubt, rests on the prosecution. According to the section, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code; or within any special exception or proviso contained in any other part of the Code or in any other Law, shall be on the accused person, and the Court shall presume the absence of such circumstances. But this Section does not neutralise or shift the general burden that lies on the prosecution to prove beyond reasonable doubt all the ingredients of the offence with which the accused stand charged. Therefore, where the charge about the accused is one of culpable homicide, the prosecution must prove beyond all manner of reasonable doubt that the accused caused the death with the requisite knowledge or intention described in Section 299 of the Penal Code. It is only after the prosecution so discharges its initial traditional burden establishing the complicity of the accused, that the question whether or not the accused had acted in the exercise of his right of private defence, arises. As pointed out by the Court in Dahyabhai v. State of Gujarat , under Section 105, read with the definition of "shall presume" in Section 5, Evidence Act, the Court shall regard the absence of circumstances on the basis of which the benefit of an Exception (such as the one on which right of private defence is claimed), as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. The accused has to rebut the presumption envisaged in the last limb of Section 105, by bringing on record evidential material before the Court sufficient for a prudent man to believe that the existence of such circumstances is probable. In other words, even under Section 105, the standard of proof required to establish those circumstances is that of a prudent man as laid down in Section 3, Evidence Act. But within that standard there are degrees of probability, and that is why under Section 105, the nature of burden on an accused person claiming the benefit of an Exception, is not as onerous as the general burden of proving the charge beyond reasonable doubt cast on the prosecution. The accused may discharge his burden by establishing a mere balance of probabilities in his favour with regard to the said circumstances.

16. Notwithstanding the failure of the accused to establish positively the existence of circumstances which would bring his case within an Exception, the circumstances proved by him may raise a reasonable doubt with regard to one or more of the necessary ingredients of the offence itself with which the accused stands charged. Thus, there may be cases where, despite the failure of the accused to discharge his burden under Section 105, the material brought on the record may, in the totality of the facts and circumstances of the case, be enough to induce in the mind of the Court a reasonable doubt with regard to the mens rea requisite for an offence under Section 299 of the Code (See Dahyabhai v. State of Gujarat (ibid) State of U. P. v. Ram Swarup , Pratap v. State of U.P.”

27. Their lordships of the Hon'ble Supreme Court in the case of ***Darshan Singh vrs. State of Punjab and another,*** reported in ***(2010) 2 SCC 333,*** have reiterated the principles and scope of right of private defence as under:

> " 25. When enacting sections 96 to 106 of the Indian Penal Code, excepting from its penal provisions, certain classes of acts, done in good faith for the purpose of repelling unlawful aggressions, the Legislature clearly intended to arouse and encourage the manly spirit of self-defence amongst the citizens, when faced with grave danger. The law does not require a law-abiding citizen to behave like a coward when confronted with an imminent unlawful aggression. As repeatedly observed by this court there is nothing more degrading to the human spirit than to run away in face of danger. The right of private defence is thus designed to serve a social purpose and deserves to be fostered within the prescribed limits.
>
> 26. Hari Singh Gour in his celebrated book on Penal Law of India (11th Edition 1998-99) aptly observed that self-help is the first rule of criminal law. It still remains a rule, though in process of time much attenuated by considerations of necessity, humanity, and social order. According to Bentham, in his book `Principles of Penal Laws' has observed "the right of defence is absolutely necessary". It is based on the cardinal principle that it is the duty of man to help himself.
>
> 27. Killing in defence of a person, according to the English law, will amount to either justifiable or excusable homicide or chance medley, as the latter is termed, according to the circumstances of the case.
>
> 28. But there is another form of homicide which is excusable in self-defence. There are cases where the necessity for self- defence arises in a sudden quarrel in which both parties engage, or on account of the initial provocation given by the person who has to defend himself in the end against an assault endangering life.
>
> 29. The Indian Penal Code defines homicide in self-defence as a form of substantive right, and therefore, save and except the restrictions imposed on the right of the Code itself, it seems that the special rule of English Law as to the duty of retreating will have no application to this country where there is a real need for defending oneself against deadly assaults.
>
> 30. The right to protect one's own person and property against the unlawful aggressions of others is a right inherent in man. The duty of protecting the person and property of others is a duty which man owes to society of which he is a member and the preservation of which is both his interest and duty. It is, indeed, a duty which flows from human sympathy. As Bentham said:
>
> > "It is a noble movement of the heart, that indignation which kindles at the sight of the feeble injured by the strong. It is noble movement which makes us forget our danger at the first cry of distress..... It concerns the public safety that every honest man should consider himself as the natural protector of every other."
>
> But such protection must not be extended beyond the necessities of the case, otherwise it will encourage a spirit or lawlessness and disorder. The right has, therefore, been restricted to offences against the human body and those relating to aggression on property.
>
> 31. When there is real apprehension that the aggressor might cause death or grievous hurt, in that event the right of private defence of the

defender could even extend to causing of death. A mere reasonable apprehension is enough to put the right of self-defence into operation, but it is also settled position of law that a right of self-defence is only right to defend oneself and not to retaliate. It is not a right to take revenge.

32. Right of private defence of person and property is recognized in all free, civilsed, democratic societies within certain reasonable limits. Those limits are dictated by two considerations : (1) that the same right is claimed by all other members of the society and (2) that it is the State which generally undertakes the responsibility for the maintenance of law and order. The citizens, as a general rule, are neither expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression, nor are they expected, by use of force, to right the wrong done to them or to punish the wrong doer of commission of offences.

33. A legal philosopher Michael Gorr in his article "Private Defense" (published in the Journal "Law and Philosophy" Volume 9, Number 3 / August 1990 at Page 241) observed as under:

"Extreme pacifists aside, virtually everyone agrees that it is sometimes morally permissible to engage in what Glanville Willams has termed "private defence", i.e., to inflict serious (even lethal) harm upon another person in order to protect oneself or some innocent third party from suffering the same".

34. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self creation. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose.

35. This court in number of cases have laid down that when a person is exercising his right of private defence, it is not possible to weigh the force with which the right is exercised. The principle is common to all civilized jurisprudence. In Robert B. Brown v. United States of America (1921) 256 US 335, it is observed that a person in fear of his life in not expected to modulate his defence step by step or tier by tier. Justice Holmes in the aforementioned case aptly observed "detached reflection cannot be demanded in the presence of an uplifted knife".

36. According to Section 99 of the Indian Penal Code the injury which is inflicted by the person exercising the right should commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right every reasonable allowance should be made for the bona fide defender. The courts in one voice have said that it would be wholly unrealistic to expect of a person under assault to modulate his defence step by step according to attack.

37. The courts have always consistently held that the right of private defence extends to the killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of section 100 of the IPC. According to the combined effect of two clauses of section 100 IPC taking the life of the

assailant would be justified on the plea of private defence; if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. A person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. When we see the principles of law in the light of facts of this case where Darshan Singh in his statement under section 313 has categorically stated that "Gurcharan Singh gave a gandasa blow hitting my father Bakhtawar Singh on the head as a result of which he fell down. I felt that my father had been killed. Gurcharan Singh then advanced towards me holding the gandasa. I apprehended that I too would be killed and I then pulled the trigger of my gun in self defence." Gurcharan Singh died of gun shot injury.

38. In the facts and circumstances of this case the appellant, Darshan Singh had the serious apprehension of death or at least the grievous hurt when he exercised his right of private defence to save himself.

BRIEF ENUMERATION OF IMPORTANT CASES:

39. The legal position which has been crystallized from a large number of cases is that law does not require a citizen, however law-abiding he may be, to behave like a rank coward on any occasion. This principle has been enunciated in Mahandi v. Emperor [(1930) 31 Criminal Law Journal 654 (Lahore); Alingal Kunhinayan & Another v. Emperor Indian Law Reports 28 Madras 454; Ranganadham Perayya, In re (1957) 1 Andhra Weekly Reports 181.

40. The law clearly spells out that right of private defence is available only when there is reasonable apprehension of receiving the injury. The law makes it clear that it is necessary that the extent of right of private defence is that the force used must bear a reasonable proportion of the injury to be averted, that is the injury inflicted on the assailant must not be greater than is necessary for the protection of the person assaulted. A person in fear of his life is not expected to modulate his defence step by step, but at the same time it should not be totally disproportionate.

58. The following principles emerge on scrutiny of the following judgments:

(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

28. In the case of ***Madan Chandra Dutta vrs. The State of Assam,*** reported in ***1977 CRI.L.J. 506,*** the division Bench of the Gauhati High Court has held that apprehension of grievous injury is enough for the exercise of the right and the actual injury is not essential. It has been held as under:

"9. Section 96 of the Penal Code provides Nothing is an offence which is done in the exercise of the right of private defence.

Relevant portion of Section 100 of the Penal Code may also be extracted:

The right of private defence of the body extends, under the restrictions mentioned in the last preceding section to the voluntary causing of death ..., if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:

....

Secondly - Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault.

Section 100. 'Secondly', provides that the accused may not even wait till the causing of the grievous injury; apprehension of grievous injury is enough for the exercise of the right. In the instant case the deceased being armed with dao caused grievous injury to the appellant. Therefore, the appellant undoubtedly had the right granted by law under Section 100 and as in exercise of that right, he killed the deceased, in our opinion, he has committed no offence."

29. In the instant case, the accused has received three injuries from a sharp edged weapon and his defence is probablized by the statements of witnesses produced by the accused. The prosecution has failed to the prove the case against the accused under Section 302, 451, 506 IPC read with Section 34 IPC.

30. Since there are inherent improbabilities, serious omissions and infirmities, the interested or inimical nature of the evidence and other circumstances, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

31. 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 28.6.2008.

****

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

Cr. Appeal Nos. 303 of 2012 & 410 of 2012
Judgment reserved on: 03rd November, 2014
Date of Decision: January 06, 2015

1. **Cr. Appeal No. 303 of 2012**
Deepak Kumar son of late Shri Satveer Singh .....Appellant.
Vs.
State of Himachal Pradesh .....Respondent.
2. **Cr. Appeal No. 410 of 2012**
Joginder Singh son of Shri Raj Veer Singh .....Appellant.
Vs.
State of Himachal Pradesh .....Respondent.

N.D.P.S. Act- 1985- Section 20- Accused were found in possession of 1kg 600 grams of charas- one independent witness did not support the prosecution version- another independent witness was not examined – original seal was not produced before the Court- held, that in these circumstances, prosecution case was not proved beyond reasonable doubt – accused acquitted. (Para-10 to 16)

Cases referred:
Nanha vs. State Latest HLJ 2011 HP 1195 (DB)
State of Rajasthan vs. Gopal, (1998)8 SCC 449
Gyan Chand vs. State of Rajasthan, 1993 Criminal Law Journal 3716
Mool Chand vs. Jagdish Singh Bedi and others 1992(2) S.L.J.1213
Shashi Pal and others vs. State of HP 1998(2) S.L.J. 1408
State of H.P. vs. Sudarshan Singh 1993(1) SLJ 405
State of Himachal Pradesh vs. Inder Jeet and others 1995 (3) SLJ 1819
State of H.P. vs. Diwana and others 1995(4) SLJ 2728.
Deelip and another vs. State of H.P. (Apex Court of India) 2007(1) SCC (Cri) 377
Ritesh Chakarwati vs. State of M.P.2006(12) SCC 321
Jagdish vs. State of H.P., 2003(9) SCC 159
State of Punjab vs. Baldev Singh 1999(6) SCC 172
State of Punjab vs. Balbir Singh 1994(2) SCC 299
Anjlus Dungdung vs. State of Jharkhand (2005)9 SCC SC 765 (DB)
State (Delhi Administration) vs. Gulzarilal Tandon AIR 1979 SC 1382
Sharad Birdhichand Sarda vs. State of Maharashtra AIR 1984 SC 1622
Bhugdomal Gangaram and others vs. the State of Gujarat AIR 1983 SC 906
State of U.P. vs. Sukhbasi and others AIR 1985 SC 1224

For the Appellant(s): Mr.Vivek Sharma Advocate vice Mr.Ajay Kochhar Advocate in Cr. Appeal No. 303 of 2012.
Mr. N.S. Chandel, Advocate in Cr. Appeal No. 410 of 2012.
For the respondent: Mr.B.S.Parmar, Additional Advocate General with Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, J.

Both appeals are filed against the same judgment and sentence passed by learned Special Judge Fast Track Court Shimla in Sessions Trial No.

18-S/7 of 2011 titled State of H.P. Vs. Deepak Kumar and another decided on 31.5.2012. Both appeals are consolidated in order to avoid the repetition.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by the prosecution are that on dated 5.3.2011 at about 9.05 PM near Panchayat Ghar Gharyana falling within the jurisdiction of Police Station Dhalli District Shimla co-accused Deepak Kumar while travelling in vehicle having registration No. HR-12J-4248 was found in conscious and exclusive possession of 1 Kg. 600 grams of cannabis (Charas) without licence and permit pursuant to criminal conspiracy of co-accused Joginder Singh. It is alleged by prosecution that on the same date time and place co-accused Joginder Singh was driving the vehicle having registration No. HR-12J-4248. It is alleged by prosecution that secret information was received by Inspector Meenakshi Bhardwaj which was sent to Dy.S.P. It is alleged by prosecution that raiding party was constituted comprised of SI Rupinder Kumar, ASI Rajesh Kumar, ASI Kalyan Singh and HC Bhoom Parkash. It is alleged by prosecution that raiding party proceeded in vehicle having registration No. HP-07B-0407 towards Karsog side. It is further alleged by prosecution that at about 9 PM when police party reached near Gharyna Panchayat Ghar then vehicle having registration No. HR-12J-4248 came from Tatapani side and same was stopped. It is alleged by prosecution that another vehicle No. HP-03B-0667 also came from Karsog side which was driven by one Devender Sharma and same was also stopped by police party. It is alleged by prosecution that members of raiding party have given their personal search and memo Ext.PW1/A was prepared. It is also alleged by prosecution that option was given to accused persons whether they intended to be searched before the Magistrate or gazetted officer and accused persons have given the offer that they should be searched before the police officials. It is alleged by prosecution that consent memo Ext.PW1/B was prepared and one bolt of vehicle was slightly raised and thereafter bolt was opened and three packets were found. It is alleged by prosecution that all packets were wrapped with black coloured tape. It is alleged by prosecution that 1 Kg. 600 grams of charas was found and NCB form in triplicate Ext.PW11/A was prepared and specimen of seal also placed upon NCB form. It is alleged by prosecution that specimen of seal also obtained on piece of cloth and I.O. also prepared ruka Ext.PW11/A-1 and handed over the same to ASI Kalyan Singh along with case property, sample seals, NCB forms, seizure memos with direction to send the same to P.S. CID Bharari. It is further alleged by prosecution that FIR Ext.PW6/B was prepared and site plan Ext.PW11/B was prepared. It is alleged by prosecution that SHO resealed the parcels and issued resealing certificate. It is alleged by prosecution that special report under Section 57 of NDPS Act was sent to Dy.S.P. Crime Branch Shimla and thereafter case property was handed over to MHC. It is alleged by prosecution that case property was sent to office of FSL Junga for chemical examination along with NCB form and relevant documents. It is alleged by prosecution that report of chemical examiner is Ext.PW11/D.

3 Learned Special Judge Fast Track Court Shimla framed the charge against the appellants under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act on dated 17.8.2011. Appellants did not plead guilty and claimed trial.

4. The prosecution examined as many as eleven witnesses in support of its case:-

Sr.No.	Name of Witness
PW1	SI Rupinder Kumar
PW2	Bhom Parkash

PW3	Sunil Negi
PW4	C. Naginder
PW5	HC Pradeep Kumar
PW6	HC Parkash Chand
PW7	Prakash
PW8	SI Rattan Singh
PW9	Ranjit Singh
PW10	ASI Kalyan Singh
PW11	Inspector Minakshi

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

Sr.No.	*Description:*
Ex.PW.1/A.	*Search memo.*
Ex.PW1/B	*Consent memo.*
Ex.PW1/C.	*Memo regarding identity of charas*
Ex.PW1/D.	*Seizure memo*
Ex.P1	*Packets*
Ex.P2	*Red bag*
Ex.P3 and Ext.P4	*Black plastic packets*
Ex.P5	*Charas*
Ex.PW2/A.	*Memo regarding vehicle*
Ex.PW2/B & C	*Arrest memos*
Ex.PW2/D & E	*Personal search memos*
Ex.PW3/A	*Special information under Section 42 of the Act.*
Ex.PW3/B	*Special report*
Ext.PW6/A	*Rapat*
Ext.PW6/B	*FIR*
Ext.PW6/C & D	*Extracts of malkhana register*
Ext.PW8/A	*Sample seal*
Ext.PW11/A	*NCB Form*
Ext.PW11/A-1	*Ruka*
Ext.PW11/B	*Spot map*
Ext.PW11/C	*Statement of Bhom Parkash*
Ext.PW11/F	*FSL report*

Ext.P6	*Driving licence*
Ext.P7	*Affidavit*
Ext.P8	*Insurance*
Ext.DA	*Rapat*
Ext.DB	*Roll Call*

5. Learned Special Judge, Fast Track Court Shimla convicted the appellants under Section 20(b) (ii) (C) read with Section 29 of NDPS Act. Learned trial Court sentenced the appellants to undergo rigorous imprisonment for a period of ten years and to pay fine of ` 1 lac each. Learned trial Court further directed that in default of payment of fine the appellant would undergo simple imprisonment for a period of one year. Learned trial Court further directed that period of custody would be set off. Feeling aggrieved against the judgment and sentence passed by learned Trial Court the appellants have filed present appeals under Section 374 of the Code of Criminal Procedure and a prayer for acceptance of appeals sought.

6. We have heard learned Advocates appearing on behalf of the appellants and learned Additional Advocate General appearing on behalf of the State and also perused the entire record carefully.

7. Question that arises for determination before us in this appeal is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice by convicting both the appellants.

Findings in both appeals i.e. Cr. Appeal No. 303 of 2012 titled Deepak Kumar vs. State of H.P. and Cr. Appeal No. 410 of 2012 titled Joginder Singh vs. State of H.P.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

8.1. PW1 SI Rupinder Kumar has stated that he is posted as SI/IO in P.S. CID Bharari Shimla since October 2010 and on dated 5.3.2011 Inspector Meenakshi of P.S. CID Shimla told that she had received prior information regarding contraband. He has stated that thereafter he, Inspector Meenakshi, ASI Kalyan Singh, ASI Rajesh, HC Bhom Parkash went in vehicle having registration No. HP-07B-0407 towards Karsog side and official vehicle was driven by C. Ravi Kumar. He has stated that at about 9 PM they reached Gharyana and stopped official vehicle in the middle of road in zigzag manner. He has stated that thereafter vehicle having registration No. HR-12J-4248 came from Karsog side and another vehicle No. HP-03B-0667 also came from Karsog side which was driven by Devinder Sharma. He has stated that vehicle having registration No. HR-12J-4248 was stopped and one man Bhom Parkash was found on the road and he was asked to join the investigation. He has stated that in presence of Devinder Sharma and Bhom Parkash the occupants of vehicle No. HR-12J-4248 were asked about their identity. He has stated that co-accused Joginder was on driver seat and Deepak was on front seat of vehicle. He has stated that accused persons were asked to search the police officials. He has stated that Bhom Parkash took the search of police officials and memo Ext.PW1/A was prepared on spot. He has stated that thereafter Investigating Agency told that they suspected the contraband in the vehicle. He has stated that option was given to accused persons whether they intended to be searched before the gazetted officer or before the Magistrate or before the Investigating Agency. He has stated that accused told that they would give search to the police officials present at the spot. He has stated that consent memo Ext.PW1/B was prepared which bears signatures of Bhom Parkash and Devinder. He has

further stated that thereafter both accused persons told that packets of charas were concealed by them below the footrest of front left tyre of their vehicle. He has stated that thereafter co-accused Deepak present in Court laid down underneath the vehicle and co-accused Joginder Singh present in Court directed co-accused Deepak to open the nut bolts of steel plate underneath the footrest of left front tyre. He has stated that thereafter co-accused Deepak opened the nut bolt and took out red bag wrapped with black tape. He has stated that in red bag two other polythene packets were also there and in those packets charas was kept. He has stated that recovered charas was weighed with scale which was in the I.O.'s kit and it was found 1.700 Kg with bag and found 1.600 Kg. without bag. He has stated that recovered charas was put in same bag along with polythene packets and then wrapped in cloth parcel and sealed with four seals of 'K' and seizure memo was prepared. He has stated that sample of seal was took in cloth parcel and NCB form in triplicate was filled. He has stated that seal after use was given to Bhom Parkash. He has stated that thereafter ruka was sent to P.S. CID Bharari through ASI Kalyan for registration of FIR. He has stated that red bag Ext.P2, black packets Ext.P3 and Ext.P4 and bulk charas Ext.P5 are the same which were recovered from possession of accused persons. He has stated that thereafter spot map was prepared by I.O. and accused persons were arrested. He has denied suggestion that no recovery of contraband was effected from accused persons. He has denied suggestion that all documents were prepared at the later stage just to create the evidence.

8.2 PW2 Bhom Parkash has stated that he is ex-serviceman and he also worked with Home Guard. He has stated that he remained Pardhan of his Panchayat from 2000 to 2005. He has stated that on dated 5.3.2011 in the evening one Devinder Sharma came to his house at village Palyad and he went to see him off in his vehicle. He has stated that after seeing him off on the main road he was coming back towards his house. He has stated that thereafter he received a call from Devinder Sharma that some quarrel was going on. He has stated that thereafter he came back to the main road at 9.15 PM. He has stated that he was told by police officials that they were from CID and police officials further told that charas was recovered from accused. He has stated that accused persons were also present at the spot. He identified the accused persons in Court. He has stated that at that time two black packets were on front left footrest of the vehicle and one red bag was in the hand of lady police official. He has stated that co-accused Joginder Singh was outside the vehicle. He has stated that he does not remember the registration number of the vehicle. He has stated that contraband was measured with help of scale and it was found to be 1.700 Kg. with bag and 1.600 Kg. without bag. He has stated that they all went to the Panchayat office which was about 40-50 metres from the spot. He has stated that thereafter recovered contraband was placed in red coloured bag along with polythene packets and then wrapped and sealed in cloth parcel. He has stated that memo Ext.PW1/D was prepared which bears his signatures and signatures of Devinder Sharma. The witness was declared hostile by prosecution. He has stated that accused did not tell in his presence that they were carrying the contraband in the vehicle. He has also stated that no personal search of police officials was conducted in his presence. He has also stated that no option was given to accused persons in his presence whether they intended to be searched before the gazetted officer or Magistrate. He has denied suggestion that co-accused Deepak laid down himself underneath the vehicle and he has denied suggestion that after opening the nuts and bolts of plate three polythene packets recovered. He has denied suggestion that he is inimical towards the police officials

8.3 PW3 Sunil Negi has stated that he remained as Dy.S.P. Crime Branch Shimla till September 2011 and on dated 5.3.2011 at about 8.15 PM C. Naginder Singh brought information under Section 42 of NDPS Act at his residence which he received and made entry of same in the concerned register. He has stated that he also made endorsement on the information letter and

endorsement on the letter is encircled portion A to A and information letter is Ext.PW3/A. He has stated that on dated 6.3.2011 C. Naginder Singh brought information under Section 57 of Act at his residence and he made endorsement on letter which is encircled A to A and information letter is Ext.PW3/B which is in his hand and bears his signatures. He has denied suggestion that in order to do manipulations police has separately maintained register pertaining to NDPS cases and he has also denied suggestion that he did not receive Ext.PW3/B on dated 6.3.2011.

8.4 PW4 C. Naginder Singh has stated that he is posted in Crime Branch Shimla since 2009 and on dated 5.3.2011 he was in police station CID Bharari Shimla and Inspector Meenakshi handed over one letter at 7 PM to him containing compliance of provisions of Section 42(2) of the Act and also told him that same be handed over to Dy.S.P. Crime. He has stated that he went to office of Dy.S.P. and he came to know that Dy.S.P. had left the office and thereafter he went to the residence of Dy.S.P. and handed over Ext.PW3/A to him. He has stated that copy of letter brought back by him and thereafter he handed over the same to Inspector Meenakshi. He has stated that on dated 6.3.2011 at about 11.30 AM Inspector Meenakshi gave letter Ext.PW3/B under Section 57 of the Act and directed him to deliver the same to Dy.S.P. Crime. He has stated that he handed over the letter to Dy.S.P. at his residence. He has denied suggestion that he did not go to residence of Dy.S.P. on 5th and 6th March 2011. He has denied suggestion that he did not hand over the letters Ext.PW3/A and Ext.PW3/B to Dy.S.P.

8.5 PW5 HC Pradeep Kumar has stated that he was posted as Reader to Dy.S.P. Crime Shimla since 2009 and on dated 5.3.2011 C. Naginder came to office at 6.30 PM and he told that he was to give information under Section 42 of the Act to Dy.S.P. He has stated that Dy.S.P. had left the office and thereafter he and Naginder Singh went to residence of Dy.S.P. Crime. He has further stated that thereafter Naginder Singh handed over the information in written to Dy.S.P. Shri Sunil Negi who received the same and entered in the register. He has stated that copy was given to him which was kept by him in record. He has stated that he has brought the original record and copy Ext.PW3/A is true copy of original. He has stated that on dated 7.3.2011 when Sunil Negi came to office he gave him copy of special report under Section 57 of the Act and Dy.S.P. made the entry regarding special report. He has stated that entries are at Sr. Nos. 5 and 6 of the register. He has stated that Ext.PW3/B is true copy of original. He has denied suggestion that he did not go with C. Naginder Singh on dated 5.3.2011 with register and also denied suggestion that he did not receive the special report on dated 7.3.2011.

8.6 PW6 HC Parkash Chand has stated that he is posted as MHC in P.S. CID Bharari since November 2009 and on dated 5.3.2011 at about 6.30 PM Inspector Meenakshi was present in police station and she received the secret information under Section 42(2) of NDPS Act. He has stated that SI Rupinder Singh ASI Rajesh, ASI Kalyan, HC Bhom Parkash were also present and they left the police station in vehicle No. HP-07B-0407 which was driven by C. Ravi Kumar. He has stated that police officials went towards Sunni and Karsog side and rapat was entered which is Ext.PW6/A. He has stated that he has brought the roznamacha and Ext.PW6/A is correct copy of it. He has stated that on dated 6.3.2011 at 12.30 AM ASI Kalyan came to police station CID Bharari and handed over ruka along with case property and documents to SI Rattan Singh. He has stated that SI Rattan Singh handed over ruka to him and he recorded FIR Ext.PW6/B. He has stated that he prepared police file and sent the same to I.O. through ASI Kalyan Singh. He has stated that ASI Kalyan Singh handed over the case property sealed in parcel, copy of seizure memo, NCB form, resealing certificate which he deposited in malkhana after making entries in malkhana register. He has stated that he has brought the malkhana register and entries recorded at Sr. No. 36 and further stated that copy Ext.PW6/C is

correct as per original. He has stated that on dated 7.3.2011 he filled the relevant column No. 12 of NCB form and sent the case property alongwith sample seal, copy of seizure memo, NCB form in triplicate, resealing certificate, copy of FIR and docket vide RC No. 16/11 through C. Parkash Chand to FSL Junga for analysis. He has stated that Parkash Chand gave the receipt of deposit on the same day. He has stated that he has brought RC register and stated that copy Ext.PW6/D is correct as per original. He has stated that no tampering was done with case property. He has denied suggestion that on dated 5.3.2011 he did not make any entry in Ext.PW6/A and also denied suggestion that no case property was deposited with him along with documents. He has denied suggestion that he did not send any case property along with documents to FSL Junga. He has denied suggestion that entries have been ante timed.

8.7 PW7 C. Parkash Chand has stated that he is posted as Constable with Crime Branch Shimla since 2007 and on dated 7.3.2011 MHC Prakash Chand gave to him one sealed parcel, sealed with nine seals of K and ten of N along with sample seal, NCB form, seizure memo, copy of FIR and documents for depositing with FSL Junga which he deposited on the same day and gave the receipt to MHC. He has stated that no tampering was done with case property during the period it remained in his custody. He has denied suggestion that he did not take any case property to FSL Junga for analysis on dated 7.3.2011.

8.8 PW8 SI Rattan Singh has stated that he remained posted as SI/IO in P.S. CID Bharari Shimla from 2008 to June 2011 and on dated 6.3.2011 ASI Kalyan Singh presented before him at about 12.30 AM one sealed parcel sealed with nine seals of K along with ruka, NCB forms and seizure memo. He has stated that he gave ruka to MHC Prakash Chand for registration of FIR and he resealed the sealed parcel with ten seals of N and took separate seal sample Ext.PW8/A. He has stated that he also filled up column Nos. 9 to 12 of NCB form and then handed over the sealed parcel, sample seal, NCB form to MHC for depositing in the malkhana and FIR Ext.PW6/B bears his signatures. He has stated that ruka bears endorsement encircled A and it is in his hand writing and bears his signatures and he directed that contraband be got analysed from FSL. He has denied suggestion that entries were filled by MHC subsequently. He has denied suggestion that entries were interpolated and also denied suggestion that case property was not produced by ASI Kalyan Singh with documents and he has also denied suggestion that he did not reseal the case property.

8.9 PW9 Ranjit Singh has stated that he is cable operator at Rohtak. He has stated that he knew driving and accused Joginder who was present in Court is known to him. He has stated that co-accused Deepak was also known to him as he is from his village. He has stated that Suresh Kumar is also resident of village of Joginder. He has stated that he does not know whether Suresh was having vehicle No. HR-12J-4248. He has stated that Suresh Kumar used to visit on foreign trip. The witness was declared hostile. He has denied suggestion that he has given statement to I.O. that vehicle No. HR-12J-4248 belonged to Suresh Kumar was sold by him to Joginder. He has denied suggestion that he has given the statement that vehicle was sold by Joginder to Parveen. He has denied suggestion that as Parveen had not paid the amount to Joginder vehicle was operated by Joginder. He has denied suggestion that Suresh Kumar had sold the vehicle on affidavit. He has denied suggestion that he has deposed falsely.

8.10 PW10 ASI Kalyan Singh has stated that he is I.O. at P.S. CID Bharari Shimla from 1.9.2010 to 6.8.2011 and on dated 5.3.2011 Inspector Meenakshi told that she had received secret information regarding contraband. He has stated that thereafter he, Inspector Meenakshi, SI Rupinder, ASI Rajesh, HC Bhom Parkash went in official vehicle No. HP-07B-0407 towards Karsog side. He has stated that vehicle was driven by C. Ravi Kumar. He has stated that Inspector Meenakshi told that two boys aged 25 and 26 were coming in tata

vehicle No. HR-12J-4248 with contraband towards Shimla. He has stated that at about 9 PM they reached Gharyana and stopped the vehicle in the middle of the road in zigzag manner. He has stated that vehicle having registration No. HR-12J-4248 came from Karsog side and thereafter immediately vehicle No. HP-03B-0667 came from Karsog side which was driven by Devinder Sharma. He has stated that vehicle bearing No. HR-12J-4248 was stopped by police officials and one man Bhom Parkash was on the road at that time and he was asked to join the investigation. He has stated that in presence of Devinder Sharma and Bhom Parkash the occupants of vehicle No. HR-12J-4248 were asked about identities and he has stated that co-accused Joginder was on driver seat whereas co-accused Deepak was on front seat. He has stated that personal search of police officials was taken and memo Ext.PW1/A was prepared. He has stated that police officials told both the accused that police officials have suspicion that both accused were carrying contraband with them in the vehicle. He has stated that option was given to accused persons whether they intended to be searched before the gazetted officer or Magistrate. He has stated that accused told them that they intended to be searched by police officials present at the spot. He has stated that consent memo Ext.PW1/B was prepared. He has further stated that thereafter both accused told that packets of contraband were concealed by them below the footrest of front left tyre of vehicle. He has further stated that thereafter co-accused Deepak laid down underneath the aforesaid vehicle. He has further stated that co-accused Joginder directed co-accused Deepak to open the nut bolts of steel plate. He has stated that thereafter co-accused Deepak opened the nut bolts and red coloured bag was found wrapped with black tape and in red bag contraband was found. He has stated that in addition to it two other polythene packets were found and in those packets also contraband was kept. He has stated that recovered contraband was weighed with scale which was in I.O.'s kit and it was found 1.700 Kg. with bag and 1.600 Kg. without bag. He has stated that recovered charas along with polythene packets wrapped in a cloth parcel and sealed with nine seals of K. He has stated that seizure memo was prepared and sample seal was took on cloth parcel. He has stated that NCB form in triplicate was prepared and seal after use was given to Bhom Parkash. He has stated that ruka was prepared by Inspector Meenakshi and same was handed over to him along with case property sample seals, NCB form, seizure memos of charas and vehicle at 10.30 PM with direction to take the same to P.S. CID Bharari. He has stated that he reached at police station CID Bharari at 12.30 AM in private vehicle and he handed over case property, relevant documents and ruka to SI Rattan Singh. He has stated that case property remained intact in his custody. He has denied suggestion that there is no driver namely Ravi Kumar in P.S. CID. He has stated that he is not witness to any memo prepared at the spot. He has stated that contraband was found hidden underneath the front tyre side. He has stated that contraband was recovered from the space which was in between engine and tyre. He has stated that police officials recovered three packets containing charas. He has denied suggestion that he was not the member of raiding party.

8.11 PW11 Meenakshi has stated that she remained posted as I.O. in P.S. CID Shimla. She has stated that on dated 5.3.2011 at about 6.45 PM she received secret information at P.S. CID Shimla that two boys aged 24 and 26 years were coming in vehicle having registration No. HR-12J-4248 with contraband towards Shimla. She has stated that after receiving the information she prepared special information report under Section 42 (2) of Act Ext.PW3/A and handed over the same to C. Naginder with direction to hand over to Dy.S.P. Crime Branch Shimla. She has stated that at 6.45 PM she along with SI Kalyan, SI Rupinder, ASI Rajesh, HC Bhom Parkash proceeded in official vehicle No. HP-07B-0407 towards Karsog side. She has stated that vehicle was driven by C. Ravi Kumar. She has stated that at about 9 PM they reached Gharyana and stopped their vehicle in the middle of road in zigzag manner. She has further stated that vehicle having registration No. HR-12J-4248 came from Karsog side

which was driven by co-accused Joginder Singh and then immediately vehicle No. HP-03B-0667 came from Karsog side which was driven by Devinder Sharma. She has stated that vehicle No. HR-12J-4248 was stopped and one man Bhom Parkash was also walking on the road at that time and he was coming from Tatapani side and he was asked to join the investigation. She has stated that thereafter members of raiding party have given their personal search to accused in presence of witnesses and memo Ext.PW1/A was prepared at the spot which bears her signatures. She has stated that accused were told that raiding party had suspicion that accused were possessing contraband with them or in the vehicle. She has stated that thereafter accused persons were apprised of their legal right to be searched before the gazetted officer or Magistrate and option was given to accused persons. She has stated that memo Ext.PW1/B was prepared and accused had given the option that they should be searched by police officials. She has stated that bolt of vehicle was slightly raised and co-accused Deepak who was present in Court laid down underneath the vehicle and further stated that co-accused Joginder opened the bolt of vehicle. She has stated that thereafter co-accused Deepak opened the nut bolt of steel plate and under the footrest of left front tyre three packets were found. She has stated that two packets were wrapped with black coloured tape and one bag was of red colour. She has stated that recovered contraband was weighed with scale which was in I.O.'s kit and on weighment it was found 1.700 Kg. with bag and 1.600 Kg. without bag. She has stated that recovered charas was put in same bag along with polythene packets and wrapped in cloth parcel with seal. She has stated that NCB form in triplicate was filled at the spot and sample seal was also obtained on cloth parcel. She has stated that seal after use was given to Bhom Parkash. She has stated that vehicle having registration No. HR-12J-4248 was also took into possession along with documents i.e. RC Ext.P6, affidavit of Joginder Singh regarding sale of vehicle and insurance certificate in the name of Suresh Kumar. She has stated that ruka was prepared and same was handed over to ASI Kalyan Singh along with case property, sample seals, NCB form, seizure memos of charas with direction to take the same to P.S. CID Bharari. She has stated that red bag is Ext.P2 and black packets are Ext.P3 and Ext.P4 and bulk charas is Ext.P5. She has stated that said articles are same which were recovered from accused persons present in Court. She has stated that thereafter she inspected the spot and prepared site plan Ext.PW11/B and also recorded statements of witnesses under Section 161 Cr.P.C. She has stated that she also prepared special report under Section 57 of the Act and handed over the same to C. Naginder with direction to take the same to Dy.S.P. Crime. She has stated that after receiving the report from FSL Ext.PW11/D and after completion of investigation she handed over the case file to Inspector Tenzin Negi who prepared challan and presented in Court. She has stated that she is acquainted with signatures of Inspector Tenzin Negi as she worked under him for two years. She has denied suggestion that entries in the daily diary register were later on manipulated. She has denied suggestion that false case has been planted against accused persons and she has also denied suggestion that documents were prepared later on. She has denied suggestion that accused persons were picked from Dhalli as they had altercation with police regarding some traffic offence.

9. Statement of appellants recorded under Section 313 Cr.P.C. They have stated that personal search of accused was conducted at Dhalli. Accused have further stated that when they were coming from Narkanda side then at Thego their vehicle was challaned at 5.30 PM and thereafter they came to Dhalli. Accused persons have stated that police party again stopped them as they were having black glasses on the windows and they had altercation with them. They have further stated that police party took them to an isolated place and took their signatures on many documents. Accused have also stated that they are innocent and falsely implicated in this case. Accused persons did not lead any defence evidence.

Testimony of PW2 Bhom Parkash is fatal to the prosecution

10. It is the case of prosecution that 1.600 Kg. charas was found in conscious and exclusive possession of accused in presence of independent witnesses namely Bhom Parkash and Devender Sharma. We have carefully perused seizure memos Ext.PW1/C and Ext.PW1/D placed on record. Seizure memos Ext.PW1/C and Ext.PW1/D signed by three witnesses namely Bhom Parkash, Devender Sharma and Rupender Kumar. PW2 Bhom Parkash eye witness of recovery has specifically stated in positive manner when he appeared in witness box that when he reached at the place of incident at that time accused persons did not state that they were carrying contraband. PW2 has also stated in positive manner that no personal search of police officials was conducted in his presence. PW2 Bhom Parkash has also stated in positive manner that no option was given to accused persons in his presence that whether they intended to be searched by gazetted officer or Magistrate. PW2 has stated in positive manner that when he reached at the spot at the time one red packet was already in the hands of lady police constable and he has further stated that two bulk packets were on front left footrest of vehicle. PW2 contradicts the entire story of prosecution. Prosecution has alleged that contraband was hidden underneath the front tyre side and was recovered from the space which was between the engine and tyre. PW2 did not state when he appeared in the witness box that contraband was recovered from the space between the engine and tyre and PW2 also did not state that contraband was hidden underneath the front tyre side. It was held in case reported in ***Latest HLJ 2004 HP (DB) 642 titled State of H.P. versus Hanacho alias Stewart*** that joining of independent witnesses is not an empty formality but is intended to ensure the fairness in conducting the search and to corroborate the version of Searching Officer about the search and seizure of contraband. It was held that if independent witness did not support the prosecution case then same casts doubt about the veracity of police officials and version of prosecution. Hence we are of the opinion that testimony of PW2 Bhom Parkash is fatal to the prosecution in present case.

Non-examination of another independent witness namely Devender Sharma is also fatal to the prosecution

11. In the present case it is the case of prosecution that charas was recovered from the exclusive and conscious possession of accused in presence of independent witnesses Devinder Sharma and Bhom Parkash. One Bhom Parkash did not support the prosecution story and another witness Devinder Sharma was present in Court on dated 10.10.2011 but learned Public Prosecutor Mr. Purinder Sharma has given the statement before learned Special Judge Shimla that he does not want to examine witness Devinder Sharma present in Court being won over by accused. No reason has been assigned by prosecution as to why prosecution did not examine another independent witness Devinder Sharma when he was present in Court despite the fact that PW2 Bhom Parkash did not support the prosecution. The prosecution could ascertain the true facts of the case by way of declaring witness Devinder Sharma as hostile and prosecution could ascertain the truth by way of cross examination of Devinder Sharma. We are of the opinion that simply stating that Devinder Sharma was won over by accused is no positive ground for non-examination of independent witness Devinder Sharma in the trial Court when Devinder Sharma was present in Court for his examination. Hence adverse inference under Section 114 (g) of Indian Evidence Act is drawn against the prosecution for non-examination of independent eye witness Devinder Sharma who was present in Court on dated 10.10.2011.

Non-production of original seal is also fatal to the prosecution case

12. It is the case of prosecution that original seal after use was handed over to PW2. Original seal was not produced in Court for the purpose of

comparison and no FIR was recorded to the effect that original seal was lost. It was held in case reported in ***Latest HLJ 2011 HP 1195 (DB) titled Nanha vs. State*** that if original seal is not produced then conviction could not be recorded. ***(See (1998)8 SCC 449 titled State of Rajasthan vs. Gopal)***

Investigation of case by complainant herself is also fatal to the prosecution in present case

13. As per FIR Ext.PW6/B it is proved on record that complainant in present case was Inspector Meenakshi Bhardwaj. It is also proved on record that entire investigation of case i.e. preparation of seizure memo, preparation of site plan, recording the statements of witnesses, filling up of NCB form and preparation of sample was conducted by complainant herself. There is no evidence on record in order to prove that another Investigating Officer was not available. It is well settled law that investigation of a criminal case should be conducted by independent Investigating Officer. Practice of investigating the case by complainant in criminal case is deprecated by Hon'ble Apex Court of India in case reported in ***1993 Criminal Law Journal 3716 titled Gyan Chand vs. State of Rajasthan.***

Two views are possible in present case and accused are entitled for the benefit of two views

14. In Narcotic Drugs and Psychotropic Substances cases seizure memo is substantive piece of evidence. We have carefully perused the seizure memos Ext.PW1/C and Ext.PW1/D. Eye witnesses of seizure memos are (1) Bhom Parkash (2) Devinder Sharma and (3) Rupinder Kumar. PW1 Rupinder Kumar official witness has specifically stated that contraband was recovered from possession of accused but PW2 Bhom Parkash has specifically stated that when he reached at the spot the contraband was already in the hands of lady police constable and further stated that no option was given to accused persons whether they intended to be searched by gazetted officer or by Magistrate and has specifically stated that no contraband was recovered from the space between engine and tyre. We are of the opinion that two views have emerged in present case. It was held in case reported in ***1992(2) S.L.J.1213 titled Mool Chand vs. Jagdish Singh Bedi and others*** that when evidence in criminal case is of such a nature that two views are possible then view favourable to accused should be adopted. ***(See: 1998(2) S.L.J. 1408 Shashi Pal and others vs. State of HP, 1993(1) SLJ 405 titled State of H.P. vs. Sudarshan Singh***, ***See 1995 (3) SLJ 1819 titled State of Himachal Pradesh vs. Inder Jeet and others***, ***See 1995(4) SLJ 2728 titled State of H.P. vs. Diwana and others.)*** It was held in case reported in ***2007(1) SCC (Cri) 377 titled Deelip and another vs. State of H.P. (Apex Court of India)*** that if in NDPS cases two views are possible then view favourable to accused should be adopted and benefit of doubt should be given to accused. ***(Also see 2006(12) SCC 321 titled Ritesh Chakarwati vs. State of M.P. Also see 2003(9) SCC 159 titled Jagdish vs. State of H.P. Also see 1999(6) SCC 172 titled State of Punjab vs. Baldev Singh. Also see 1994(2) SCC 299 titled State of Punjab vs. Balbir Singh)***

15. Submission of learned Additional Advocate General appearing on behalf of State that all memos have been signed by witnesses and in view of signatures of witnesses upon the memos appeals filed by appellants be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that solely signing of document does not mean that contents of document are admitted by person who signed the document. It is well settled law that contents of document should be proved in Court in accordance with law as per Chapter V of Indian Evidence Act 1872.

16. Another submission of learned Additional Advocate General appearing on behalf of State that judgment and sentence of learned trial Court be affirmed on the testimonies of police officials is rejected being devoid of any

force for the reasons hereinafter mentioned. It is well settled law that conviction could be based on the evidence of police officials provided such evidence is trustworthy and inspires confidence. It is well settled law that police officials undoubtedly are competent witnesses but the Court has to be cautious and careful while scrutinizing their statements. In present case other police officials are not signatory to substantial documents i.e. seizure memos and only Rupender Kumar is the signatory to substantial documents i.e. seizure memos Ext.PW1/B and Ext.PW1/C. It is well settled law that contents of document cannot be proved by way of testimonies of witnesses who are not signatories to the document and one independent witness namely Bhom Parkash who is signatory to documents i.e. seizure memos Ext.PW1/B and Ext.PW1/C did not support the prosecution story as alleged by prosecution and another witness of substantial documents i.e. seizure memos Ext.PW1/B and Ext.PW1/C namely Devinder Sharma was not examined by prosecution despite the fact that Devinder Sharma was personally present in Court for examination and other police officials are only corroborative witnesses and are not eye witnesses of substantial documents i.e. seizure memos Ext.PW1/B and Ext.PW1/C of contraband. It is proved on record that on dated 5.3.2011 at Theog vehicle of accused was challaned at 5.30 PM and it is also proved on record that on the same date at Panchayat Office Gharyana falling within the jurisdiction of P.S. Dhalli vehicle was again intercepted at 9.05 PM. It is the case of prosecution that prior information was given to police officials qua presence of contraband in vehicle having registration No. HR-12J-4248. We are of the opinion that concept of two views theory is applicable in the present case when different eye witness of incident gives contradictory testimony qua relevant fact which is the issue before the criminal Court. In present case the issue before the Criminal Court is whether contraband measuring 1.600 Kg. was recovered from exclusive and conscious possession of accused or not. In present case PW1 has specifically stated that contraband measuring 1.600 Kg. was recovered from exclusive and conscious possession of accused in presence of PW1 but another witness PW2 eye witness of seizure memo has specifically stated that when he reached at the spot contraband was already in the hands of lady police official. PW1 stated that option was given to accused persons whether they intended to be searched by gazetted officer or by Magistrate but on the contrary PW2 eye witness stated in positive manner that no option was given to accused in his presence. We are of the opinion that above said facts proves two contradictory views in present case and benefit of two contradictory views cannot be given to prosecution as per law. It was held in case reported in ***(2005)9 SCC SC 765 (DB) titled Anjlus Dungdung vs. State of Jharkhand*** that suspicion however strong cannot take place of proof. It was held in case ***AIR 1979 SC 1382 titled State (Delhi Administration) vs. Gulzarilal Tandon*** that suspicion however grave cannot take place of proof. (also see ***AIR 1984 SC 1622 titled Sharad Birdhichand Sarda vs. State of Maharashtra***, ***See: AIR 1983 SC 906 titled Bhugdomal Gangaram and others vs. the State of Gujarat See: AIR 1985 SC 1224 titled State of U.P. vs. Sukhbasi and others***.

17. In view of above stated facts we hold that learned trial Court did not properly appreciate oral as well as documentary evidence placed on record. We accept both appeals and set aside the judgment and sentence passed by learned trial Court. We acquit both accused persons by way of giving them the benefit of doubt. Contraband will be confiscated to State of H.P. in accordance with law after the expiry of period of filing further proceedings. Fine if deposited be refunded to appellants. Appellants shall be released forthwith if not required in nay other criminal ase. Learned Additional Registrar (Judicial) will issue warrant of discharge forthwith to officer in-incharge of jail along with certified copy of judgment. Certified copy of this judgment be placed on the file of Cr. Appeal No. 410 of 2012 titled Joginder Singh vs. State of H.P. and file of learned trial Court along with certified copy of this judgment be sent back forthwith.

Both appeals stand disposed of. All pending miscellaneous application(s) if any also stand disposed of.

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

Hans Raj ...Appellant.

Versus

Himachal Road Transport Corporation & others ...Respondents.

LPA No. 581 of 2011
Reserved on : 09.12.2014
Decided on: 06.01.2015

Constitution of India, 1950- Article 226- Central Civil Services (Classification, Control and Appeal) Rules, 1965-Petitioner, a driver with HRTC had parked his bus- bus rolled down in which seven passengers died and some passengers sustained injuries- penalty of termination was imposed upon the petitioner after an inquiry- petitioner filed an appeal, which was allowed and the disciplinary authority was asked to pass an appropriate order- disciplinary authority asked the petitioner to appear in person and thereafter imposed the same penalty- he filed an appeal, which was dismissed-held, that disciplinary authority had not recorded the reasons for passing the order of removal from the services- it was not mentioned that copy of inquiry report was furnished to the petitioner and what factors were taken into consideration while passing the order of removal from service- disciplinary authority had passed the same order and had not discussed all aspects, which suggests that it had not complied with the direction of the Appellate Authority. (Para-11 to 14)

Central Civil Services (Classification, Control and Appeal) Rules, 1965- Rule 11- Criminal case was registered against the petitioner for negligence which resulted in his acquittal- it was specifically held that prosecution had failed to prove the rashness and negligence on the part of the petitioner- Writ Court held that in view of the award passed by MACT, writ petitioner is guilty- held, that MACT recorded a prima facie finding to award compensation – standard of proofs in departmental inquiry, criminal case and claim petition are different- Writ Court had wrongly upheld the removal on a ground, which was not the foundation of the removal order. (Para-19 to 26)

Constitution of India, 1950- Article 309- Department was held liable to pay damages of compensation- held, that even if damages were awarded, punishment of removal is not justified. (Para- 28 and 29)

Words and Phrase- Negligence. (Para-33 to 37)

Central Civil Services (Classification, Control and Appeal) Rules, 1965- Rule 14- Disciplinary authority has to furnish copy of the inquiry report along with its findings and ask the employee to show cause - it was not mentioned in the first show cause notice that copy of final report along with report of disciplinary authority was furnished to the writ petitioner- even on remand, the disciplinary authority had not furnished the copy of inquiry report to the writ petitioner- held that the orders passed by disciplinary authority and Appellate Authority were not sustainable-matter remanded with a direction to furnish the copy of inquiry report to the petitioner. (Para-46 to 48)

Cases referred:

Girish Bhushan Goyal versus Bhel and another, (2014) 1 Supreme Court Cases 82

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
N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Raghubir Singh versus General Manager, Haryana Roadways, Hissar, 2014 AIR SCW 5515
Rajkot Municipal Corporation versus Manjulben Jayantilal Nakum and others, (1997) 9 Supreme Court Cases 552
Jacob Mathew versus State of Punjab and another, (2005) 6 Supreme Court Cases 1

For the appellant: Mr. Sanjeev Bhushan, Advocate.
For the respondents: Mr. Adarsh Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This Letters Patent Appeal is directed against the judgment and order, dated 27th July, 2011, passed by the Writ Court in CWP (T) No. 7176 of 2008, titled as Hans Raj versus HRTC and others, whereby the writ petition filed by the appellant-writ petitioner came to be dismissed (hereinafter referred to as "the impugned judgment").

2. It appears that this case has a chequered history. The appellant-writ petitioner has been dragged from pillar to post and post to pillar due to the procedural wrangles and tangles.

3. The appellant-writ petitioner was employed as a driver with the respondents, i.e. Himachal Road Transport Corporation (for short "HRTC"), had driven the bus, bearing registration No. HP-34-3008 on 10th July, 1999. The said vehicle was parked/stopped by the driver, i.e. the appellant-writ petitioner near Village Nal in Sub Division Sundernagar, District Mandi, rolled down, seven passengers died and some passengers sustained injuries. FIR No. 17 of 1999 was lodged at Police Station Sundernagar under Sections 279, 336, 337, 338 and 304-A of the Indian Penal Code (for short "IPC"). During investigation and trial, departmental inquiry was also initiated against the appellant-writ petitioner. The Competent Authority appointed the Inquiry Officer, who submitted his inquiry report to the disciplinary authority. The disciplinary authority issued a show cause notice, dated 26th October, 2002 (Annexure PC to the writ petition). The appellant-writ petitioner was asked to file written statement/defence/ representation to show cause as to why major penalty be not imposed upon him as per the mandate of Rule 11 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (for short "the Rules"). He filed reply on 1st December, 2002 (Annexure PD to the writ petition). The disciplinary authority imposed the penalty of termination of services vide order, dated 17th January, 2003 (Annexure PE to the writ petition). The appellant-writ petitioner filed appeal against the said order before the Appellate Authority, i.e. the Managing Director, Himachal Road Transport Corporation, Shimla, on 17th February, 2003, (Annexure PF to the writ petition), was allowed vide order, dated 22nd May, 2003 (Annexure PG to the writ petition) whereby order, dated 17th January, 2003 was set aside with a command to the disciplinary authority to pass appropriate penalty orders as per the mandate of Rule 11 of the Rules. It is apt to reproduce para 4 of order, dated 22nd May, 2003 (Annexure PG to the writ petition) herein:

> *"4. Now, therefore, the undersigned after careful consideration of the appeal and in exercise of the powers vested under CCS (CC&A) Rules, 1965 and all other powers enabling the undersigned in this behalf hereby quash and set-aside the penalty orders passed by the Divisional Manager, Mandi, vide order dated 17.01.2003 and remit the case back to him for passing appropriate penalty orders, in this case, as per Rule 11 of the CCS (CC&A) Rules, 1965."*

4. In compliance to the orders of the Appellate Authority (supra), the disciplinary authority asked the appellant-writ petitioner to appear in person on 10th June, 2003, at 11.00 a.m. The disciplinary authority again imposed the same penalty, i.e. order of removal from service vide order, dated 1st July, 2003 (Annexure PJ to the writ petition). It is apt to reproduce paras 6, 8 and 9 of order, dated 1st July, 2003 (Annexure PJ to the writ petition) herein:

> *"6. AND WHEREAS the said Sh. Hans Raj, Driver submitted his reply to the aforesaid show cause notice on 1.12.02 which has duly been considered by the competent authority and found to be un-satisfactory. After taking into consideration the reply of show cause notice and hearing him personally on 27.12.2002 impose the penalty of "termination of services" upon the said Sh. Hans Raj, Driver vide office order No. 9001-02 dated 17.1.2003.*
>
> *7. .....*
>
> *8. AND WHEREAS the opportunity for personal hearing was afforded to Sh. Hans Raj, Driver vide office memo No. MD/MANDAL/vig/Hans Raj, Driver/03/2068-69 dated 03.6.03 and the said driver was personally heard on 18.6.2003 by the undersigned.*
>
> *9. NOW THEREFORE, the undersigned after careful consideration of the case and in exercise of the powers vested in him under Rule-11 of the CCS (CC&A) Rules-1965 and all other powers enabling him in this behalf hereby impose the penalty of "removal from service under Rule-11 (VIII) of CCS (CC&A) Rule's 1965" upon the said Sh. Hans Raj, Driver, HRTC, SunderNager with immediate effect. Further he will get only subsistance allowance for the period he remained under suspension."*

5. Feeling aggrieved, the appellant-writ petitioner again questioned the order by the medium of appeal (Annexure PK to the writ petition), which was dismissed by the Appellate Authority vide order, dated 13th August, 2003 (Annexure PL to the writ petition).

6. The writ petitioner-appellant questioned the said orders before the erstwhile H.P. State Administrative Tribunal by the medium of Original Application, was transferred to this Court and came to be registered as CWP (T) No. 7176 of 2008.

7. The respondents resisted the writ petition on the grounds taken in the memo of objections. The Writ Court dismissed the writ petition. Hence, this appeal.

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

9. We are of the considered view that the Writ Court has fallen in an error in dismissing the writ petition for the following reasons:

10. The Appellate Authority was not satisfied by the orders whereunder and whereby the order of removal from service/ termination was imposed, set aside the same vide order dated 22nd May, 2003, with the command to the disciplinary authority for passing appropriate penalty orders.

11. The disciplinary authority, after noticing the order made by the Appellate Authority, has not applied the mind while making the order, not to speak of recording the reasons for making the order of removal from service.

12. It is also not mentioned in order, dated 1st July, 2003 (Annexure PJ to the writ petition) that when the appellant- writ petitioner was heard, whether the copy of the inquiry report was furnished to the appellant-writ petitioner and what factors were taken into consideration while imposing major penalty, i.e. removal from service.

13. In fact, the disciplinary authority has again passed the same order and imposed the same penalty which was passed earlier. Thus, one comes to an inescapable conclusion that the disciplinary authority has not complied with the directions of the Appellate Authority and in rush, rather in hot haste, made order, dated 1st July, 2003 (Annexure PJ to the writ petition).

14. The Appellate Authority, vide order, dated 13th August, 2003 (Annexure PL to the writ petition) has not discussed all aspects and a non-speaking order came to be made, is suggestive of the fact how the Appellate Authority has dealt with the file.

15. Learned Single Judge, while dismissing the writ petition, has not gone into these aspects and has not even discussed the issues whether the appellant-writ petitioner was heard in terms of the remand order made by the Appellate Authority and whether the punishment was proportionate.

16. The Writ Court has also given a slip to law by holding that the order is legal without thrashing out whether the finding recorded by the disciplinary authority, whereby major penalty was awarded, was legal and sound and was it within its competence to pass the same order despite the fact that there was direction by the Appellate Authority to pass appropriate penalty orders in terms of Rule 11 of the Rules.

17. The Apex Court in a recent judgment in the case titled as **Girish Bhushan Goyal versus Bhel and another,** reported in **(2014) 1 Supreme Court Cases 82,** has discussed about the proportionality and quantum of punishment. It is apt to reproduce paras 13 to 15 of the judgment herein:

> *"13. The major punishment which is awarded to the appellant through the order of dismissal dated 18-3-2009, is covered under Rule 23 (i) of the BHEL Conduct Rules considering that the appellant had reached the age of superannuation. However, the order of termination does not mention any form of criminal charges against him, which is necessary to attract penalty under Rule 23 (i) of the BHEL Conduct Rules amounting to dismissal from service. On the other hand, the nature of charges levelled against the appellant was such that he omitted from performing his duty of being a responsible vigilance officer which amounted to being negligent as against being an active participant in colluding with the employees against his employer and acting against the interest of the Company. The consequence of the dismissal order served on him at the end of his service*

tenure not only results in inflicting disproportionate punishment on him in terms of bad name and reputation, but also deprives the appellant of his retiral benefits for which he has got statutory entitlement for rendering three decades of service to the Company whereas his negligence attracts minor penalty under Rule 23 of the BHEL Conduct Rules.

14. It is pertinent to mention the observation made on this issue by this Court on the premise of similar facts and circumstances. In Surendra Prasad Shukla v. State of Jharkhand, (2011) 8 SCC 536 : (2011) 2 SCC (L&S) 372, at para 9-10, this Court held as under: (SCC p. 538)

> *"9. There was no charge against the appellant that he had in any way aided or abetted the offence under Section 392 IPC or that he knew that his son had stolen the car and yet he did not inform the police. The appellant, as we have held, was guilty of negligence of not having enquired from his son about the car kept in front of the government quarters occupied by him. The appellant had served the government as a Constable and thereafter as a Head Constable from 7-8-1971 till he was dismissed from service on 28-2-2005 i.e. for 34 years, and for such long service he had earned pension. In our considered opinion, the punishment of dismissal of the appellant from service so as to deprive him of his pension for the service that he had rendered for 34 longs years was shockingly disproportionate to the negligence proved against him.*
>
> *10. We accordingly, allow this appeal in part and modify the punishment of dismissal from service to compulsory retirement. The LPA and the writ petition filed by the appellant before the High Court are allowed in part. There shall be no order as to costs."*

15. Therefore, in view of the principle laid down by this Court in the abovereferred case, we are of the opinion that dismissal order served on the appellant just 6 days prior to his retirement date is exorbitant and disproportionate to the gravity of misconduct particularly, because he was not involved in active collusion with the other employees of the Company who were involved in this incident, for causing financial loss to the respondent Company but was negligent by an act of omission. We also should not lose sight of the fact that the appellant took steps to retrieve the materials which were due against the bill from the suppliers which rectified the error. Accordingly, the order of dismissal served on him is liable to be quashed and is accordingly, quashed. However, we cannot lose sight of the fact that his negligence has caused financial loss to the respondent Company. Therefore, keeping on a par with the punishment awarded to Shri B.S. Rana on ground of misconduct in terms of demotion of lower grade for 3 years as per letter dated 6-6-2011 from the Central Public

Information Officer, we award the similar punishment of deduction of one year increment to the appellant as per Rule 23 (b) of the BHEL Conduct Rules since the appellant already reached the age of superannuation when the order of dismissal was served on him. Accordingly, the civil appeals rising out of SLPs (C) Nos. 30883-84 of 2012 are allowed."

18. Applying the test to the instant case, the appellant-writ petitioner was facing a criminal trial and stood acquitted. The criminal Court has specifically held, while passing the order, that the prosecution has failed to establish the rashness and negligence on the part of the accused (appellant-writ petitioner).

19. The Writ Court has held that the appellant-writ petitioner is guilty in terms of the award made by the Presiding Officer of Motor Accident Claims Tribunal (for short "MACT"), who, while awarding compensation to the victims of the said accident, held that the driver was negligent.

20. It is not within the jurisdiction, competence and powers of the Tribunal to hold who is guilty. It has to make *prima facie* findings for limited purpose in order to assess and award compensation. It is for the criminal Court to hold whether the accused (appellant-writ petitioner) has committed or not the offences punishable under Sections 279, 336, 337, 338 and 304-A IPC.

21. Granting of compensation to the victims of the vehicular accidents is a social legislation and it is just to save the victims from social evils. The standard of proof in departmental inquiries, criminal cases and claim petitions before the MACT is different. If a person is convicted, that may be a ground for imposing penalty in departmental inquiries. In case acquittal is made, the Authority or the Court has to hold as to what is the effect of the judgment.

22. The Apex Court also in a case titled as **Dulcina Fernandes & Ors. versus Joaquim Xavier Cruz & Anr.,** reported in **2013 AIR SCW 6014,** held what is the standard of proof in the claim petitions. It was further held that the issue of negligence is required to be decided by the Tribunal on the touchstone of preponderance of probability and certainly not on the basis of proof beyond reasonable doubt. It is apt to reproduce para 7 of the judgment 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-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."

23. 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."

24. An acquittal in accidental cases cannot be a ground to refuse compensation to the victims. It is apt to reproduce relevant portion of para 3 of the judgment rendered by 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,** herein:

> *"3. Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other 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....."*

25. The Writ Court has held that the driver was guilty and upheld the removal order on the ground, which was not the foundation of the removal order.

26. Viewed thus, the learned Single Judge has fallen in an error.

27. It is also a moot question that if the department incurs damages in view of the conduct of its employee, can that be a ground for dismissal from service read with the fact that the Appellate Authority has already remanded the case for passing appropriate penalty orders.

28. The Apex Court in **Girish Bhushan Goyal's case (supra)** has held that even if damages are awarded, in absence of any criminal charge, punishment of removal is not justified.

29. The Apex Court in a series of cases has held that the disciplinary authority should pass orders while keeping in view the facts of the case read with the conduct of the employee.

30. It is apt to reproduce paras 35 to 38 of the latest judgment rendered by the Apex Court in **Raghubir Singh versus General Manager, Haryana Roadways, Hissar,** reported in **2014 AIR SCW 5515,** herein:

> *"35. Having regard to the facts and circumstances of this case, we are of the view that it is important to discuss the Rule of the 'Doctrine of Proportionality' in ensuring preservation of the rights of the workman. The principle of 'Doctrine of Proportionality' is a well recognised one to ensure that the action of the employer against employees/workmen does not impinge their fundamental and statutory rights. The abovesaid important doctrine has to be followed by the employer/employers at the time of taking disciplinary action against their employees/ workmen to satisfy the principles of natural justice and safeguard the rights of employees/ workmen.*
>
> *36. The abovesaid "Doctrine of Proportionality" should be applied to the fact situation as we are of the firm view that the order of termination, even if we accept the same is justified, it is disproportionate to the gravity of misconduct. In this regard, it would be appropriate for us to refer to certain paragraphs from the decision of this Court in the*

case of Om Kumar and Ors. v. Union of India, (2001) 2 SCC 386, wherein it was held as under:-

> *"66. It is clear from the above discussion that in India where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary reviewing Courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the Administrator. Hence the Court deals with the merits of the balancing action of the Administrator and is, in essence, applying 'proportionality' and is a primary reviewing authority.*
>
> *67. But where, an administrative action is challenged as 'arbitrary' under Article 14 on the basis of Royappa (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is 'rational' or 'reasonable' and the test then is the Wednesbury test. The Courts would then be confined only to a secondary role and will only have to see whether the Administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. [In G.B. Mahajan v. Jalgaon Municipal Council], AIR 1991 SC 1153)], Venkatachaliah, J. (as he then was) pointed out that 'reasonableness' of the Administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury Rules. In Tata's Cellular v. Union of India, AIR 1996 SC 11 : (1994 AIR SCW 3344), Indian Express Newspapers v. Union of India ([1986] 159 ITR 856 (SC)) : (AIR 1986 SC 515), Supreme Court Employees Welfare Association v. Union of India and Anr., ((1989) II LLJ 506 (SC) : AIR 1990 SC 334) and U.P. Financial Corporation v. GEM CAP (India) Pvt. Ltd. ([1993] 2 SCR 149) : (AIR 1993 SC 1435 : 1993 AIR SCW 1189), while judging whether the administrative action is 'arbitrary' under Article 14 (i.e. otherwise then being discriminatory), this Court has confined itself to a Wednesbury review always.*
>
> *68. Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the Courts*

> *by applying proportionality. However, where administrative action is questioned as 'arbitrary' under Article 14, the principle of secondary review based on Wednesbury principles applies."*

37. Additionally, the proportionality and punishment in service law has been discussed by this Court in the Om Kumar case (AIR 2000 SC 3689 : 2000 AIR SCW 4361) (supra) as follows:-

> *"69. The principles explained in the last preceding paragraph in respect of Article 14 are now to be applied here where the question of 'arbitrariness' of the order of punishment is questioned under Article 14.*
>
> *70. In this context, we shall only refer to these cases. In Ranjit Thakur v. Union of India (1988 Cri LJ 158) : (AIR 1987 SC 2386), this Court referred to 'proportionality' in the quantum of punishment but the Court observed that the punishment was 'shockingly' disproportionate to the misconduct proved. In B.C. Chaturvedi v. Union of India ((1996) 1 LLJ 1231 (SC) : (AIR 1996 SC 484 : 1995 AIR SCW 4374), this Court stated that the Court will not interfere unless the punishment awards was one which shocked the conscience of the Court. Even then, the court would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in rare situations, the Court could award an alternative penalty. It was also so stated in Ganayutham."*

38. With respect to the proportionality of the punishment of 'censure', it was further observed by this Court in the Om Kumar case, (AIR 2000 SC 3689 : 2000 AIR SCW 4361) (supra) that:-

> *"75. After giving our anxious consideration to the above submissions and the facts and the legal principles above referred to, we have finally come to the conclusion that it will be difficult for us to say that among the permission minor punishments, the choice of the punishment of 'censure' was violative of the Wednesbury Rules. No relevant fact was omitted nor irrelevant fact was taken into account. There is no illegality. Nor could we say that it was shockingly disproportionate. The Administrator had considered the report of Justice Chinnappa Reddy Commission, the finding of the Inquiry Officer, the opinion of the UPSC which was given twice and the views of the Committee of Secretaries. Some were against the officer and some were in his favour. The Administrator felt that there were two mitigating factors (i) the complicated stage at which the officer was sent to DDA, and (ii)*

> *the absence of mala fides. In the final analysis, we are not inclined to refer the matter to the Vigilance Commissioner for upward revision of punishment."*

31. It also appears that preliminary inquiry was conducted and the Inquiry Officer had, *prima facie*, made the findings that the conductor, driver and other officials were responsible for the said accident, but no departmental inquiry was drawn against other officials.

32. The question is - what is negligence?

33. The word "negligence" has been defined in the **Black's Law Dictionary, Sixth Edition** at page No. 1032 as under:

> "***Negligence.*** *The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.*
>
> *Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances. Amoco Chemical Corp. v. Hill, Del. Super., 318 A.2d 614, 617. Conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm; it is a departure from the conduct expectable of a reasonably prudent person under like circumstances. U.S. v. Ohio Barge Lines, Inc., 606 R.2d 624, 632.*
>
> *The term refers only to that legal delinquency which results whenever a man fails to exhibit the care which he ought to exhibit, whether it be slight, ordinary, or thoughtlessness, inattention, and the like, while "wantonness' or "recklessness" is characterized by willfulness. The law of negligence is founded on reasonable conduct or reasonable care under all circumstances of particular case. Doctrine of negligence rests on duty of every person to exercise due care in his conduct toward others from which injury may result.*
>
> *....."

34. In **The New Oxford Dictionary of English,** the word "negligence" has been defined at page No. 1240 as under:

> "**negligence. noun** [mass noun] failure to take proper care over something: *a scheme to protect investors in the event of negligence by their financial advisers.*
>
> Law *breach of a duty of care which results in damage.*"

35. It would also be profitable to reproduce the definition of the word "negligence" as described in the **Webster's Encyclopedic Unabridged Dictionary of the English Language,** at page No. 1285, herein:

> "**neg-li-gence.** *n.* **1.** the quality, fact, or result of being negligent; neglect: *negligence in discharging one's responsibilities.* ***2.*** *an instance of being negligent :* a downfall brought about by many negligences. **3.** *Law.*

> the failure to exercise that degree of care that, in the circumstances, the law requires for the protection of other persons or those interests of other persons that may be injuriously affected by the want of such care. - *adj.* **4.** *Law.* pertaining to or involving a civil action for compensation for damages filed by a person who claims to have suffered an injury or loss in an accident caused by another's negligence: *a negligence suit; a large negligence award."*

36. The Apex Court in a case titled as **Rajkot Municipal Corporation versus Manjulben Jayantilal Nakum and others,** reported in **(1997) 9 Supreme Court Cases 552,** has described the meaning of "negligence". It is apt to reproduce relevant portion of para 11 and para 12 herein:

> *"11. .....Negligence is failure to use such care as a reasonable, prudent and careful person would use, under similar circumstances. It is doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances. Negligence also is an omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.*
>
> *12. Negligence and tort have been viewed without elaborately embarking upon the definition of "tort" applicable to varied circumstances and the scope of negligence in its wider perspective. Let us proceed to consider the meaning of "negligence" in the context of tort liability arising in this case. In every case giving rise to tortious liability, tort consists of injury and damage due to negligence. Claim for injury and damage may be founded on breach of contract or tort. We are concerned in this case with tort. The liability in tort may be strict liability, absolute liability or special liability. The degree of liability depends on degree of mental element.*
>
> *The elements of tort of negligence consist in - (a) duty of care; (b) duty is owed to the plaintiff; (c) the duty has been carelessly breached. Negligence does not entail liability unless the law exacts a duty in the given circumstances to observe care. Duty is an obligation recognised by law to avoid conduct fraught with unreasonable risk of damage to others. The question whether duty exists in a particular situation involved determination of law. Negligence would in such acts and omissions involve an unreasonable risk of harm to others. The breach of duty causes damage and how much is the damage should be comprehended by the defendant. Remoteness is relevant and compensation on proof thereof requires consideration. The element of carelessness in the breach of the duty and those duties towards the plaintiff are important components in the tort of negligence. Negligence would mean careless conduct in commission or omission of an act connoting duty, breach and the damage thereby suffered by the person to whom the plaintiff owes. Duty of care is, therefore, crucial to understand the nature and scope of the tort of negligence."*

37. It would also be profitable to reproduce paras 10, 11 and 48 (1) of the judgment rendered by the Apex Court in a case titled as **Jacob Mathew versus State of Punjab and another,** reported in **(2005) 6 Supreme Court Cases 1,** herein:

> *"10. The jurisprudential concept of negligence defies any precise definition. Eminent jurists and leading judgments have assigned various meanings to negligence. The concept as has been acceptable to Indian jurisprudential thought is well stated in the Law of Torts, Ratanlal & Dhirajlal (24th Edn., 2002, edited by Justice G.P. Singh). It is stated (at pp. 441-42):*
>
> > *"Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury this person or property. .....the definition involves three constituents of negligence : (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the said duty; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort."*
>
> *11. According to Charlesworth & Percy on Negligence (10th Edn., 2001), in current forensic speech, negligence has three meanings. They are: (i) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of a duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings. (para 1.01) The essential components of negligence, as recognised, are three: "duty", "breach" and "resulting damage", that is to say:*
>
> > *(1) the existence of a duty to take care, which is owned by the defendant to the complainant;*
> >
> > *(2) the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and*
> >
> > *(3) damage, which is both causally connected with such breach and recognised by the law, has been suffered by the complainant. (para 1.23)*
>
> *If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence. (para 1.24)*
>
> *12 to 47. .....*

48. We sum up our conclusions as under:

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three : "duty", "breach" and "resulting damage".

....."

38. Applying the test, the Inquiry Officer or the disciplinary authority have not made a positive finding that the accident was the outcome of the negligence of the driver only. What were the reasons for not accepting the preliminary report, are not forthcoming.

39. While going through Articles of Charge, it appears that precisely, the charge against the appellant-writ petitioner was that he was negligent in maintaining the vehicle and he had not taken due care and caution while parking the vehicle.

40. Admittedly, if a driver has to stop/park the vehicle, the conductor has to perform the duties and to take all precautions to ensure the safety of the passengers. He had to give signal and to put Gutka/stone with the tyres. The appellant-writ petitioner has specifically stated in his reply (Annexure PD to the writ petition) that the conductor had put Gutka/stone.

41. It would be profitable to reproduce the relevant portion of the duties, functions and conduct of a conductor as mentioned in Himachal Pradesh Motor Vehicles Rules, 1999 (for short "MV Rules") herein:

*"**32. Duties, functions and conduct of a conductor.***

The Conductor of a stage carriage shall;

.....

(xvii) take all reasonable precautions to ensure the safety of passengers in or on entering or alighting from the vehicle.

....."

42. The appellant-writ petitioner has specifically pleaded in para (2) of the Original Application that he stopped the vehicle, the conductor put the stones behind the rear tyres of the vehicle, the same was parked in a heavy gear and switched off. It is apt to reproduce para (2) of the Original Application herein:

"(2) That on 10-7-1999 when the applicant was driving the vehicle No. HP-34-3008, on Sundernagar to Chahe-Ka-Dohra route and when the bus reached near village Nal, the same was parked by the applicant as the road was blocked due to debris on the road. The conductor of the bus get down and the stones were duly supported behind the rear tyres of the vehicle and the vehicle was switched off and parked in a heavy gear and the applicant also got down from the vehicle and was going to the site to see the

factual position of the road. Most of the passengers also got down from the vehicle and few passengers remained sitting in the bus-vehicle."

43. The respondents have not denied the said factum while filing reply to the Original Application. It is apt to reproduce para 2 of the reply on merits herein:

"2. Para No. 2 of Original application needs no reply."

44. A fact not denied specifically is deemed to have been admitted.

45. This aspect was also not discussed by the Inquiry Officer, the disciplinary authority, the Appellate Authority and by the Writ Court.

46. In terms of mandate of Rule 14 of the Rules, the disciplinary authority has to furnish copy of the Inquiry Report alongwith its findings, if any, and to ask the employee to show cause. It is not mentioned in the first show cause notice, dated 26th October, 2002 (Annexure PC to the writ petition) read with the removal order, dated 17th January, 2003 (Annexure PE to the writ petition) that copy of final report alongwith report of disciplinary authority was furnished to the appellant-writ petitioner, which is mandatory.

47. Even on remand, the disciplinary authority has not furnished the copy of Inquiry Report to the appellant-writ petitioner.

At the cost of repetition, he has only passed a mechanical order, that too, the same order in the same fashion, which was made by the disciplinary authority on 17th January, 2003.

48. Having said so, we deem it proper to allow the appeal, set aside the impugned judgment, grant the writ petition and set aside the order of Appellate Authority as well as the disciplinary authority with a command to the disciplinary authority to furnish a copy of the Inquiry Report to the appellant-writ petitioner, hear him and pass appropriate/proportionate penalty orders while keeping in view the order of the First Appellate Authority, dated 22nd May, 2003, read with the discussions made hereinabove.

49. Accordingly, the appeal is allowed, as indicated hereinabove. All pending applications are also disposed of.

****

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

Roshni Devi and others ....Applicant/Petitioners.

versus

Himachal Pradesh State Electricity Board Ltd. and others. ..Respondents.

CMP No.448 of 2015 in CWP No.318 of 2015
Decided on: January 7, 2015.

Constitution of India, 1950- Article 226- Petitioners filed a Writ petition pleading that husband of writ petitioner No. 1 and father of writ petitioners No. 2 and 3 came in contact with a live electrical wire due to which he died- held, that Court has power to grant interim compensation – accordingly, interim compensation of Rs. 50,000/- each was awarded in favour of each of the petitioners. (Para-4 to 9)

Case referred:
Chief Engineer and others vs. Mst. Zeba, reported in II (2005) ACC 705

For the applicant/petitioners: Mr.C.N. Singh, Advocate.
For the respondents: Ms.Sharmila Patial, Advocate, for respondents No.1 to 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

CMP No.447 of 2015

Leave granted. The application is disposed of.

CWP No.318 of 2015

2. Issue notice. Ms.Sharmila Patial, Advocate, waives notice on behalf of respondents No.1 to 5. Notice to respondent No.6, returnable within six weeks. Steps within one week. List on 6th April, 2015. In the meantime, reply be filed by the appearing respondents.

CMP No.448 of 2015

3. By the medium of this application, the applicants/petitioners have sought interim compensation.

4. The moot question is – whether interim compensation can be granted in writ proceedings, while exercising power under Article 226 of the Constitution of India?. The answer is in the affirmative for the following reasons.

5. To determine the issue, it is necessary to have a glance of brief facts of the case, which have been made the foundation for claiming the compensation in the main writ petition. It is averred that the husband of writ petitioner No.1 and father of writ petitioners No.2 and 3 came into the contact of a live electrical wire, sustained electric shock and burn injuries and succumbed to the same, which was the outcome of carelessness and negligence of the respondent-Department. It is further averred that the deceased was a Welder by profession and was working in a Workshop at Tattapani, Tehsil Karsog, District Mandi, H.P. He came into the contact with the live electrical wire in the middle of Tattapani Bazar, since, as averred, the Department had not adhered to proper safety measures and had not installed the same as per the Rules occupying the field. The petitioners approached the police for registration of the case and daily report was registered in Daily Rojnamcha. It is further averred that the petitioners also filed representation, which has not been heeded to by the respondents and they have turned a deaf ear. The deceased was a young man of 33 years, was earning Rs.30,000/- per month, and as averred, was the only source of dependency for the writ petitioners. Petitioner No.1 has lost her matrimonial home, family life and petitioners No.2 & 3 are also deprived of love and affection of their father.

6. Photostat copies of the documents, placed on the file, do disclose, prima facie, that it is a case where a Writ Court should intervene and come to the rescue of the victims in order to save them from destitution, vagaries and social evils and also provide them some sort of help at this stage.

7. The Apex Court in Civil Appeal No.11466 of 2014, titled as **Raman vs. Uttar Haryana Bijli Vitran Nigam Ltd. & Ors., decided on 17th December, 2014,** has laid down guidelines how to assess and grant compensation in such like cases. One of us (Justice Mansoor Ahmad Mir, Chief Justice), the then Judge of Jammu and Kashmir High Court, has also dealt with such an issue in **Chief Engineer and others vs. Mst. Zeba,** reported in **II (2005) ACC 705,** in which case, compensation was granted in favour of the victims.

8. We have also dealt with the similar issue in a public interest litigation, being **CWPIL No.7 of 2014, titled as Court on its own motion vs. State of Himachal Pradesh and others, decided on 25th June, 2014**, wherein interim compensation to the tune of Rs.5.00 lacs, to each of the victims, was granted. It is apt to reproduce paragraphs 20 to 22 of the said order hereunder:

> "20. In order to achieve the purpose of grant of interim or final relief promptly and spurn any attempt at procrastination in view of the facts and circumstances of the case, which are crying for the same, the Courts should not succumb to niceties, technicalities and mystic maybe's.
>
> 21. We are of the considered view that the Writ Court can exercise powers in terms of the mandate of the Constitution read with the inherent powers and can grant interim relief, even though it is not specifically provided for.
>
> 22. We have laid our hands on a judgment which is delivered by one of us (Justice Mansoor Ahmad Mir, Chief Justice) as a Judge of Jammu and Kashmir High Court, wherein interim compensation was granted in a First Civil Appeal, titled as **Chief Engineer & Ors. versus Mst. Zeba,** reported in **II (2005) ACC 705.** It is apt to reproduce paras 10 to 17 of the said judgment herein:
>
> > *"10. While going through the provisions of Section 151, C.P.C., this Court can exercise inherent powers in order to do justice in between the parties and can pass such orders which are warranted in the interests of justice.*
> >
> > *11. Section 140 of Motor Vehicles Act mandates how to grant interim compensation. This remedy stands introduced in terms of the recommendations made by the Apex Court in the judgments reported in 1977 ACJ 134 (SC), 1980 ACJ 435 (SC) and 1981 ACJ 507 (SC). In terms of the said judgments the legislation was made. The aim and object of the said provision is to save the victims/sufferers from starvation, destitution and from other social evils. It is just to ameliorate the sufferings of the victims.*
> >
> > *12. The Apex Court has passed a judgment reported in AIR 1996 SC 922, titled Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty, wherein Their Lordships have granted interim compensation to the victims of a rape case. In terms of the said judgment the Court is not powerless to come to the rescue of victims and save them from social evils as discussed above. It is profitable to reproduce para-18 of the said judgment herein:*
> >
> > > *"18. This decision recognizes the right of the victim for compensation by providing that it shall be awarded by the Court on conviction of the offender subject to the finalization of scheme by the Central Government. If the Court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation which should also be provided in the scheme. On the basis of principles set out in the aforesaid decision in Delhi Domestic Working Women's Forum, the jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the Courts trying the offences of rape which, as pointed out above is an offence against basic human rights as also the Fundamental Right of Personal Liberty and Life."*

13. The Apex Court has also held in the judgment reported in AIR 1986 SC 984, Smt. Savitri v. Govind Singh Rawat, that the Courts can grant interim maintenance in the proceedings under Section 488 (Section 125, Cr.P.C.), Cr.P.C. It is profitable to reproduce relevant portion of para-6 herein:

> *".....if a Civil Court can pass such interim orders on affidavits, there is no reason why a Magistrate should not rely on them for the purpose of issuing directions regarding payment of interim maintenance. The affidavit may be treated as supplying prima facie proof of the case of the applicant. If the allegations in the application or the affidavit are not true, it is always open to the person against whom such an order is made to show that the order is unsustainable. Having regard to the nature of the jurisdiction exercised by a Magistrate under Section 125 of the Code, we feel that the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to the pending final disposal of the application. In taking this view we have also taken note of the provisions of Section 7(2)(a) of the Family Courts Act, 1984 (Act No. 66 of 1984) passed recently by Parliament proposing to transfer the jurisdiction exercisable by Magistrates under Section 125 of the Code to the Family Court constituted under the said Act."*

14. While going through the said provisions of law and while keeping in view of the above discussion, I am of the considered view that Civil Court can exercise inherent powers and can grant interim compensation at any stage even though not provided by any other provision of law. It is profitable to reproduce relevant portion of para-4 of the judgment of Apex Court reported in AIR 1995 SC 350, State of Maharashtra and others v. Admane Anita Moti and Others.

> *".....Interim orders are granted by the Court as they are necessary to protect the interest of the petitioner till the rights are finally adjudicated upon. Even where it is not provided in the statute this Court has held that the Courts have inherent power to grant it....."*

15. It is also profitable to reproduce paras 9 & 10 of the Apex Court judgment reported in AIR 2004 SC 3992, Vareed Jacob v. Sosamma Geevarghese and Others, herein:

> *"9. In the case of M/s. Ram Chand and Sons Sugar Mills Pvt. Ltd. v. Kanhayalal Bhargava, reported in AIR 1966 SC 1899, it has been held by this Court that the inherent power of the Court under Section 151 C.P.C. is in addition to and complimentary to the powers expressly conferred under C.P.C., but that power will not be exercised in conflict with any of the powers expressly or by implication conferred by other provisions of C.P.C. If there is express provision covering a particular topic, then Section 151, C.P.C. cannot be applied. Therefore, Section 151, C.P.C. recognizes inherent power of the Court by virtue of its duty to do justice and which*

inherent power is in addition to and complimentary to powers conferred under C.P.C. expressly or by implication.

10. In the case of Jagjit Singh Khanna v. Rakhal Das Mullick, reported in AIR 1988 Cal. 95, it has been held that temporary injunction may be granted under Section 94(c) only if a case satisfies Order 39 Rule 1 and Rule 2. It is not correct to say that the Court has two powers, one to grant temporary injunction under Section 94 (c) and the other under Order 39 Rule 1 and Rule 2. That Section 94 (C), C.P.C. shows that the Court may grant a temporary injunction thereunder only if it is so prescribed by Rule 1 and Rule 2 of Order 39. The Court can also grant temporary injunction in exercise of its inherent powers under Section 151, but in that case, it does not grant temporary injunction under any of the powers conferred by C.P.C. but under powers inherent in the constitution of the Court, which is saved by Section 151, C.P.C."

16. In terms of the said judgments, the Civil Court can exercise inherent powers and grant interim compensation in order to do justice, save victims from social evils and just to ameliorate their sufferings.

17. Thus, I am of the considered view that Civil Court can grant interim compensation in the cases, where the claimants/plaintiffs have lost their bread earner, son or daughter due to the negligence of the defendant/s and even in the cases where the plaintiff has sustained injuries due to the negligence of the defendant/s which has rendered the plaintiff permanently disabled."

9. Keeping in view the discussion made hereinabove, we are of the considered view that the applicant/petitioners have carved out a case for grant of interim compensation. Accordingly, interim compensation to the tune of Rs.1.50 lacs, i.e. Rs.50,000/- each, is awarded in favour of the applicants/petitioners. The respondents are directed to deposit the amount of Rs.1.5 lacs within a period of six weeks from today. The application stands disposed of accordingly.

****

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

The Coordinator, HFRI .... Petitioner.

Vs.

Devi Ram .... Respondent.

CWP No. 3491 of 2009
Date of Decision: 7.1.2015.

Industrial Dispute Act, 1947- Section 25- Union of India contended that Forests Research Institute is not an industry and the Labour Court did not have jurisdiction- held, that High Court has already held in **Rakesh Kumar vs. The Forests Research Institute, 1991(1) Sim. L.C. 62** that forest research Institute constitutes an industry and the plea of petitioner is not acceptable. (Para-1 and 2)

Cases referred:

State of Gujarat and others vs. Pratamsingh Narsinh Parmar, (2001) 9 SCC 713

Rakesh Kumar vs. The Forests Research Institute, 1991(1) Sim. L.C. 62

For the petitioner: Mr. Adarsh Sharma, Advocate vice Mr. Ashok Sharma, ASGI..

For the respondents: Mr. Anand Sharma and Mr. J.P.Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, *J.(Oral):*

The Union of India is aggrieved by the award rendered by the learned Central Government Industrial Tribunal-cum-Labour Court, Chandigarh. In the impugned award before this Court the reference, as laid before the learned Central Government Industrial Tribunal-cum-Labour Court, was answered in favour of the workman and against the petitioner herein. The learned counsel appearing for the petitioner herein has submitted that the findings as recorded on Issue No. 1 by the learned Central Government Industrial Tribunal-cum-Labour Court, Chandigarh, are infirm in the face of a judgement recorded in **State of Gujarat and others vs. Pratamsingh Narsinh Parmar, *(2001) 9 SCC 713***, mandating therein that in the absence of the petitioner averring and consequentially substantiating by potent material, the factum of the respondent constituting 'an Industry', no finding in favour of the workman on issue No. 1 could have been rendered by the Central Government Industrial Tribunal-cum-Labour Court, Chandigarh, especially when in the instant case the material on record omits to demonstrate either existence of an averment in the petition laid by the petitioner before the authority aforesaid of the respondent being 'an industry' or also material in substantiation thereto having been adduced by the petitioner before the authority aforesaid who rendered the impugned award. Relevant paragraph 5 thereof is extracted hereinafter:-

> "5. If a dispute arises as to whether a particular establishment or part of it wherein an appointment has been made is an industry or not, it would be for the person concerned who claims the same to be an industry, to give positive facts for coming to the conclusion that it constitutes "an industry". Ordinarily, a department of the Government cannot be held to be an industry and rather it is a part of the sovereign function. To find out whether the respondent in the writ petition had made any assertion that with regard to the duty which he was discharging and with regard to the activities of the organisation where he had been recruited, we find that there has not been an iota of assertion to that effect though, no doubt, it has been contended that the order of dismissal is vitiated for non compliance with Section 25-F of the Act. The State in its counter affidavit, on the other hand, refuted the assertion of the respondent in the writ petition and took the positive stand that the Forest Department cannot be held to be an industry so that the provisions of Section 25-F of the Act cannot have any application. In the absence of any assertion by the petitioner in the writ petition indicating the nature of duty discharged by the petitioner as well as the job of the establishment where he had been recruited, the High Court wholly erred in law in applying the principles enunciated in the judgement of this Court in Jagannath Maruti Kondhare to hold that the Forest Department could be held to be an industry."

2. However, the said submission as addressed before this Court by the learned counsel for the petitioner, falls apart in view of the judgement relied

upon by the learned counsel for the respondent reported in **Rakesh Kumar vs. The Forests Research Institute, *1991(1) Sim. L.C. 62,*** wherein this Court on an encyclopedic and incisive research of the case law governing the factum of whether the employer/respondent fulfills the enshrined parameters for it to constitute an Industry or not, has held that the petitioner herein, who is also the respondent in the said case, while fulfilling all the essential and enshrined germane parameters for its being reckonable to be its constituting 'an industry', was, as such, held to be 'an industry'. In face thereof the findings recorded by the learned authority qua the factum of the respondent-employer being an Industry, are not interferable nor also it is hence necessary to either dwell upon or adjudicate the initial submission addressed before this Court by the learned counsel for the petitioner. Therefore, the address before this Court by the learned counsel for the petitioner anvilled upon the judgement of the Hon'ble Apex Court, is ill-founded. The learned counsel for the petitioner agitated before this Court that the reference is stale, inasmuch, as, it is belated. However, the said contention, too ought not to merit approbation by this Court in the face of it being palpably established on a reading of the impugned award that the workman had since his termination/retrenchment from service had uninterruptedly kept the dispute alive. Consequently, the industrial dispute raised and couched in the reference made to the Central Government Industrial Tribunal cannot be construed to have faded. Submission rejected. Writ petition dismissed. No costs.

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

Gulam Rasool .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 170 of 2012
Reserved on: 1.1.2015
Decided on : 8.1.2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2 Kg. 500 grams of charas – Officials witnesses deposed in harmony and consistently with each other regarding the genesis of the prosecution version- the place where proceedings were commenced was a secluded place and no independent witness could be associated- however, PW-9 who received ruqqa stated that he had received ruqqa at 8:30 P.M whereas it was mentioned in the ruqqa that it was sent from the spot at 9:00 P.M- this discrepancy would lead to an inference that proceedings relate to search, seizure and recovery were concluded at the place other than the site of the occurrence which would make the whole of the prosecution case doubtful. (Para- 9 to 10)

For the Appellant: Mr. Vinay Thakur, Advocate.

For the Respondent: Mr. M.A Khan, Additional Advocate General with Mr. P.M Negi, Dy. Advocate General and Mr. J.S Guleria, 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 21.4.2012, by the learned Special Judge, Chamba Division Chamba, Himachal Pradesh in Sessions trial No. 47 of 2010, whereby, the

learned trial Court convicted and sentenced the accused/appellant to undergo rigorous imprisonment for a period of 10 years and to pay a fine in a sum of Rs.1,00,000/- and in default of payment of fine to further undergo rigorous imprisonment for a period of one year for the commission of offence punishable under Section 20 of the NDPS Act.

2. Brief facts of the case are that on 17.10.2010 ASI Amar Nath (PW-10) alongwith other police officials HC Deva Nand (PW-1), Constable Som Prakash (PW-2), Constable Sandeep Kumar (PW-3) and SPO Jamaldeen was on patrolling towards Madhuwad, Nakrod and Dam site. They laid Naka near Pangola Nallah. At about 7.45 p.m.. the accused/appellant was noticed to be coming from village Himgiri with a bag carrying on his shoulder. On seeing the police, he tried to return back. The accused was asked to stop, however he did not stop and came to be nabbed by the police at the spot. On inquiry, he disclosed his name to be Gulam Rasul S/o Shri Fateh Mohammad alias Chunni. Since the place of occurrence was a secluded place and no independent witness was available at that odd hour, ASI Amar Nath (PW-10) and other police officials gave their personal search to the accused including the I.O kit. A memo in this behalf is comprised in Ex. PW-1/B. PW-10 informed the accused of his legal right to be searched in the presence of a Gazetted officer or a Magistrate vide memo Ex. PW-1/C, the accused opted to be searched by the police party. The bag carried by the accused was of black and blue in colour and words "solvtions Dynesty"were inscribed on it. On checking the bag, there was another green bag in it. On opening the said green bag it was found to be containing 2Kg. 500 grams charas in the shape of Batties. The recovered charas was taken into possession vide memo Ex. PW-1/D. Thereafter the contraband was put back in the same cloth bag and was sealed in a cloth parcel bearing 5 seals of seal impression 'T'. The Investigating Officer thereafter completed the codal formalities of having filled in the NCB forms, taking the specimen seals on a piece of cloth and preparing the seizure memo. PW-3 Sandeep Kumar was sent alongwith the Rukka Ex. PW-10/A for registration of an FIR to the Police Station, Tissa. One copy of Rukka was also sent to the SP Chamba through C. Som Parkash. The recovered charas was produced by the IO before the Additional SHO Mohinder Singh (PW-9), who resealed the parcel EX. P-1 with five seals of seal 'D". On 19.10.2010 the MHC Ravinder Singh (PW-8) had sent the seized contraband to the FSL, through Constable Ravinder Kumar. Report of FSL is comprised in Ex. PW-11/A. 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 was charged for his having committed offence punishable under Section 20 of the NDPS Act, by the learned trial Court to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 11 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 not to lead evidence in defence.

5. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused.

6. The accused/appellant is aggrieved by the judgment of conviction, recorded by the learned trial Court. 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. On the other hand, the learned Additional 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. Since, the official witnesses have deposed in harmony and consistency with each other qua the genesis of the prosecution version, obviously, then when they have not rendered a discrepant version qua the prosecution version, their testimonies carry probative worth and value. Consequently, when hence credence is to be imputed to their testimonies, the omission on the part of the Investigating Officer to associate independent witnesses in the proceedings relating to search, seizure and recovery is rendered insignificant and un-worthwhile, especially when PW-11 in his deposition has forthrightly deposed that the place where the proceedings were commenced and concluded was a secluded place precluding the association of independent witnesses, as such, when at the relevant time at the site of occurrence no independent witnesses were available in immediate vicinity thereof, the omission on the part of Investigating Officer to associate independent witnesses in the proceedings relating to search seizure and recovery cannot be faulted nor also it can hence be concluded that such omission renders the prosecution case to acquire the taint of partisanship or the hue of prevarication.

10. Nonetheless the significance which is to be imputed to the factum occurring in the deposition of PW-9 the person who recorded the FIR wherein he has deposed that he had received the Rukka at 8. 30 P.M. which fact occurring in his deposition belies the recital recorded in Ex. PW-10/A of it i.e. rukka having been sent from the spot at about 9 p.m. ought not to have been slighted or overlooked as untenably done by the learned trial court as it devolve upon the factum of (a) the time of preparation of rukka (b) the place where the proceedings relating to search, seizure and recovery were commenced and concluded. The learned trial Court disimputed the credibility of PW-9 qua the factum of his having received the rukka at 8.30 p.m. on the mere score that PW-3 C Sandeep Kumar, the carrier of rukka had deposed that he delivered the rukka to MHC Bachan Singh at 10.30 p.m. The testimony of PW-3 the carrier of the rukka would have acquired credibility qua the fact of his having delivered the rukka to MHC at about 10.30 p.m., only in the event of the MHC to whom it was delivered, too, in harmony thereof in his deposition deposed that PW3 had handed over the rukka to him at 10.30 p.m. However, a close and incisive reading of the testimony of MHC Bachan Singh omits to unravel as deposed by PW-3 of his having handed over to the former the rukka at about 10.30 p.m. Therefore, the mere factum of PW-3 having deposed that he had delivered the Rukka to MHC Bachan Singh at about 10.30 p.m. when has remained un-corroborated by MHC Bachan Singh cannot as such efface the truth of the testimony of PW-9 qua the fact of his having received the rukka at about 8.30 p.m. Besides, the revelation in Ex. PW-9/A of the FIR having come to be recorded at 10.30 p.m. cannot foist leverage to the fact that rukka had been received in the police station at about 10.30 p.m. nor also it can contradict the deposition of PW-9 of his having received the rukka at about 8.30 p.m. especially when the MHC to whom it was delivered by PW-3 has omitted to testify the fact of his having received from PW-3 rukka at about 10.30 p.m., moreso, when PW-9 who recorded the FIR may have consumed time since the receiving of the rukka in the police station till its contents being reduced in writing in the FIR recorded by him. Moreover an inference which is rather generated by the fact of the time of dispatch of rukka disclosed in Ex. PW-10/A to have been sent from the site of occurrence at 9.00 p.m. while having come to be belied by the deposition of PW-9, is that the proceedings relating to search, seizure and recovery were concluded at a place other than the site of occurrence.

Consequently, with a rife and blatant contradiction arising qua the time of despatch of rukka recited in PW-10/A and the testimony of PW-9 upsurges the deduction that the timing of its dispatch was invented or prevaricated to camouflage the truth qua the occurrence besides the genesis of the occurrence being prevaricated as also lends a boost and impetus to the sequel that the entire proceedings were carried out at the police station. In aftermath the entire proceedings ought to be concomitantly concluded to be invented and concocted, hence, jettison the genesis of the prosecution version qua the manner, time and place of recovery of contraband from the alleged conscious possession of the accused.

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 21.4.2012, rendered by the learned Special Judge, Chamba is set aside. The appellant/accused is acquitted of the offence charged. The fine amount, if any, deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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.

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

Sangat Ram .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 77 of 2012.
Reserved on: 31st December, 2014.
Date of Decision : 8th January, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 6.5 kg of charas- prosecution witnesses had deposed in harmony about the links in the chain of circumstances starting from the search, seizure and recovery till the report- witnesses had deposed consistently about the genesis of the occurrence- independent witness did not support the prosecution version but he had admitted his signatures on the search, seizure, arrest and personal search memo- hence, his oral evidence in derogation to the written document is barred under Sections 91 and 92 of Indian Evidence Act – defence version was not believable- held that in these circumstances, accused was rightly convicted. (Para-9 to 12)

For the Appellant: Mr. Sunil Mohan Goel, Legal Aid counsel.
For the Respondent: Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment of the learned Special Judge, Kinnaur Sessions Division at Rampur Bushahr, Himachal

Pradesh, rendered on 24th December, 2011 in NDPS Act Case No. 7 of 2011, whereby, the learned trial Court convicted the accused for his having allegedly committed an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as "NDPS Act") and sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, sentenced him to suffer simple imprisonment for one year.

2. The facts relevant to decide the instant case are that on 14.12.2010, the complainant along with H.C. Dharam Pal, Constable Surender Singh, was on patrol/traffic checking duty. When, at about 12.15 p.m., they were present at Bazeer Bawadi, a person was seen coming from Nirmand side carrying a bag on his left shoulder. On seeing the police, he became nervous/frightened and started running. He was overpowered/apprehended by the police. On inquiry he disclosed his name to be Sangat Ram. Since, his bag was required to be searched, independent witnesses, S/Sh. Jawahar Lal Neta and Revati Ram Sharma were also associated. Allegedly, at the relevant time, the bag which the accused was carrying was of black colour, having strap and handle, on which Nike was written. Before taking the search of the bag, the complainant gave his search to the accused and in this regard search memo was prepared. Allegedly, the bag contained black coloured pouch/thaili in which there was black coloured substance in round, flat and wicks form. The same appeared to be that of charas. On weighment, it was found to be 6.500 kilograms and put in the same bag which was sealed in a parcel with seal 'T' (six seals), the sample of which was taken separately on a piece of cloth. NCB form in triplicate was filled in. Seal after use was given to witness Sh. Jawahar Lal. The recovered charas was taken into possession by preparing seizure memo which was signed by the witnesses as well as the accused. Its copy was also supplied to the accused free of costs. Rukka was drawn and sent to Police Station for registration of case. Since, evidence had been found against the accused to have committed an offence under Section 20 of the NDPS Act, he was arrested and in this regard information was given to his brother, Sh. Ramesh. Site plan of the place of occurrence was also prepared and the sealed parcel containing charas was produced before the SHO, who resealed it with seal 'K' at six places, the seal impression of which was also taken separately. The complainant also prepared special report which was got sent to the SDPO, Rampur Bushahr. The parcel containing charas was sent to FSL, Junga and in this regard report was obtained according to which it was opined to be containing quantity of resin to the extent of 28.93% WW and for this reason, it was found to be the extract of charas.

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

4. Accused was charged for his having committed an offence under Section 20 of the NDPS Act by the learned trial Court. In proof of the prosecution case, the prosecution examined 10 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the Court, in which the accused claimed innocence and pleaded false implication in the case and chose to lead evidence in defence. The accused examined two defence witnesses.

5. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

6. The accused/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. The learned defence counsel has concertedly and vigorously contended that the findings of conviction recorded by the learned trial Court are not based on a proper appreciation of the evidence on

record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

7. On the other hand, the learned Assistant Advocate General 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. This Court has traversed through the entire evidence available on record. The accused is alleged to have been found in exclusive and conscious possession of 6.500 kgs of charas. 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 parcel sent to it for analysis, hence portraying proof of unbroken and un-severed links, in the entire chain of circumstances, as such, it is argued that when the prosecution case stood established, it would be legally unwise for this Court to acquit the accused. Besides when the testimonies of the official witnesses unravel the fact of their being bereft of any inter se or intra se contradictions, hence, consequently they too are contended to enjoy credibility.

10. The prosecution case gathers strength from the deposition of the official witnesses especially when they have deposed qua the genesis of the prosecution version in a consistent, uniform and harmonious manner. Consequently, their depositions acquire a hue of veracity. The Investigating Officer had associated two independent witnesses namely Jawahar Neta and Revti Nand in the proceedings relating to search, seizure and recovery. However, only one Jawahar Lal (PW-10) was examined on behalf of the prosecution to prove the recovery of the alleged contraband from the purported exclusive and conscious possession of the accused. During his examination-in-chief, he omitted to lend any support to the prosecution case, hence, he was declared hostile. However, during the course of his cross-examination by the learned Public Prosecutor, he has admitted his signatures on search memo Ex.PW10/A, seizure memo Ex.PW1/B, arrest memo Ex.PW10/B and personal search memo Ex.PW10/C. Obviously then given the fact that he has omitted to depose in his disposition that he appended his signatures thereon under compulsion or duress. As a sequel then he is bound by the recitals recorded therein. As a concomitant then his having reneged from the recitals recorded in the memos is of no consequence as it comprises oral evidence in derogation to or in detraction to the recorded contents qua search, seizure and recovery comprised in Ex. PW1/B, which oral evidence, in detraction from or in derogation to the scribed contents admitted to be signatured by the aforesaid PW- 10 (Jawahar Lal) is barred and interdicted by Sections 91 and 92 of the Indian Evidence Act. As a corollary, then it has to be emphatically concluded that his turning hostile is of no consequence, more so when a reading of the testimonies of the official witnesses omit to convey existence of any inter-se or intra-se contradictions in their respective testimonies, as such, their testimonies are both credible or inspiring and cannot be discarded or ousted. However, the accused has depended upon the testimonies of DW-1 Durga Devi and DW-2 Gopal Dutt to propagate that as a matter of fact the bag from which the alleged recovery was purportedly effected was owned by one Kewal Ram, who abandoned it in the bus stand and that it was falsely foisted/planted upon the accused. PW-11 ASI Bhagat Ram has been subjected to a lengthy and inexorable cross-examination by the defence to clothe the defence propagated by

the accused that the case property belonged to Kewal Ram and he in lieu of letting off Kewal Ram had received from him a sum of Rs. 15,000/- with veracity. Momentum and aggravation to the said propagation is concerted to be derived from the testimonies of DW-1 and DW-2. DW-1 in her deposition comprised in her examination-in-chief has deposed that at about 5.00 p.m. ASI Bhagat Ram had telephonically summoned her and her husband to the police station. In pursuance thereto she deposes that she and Gopal (DW-2) has accompanied her husband to the police station, Rampur. ASI Bhagat Ram proposed them to stay in the police station as he had accommodation available for their stay. She deposes that ASI Bhagat Ram had requested Ramesh and Gopal to go to Jhakri along with one advocate so that the said advocate could be dropped there, hence, both Ramesh and Gopal departed from the police station along with ASI Bhagat Ram, who accompanied them upto the bus stand and bid them adieu there. However, ASI Bhagat Ram returned to the police station and when he was in an inebriated condition, DW-1 deposes that he touched her face to which she objected. She also deposes that she telephoned her husband and asked him to return to the police station. However, she has proceeded to depose that when she was alone in the police station, she received a telephone call from Kewal Ram wherein he communicated to her his apology for the false implication of her brother-in-law (accused Sangat Ram) as also communicated that he was the owner of the bag from which the recovery of the contraband was effected by the police and that he had been let off by ASI Bhagat Ram on his paying a sum of Rs.15,000/- to the latter. The above deposition, though purportedly receiving corroboration from the deposition of DW-1, is in its entirety enmeshed with falsehood arising from the fact that in case her face was touched by ASI Bhagat Ram whereupon she had telephonically requested her husband to come to police station, then her husband in response thereto would have ensured his presence at the police station. However, she in her entire deposition omitted to divulge whether on hers having requested her husband, to return to the police station for undoing the misdemeanor committed upon her by ASI Bhagat Ram, he returned or not. Consequently, it appears that her face was neither touched by ASI Bhagat Ram nor she had telephonically requested her husband to return to the police station, Rampur for making ASI Bhagat Ram expiate for his misdemeanor. More so, it appears that she has concocted the fact of hers receiving a telephonic call from Kewal Ram communicating/disclosing to her that her brother-in-law i.e. accused Sangat Ram was falsely implicated by the police for his having been allegedly found in exclusive and conscious possession of contraband and as a matter of fact the said Kewal Ram was the owner of the bag from which contraband was recovered and that he was let off by ASI Bhagat Ram on his paying a sum of Rs. 15,000/- to the former, rather her story of hers receiving a telephonic call from Kewal Ram, the purported owner of the bag, who had abandoned it at the bus stand stands belied as she in her entire deposition has omitted to disclose the manner in which she acquired acquaintance with Kewal Ram, hence, she had an occasion to reveal her telephone number to him so as to facilitate the latter to have a telephonic conversation with her in the manner in which she has deposed. In sequel the defence version is ripped apart in its entirety, rather the consistent, harmonious and uniform testimonies of the official witnesses establish the prosecution case beyond all reasonable doubt, dehors the fact of PW-10 having turned hostile which fact of his reneging from his previous testimony recorded in writing stands waned by his admitting his signatures on the various memos with the concomitant effect of his being bound by the recital comprised therein. In aftermath, scope for formation of no inference other than that of the prosecution has unfailingly established the factum of recovery having been effected from the bag carried by the accused in the manner as projected by the prosecution, is left.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has appraised the entire evidence

on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of the evidence on record, rather it has aptly appreciated the material available on record.

13. Hence, the appeal is dismissed and the impugned judgment of the learned trial Court is affirmed and maintained. Records be sent back.

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

Simran Pal Singh ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Appeal No. 243 of 2012
Judgment reserved on : 26.11.2014
Date of Decision : January 8, 2015

Indian Evidence Act, 1872- Section 3- Circumstantial evidence- where there is no direct evidence of crime- guilt of the accused can be proved by circumstantial evidence- circumstances from which conclusion of guilt is to be drawn should be fully proved and must be conclusive in nature to fully connect the accused with 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- Court must adopt a cautious approach while evaluating the circumstantial evidence. (Para-19)

Indian Evidence Act, 1872- Section 106- When the accused is last seen with the victim, it becomes his duty to explain the circumstances under which victim died- last seen theory comes into play when the time gap, between the death of the deceased and last seen, is so small that the possibility of any person other than the accused being the author of the crime becomes impossible- accused was seen with the deceased in Kufri Holiday Resort and deceased was not seen thereafter- his explanation that his wife was missing was not believable as he had not informed the parents of his wife regarding her missing and had not lodged any FIR - he had further failed to explain the circumstances appearing against him which established his guilt. (Para-22 to 38)

Indian Penal Code, 1860- Section 302- Accused and his wife came to Kufri for their honeymoon- accused pushed his wife below the cliff into a deep gorge near Hasan Valley- he misinformed her family members that his wife had left at Kufri and was not traceable- a missing report was lodged by the family members of the wife- accused disclosed on inquiry that he had pushed his wife down the cliff near Kufri – accused was brought to police station, Dhalli where his statement was recorded on which FIR was registered- statement of accused was recorded under Section 27 of Indian Evidence Act that he could get dead body of his wife recovered - accused led the police party to the spot and got recovered the dead body partially eaten by wild animals- mobile phone was recovered from the possession of the accused which contained recording of the conversation between the accused and his wife- voice sample of the accused was taken and was sent to FSL- it was opined by FSL that voice sample tallied with the voice in the mobile phone- prosecution witness admitted that upon being questioned by police officials from Firozpur rather strictly accused informed that while coming from Kufri he pushed his wife- he clarified that term strictly means Dabka (sternly)- held, that no pressure was put on the accused - attitude of sternness is not pressure- accused had told at Panckhula that he had pushed his wife down the cliff - subsequently, he told that he was not aware of name of the place where he had pushed his wife down the cliff yet he could get her dead body recovered by identifying the place- this kind of statement was not made by him

earlier- hence, disclosure statement could not be doubted on the ground that police was aware of the place from where recovery was effected subsequently. (Para-39 to 58)

Cases referred:

Shivaji Sahabrao Bobade & another vs. State of Maharashtra, (1973) 2 SCC 793
Bodhraj alias Bodha & others vs. State of Jammu and Kashmir, (2002) 8 SCC 45
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
Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172
Trimukh Maroti Kiran versus State of Maharashtra, (2006) 10 SCC 681
Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43
Ashok Kumar Chatterjee vs. State of M.P., 1989 Supp. (1) SCC 560
Balwinder Singh vs. State of Punjab, (1987) 1 SCC 1
State of U.P. vs. Sukhbasi, 1985 Supp. SCC 79
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Earabhadrappa vs. State of Karnataka, (1983) 2 SCC 330;
Hukam Singh vs. State of Rajasthan, (1977) 2 SCC 99
Eradu vs. State of Hyderabad, AIR 1956 SC 316
Sujit Biswas vs. State of Assam, (2013) 12 SCC 406
Hanumant Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343
Dharam Deo Yadav v. State of Uttar Pradesh, (2014) 5 SCC 509
Ravirala Laxmaiah vs. State of Andhra Pradesh, (2013) 9 SCC 283
Nika Ram vs. State of H.P., (1972) 2 SCC 80
Ganeshlal vs. State of Maharashtra, (1992) 3 SCC 106
Krishnan alias Ramasamy & others, vs. State of Tamil Nadu, AIR 2014 SC 2548
Harivadan Babubhai Patel vs. State of Gujarat, (2013) 7 SCC 45
Rohtash Kumar vs. State of Haryana, (2013) 14 SCC 434
Anthony D'Souza & others vs. State of Karnataka, (2003) 1 SCC 259
State of Maharashtra vs. Suresh, (2000) 1 SCC 471
Swapan Patra vs. State of W.B. (1999) 9 SCC 242
Raj Kumar v. State of Madhya Pradesh, (2014) 5 SCC 353
Pulukuri Kottaya and others v. Emperor, AIR (34) 1947 Privy Council 67
Mohmed Inayatulla vs. The State of Maharashtra, 1976 SCC (Cri) 199
Shanti Devi vs. State of Rajasthan, (2012) 12 SCC 158
Rang Bahadur Singh and others vs. State of U.P., AIR 2000 SC 1209
Ujjagar Singh vs. State of Punjab, (2007) 13 SCC 90
Sanaullah Khan vs. State of Bihar, (2013) 3 SCC 52
R.M. Malkani vs. State of Maharashtra, AIR 1973 SC 157
Nilesh Dinkar Paradkar vs. State of Maharashtra, (2011) 4 SCC 143
C. Perumal vs. Rajasekaran & others, 2012 Cr. L.J. 3491
Ishwar Pandurang Masram vs. State of Maharashtra, 2013 Cri. L. J. 3597
State of Orissa vs. Babaji Charan Mohanty & another, (2003) 10 SCC 57
Prabhoo vs. State of Uttar Pradesh, AIR 1963 SC 1113
Jaffer Husain Dastagir vs. The State of Maharashtra, AIR 1970 SC 1934
Kora Ghasi vs. State of Orissa, (1983) 2 SCC 251
Budh Ram vs. State of Himachal Pradesh, Latest HLJ 2010 (HP) 58
Koli Trikam Jivraj & another vs. The State of Gujarat, AIR 1969 Gujarat 69
State of U.P. v. Ramesh Prasad Misra, [(1996) 10 SCC 360: AIR 1996 SC 2766
C. Muniappan vs. State of Tamil Nadu, (2010) 9 SCC 567: AIR 2010 SC 3718
Himanshu @ Chintu v. State (NCT of Delhi), (2011) 2 SCC 36
Ramesh Harijan vs. State of U.P., (2012) 5 SCC 777: AIR 2012 SC 1979

Pradeep Narayan Madgaonkar vs. State of Maharashtra, (1995) 4 SCC 255
Paras Ram v. State of Haryana, (1992) 4 SCC 662: AIR 1993 SC 1212
Balbir Singh v. State (1996) 11 SCC 139
Kalpnath Rai v. State (Through CBI) (1997) 8 SCC 732: AIR 1998 SC 201
M.Prabhulal v. Directorate of Revenue Intelligence (2003) 8 SCC 449
Ravindran v. Superintendent of Customs (2007) 6 SCC 410: AIR 2007 SC 2040

For the appellant : Mr. B. S. Slathia, Sr. Advocate with Mr. Vinay Thakur and Mr. Nitin Gupta, Advocates, for the appellant.
For the respondent : Mr. B. S. Parmar, Mr. Ashok Chaudhary and Mr. V.S. Chauhan, Addl. Advocate Generals with Mr. Vikram Thakur, Dy. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Assailing the judgment dated 24.5.2012, passed by learned Addl. Sessions Judge, Fast Track Court, Shimla, H.P., in Sessions Trial No. 14-S/7 of 2010, titled as State of H.P. vs. Simran Pal Singh, whereby appellant-accused stands convicted and sentenced to undergo imprisonment for life in relation to an offence punishable under the provisions of Section 302 of the Indian Penal Code, 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 17.1.2010 accused Simran Pal Singh son of Rachpal Singh (PW-5) got married to Simarjit Kaur (deceased) daughter of Harnek Singh (PW-1). The couple decided to visit Shimla for their honeymoon. Accused borrowed a car from his friend Pankaj Sethi (PW-32) at Panchkula (Haryana) and came to Shimla. On 21.2.2010 they checked in at Kufri Holiday Resorts, Kufri, District Shimla (H.P.). During their stay there, they spoke with their respective parents. Last such conversation took place on 22.2.2010. Same day, at 4.00 p.m. accused also spoke with Ranjit Singh (PW-4), brother of the deceased and informed that they were returning to Panchkula from Kufri. He also informed Rachpal Singh about the same. However, on return from Kufri, just before Shimla, accused stopped the car near Hasan Valley and with an intent of murdering, pushed the deceased below the cliff into a deep gorge. Motive being, his suspicion of deceased having illicit relationship with her father-in-law. Thereafter accused came and checked in at hotel Gulmarg Regency in Shimla and the following morning i.e. 23.2.2010 left for Panchkula, where he met his friend Pankaj Sethi and also sought legal opinion from a lawyer. In the night of 22.2.2010 and morning of 23.2.2010, Harnek Singh, without any success, tried to contact his daughter on telephone. On 24.2.2010/ 25.2.2010 accused met his father Rachpal Singh at Panchkula/Mohali (Twin Cities on the periphery of Chandigarh) and misinformed that the deceased had left him at Kufri, as she had desired to take a long walk, since when she was not traceable. On 26.2.2010, Rachpal Singh informed Harnek Singh that both the accused and the deceased were well. All along accused remained in Panchkula. Since Harnek Singh was not able to contact his daughter, on 27.2.2010, he alongwith Rachpal Singh came to Chandigarh to meet the deceased whose whereabouts were still not known to him. Even then accused maintained stoic silence. Since deceased was not traceable, on 28.2.2010 Rachpal Singh lodged missing reports (Ext.PW-5/A and Ex.PW-5/B) at Police Station, Sadar, Ferozepur (Punjab). For investigation,

police officials HC-Gurcharan Singh (PW29), ASI Rakesh Kumar (PW-36) and HC-Jaspal Singh (PW-28) visited Panchkula and questioned the accused. Eventually on 1.3.2010, accused disclosed to ASI Rakesh Kumar that he had killed his wife by pushing her down the cliff somewhere near Kufri, which

information was passed on to officials of Police Station Dhalli (H.P.). ASI-Sapinder Singh (PW-39) Police Station, Dhalli, recorded such fact in the roznamcha register (Ext.PW-9/A) and informed his higher authorities. Inspector Balbir Singh (PW-40), S.H.O. Police Station Dhalli, deputed ASI Bhup Singh (PW-38) to take necessary action. Police officials visited Panchkula and in the early hours of morning of 2.3.2010, ASI Bhup Singh (PW-38) brought the accused to Police Station, Dhalli, where Harnek Singh (PW-1) got his statement recorded under Section 154 Cr.P.C. (Ext. PW-1/A), on the basis of which F.I.R. No. 41 of 2010, dated 2.3.2010 (Ext. PW-40/A) was registered against the accused under the provisions of Section 302 of the Indian Penal Code. Accused, who was arrested, in the presence of Harnek Singh, Atma Singh (PW-2), Ranjit Singh (PW-4) and Ravinder Singh (PW-3) made a disclosure statement (Ex. PW-1/B), under the provisions of Section 27 of the Indian Evidence Act to the effect that near Kufri, between Green Valley and Hasan Valley, he had thrown the body of the deceased into a gorge. He then led the police to the spot and got recovered from the jungle, dead body, partially eaten by wild animals, so identified to be the deceased by Harnek Singh, vide Memo (Ex. PW-1/D). Constable Lokender Singh (PW-22) took photographs of the spot (Ex. PW-22/1-A to 22/A-9), which also was demarcated by Patwari Vijay Singh (PW-12), who prepared tatima (Ex. PW-12/A). From the spot, dupatta (Ex.P-2) and other incriminating articles belonging to the deceased were also recovered. Inquest reports (Ext.PW-25/A and 25/B) were prepared and vide application (Ext. PW-25/A) dead body was sent for post mortem which was conducted by a Board and Dr. Piyush Kapila, on the basis of report (Ex. PW-23/A) of the chemical examiner, issued final post mortem report (Ex. PW-25/E), opining that deceased died on account of head injury. Thereafter, dead body was handed over to Harnek Singh (PW-1) for performance of last rites.

From the custody of accused 14 articles/items were recovered vide memo Ext. PW-1/C, dated 2.3.2010, including his mobile phone (Samsung) (Ex.P-3), SIM card (Ex. P-4), which were deposited with the MHC. Investigation further revealed that immediately prior to the incident, in his Cell Phone, accused had recorded conversation which he had had with his wife. Accordingly, after obtaining his consent (Ex. PW-27/A), voice sample of the accused was taken vide memo (Ex. PW-27/B). ASI Sapinder Singh (PW-39) and HC Kuldeep Singh (PW-34) prepared two transcripts (Ex. PW-39/B and 39/C) of the voice recorded conversations. Mobile Phone and the recorded voice sample, was also sent through constable Manish Mehta (PW-17), for analysis to the Central Forensic Science Laboratory, Chandigarh, vide Road Certificate dated 18.3.2010, which stood deposited there. As per opinion of the Expert (Ex. PW-37/A), the questioned voice sample, in all probability, matched with the voice so recorded in the Mobile Phone. Also, during investigation, police took into possession records of the hotels, where accused had spent the night of 21st and 22nd February, 2010. After obtaining his sample handwriting (S-1 to S-12 - Ex. PW-11/C-1 to 11/C-12), record was sent for opinion of an Expert and as per Dr. Minakshi Mahajan (PW-11), questioned documents (Q-1 to Q-12 - Ex. PW-11/D-1 to 11/D-12) bore the signatures of the accused. With the completion of investigation, which revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 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 40 witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was recorded. Though initially, accused chose to lead evidence in his defence, but despite opportunity afforded, he did not do so.

5. Despite witnesses Rachpal Singh and Pankaj Sethi not supporting the prosecution, trial Court found the prosecution to have proved the guilt of the accused, beyond reasonable doubt. Thus, based on the testimonies of witnesses and the material on record, trial Court convicted the accused of an offence punishable under the provisions of Section 302 of the Indian Penal Code and sentenced him to undergo imprisonment for life, not to be released from prison, till the end of his life. Hence the present appeal.

6. Assailing the judgment, Mr. B.S. Slathia, Senior Advocate, ably assisted by Mr. Vinay Thakur and Mr. Nitin Gupta, Advocates, has made the following submissions: (i) Court below erred in relying upon disclosure statement (Ex. PW-1/B) of the accused. Recovery of dead body was not as a result of or pursuant to such statement, for police was already aware of the place from where the accused had pushed his wife. Such information furnished to the police officials at Panchkula stood communicated to the officials of Police Station, Dhalli; in any event, such disclosure statement is involuntary in nature, for even according to prosecution witnesses, police used force (Dabka). There were no telltale signs on the spot of crime and dead body so recovered was not that of the deceased; (ii) Mobile phone so recovered from the accused, was not sealed by the police on 2.3.2010; in the memo of personal search (Ex. PW-1/C), there is no mention of seizure of memory card of the mobile, which was sealed only on 9.3.2010, hence possibility of tampering of evidence by police officials cannot be ruled out. In the seizure memo (Ex. PW-1/C) as also malkhana register (Ex. PW-19/B-1), there is no mention of Memory Card, which was recovered only on 7.3.2010, as is evident from Ex.PW-19/A. Hence, in the absence of seizure of memory card, exhibiting motive, transcript is inadmissible in evidence. Sample voice recording of the accused is inadmissible, in view of provisions of Sections 24, 25 of the Indian Evidence Act; out of seven recorded conversations, for unexplainable reasons, police got prepared transcript of only two conversations, thus concealing/withholding material piece of evidence; transcript was not prepared by the very same person, who heard the conversation. Also possibility of error cannot be ruled out. Thus, the transcribed version of alleged recorded conversation cannot be relied upon as a piece of evidence; in any event, circumstance, material in nature, of recovery of memory card, not put to the accused in his statement under the provisions of Section 313 of the Code of Criminal Procedure, cannot be used against him; (iii) Notwithstanding the fact that in the night of 22.2.2010 accused stayed alone at a hotel in Shimla, his conduct vis-â-vis last seen theory is irrelevant and not a circumstance to be considered for determination of guilt of the accused; (iv) testimony of an Expert, i.e. Dr. Piyush Kapila (PW-25) stands contradicted and thus discredited by her own report (Ex. PW-25/D); evidence of expert does not establish the deceased to have died on 22.2.2010; (v) No conviction can be based on admission made by the accused in his statement made under the provisions of Section 313 of the Code of Criminal Procedure; (vi) motive as stated in the proceedings under the provisions of Section 173 (Challan) has not been proved on record. Absence thereof automatically entitles the accused for an acquittal.

7. On the other hand Mr. Ashok Chaudhary, learned Additional Advocate General, has supported the judgment for the reasons set out therein. He has minutely taken us through the testimonies of the witnesses and other incriminating material on record.

8. We have extensively heard learned counsel appearing on both sides, perused the record and gone through various decisions cited during the course of hearing.

9. Conviction of the accused is based on the following circumstances, culled out by the trial Court: "(1) disclosure statement of accused with postmortem report indicates it to be case of homicide; (2) the accused and the deceased having been together soon before the incident; (3)

existence of a motive; (4) conversation in the SIM card of accused mobile phone with his wife; (5) unnatural behavior of the accused soon after the incident."

10. We now proceed to discuss each of the circumstances, which we find are material and relevant, against the accused.

I. Relationship between the parties

11. Fact that the accused was married to Simarjit Kaur (deceased) on 17.1.2010, as per Sikh Customary rites is not in dispute.

II. Honeymoon trip to Kufri

12. Fact that the accused came to Shimla Hills on a honeymoon trip with his wife Simarjit Kaur is not disputed by the accused. Since the evening of 22.2.2010, Simarjit Kaur was found missing is also not disputed by him.

III. Cause and time of Death

13. In the instant case a board was constituted for conducting the postmortem of dead body of Smt. Simarjeet Kaur. Dr. Piyush Kapila (PW-25) being one of its members, has opined that death occurred within one hour of the deceased sustaining injuries. As per report, deceased died about eight days prior to the date of postmortem, which was so done on 2.3.2010, which means that decessed died almost at the same time she was found missing or had left Kufri for a walk. Doctors found the body to have solidified due to extreme cold. Hypostasis was present. Rigor mortis was absent and there was no presence of putrification. As per final opinion (Ext. PW-25/E), witness opined that "it is not possible to opine about exact cause of death in absence of neck tissues, however, taking into consideration about trauma to head and chest in our opinion head injury is most probable cause of death".

14. We do not agree with the submission so made on behalf of the accused, that medical evidence is contradictory and mutually destructive. Absence of rigor mortis and putrification, upon which much emphasis is laid, can be on account of existence of extreme cold, almost freezing like conditions, prevalent at the place and time of the incident. According to the doctor, death was almost instantaneous. The body was lying deep in the jungle, for almost eight days in the month of February, when normally Kufri/Shimla and its surrounding areas are covered with snow.

IV. Circumstance of Last Seen and Conduct of the Accused

15. Admittedly there is no eye-witness to the alleged incident in relation to which accused stands convicted. Prosecution case primarily rests upon circumstantial evidence. The law on circumstantial evidence is now very well settled. To base a conviction on circumstantial evidence, prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events, as would permit no conclusion other than the one of guilt of the accused. Circumstances to be proved have to be beyond reasonable doubt and not based on principle of preponderance of probability. Suspicion, howsoever, grave, cannot be a substitute for a proof and courts should take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. In the instant case, circumstance of last seen and conduct of the accused is heavily relied upon by the prosecutors. Before we deal with the factual matrix, with profit, we discuss the law on the point.

Meaning of beyond reasonable doubt

16. 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 break 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]

Law on Circumstantial Evidence

17. In ***Bodhraj alias Bodha & others vs. State of Jammu and Kashmir, (2002) 8 SCC 45***, Hon'ble the Supreme Court of India held that:-

"9. Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed. ....."

10. .....In *Bhagat Ram v. State of Punjab* [AIR 1954 SC 621], it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt." (Emphasis supplied)

18. Also it is a settled proposition of law that when there is no direct evidence of crime, guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which 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 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, 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***; ***Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172***; *T****rimukh Maroti Kiran versus State of Maharashtra, (2006) 10 SCC 681***; ***Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43***; ***Ashok Kumar Chatterjee vs. State of M.P., 1989 Supp. (1) SCC 560***; ***Balwinder Singh vs. State of Punjab, (1987) 1 SCC 1***; ***State of U.P. vs. Sukhbasi, 1985 Supp. SCC 79***; ***Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116***; ***Earabhadrappa vs. State of Karnataka, (1983) 2 SCC 330; Hukam Singh vs. State of Rajasthan, (1977) 2 SCC 99***; and ***Eradu vs. State of Hyderabad, AIR 1956 SC 316***]

19. In ***Sujit Biswas vs. State of Assam, (2013) 12 SCC 406***, Hon'ble the Supreme Court of India held that:-

> "13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. [Vide: Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, (2011) 3 SCC 109: AIR 2011 SC 1017; and Ramesh Harijan vs. State of U.P., (2012) 5 SCC 777].
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> 14. In Kali Ram vs. State of Himachal Pradesh, (1973) 2 SCC 808: AIR 1973 SC 2773, this Court observed as under:
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> > "25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence.""

20. Relying upon its earlier decision in ***Hanumant Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343***, Hon'ble the Supreme Court of India in ***Dharam Deo Yadav v. State of Uttar Pradesh, (2014) 5 SCC 509***, again reiterated that:

> "15. .... Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eye-witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, the accused may be convicted on the basis of such circumstantial evidence."

Law on Last Seen Theory and Conduct of the Accused

21. Hon'ble the Supreme Court of India in ***Ravirala Laxmaiah vs. State of Andhra Pradesh, (2013) 9 SCC 283***, after taking note of its earlier decisions rendered in ***Nika Ram vs. State of H.P., (1972) 2 SCC 80***; ***Ganeshlal vs. State of Maharashtra, (1992) 3 SCC 106*** and ***Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681*** reiterated the principle that where accused is last seen with the victim, it becomes his duty to explain the circumstances under which the victim died. It is a strong circumstance indicative of the fact that he is responsible for the crime.

22. Hon'ble the Supreme Court of India in ***Dharam Deo Yadav vs. State of Uttar Pradesh, (2014) 5 SCC 509*** has further held that:-

> "19. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. Reference may be made to the judgment of this Court in *Sahadevan vs. State,* (2003) 1 SCC 534."
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> (Emphasis supplied)

23. In ***Krishnan alias Ramasamy & others, vs. State of Tamil Nadu, AIR 2014 SC 2548***; and ***Harivadan Babubhai Patel vs. State of Gujarat, (2013) 7 SCC 45***, the principle stands reiterated.

24. Significantly, in ***Rohtash Kumar vs. State of Haryana, (2013) 14 SCC 434***, Hon'ble the Supreme Court of India has held that:-

> "34. Thus, the doctrine of "last seen together" shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation

in this regard, would give rise to a very strong presumption against him."
(Emphasis supplied)

25. Thus, last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased died or is found dead, is so small that possibility of any person, other than the accused, being the author of crime becomes impossible. The burden would immediately shift upon the accused.

Factual matrix on the circumstance of Last Seen and Conduct

26. Ms Yogita Verma (PW-8) has proved on record extract of the register (Ex.PW-8/A) and the Bill (Ex.PW-8/B), issued by Kufri Holiday Resorts, the place where the couple spent the night. Signatures of the accused are there on both these documents. Witness has testified to such effect. Evidently, accused checked in the hotel on 21.2.2010 and checked out on 22.2.2010 at about 12.40 p.m. Constable Deepak Kumar (PW-20) has testified having taken on record documents, including bills (Ex. PW-8/B and 8/D) for purchase of food by the accused from the hotel.

27. On an application moved by the Investigating Officer Balbir Singh, in the presence of Chief Judicial Magistrate, Shimla, specimen signatures of the accused were obtained, which were sent for comparison with the signatures recorded on the aforesaid documents and from the testimony of Dr. Meenakshi (PW-11), Assistant Director (Documents and Photography), Forensic Science Laboratory, Junga, who proved on record report (Ex. PW-11/A), signatures are testified to be that of the accused. There was no reason for the accused to have disputed his signatures on these documents, for it is his own case that at Kufri, he stayed in a hotel. Which hotel? He did not disclose. Which fact stands established, beyond reasonable doubt, by the prosecution.

28. In his statement so recorded, under Section 313 of the Code of Criminal Procedure, accused has taken the following defence:

> "I am innocent. On 22.2.2010 I alongwith my wife checked out from hotel at Kufri and went to different spots at Kufri. I was in mood to go to Shimla, whereas, my wife was insisting to stay at Kufri. At about 7.30 PM, she told me that she was going out for a walk. I remained in the hotel. My wife did not return back, thereafter, I tried to locate my wife at Kufri myself and with the help of hotel employees. I also contacted with my friends at Chandigarh and then came to Shimla. I stayed at Shimla and on 23.2.2010, I went to Chandigarh. I contacted my friends and lawyers friend at Chandigarh. I was confused and perplexed due to this incident so, I did not think it proper to contact my relatives at that time. My father met me at Chandigarh on 25.2.2010 and at that time, I told him that I am trying to locate my wife with the help of my friends. I had good/cordial relations with my wife. I am roped in a false."

29. Prima facie, defence taken by the accused appears to be false. Evidently, he checked out of the hotel at 12.40 p.m. Where did he go thereafter, has not been explained by him. It is not his case that the couple returned to the hotel and stayed there till 7 p.m. Accused had already decided to leave Kufri during the day. Thus, there is no question of his being in the hotel till 7 p.m. or the deceased leaving for a long walk and that too alone. He has not disclosed the names of the employees of the hotel, his friends or the Advocate.

30. Accused in his statement so recorded under Section 313 Cr. P.C. admits that after 22nd February, 2010, neither he, nor the deceased had any conversation with Harnek Singh; on 25th February, 2010, his father met him in the house of his friend at Mohali, where he disclosed that the deceased had left him for taking a long walk and that he could not find her. [Questions No. 8, 11 and 12]

31 Significantly, Rachpal Singh (PW-5), father of the accused, also admits of being informed by the accused that on 22.2.2010 deceased left for a long walk and since then she was untraceable. Also, in his uncontroverted testimony, witness admits that on 25.2.2010, when he met his son at Panchkula, one Advocate by the name of Mr. Dinesh was with him. His request and offer of searching the deceased stood declined by the accused for the reason that it was not necessary for him to do so. Accused chose to himself trace the deceased. Thus, evidently, just three days after occurrence of the incident, accused was seeking legal assistance. The question is, why would a newly married husband do this? For he did not suspect any foul play. Intriguingly, accused left his wife alone at Kufri and without lodging any complaint or reporting the factum of her absence to anyone, not even staff of the hotel, he coolly came to Shimla and checked into a private hotel for spending the night. Viju Sharma (PW-6) has placed on record extract of register (Ex. PW-6/B), taken into possession by the police vide memo (Ex. PW-6/C), recording entry of such stay in the night of 22.2.2010 at Hotel Gulmarg Regency, Shimla. Testimony of Bal Krishan (PW-7) and HC-Daljit Singh (PW-18) is also evidently clear to this effect. Record reveals that accused checked into this hotel at 11.45 p.m. and checked out the following morning, i.e. 23.2.2010 at 10.00 a.m. Even in Shimla accused did not make any endeavour of tracing his wife. Why so? has not been explained. No complaint was lodged with any person.

32. Harnek Singh (PW-1) states that accused lastly spoke with him on 22.2.2010 at 4 p.m. Even Rachpal Singh (PW-5) admits to have spoken with the accused and the deceased same day at 7 p.m. At that time, couple was still at Kufri. Significantly, thereafter, though accused sought legal opinion, but made no endeavour of contacting either his father or father-in-law. Rachpal Singh was in constant touch with Harnek Singh and only when he failed to establish any contact either with the accused or the deceased, on 24.2.2010 he came to Chandigarh and met the accused on 25.2.2010. Why is it that prior thereto, accused did not inform his parents about the missing of his wife. Not only that, even at Panchkula or Ferozpur accused did not lodge any missing report. Significantly, it was his father Rachpal Singh (PW-5) who informed Harnek Singh (PW-1) about the same on 27.2.2010 and only thereafter such reports came to be lodged at Police Station, Ferozpur and that too, not by him but his father. HC-Gurcharan Singh (PW-29), ASI Rakesh Kumar (PW-36) and HC-Jaspal Singh (PW-28), police officials of Police Station, Ferozepur, have testified lodging of two complaints, dated 28.2.2010 (Ex. PW-5/A and 5/B).

33. After all couple was young, newly married and neither of them knew anyone in Kufri or in Shimla. Also, deceased was unfamiliar with the place, its topography and terrain. Why is that he did not stop his wife from going alone for a walk? And that too in a cold wintry dark night. What all he did after his wife went for a walk in the evening (7'O Clock) has not been explained by him. Why is it that accused came to Shimla and checked into a hotel? Significantly, in the month of February, days are not long and Kufri is only a small hamlet. It is neither a city nor a town having big bazaar. Why would he allow his wife, and that too alone, to step-out out of the hotel in darkness, remains unexplained. It is not the case of the accused that despite his resistance, deceased stepped out of the hotel against his wishes. Judicial notice can be taken of the fact that Kufri is at a distance of 16 k.m. from Shimla and Kufri Resorts is 2 k.m. further ahead, on the road to Chail. Hassan Valley and Green Valley are places which fall midway between Kufri and Shimla. Even if a native was to walk from Kufri Resorts, in a cold and dark wintry evening, it would take minimum of one hour to reach the place from where dead body was recovered. Thus, from the testimony of prosecution witnesses, we find the prosecution to have established the fact that immediately prior to the occurrence of incident/death, only deceased was in the company of the accused. He misled and misinformed his father and also refused his help. Thus, conduct of the

accused in the instant case is another circumstance, which stands proved by the prosecution against him.

Failure to explain incriminating material u/s 313 Cr.P.C.

34. In a case of circumstantial evidence, where no eyewitness account is available, when an incriminating circumstance is put to the accused and the said accused either offers no explanation for the same, or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. False answers given by the accused in Section 313 Cr.P.C. statement may offer an additional link in the chain of circumstances to complete the chain. [See: ***Dharam Deo Yadav vs. State of Uttar Pradesh, (2014) 5 SCC 509***; ***Harivadan Babudhai Patel vs. State of Gujarat, (2013) 7 SCC 45***; and ***Rohtash Kumar vs. State of Haryana, (2013) 14 SCC 434***; ***Anthony D'Souza & others vs. State of Karnataka, (2003) 1 SCC 259***; ***State of Maharashtra vs. Suresh, (2000) 1 SCC 471*** and ***Swapan Patra vs. State of W.B. (1999) 9 SCC 242***].

35. In ***Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116***, Hon'ble the Supreme Court of India has held that before a false explanation can be used as additional link, Court must be satisfied that various links in the chain of evidence led by the prosecution have been satisfactorily proved; the said circumstance points to the guilt of the accused with reasonable definiteness; and the circumstance is in proximity to the time and situation.

36. In ***Raj Kumar v. State of Madhya Pradesh, (2014) 5 SCC 353***, Hon'ble the Supreme Court of India, held as under:-

> "22. The accused has a duty to furnish an explanation in his statement under Section 313 Cr.P.C. regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 Cr.P.C. is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. [Vide: Ramnaresh vs. State of Chhattisgarh, (2012) 4 SCC 257; Munish Mubar vs. State of Haryana, (2012) 10 SCC 464: AIR 2013 SC 912; and Raj Kumar Singh vs. State of Rajasthan, (2013) 5 SCC 722.]
>
> 23. In the instant case, as the appellant did not take any defence or furnish any explanation as to any of the incriminating material placed by the trial court, the courts below have rightly drawn an adverse inference against him. The appellant has not denied his presence in the house on that night. When the children were left in the custody of the appellant, he was bound to explain as under what circumstances Gounjhi died.
>
> 24. In Prithipal Singh vs. State of Punjab, (2012) 1 SCC 10, this Court relying on its earlier judgment in State of W.B. vs. Mir Mohammad Omar, (2000) 8 SCC 382, held as under:
>
> > "53..... if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special

> knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused." (Emphasis supplied)
>
> [See also: Neel Kumar vs. State of Haryana, (2012) 5 SCC 766; and Gian Chand vs. State of Haryana, (2013) 14 SCC 420]"

37. Thus prosecution having discharged its onus, it was incumbent upon the accused to have come forward and explained the circumstances leading to the death of his wife, as is so required by law. Whom all did accused meet between 23rd and 25th of February has not been explained by him. Where all did he stay and what all did he do has also not been explained. His stoic silence till the time his father contacted him, and thereafter refusing his help for searching the deceased, is only indicative of his conduct and guilt.

V. Circumstance of disclosure statement of the accused also leading to recovery of dead body at his instance.

38. Before discussing the factual aspect, we refer to the law on the point.

39. Sections 25, 26 and 27 of the Indian Evidence Act read as under:

> "25. Confession to police officer not to be proved.
>
> No confession made to a police officer, shall be proved as against a person accused of any offence.
>
> 26. Confession by accused while in custody of police not to be proved against him.
>
> No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.
>
> 27. How much of information received from accused may be proved.
>
> Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.**"**

40. It be observed the principle of law as laid down in ***Pulukuri Kottaya and others v. Emperor, AIR (34) 1947 Privy Council 67***, which is reproduced herein under, has been consistently followed by Hon'ble the Supreme Court of India.

> "[10] … … On normal principles of construction their Lordships think that the proviso to S. 26, added by S. 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if

the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

(Emphasis supplied)

41. In ***Bodhraj alias Bodha & others vs. State of Jammu and Kashmir, (2002) 8 SCC 45***, Hon'ble Supreme Court of India, held as under:-

"18. Emphasis was laid as a circumstance on recovery of weapon of assault, on the basis of information given by the accused while in custody. The question is whether the evidence relating to recovery is sufficient to fasten guilt on the accused. Section 27 of the Indian Evidence Act, 1872 (in short 'the Evidence Act') is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. This position was succinctly dealt with by this Court in *Delhi Admn. vs. Bal Krishan,* (1972) 4 SCC 659: AIR 1972 SC 3 and *Mohd. Inayatullah vs. State of Maharashtra,* (1976) 1 SCC 828: AIR 1976 SC 483. The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The ban as imposed by the preceding sections was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequences of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is

true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in *Pulukuri Kotayya v. Emperor* (AIR 1947 PC 67), is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. [See: *State of Maharashtra v. Danu Gopinath Shinde,* (2000) 6 SCC 269]. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given." (Emphasis supplied)

42. In ***Harivadan Babubhai Patel vs. State of Gujarat, (2013) 7 SCC 45***, Hon'ble Supreme Court of India, held that:-

"17. In this context, we may usefully refer to A.N. Venkatesh and another v. State of Karnataka [(2005) 7 SCC 714] wherein it has been ruled that:

> "By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer the place where the dead body of the kidnapped boy was found ... would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act or not. ..."

In the said decision, reliance was placed on the principle laid down in Prakash Chand v. State (Delhi Admin) [(1979) 3 SCC 90: AIR 1979 SC 400]. It is worth noting that in the said case, there was material on record that the accused had taken the Investigating Officer to the spot and pointed out the place where the dead body was buried and this Court treated the same as admissible piece of evidence under Section 8 as the conduct of the accused.

18. In State of Maharashtra v. Damu [(2000) 6 SCC 269], it has been held as follows: -

> "35. ... It is now well settled that recovery of an object is not discovery of a fact as envisaged in Section 27 of the Evidence Act, 1872. The decision of the Privy Council in Pulukuri Kottaya v. King Emperor [AIR 1947 PC 67] is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

19. The same principle has been laid down in State of Maharashtra v. Suresh [(2000) 1 SCC 471], State of Punjab v. Gurnam Kaur and others [(2009) 11 SCC 225], Aftab Ahmad Anasari v. State of Uttaranchal [(2010) 2 SCC 583], Bhagwan Dass v. State (NCT) of Delhi [(2011) 6 SCC 396: AIR 2011 SC 1863], Manu Sharma v. State [(2010) 6 SCC 1: AIR

2010 SC 2352] and Rumi Bora Dutta v. State of Assam [(2013) 7 SCC 417]."

43. In ***Mohmed Inayatulla vs. The State of Maharashtra, 1976 SCC (Cri) 199***, Hon'ble Supreme Court of India, held that:-

"12. The expression "Provided that" together with the phrase "whether it amounts to a confession or not" shows that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Sec. 24, also. It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to that fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably" "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly" relates "to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.

13. At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact [See: Sukhan v. Crown, ILR 10 Lah 283 (FB): AIR 1929 Lah 344; Rex vs. Ganee, ILR 56 Bom 172: AIR 1932 Bom 286.] Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this [See Palukuri Kotayya v. Emperor, AIR 1947 PC 67; Udai Bhan v. State of Uttar Pradesh, 1962 Supp (2) SCR 830: AIR 1962 SC 1116]."

(Emphasis supplied)

44. In ***Dharam Deo Yadav v. State of Uttar Pradesh, (2014) 5 SCC 509***, the Hon'ble Supreme Court of India, held that:

"22. The expression "custody" which appears in Section 27 does not mean formal custody, which includes any kind of surveillance, restriction or restraint by the police. Even if the accused was not formally arrested at the time when the accused gave the information, the accused was, for all practical purposes, in the custody of the police. This Court in *State of A.P. vs. Gangula Satya Murthy,* (1997) 1 SCC 272 held that if the accused is within the ken of surveillance of the police during which his movements are restricted, then it can be regarded as custodial surveillance. Consequently, so much of information given by the accused in "custody", in consequence of which a fact is discovered, is admissible in evidence, whether such information amounts to a confession or not. Reference may also be made to the judgment of this Court in *A. N.*

Venkatesh vs. State of Karnataka, (2005) 7 SCC 714. In *Sandeep vs. State of U.P.,* (2012) 6 SCC 107, this Court held that:

> "52. … It is quite common that based on admissible portion of the statement of the accused whenever and wherever recoveries are made, the same are admissible in evidence and it is for the accused in those situations to explain to the satisfaction of the court as to the nature of recoveries and as to how they came into possession or for planting the same at the places from where they were recovered." "

45. Recovery of dead body of the deceased at the instance of the convict can be taken as a strong circumstance against him. [See: ***Shanti Devi vs. State of Rajasthan, (2012) 12 SCC 158***].

46. Keeping in view the aforesaid principles, we proceed to discuss the evidence on record.

47. Accused in his statement so recorded under Section 313 Cr. P.C. admits that on 1.3.2010 his father Rachpal Singh, father-in-law Harnek Singh alongwith police officials came to the house of his friend at Panchkula from where he was taken to Police Station, Sector-14 Panchkula and that police officials from Shimla visited Panchkula and brought him to Shimla alongwith his relatives, one Advocate and Atma Singh.

48. On the complaint dated 28.2.2010 (Ext. PW-5/A), so made by Rachpal Singh (PW-5), police party from Police Station, Sadar, Ferozpur, after recording entry in the roznamcha (Ext.PW-29/A), so proved by HC-Gurcharan Singh (PW-29), proceeded to Panchkula. Also, police officials ASI-Rakesh Kumar (PW-36) and HC-Jaspal Singh (PW-28), on another complaint (Ex. PW-5/B), made by Rachpal Singh, met the accused at Panchkula on 1.3.2010. When they put "mental pressure", accused informed that "while coming from Kufri to Shimla, he threw his wife down hill on 22.2.2010". Now, ASI-Rakesh Kumar categorically states that he never recorded any statement of the accused, who, in fact, never intended to make one. However, telephonically, he informed Inspector Balbir Singh, Incharge of Police Station Dhalli, Shimla (H.P.) about the same. Also, Harnek Singh (PW-1) states that upon being questioned by the police officials from Ferozpur, rather "strictly", accused informed that "while coming from Kufri, he gave a push to her (here he refers to the deceased) down hill into a gorge", he clarifies the term "strictly" to mean "Dabka" (sternly). We are convinced that no pressure was put on the accused. Attitude of sternness is not pressure. Rachpal Singh (PW-5), who does not support the prosecution only states that despite being slapped by police officials, accused only informed that "his wife went missing while walking in the forests near Kufri". ASI-Bhup Singh (PW-38) also states that at Panckhula accused informed that he had pushed his wife down the hill. In the early hours of 2.3.2010, when he brought the accused to Police Station, Dhalli, accused made a disclosure statement. Prior thereto, as is evident from the testimony of Inspector Balbir Singh (PW-40), S.H.O. Police Station Dhalli, statement of Harnek Singh (PW-1) under Section 154 Cr.P.C. (Ext. PW-1/A) stood recorded, which led to registration of the FIR(Ext. PW-40/A) against the accused. Disclosure statement (Ex.PW-1/B) made by the accused, under Section 27 of the Evidence Act, was recorded thereafter. Significantly, no pressure, of any nature, was put by police officials of Police Station, Dhalli, where disclosure statement was made and recorded. Much emphasis is laid on the fact that since police was already aware of the accused having killed his wife by pushing her into a gorge, his subsequent statement is inadmissible in law. But it is not so. Statement (Ex.PW-1/A) only records that when no information pertaining to the deceased was disclosed by the accused, ASI-Rakesh Kumar (PW-36) brought him to Sector 14 Panchkula, where accused disclosed that *on 22.2.2010 near Kufri, he quarreled with his wife and killed her by pushing her down the cliff*. Whereas in disclosure statement (Ext. PW-1/B), he discloses that *on 22.2.2010 at about 7 p.m., while he was on way from Kufri to Shimla, he*

*stopped his car and fought with his wife. Though he was not aware of name of the place where he had pushed his wife below the cliff, yet he could get her dead body recovered by identifying such plac*e. What is significant in statement (Ex. PW-1/B) is not that accused killed his wife but the fact that (i) after identifying the spot from where he had pushed her, (ii) he could get her dead body recovered, which fact he had not disclosed to any one at Panchkula or Mohali.

49. We find the disclosure statement to be admissible in law and not hit by Sections 25 and 26 of the Evidence Act. It is voluntary in nature, recorded in the presence of Harnek Singh (PW-1), Atma Singh (PW-2), Revinder Singh (PW-3) and Ranjit Singh (PW-4), who have also proved such fact. At that time, accused though in custody and was not under any pressure. Also pursuant to such statement, accused actually led the police party to the spot from where he had pushed the deceased and got her dead body recovered in the presence of not only police officials Balbir Singh (PW-40), Kuldeep Singh (PW-34), Photographer C-Lokinder Singh (PW-22), but also independent witnesses Harnek Singh (PW-1), Atma Ram (PW-2), Ravinder Singh (PW-3) and Ranjit Singh (PW-4), who in one voice, without any blemish or demur, have testified such fact.

50. Balbir Singh categorically states that accused first took the police party towards Kufri and then brought them back to a place "between Hasan valley and Green Valley", where he pointed to a place, on the left side of road, and showed the point from where he had pushed the deceased. Only one green coloured "*Chunni*" and not the dead body was visible from the road, hence, police party took another route (forest-Seog road) and reached the spot where dead body of a girl, identified to be that of the deceased by her relatives, was found and recovered. Such version stands corroborated by ASI-Bhoop Singh (PW-38) and HC-Kuldeep Singh (PW-34), according to whom dead body was visible from the Highway, only "with some deep concentration". In fact, he clarifies that from the place where on the asking of accused, vehicle was stopped, only "*Chunni*" was visible from the road. Contradiction in his testimony, upon which much emphasis is laid, is none and stands clarified by the witness himself.

51. When we peruse testimony of independent witnesses, we find there is no contradiction at all, either with regard to disclosure statement or recovery of dead body. Harnek Singh categorically states that the place was identified by the accused, who led the police party to the spot from where he had pushed the deceased down the cliff and also got recovered dead body, identified by him to be that of his daughter. He is witness to the proceedings conducted on the spot, i.e. memos (Ex. PW-1/D & 1/E). We find that the spot in question was also identified by Patwari Vijay Singh (PW-12), who prepared spot map (Ex. PW-12/A). Evidently, body was found at a place which was 40 meters below the National Highway, i.e. Shimla-Kufri road.

52. An endeavour, on a serious note, was made to point out that the recovered body was not that of the deceased but someone else. In effect, identification of dead body is in issue. Investigating Officer Inspector Balbir Singh (PW-40) states that pursuant to disclosure statement made by the accused, dead body of the deceased was recovered from the forest between Green Valley and Hassan Valley near Kufri. This was so done after it was identified by Sh. Harnek Singh (PW-1), Ranjit Singh (PW-4) and Angrez Singh. Memo (Ext. PW-1/D) is on record to this effect. Witness clarifies that only half portion of face of the deceased was eaten by wild animals whereas remaining half portion was still intact. We have seen Photographs, which reveal the face to be identifiable. Even HC-Kuldeep Singh (PW-34) corroborates such fact. Also, Harnek Singh (PW-1), in his unrebutted testimony, testifies that he identified the dead body to be that of his daughter (deceased). This he was able to do after seeing her face. His testimony stands corroborated by uncontroverted version of Atma Singh (PW-2) as also Ranjit Singh (PW-4), brother of the deceased. Hence, the contention only merits rejection.

53. While recovery proceedings were conducted by the police, photographs (Ex.PW-22A-1 to A-9) were taken by C-Lokinder Singh (PW-22).

54. Police also recovered Choora (Ext. P-10), 2 gold bangles; 3 gold rings; 1 chain with pendle; 1 hairpin (Ext. P-11) worn by the deceased, vide memo (Ext. PW-1/F) and *chunni* (Ext.P-2) vide memo (Ext. PW-1/G). All these articles were identified by the father and the brother to be that of the deceased.

55. Contention that there were no telltale signs of the accused having pushed the deceased, falsifying the prosecution case, to say the least is preposterous. Crime took place in the month of February when normally there is rain and snow. Dead body was got recovered by the accused after a gap of eight days. One cannot expect signs of accused pushing the deceased down the cliff, after such a long period to be there. Be that as it may, dupatta (Ext. P-2) lying hanging, almost half way between the place where accused pushed the deceased and her dead body was recovered was taken into possession by the police.

56. While referring to ***Rang Bahadur Singh and others vs. State of U.P., AIR 2000 SC 1209***, appellant contends that when police at Panchkula learnt about the incident they could have straightaway come and recovered the body for, after all, they knew where it was lying. The contention only merits rejection. At Panchkula accused had only disclosed that he had murdered his wife by pushing her down the cliff somewhere near Kufri. He had not stated that he could get the dead body recovered. He had also not disclosed the exact location of crime. Now Kufri is a big revenue estate. It is like finding a needle in a haystack and in any event not a fact which already stood discovered.

57. Thus, pursuant to disclosure statement, accused led to discovery of two facts; (i) the place from where he pushed the deceased below the cliff, and (ii) recovery of dead body. In our considered view, these circumstances stand conclusively proved and established on record, beyond reasonable doubt, by the prosecution. The evidence is legal, admissible and proved by witnesses of credence.

58. Thus far, we find the prosecution to have established, beyond reasonable doubt, the following circumstances pointing to the guilt of the accused: (i) That immediately prior to her death, deceased was in the company of the accused; (ii) failure to explain the circumstances under which his wife went missing. Obligation cast upon him, in view of law laid down in *Dharam Deo Yadav (supra)* as also provisions of Section 106 of the Evidence Act stand not discharged; (iii) conduct of the accused; (iv) disclosure statement, made by the accused; (v) which led to recovery of dead body of the deceased; (vi) and the place from where he pushed her into the gorge. In our considered view, prosecution evidence is reliable and trustworthy. It is clear, cogent, convincing and consistent. There is no missing link or doubt about the chain of events, woven by credible evidence, pointing only towards the guilt of the accused and no other hypothesis of either his innocence or possibility of involvement of a third person. Each and every incriminating circumstance stands clearly established by the prosecution. Reliable and clinching evidence is on record to such effect. It cannot be said that view other than the one, which we have discussed and formed, even by inference, would emerge on record. According to us, all these factors, cumulatively, are sufficient enough to uphold the view so taken by the trial Court. Thus, guilt of the accused stands proved beyond reasonable doubt.

VI. Motive to Kill

59. That accused suspected the deceased to have illicit relationship with her father-in-law is a motive ascribed by the prosecution. The question which first needs to be considered is as to whether in the absence of proof of motive, prosecution story would fall flat on the ground or not. On this issue, we may straightway come to the law on the point.

60. Reiterating its earlier decision in ***Ujjagar Singh vs. State of Punjab, (2007) 13 SCC 90***, Hon'ble Supreme Court of India, in ***Sanaullah Khan vs. State of Bihar, (2013) 3 SCC 52*** has held that where other circumstances lead to only hypothesis that the accused had committed offence, court cannot acquit the accused of the charged offence, merely because motive for committing the offence stands not established on record. The Court further held that:-

> "18. … … Where other circumstances lead to the only hypothesis that the accused has committed the offence, the Court cannot acquit the accused of the offence merely because the motive for committing the offence has not been established in the case. In *Ujjagar Singh vs. State of Punjab,* (2007) 13 SCC 90 this court has held:
>
> > "17. … It is true that in a case relating to circumstantial evidence motive does assume great importance but to say that the absence of motive would dislodge the entire prosecution story is perhaps giving this one factor an importance which is not due and (to use the cliché) the motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy."

61. Notwithstanding this position of law, after careful appreciation of testimonies of the witnesses, we are of the considered view that even this circumstance, prosecution has been able to establish and prove, beyond reasonable doubt. Recorded conversation, which the accused had with the deceased, stands proved on record by the prosecution.

Law on Admissibility of voice recorded conversation

62. Tape recorded conversation is admissible, provided that such conversation is relevant to the matter(s) in issue; there is identification of voice; and accuracy thereof is proved by eliminating possibility of erasing. Contemporaneous tape recording of a relevant conversation is a relevant fact, admissible under Section 8 of the Evidence Act. The tape recorded conversation is contemporaneous relevant evidence and therefore admissible. If it is not tainted by coercion or unfairness, there should be no reason to exclude the same. If there is no unlawful or irregular method in obtaining the recording of conversation, then there is no violation of either Art. 20(3) or Art. 21 of the Constitution. Even if evidence is illegally obtained it is admissible. The Court will take care of two factors in admitting such evidence. First, it will find out that it is genuine and free from tampering or mutilation. Secondly it may also secure scrupulous conduct and behaviour on behalf of the police. The reason is that Police Officer is more likely to behave properly if improperly obtained evidence is liable to be viewed with care and caution by the Judge. [See: ***R.M. Malkani vs. State of Maharashtra, AIR 1973 SC 157***].

63. In ***Nilesh Dinkar Paradkar vs. State of Maharashtra, (2011) 4 SCC 143***, Hon'ble the Supreme Court of India, took note of its earlier decisions in the following manner:

> "32. In Ziyauddin Burhanuddin Bukhari Vs. Brijmohan Ramdass Mehra & Ors. (1976) 2 SCC 17, this Court made following observations:-
>
> > "19. We think that the High Court was quite right in holding that the tape-records of speeches were "documents", as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying the following conditions:
> >
> > "(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.

(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

(c) The subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act."

33. In Ram Singh & Ors. Vs. Col. Ram Singh 1985 (Supp) SCC 611, again this Court stated some of the conditions necessary for admissibility of tape recorded statements, as follows:-

"(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence - direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."

34. In Ram Singh's case (supra), this Court also notices with approval the observations made by the Court of Appeal in England in R. vs. Maqsud Ali (1965) 2 AER 464(CCA). In the aforesaid case, Marshall, J. observed thus:-

"…We can see no difference in principle between a tape-recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this Court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape- recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged."

35. To the same effect is the judgment in R. vs. Robson (1972) 2 AER 699, which has also been approved by this Court in Ram Singh's case (supra). In this judgment, Shaw, J. delivering the judgment of the Central Criminal Court observed as follows:-

"…The determination of the question is rendered more difficult because tape-recordings may be altered by the transposition,

> excision and insertion of words or phrases and such alterations may escape detection and even elude it on examination by technical experts."

36. Chapter 14 of Archbold Criminal Pleading, Evidence and Practice (2010 Edn. At pp.1590-91) discuss the law in England with regard to Evidence of Identification. Section 1 of this Chapter deals with Visual Identification and Section II relates to Voice Identification. Here again, it is emphasised that voice identification is more difficult than visual identification. Therefore, the precautions to be observed should be even more stringent than the precautions which ought to be taken in relation to visual identification. Speaking of lay listeners (including police officers), it enumerates the factors which would be relevant to judge the ability of such lay listener to correctly identify the voices. These factors include:-

> "(a) the quality of the recording of the disputed voice,
>
> (b) the gap in time between the listener hearing the known voice and his attempt to recognize the disputed voice,
>
> (c) the ability of the individual to identify voices in general (research showing that this varies from person to person),
>
> (d) the nature and duration of the speech which is sought to be identified and
>
> (e) the familiarity of the listener with the known voice; and even a confident recognition of a familiar voice by a way listener may nevertheless be wrong."

37. The Court of Appeal in England in R. vs. Chenia (2004) 1 AER 543 and R. vs. Flynn 2008 EWCA Cri 970 has reiterated the minimum safeguards which are required to be observed before a Court can place any reliance on the voice identification evidence, as follows:-

> "(a) the voice recognition exercise should be carried out by someone other than the officer investigating the offence;
>
> (b) proper records should be kept of the amount of time spent in contact with the suspect by any officer giving voice recognition evidence, of the date and time spent by any such officer in compiling any transcript of a covert recording, and of any annotations on a transcript made by a listening officer as to his views as to the identify of a speaker; and
>
> (c) any officer attempting a voice recognition exercise should not be provided with a transcript bearing the annotations of any other officer."

38. In America, similar safeguards have been evolved through a series of judgments of different Courts. The principles evolved have been summed up in American Jurisprudence 2d (Vol. 29) in regard to the admissibility of tape recorded statements, which are stated as under:-

> "The cases are in general agreement as to what constitutes a proper foundation for the admission of a sound recording, and indicate a reasonably strict adherence to the rules prescribed for testing the admissibility of recordings, which have been outlined as follows:
>
> (1) a showing that the recording device was capable of taking testimony;
>
> (2) a showing that the operator of the device was competent;

(3) establishment of the authenticity and correctness of the recording;

(4) a showing that changes, additions, or deletions have not been made;

(5) a showing of the manner of the preservation of the recording;

(6) identification of the speakers; and

(7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

... However, the recording may be rejected if it is so inaudible and indistinct that the jury must speculate as to what was said."

{See: *Umesh Kumar v. State of Andhra Pradesh and another,* (2013) 10 SCC 591; *Tukaram S. Dighole v. Manikrao Shivaji Kokate,* (2010) 4 SCC 329; and *R.K. Anand v. Registrar, Delhi High Court,* (2009) 8 SCC 106.}

64 Applying these principles, we find the evidence to be legally admissible.

65 During the course of investigation, on 2.3.2010, itself Inspector Balbir Singh (PW-40) conducted personal search of the accused and recovered certain articles including mobile phone (Samsung-S 3500) (Ext. P-3), SIM No. 095694-21704 and SIM Airtel No. 97796-42348 (Ext. P-4) vide memo (Ext. PW-1/C). Witnesses to the document Harnek Singh (PW-1) and Atma Singh (PW-2) corroborate such fact. Inspector Balbir Singh (PW-40) states that these articles were deposited with MHC Shiv Kumar (PW-19) on 2.3.2010 itself, entry pertaining to which was also made in the Register (extracts Ex.PW-19/B-1 to 19/B-4).

66. That accused had quarreled with the deceased and recorded conversion in his mobile phone came to light during the course of investigation, as is so deposed by Balbir Singh (PW-40). We find his version worthy of credence. Accordingly, after obtaining consent (Ex. PW-27/A), he got recorded, in a tape-recorder, voice sample of the accused, in the presence of independent witnesses, Gopal Sharma (PW-27), ASI Sapinder Singh (PW-39) and Kuldeep Singh (PW-34), who also corroborate such fact, through their testimonies, which are wholly convincing and reliable.

67 From the unrebutted testimony of MHC Shiv Kumar (PW-19), it has come on record that articles seized vide memo (Ex. PW-1/C), which remained untampered in the Malkhana, were handed over to the SHO on 7.3.2010, who again on 9.3.2010 handed over three different sealed parcels, containing mobile phone, SIM and tape-recorder, in relation to which entry was made in the Malkhana Register (extracts Ex.PW-19/B-1 to 19/B-4). Such recorded conversation and the voice sample (Memo Ex.PW-27/B) were thereafter sent for comparison to the Central Forensic Science Laboratory, through C-Manish Mehta (PW-17) on 18.3.2010. He clarifies that so long as articles remained with him, they remained intact and not tampered with.

68. Dr. B. Badonia (PW-37), Deputy Director, Central Forensic Laboratory, Pune, who proved on record report (Ex. PW-37/A), testified that the questioned voice sample (marked as S-1) was the probable voice of the same person, i.e. Simran Pal Singh. We do not find any discrepancy in the prosecution case thus far. However, when we examine the testimonies of police officials, namely ASI Sapinder Singh (PW-39) and HC Kuldeep Singh (PW-34), who prepared transcript (Ex.PW-39/B & 39/C) vide memo (Ex.PW-27/B), witnessed by Gopal (PW-27) and ASI Bhup Singh (PW-38), it is evident that there were seven conversations, which the accused had recorded in his mobile phone (Ext.

P-3), out of which only two were transcribed. Now, does this make the prosecution case weak? In our considered view no. Accused denied having recorded any conversation. Two such conversations, which stand proved on record to be in the voice of accused, sufficiently establish his motive to kill the deceased. He was suspecting his wife of having illicit relationship with his own father. The conversation so recorded on 22.2.2010 at 20.59 hours (PM) almost matches with the time when accused left Kufri, as also the time since when deceased was found to be missing. One cannot ignore the admission made by the accused that his wife left the hotel at Kufri, for a walk, on 22.2.2010 at 7.30 p.m.

69. From the testimony of MHC Shiv Kumar (PW-19), it is evidently clear that the articles deposited with him were sealed. There was no question of mention of memory card in Memo (Ex. PW-1/C), for the simple reason that the memory card was in the Mobile Phone and recording of conversation came to the notice of the police, only when the accused was under interrogation during the period of remand. The moment police gathered such information, mobile phone was taken by the Investigating Officer from the MHC alongwith other articles. Police officials have categorically deposed that so long as mobile phone and the memory card remained with them, they were kept in safe custody and not tampered with. The circumstance of recovery of mobile phone, SIM and other material stands put to the accused in Questions No.28 & 48 of his statement, recorded under Section 313 Cr.P.C. Here we also refer to two questions put to the accused in his Statement, under Section 313 Cr.P.C.

> "Q. 19. It has come in the evidence that your personal search was conducted by the police and 14 different articles were recovered during your personal search. A memo, Ext. PW-1/C was prepared to this effect. What you have to say about it?
>
> Ans. It is correct."
>
> "Q.28. It has further come in the evidence that during your personal search the police has taken into possession one mobile phone Samsung Brand, Ex. P-3, a sim card, Ex. P-4, a passport, Ex. P-5, your photographs of passport size (four in number), Ex. P-6, your two photographs alongwith deceased, Ex. P-7 and Ex. P-8, some hotel bills, mobile phone charger, Ex. P-9 and all these articles were sealed in a parcel with six seals of seal impression M. What you have to say about it?
>
> Ans. It is correct."

70. Record reveals that articles seized vide memo (Ext. PW-1/C) were immediately deposited with MHC- Shiv Kumar (PW-19) who has categorically deposed that so long as they remained with him, they were kept in safe custody and never tampered with.

71. Thus, even this circumstance stands proved by the prosecution. The evidence is credible, legally admissible, untampered and not hit by any provision of law.

72. We now proceed to deal with various decisions referred to by the learned counsel for the parties.

73. The decision referred to by learned counsel for the appellant, as reported in ***C. Perumal vs. Rajasekaran & others, 2012 Cr. L.J. 3491*** (Supreme Court) was rendered in the given facts and circumstances and does not lay down any ratio of law.

74. Reliance on ***Ishwar Pandurang Masram vs. State of Maharashtra, 2013 Cri. L. J. 3597*** (Bombay High Court) (Nagpur Bench) to the effect that if circumstance is not put to the accused while

examination under Section 313 Cr.P.C. cannot be used against him, is not applicable in the given facts and circumstances, for as we have noticed that circumstance of recovery of mobile phone and SIM card was in fact put to the accused (Question No.28).

75. Judgment referred to in ***State of Orissa vs. Babaji Charan Mohanty & another, (2003) 10 SCC 57*** was in relation to the facts, where the Court found the prosecution story not to be artificial and improbable despite the prosecution case, solely resting on the testimony of solitary eye witness, fully inspiring in confidence.

76. In ***Prabhoo vs. State of Uttar Pradesh, AIR 1963 SC 1113***, Hon'ble the Supreme Court of India, was dealing with a case where accused produced incriminating articles such as clothes and axe. Recovery of such articles was not pursuant to any "statement relating to recovery". It is in this background, Court held that the incriminating statement of handing over of weapon of offence to be hit by the provisions of Sections 25 and 26 of the Evidence Act, not being a statement leading to discovery within the meaning of Section 27 of the Evidence Act.

77. In ***Jaffer Husain Dastagir vs. The State of Maharashtra, AIR 1970 SC 1934***, where prior to the disclosure statement being made by the accused, police were aware of a relevant fact, the Court held discovery of such fact not to be as a consequence of disclosure statement. To similar effect is decision rendered by Hon'ble the Supreme Court of India, in *Thimma vs. The State of Mysore,* AIR 1971 SC 1871.

78. Judgment relied upon by the learned counsel for the appellant in ***Kora Ghasi vs. State of Orissa, (1983) 2 SCC 251*** is in peculiar facts and circumstances and not applicable in the present case.

79. Seeking reliance on ***Budh Ram vs. State of Himachal Pradesh, Latest HLJ 2010 (HP) 58*** and ***Koli Trikam Jivraj & another vs. The State of Gujarat, AIR 1969 Gujarat 69*** it is contended that suggestion put to the witnesses is no evidence at all and thus no inference can be drawn against the accused that he admitted the fact referred to in the suggestions. Reliance on the decisions is misconceived for prosecution has proved its case, in the affirmative, by leading clear, cogent and convincing piece of evidence.

80. In ***State of U.P. v. Ramesh Prasad Misra, [(1996) 10 SCC 360: AIR 1996 SC 2766***], Hon'ble the Supreme Court of India, has held that evidence of a hostile witness would not be rejected in entirety, if the same has been given in favour of either the prosecution, or the accused, but is required to be subjected to careful scrutiny, and thereafter, that portion of the evidence which is consistent with either case of the prosecution, or that of the defence, may be relied upon. Position stands reiterated in ***C. Muniappan vs. State of Tamil Nadu*, (2010) 9 SCC 567: AIR 2010 SC 3718; *Himanshu @ Chintu v. State (NCT of Delhi)*, (2011) 2 SCC 36**; and ***Ramesh Harijan vs. State of U.P.*, (2012) 5 SCC 777: AIR 2012 SC 1979**.

81. Therefore, law permits the court to take into consideration deposition of a hostile witness, to the extent that the same is in consonance with the case of the prosecution, and is found to be reliable in careful judicial scrutiny. [See: **Rohtash Kumar vs. State of Haryana, (2013) 14 SCC 434**].

82. In the instant case, testimony of Rachpal Singh, father of the accused, on material facts, is relevant, reliable and believable. Though initially he did support the prosecution, but lateron was declared hostile and cross examined by the Public Prosecutor. We find that he has not supported the prosecution with regard to the events which took place on 1st and 2nd of March, 2010 at Panchkula and Dhalli, which in any event, stand conclusively established by other credible evidence. His testimony with regard to the conduct of the accused and the events which took place on 22.2.2010 and 25.2.2010, is evidently clear, fully inspiring in confidence and has been rightly relied upon by

the prosecution. Witness feigned ignorance about the contents of complaint (Ext. PW-5/B) but admitted his signature thereupon. He is an educated person and we see no reason as to why he would sign document without reading the same.

83. The term "witness", means a person who is capable of providing information by way of deposing as regards relevant facts, via an oral statement, or a statement in writing, made or given in Court, or otherwise. In ***Pradeep Narayan Madgaonkar vs. State of Maharashtra*, (1995) 4 SCC 255,** Hon'ble the Supreme Court of India, examined the issue of requirement of the examination of an independent witness, and whether the evidence of a police witness requires corroboration. The Court herein held, the same to be subjected to strict scrutiny. It stood clarified that evidence of police officials cannot be discarded merely on the ground that they belonged to the police force, and are either interested in the investigating or the prosecuting agency. However, as far as possible, corroboration of their evidence on material particulars, should be sought. [See: **Paras Ram v. State of Haryana, (1992) 4 SCC 662: AIR 1993 SC 1212**; **Balbir Singh v. State (1996) 11 SCC 139; Kalpnath Rai v. State (Through CBI) (1997) 8 SCC 732: AIR 1998 SC 201; M.Prabhulal v. Directorate of Revenue Intelligence (2003) 8 SCC 449;** and **Ravindran v. Superintendent of Customs (2007) 6 SCC 410: AIR 2007 SC 2040**].

84. A witness is normally considered to be independent, unless he springs from sources which are likely to be tainted and this usually means that the said witness has cause, to bear such enmity against the accused, so as to implicate him falsely. There can be no prohibition to the effect that a policeman cannot be a witness, or that his deposition cannot be relied upon. [See: ***Rohtash Kumar vs. State of Haryana, (2013) 14 SCC 434***]

85. Here the testimonies of police officials, who conducted the investigation in a free and fair manner, are fully inspiring in confidence. They have no reason to falsely implicate the accused. Information received from ASI Rakesh Kumar (PW-36) was reduced into writing by ASI Sapinder Singh (PW-39) vide daily diary report (Ext. PW-9/A), leading to investigation of the case.

86. 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 Simarjit Kaur.

87. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. 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 MANSOOR AHMAD MIR, C.J.

Gurdial Singh ...Appellant.
Versus
Shri Hoshiar Singh & others ...Respondents.

FAO No. 165 of 2007
Reserved on: 02.01.2015
Decided on: 09.01.2015

Motor Vehicle Act, 1988- Section 166- Claimant was travelling from Una to Police Lines, Jhalera on a scooter which collided with a truck parked in the middle of the road- he sustained injuries and was taken to Hospital- claimant

suffered 25% permanent disability and remained admitted in PGI Chandigarh from 25th January, 2004 to 6th March, 2004 – Tribunal awarded an amount of Rs. 15,000/- under the head 'pain and sufferings' and Rs. 5,000/- under the head 'loss of enjoyment and expectation of life' – held, that Tribunal had wrongly applied multiplier of 6 and had wrongly calculated the loss of earning capacity- claimant is entitled to Rs. 50,000/- for pain and sufferings undergone by him and Rs. 50,000/- for pain and suffering which he will have to undergo throughout his life- consequently, compensation was enhanced to Rs. 2,76,800/-. (Para-15 to 25)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Kavita versus Deepak and others, 2012 AIR SCW 4771

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellant: Mr. Ramakant Sharma, Advocate,

For the respondents: Nemo for respondents No. 1 and 2.
Mr. Harish Behl, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Appellant-claimant-injured has questioned the award, dated 27th February, 2007, made by the Motor Accident Claims Tribunal, Una, H.P. (for short "the Tribunal"), in MAC Petition No. 45 of 2004, titled as Gurdial Singh versus Hoshiar Singh, whereby compensation to the tune of Rs.54,200/- with 7.5% per annum from the date of the petition till realization of the amount came to be awarded in his favour (for short "the impugned award").

2. The owner-insured, the driver 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-claimant-injured has questioned the impugned award on the ground of adequacy of compensation.

4. In order to determine whether the amount awarded is just and appropriate, it is necessary to give a brief resume of the case, which has given birth to the impugned award.

Brief facts:

5. The appellant-claimant-injured, who is working as a Constable with the Himachal Pradesh Police, was travelling from Una to Police Lines, Jhalera on 24th January, 2004, on a scooter, bearing registration No. HP-20 A-6150, collided with a truck, bearing registration No. HP-19-0476, which was parked in the middle of the road, at about 8.30 p.m., near 'Ganesh Petrol Pump', sustained injuries, was taken to hospital, referred to PGI Chandigarh, where he remained admitted from 25th January, 2004 to 6th March, 2004, had undergone various tests and operations, has claimed compensation to the tune of Rs.12,00,000/-, as per the break-ups given in the claim petition.

6. The owner-insured and the driver of the offending vehicle, i.e. respondents No. 1 and 2, filed reply and resisted the claim petition on the grounds taken therein. The insurer has also filed separate reply.

7. Following issues came to be framed by the Tribunal on 2nd August, 2005:

> *"1. Whether the petitioner sustained injuries in a motor accident caused by wrong parking of the truck (No. HP-19-0476) by the respondent No. 1, Hoshiar Singh, on January 24, 2004 near Ganesh Filling Station, Una? 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 truck in question was insured with respondent 3, United India Insurance Company Ltd.? OPP*
>
> *4. Whether the respondent 1 was not having a valid and effective driving licence at the time of accident. If so, to what effect? OPR-3*
>
> *5. Whether the petition is bad for non-joinder of the insurer of the scooter allegedly involved in the accident? OPR-3*
>
> *6. Whether the petitioner was himself a tort-feaser and therefore not entitled to compensation? OPR-3*
>
> *7. Relief."*

8. The appellant-claimant-injured has examined Dr. G. Upadhaya as PW-1, HHC Satwinder Singh as PW-2, Shri Purshotam Lal as PW-3, Dr. R.K. Sharma as PW-4, appeared himself in the witness box as PW-5 and placed on record photocopies of MLC, FIR, discharge summary & disability certificate as Ext. PW-1/A, Ext. PW-2/A, Ext. PW-4/A & Ext. PW-4/B, respectively. The respondents have not led any evidence but have filed before the Tribunal the photocopies of driving licence and insurance policy as Ext. R-1 and Ext. RX, respectively. Thus, the evidence led by the appellant-claimant-injured has remained unrebutted.

Issue No. 1:

9. The Tribunal, after scanning the evidence, oral as well as documentary, has held that the accident was outcome of contributory negligence of the appellant-claimant-injured and the truck driver, namely Shri Hoshiar Singh and accordingly decided issue No. 1. The findings returned by the Tribunal on issue No. 1 are not in dispute, are accordingly upheld.

10. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 to 6.

Issues No. 3 to 6:

11. The Tribunal has decided issues No. 3 to 6 against the respondents and in favour of the appellant-claimant-injured. The respondents have not questioned the same, thus, the findings returned on these issues are to be upheld.

12. However, I have examined the record. It was for the insurer to prove issues No. 4 to 6, has failed to discharge the onus, thus, rightly came to

be decided in favour of the appellant-claimant-injured and against the insurer. Therefore, the findings returned by the Tribunal on issues No. 4 to 6 are accordingly upheld.

13. The insurer has also not questioned the findings returned by the Tribunal on issue No. 3. I have gone through the insurance policy, Ext. RX. The offending truck was duly insured with respondent No. 3. Thus, the findings returned on issue No. 3 are also upheld.

Issue No. 2:

14. I am of the considered view that the Tribunal has fallen in an error in assessing the compensation for the following reasons:

15. The appellant-claimant-injured has suffered 25% permanent disability and remained admitted in PGI Chandigarh from 25th January, 2004 to 6th March, 2004, which fact stands proved by the appellant-claimant-injured by leading oral as well as documentary evidence, which has remained unrebutted.

16. The disability certificate, Ext. PW-4/B, contains the details how the appellant-claimant-injured stands disabled and what is its effect on his physical frame and enjoyment of life, which has not been taken into consideration by the Tribunal while granting compensation.

17. The Apex Court in case titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** has discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads. It is apt to reproduce paras 9 to 14 of the judgment herein:

> *"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.*
>
> *10. It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined*

as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.

11. In the case Ward v. James, 1965 (1) All ER 563, it was said:

> *"Although you cannot give a man so gravely injured much for his "lost years", you can, however, compensate him for his loss during his shortened span, that is, during his expected "years of survival". You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and Juries have to do the best they can and give him what they think is fair. No wonder they find it well-nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The Judges have worked out a pattern, and they keep it in line with the changes in the value of money."*

12. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

13. This Court in the case of C.K. Subramonia Iyer v. T. Kunhikuttan Nair, AIR 1970 SC 376, in connection with the Fatal Accidents Act has observed (at p. 380):

> *"In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable."*

14. In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :-

> *"Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will*

> *currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award. The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."*

18. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085,** while granting compensation in such a case. It is apt to reproduce para-7 of the judgment herein:

> *"7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."*

19. The Apex Court in case titled as **Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** also laid down guidelines for granting compensation. It is apt to reproduce paras 8 and 9 of the judgment herein:

> *"8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.*
>
> *9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability*

benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."

20. The Apex Court in case titled as **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771,** also discussed the entire law and laid down the guidelines how to grant compensation. It is apt to reproduce paras 16 & 18 of the judgment herein:

"16. In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:

"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

The heads under which compensation is awarded in personal injury cases are the following:

"Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

> *(v) Loss of amenities (and/or loss of prospects of marriage).*
>
> *(vi) Loss of expectation of life (shortening of normal longevity).*
>
> *In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."*
>
> *17. .....*
>
> *18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."*

21. The Tribunal has held that the appellant-claimant-injured has suffered permanent disability to the extent of 25%, thus, has lost earning capacity to the tune of Rs. 750/- per month, i.e. Rs.9,000/- per annum and applied the multiplier of '6'. The Tribunal has not awarded any amount under the head 'medical expenses' on the ground that the amount stands withdrawn by the appellant-claimant-injured as medical reimbursement.

22. The Tribunal has fallen in an error, while assessing the effect of the injury, which has not shattered the physical frame of the appellant-claimant-injured, but has deprived him of the charm of his life. He had undergone pain and has to undergo pain throughout his life. Thus, the Tribunal has wrongly came to the conclusion that the appellant-claimant-injured is entitled only to Rs.15,000/- under the head 'pain and sufferings' and Rs.5,000/- under the head 'loss of enjoyment and expectation of life'.

23. The disability has affected the earning capacity of the appellant-claimant-injured to the tune of Rs.2,700/- per month while keeping in view his salary as Rs.10,800/-. The appellant-claimant-injured was 35 years of age at the time of accident. The multiplier provided is '16' as per the Schedule appended with the Motor Vehicles Act, 1988 (for short "the MV Act"). In view of the judgment rendered by the Apex Court in a case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** multiplier of '14' was applicable. Thus, the Tribunal has fallen in an error while assessing the compensation under the heard 'loss of income'.

24. The Tribunal has awarded meager amount under the head 'pain and sufferings' and has also not awarded any amount for the pain and sufferings through which he has to undergo throughout his life, was entitled to Rs.50,000/- on account of the pain and sufferings which he had undergone and Rs.50,000/- on account of the pain and sufferings which he has to undergo throughout his life, i.e. Rs. 1,00,000/- in lump-sum.

25. Viewed thus, the appellant-claimant-injured was entitled to Rs. 2,700 x 12 x 14 = Rs. 4,53,600/- + 1,00,000/- = Rs.5,53,600/-. But, as it has been held that the accident was outcome of contributory negligence, 50% was rightly deducted, thus, was entitled to compensation to the tune of Rs.2,76,800/-.

26. On the last date of hearing, learned counsel for the insurer was asked to seek instructions and to pay Rs.1,00,000/- in lump-sum in addition to the amount already paid in terms of the impugned award, has stated that he is under instructions to make a statement that the insurer is ready to pay Rs.50,000/-.

27. Keeping in view the discussions made hereinabove read with the fact that the appellant-claimant-injured is serving with the Himachal Pradesh Police as a Constable, is drawing salary and will also get pension and all service benefits after retirement, I deem it proper to enhance the compensation by Rs. 1,00,000/- in addition to the amount already paid in terms of the impugned award.

28. Having glance of the above discussions, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

29. The insurer is directed to deposit Rs.1,00,000/- before the Registry within four weeks. In default, it is payable with interest @ 7.5% per annum from the date of the impugned award till its final realization. On deposition of the amount, the same be released in favour of the appellant-claimant-injured after proper identification strictly as per the terms and conditions contained in the impugned award.

30. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Company Limited ...Appellant.

Versus

Ragi Ram & others ...Respondents

FAO No. 4075 of 2013
Decided on: 09.01.2015

Motor Vehicle Act, 1988- Section 166- Deceased was a student who would have been earning not less than Rs. 3,000/- per month- claimant had lost source of dependency of Rs. 2,000/- Tribunal has rightly applied multiplier of '18'- claimant would be entitled to Rs. 4,32,000/- under the head 'loss of source of dependency', Rs. 10,000/- under the head 'funeral expenses' and Rs. 2,500/- under the head 'transportation charges' – claimant would also be entitled for interest @ 7.5 % per annum from the date of the claim petition. (Para-13 to 17)

For the appellant: Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. Ramesh Sharma, Advocate, for respondents N. 1 to 3.

Mr. Dibender Ghosh, Advocate, 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 the award, dated 18th May, 2013, made by the Motor Accident Claims Tribunal, Shimla, H.P. (for short "the Tribunal") in M.A.C.T. No. 48-S/2 of 2011, titled as Sh. Rangi Ram and others versus Mrs. Deepa Kumari and others, whereby compensation to the tune of Rs. 6,60,500/- with interest @ 9% per annum from the date of the petition till its realization came to be awarded in favour of the claimants (for short "the impugned award").

2. The claimants and the owner-insured have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has questioned the impugned award on various counts including the adequacy of compensation.

4. Learned counsel for the appellant-insurer argued that he restricts the challenge and appeal so far it relates only to the quantum of compensation.

5. In order to determine the said issue, it is necessary to give a flashback of the case, the womb of which has given birth to the instant appeal.

Brief facts:

6. The claimants filed claim petition before the Tribunal for grant of compensation on the ground that driver-cum-owner, namely Shri Kehar Singh, had driven the vehicle, i.e. Maruti Car, bearing registration No. HP-06A-2090, rashly and negligently on 10th April, 2011, at about 4.15 a.m., at Gwahi on its way from Nankhari to Solan; resultantly the vehicle rolled down the road, the owner-cum-driver and deceased, namely Km. Sandeepna, sustained injuries and succumbed to the injuries.

7. The respondents, i.e. the owners-insured and the insurer resisted the claim petition on the grounds taken in the respective memo of objections.

8. Following issues came to be framed by the Tribunal on 19th December, 2011:

> *"1. Whether Kumari Sandeepna had died on account of rash and negligent driving of vehicle No. HP-06A-2090 by its driver? OPP*
>
> *2. If issue No. 1 is proved, to what amount of compensation and from whom are the petitioners entitled to? OPP*
>
> *3. Whether driver of vehicle No. HP-06A-2090 had not been in possession of valid and effective driving licence. If so with what effect? OPR-3*
>
> *4. Whether owner of vehicle No. HP-06A-2090 had contravened terms and conditions of insurance policy and Act? OPR-3*
>
> *5. Whether Kumari Sandeepna had been travelling as gratuitous passenger in vehicle No. HP-06A-2090. If so, with what effect? OPR-3*
>
> *6. Relief."*

9. One of the claimants, namely Shri Rangi Ram, has himself appeared in the witness box as PW-1, examined Dr. Pawan Sharma as PW-2 and placed on record photocopies of family register, FIR, postmortem and the receipt issued by Goods carrier & Tour Travel as Exhibits PW-1/A, PW-1/B, PW-1/C and PW-1/D, respectively. Respondent No. 1 has appeared in the witness box as RW-1 and has placed on record copy of registration certificate and insurance policy as Exhibits RW-1/A and R-1, respectively. The insurer has not led any evidence in support of its case.

Issue No. 1:

10. The Tribunal, after examining the documents and the evidence held that the driver, namely Shri Kehar Singh, had driven the offending vehicle rashly and negligently on 10th April, 2011, at about 4.15 a.m., at Gwahi, and caused the accident. There is no rebuttal to the same. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

11. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 to 5.

Issues No. 3 to 5:

12. The onus to prove these issues was on the appellant-insurer, has not led any evidence, thus, has failed to discharge the onus. However, I have perused the record and am of the considered view that the Tribunal has rightly decided all the three issues in favour of the claimants and against the insurer. Accordingly, the findings returned on issues No. 3 to 5 are upheld.

Issue No. 2:

13. The Tribunal, after scanning the evidence, oral as well as documentary, held that the deceased, namely Kumari Sandeepna, was 25 years of age at the time of accident and was a student of BA- II year, would have been earning Rs. 4,500/- per month and applied multiplier of '18'.

14. Admittedly, the deceased was a student and by guess work, at the best, should have been earning not less than Rs.3,000/- per month. The Tribunal has rightly deducted one third towards her personal expenses. Thus, the claimants have lost source of dependency to the tune of Rs. 2,000/- per month. The Tribunal has rightly applied multiplier of '18'. Therefore, the claimants are held entitled to Rs.4,32,000/- (i.e. Rs.2,000/- x 12 x 18) under the head 'loss of source of dependency'.

15. The Tribunal has rightly awarded Rs.10,000/- under the head 'funeral expenses' and Rs. 2,500/- under the head 'transportation charges'.

16. The Tribunal has also fallen in an error in awarding interest @ 9% per annum, was to be awarded @ 7.5% per annum.

17. Having glance of the above discussions, the appeal merits to be allowed. Accordingly, the appeal is allowed and the impugned award is modified by providing that the claimants are entitled to compensation to the tune of Rs.4,44,500/- (i.e. Rs.4,32,000/- + Rs.10,000/- + Rs. 2,500/-) with interest @ 7.5 % per annum from the date of the claim petition till its realization.

18. 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. Excess amount be released to the appellant-insurer through payee's account cheque.

19. Send down the record after placing copy of the judgment on Tribunal's file.

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

Naval Kumar alias Rohit Kumar .....Petitioner.

Versus

State of H.P. & ors. ....Respondent.

CWP No. 475 of 2013.
Reserved on: 24.12.2014
Decided on: 09.01.2015.

Constitution of India, 1950- Article 226- Petitioner came in contact with a high tension live wire known as 'Lahru-Chowari Line'-he received burn and other injuries-his both arms were amputated- he suffered 100% disability- held, that respondent had failed to maintain the electricity lines in accordance with Electricity Act and the Rules framed thereunder – electricity is dangerous commodity and it is the statutory duty of the person responsible for its supply and maintenance to abide by all the protective measures- the accident could have been avoided if the safety measures were taken - petitioner was reduced to a vegetative state- he would have started earning at least Rs. 30,000/- per month- his income would be Rs. 3,60,000/- per annum –applying multiplier of 25 – the loss of income of the petitioner would be Rs. 90,00,000/-- petitioner is entitled to standard damages of Rs. 10,00,000/- towards loss of companionship, life amenities/pleasures and loss of happiness, Rs. 10,00,000/- for pain and suffering, Rs. 10,00,000/- towards attendant/nursing expenses for his life and Rs. 5,00,000/- for securing artificial/robotic limbs and future medical expenses-thus, total amount of Rs. 1,25,00,000/- awarded as compensation to the petitioner. (Para- 5 to 50)

Cases referred:

Eastern and South African Telegraph Company, Limited vrs. Cape Town Tramways Companies Limited, (1902) AC 381

Corporation of The City of Glasgow vrs. Taylor, (1922) 1 AC 44

Paine vrs. Colne Valley Electricity Supply Co., Ltd. And British Insulated Cables, Ltd. (1938) 4 All E.R. 803

Yachuk & another vrs. Oliver Blais Co., Ltd., (1949) 2 All. E.R. 150

Hawkins vrs. Coulsdon and Purley Urban District Council, (1954) 1 All. E.R. 97

Hughes vrs. Lord Advocate, 1963 A.C. 837

Gough vrs. Throne, (1966) 3 All. E.R. 398

Croke (a minor) and another v. Wiseman and others, (1981) 3 All. E.R. 852

Manohar Lal Sobha Ram Gupta and others vrs. Madhya Pradesh Electricity Board, 1975 ACJ 494

Amul Ramchandra Gandhi vrs. Abhasbhai Kasambhai Diwan and others, AIR 1979 Gujarat 14

The Kerala State Electricity Board Trivandrum vrs. Suresh Kumar, AIR 1986 Kerala 72

Angoori Devi and ors. Vrs. Municipal Corporation of Delhi, AIR 1988 Delhi 305

Sagar Chand and anr. Vrs. State of J & K and anr., AIR 1999 J & K 154

Padma Behari Lal vrs. State Electricity Board and another, reported in AIR 1992 Orissa 68

Asa Ram and another vrs. M.C.D. and others, reported in AIR 1995 Delhi 164

M.P. State Road Transport Corporation and others vrs. Abdul Rahman and others, AIR 1997 MP 248

R.S.E.B. & another vrs. Jai Singh and others, AIR 1997 Rajasthan 141

T. Gajayalakshmi Thayumanavar and anr. Vrs. Secretary, Public Works Department, Govt. of Tamil Nadu, Madras and ors., AIR 1997 Madras 263

M.P. Electricity Board vrs. Shail Kumar and others, reported in AIR 2002 SC 551
H.S.E.B. & ors. Vrs. Ram Nath and others, (2004) 5 SCC 793
Ramesh Singh Pawar vrs. Madhya Pradesh Electricity Board and others, AIR 2005 MP 2
Nilabati Behera vrs. State of Orissa and ors., (1993) 2 SCC 746
Sube Singh vrs. State of Haryana and ors., (2006) 3 SCC 178
R.D.Hattangadi vrs. Pest Control (India) Pvt. Ltd. And ors., (1995) 1 SCC 551
Rekha Jain vrs. National Insurance Company Limited and ors., (2013) 8 SCC 389
Balram Prasad vrs. Kunal Saha and others & connected matters, (2014) 1 SCC 384

For the petitioner: Mr. Vijay Chaudhary, Advocate.
For the respondents: Mr. M.A.Khan, Addl. AG with Mr. Ramesh Thakur and Mr. J.S.Guleria, Asstt. AG, for respondent No. 1.
Mr. B.S.Ranjan, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner is a minor. He has filed this petition through his natural guardian and next friend Smt. Lata Devi. The petitioner came in contact with a high tension live wire (11 KV) commonly known as 'Lahru-Chowari Line'. He got electrocuted. He received grievous burn and other injuries. He became unconscious. FIR was also registered on 18.3.2012. The petitioner was initially taken to Referal Hospital Chowari for treatment. He was referred to Dr. Rajendra Prasad Medical Hospital Tanda, District Kangra, H.P. He was operated upon on 25.3.2012. His both arms were amputated. He remained admitted in Dr. Rajendra Prasad Medical Hospital, Tanda, w.e.f. 18.3.2012 to 3.5.2012. The petitioner has suffered 100% disability as per Annexure P-4. He has become totally dependant upon family members even for day-to-day activities for his entire life. The petitioner was brilliant student and he had to discontinue his studies. The petitioner and his family members have also suffered mental agony and pain. The case of the petitioner, precisely, is that the respondents were duty bound to lay and maintain the 11 KV 'Lahru-Chowari High Tension Line' according to the provisions of the Electricity Act, 2003 and the Rules framed thereunder.

2. Respondents No. 2 & 3 have filed the reply. According to them, the accident has occurred due to the act of God and also on account of wanton and negligent act of the petitioner. According to the averments contained in the reply, as per Annexure RA-1, in between two ends of the poles, the line was crossing over a raised rock and there was no apprehension that any person can climb on the same. The petitioner had climbed on the rock and in the process got electrocuted. They have taken all the necessary precautions and there was no negligence on the part of the field/operating staff. The line was erected in accordance with the Rules and was equipped with all safety measures. It was patrolled periodically.

3. The petitioner has also filed a detailed rejoinder to the reply filed by respondents No. 2 & 3. The averments made in the reply are specifically denied in the rejoinder. According to the averments contained in the rejoinder, the high tension live wire was lying low which resulted in the electrocution of the petitioner.

4. The Parliament has enacted an Act to consolidate the laws relating to generation, transmission, distribution etc. called the Electricity Act, 2003 (hereinafter referred to as the Act). Section 2(6) of the Act defines the 'Authority' to mean the Central Electricity Authority referred to in sub-section (1) of Section 70. Section 2(20) defines the "electric line" to mean any line which is used for carrying electricity for any purpose and includes (a) any support for any such line, that is to say, any structure, tower, pole or other thing in, on, by or from which any such line is, or may be, supported, carried or suspended; and (b) any apparatus connected to any such line for the purpose of carrying electricity. Section 2(48) defines the "overhead line" to mean an electric line which is placed above the ground and in the open air but does not include live rails of a traction system. Section 2(72) defines the "transmission lines".

5. Sections 53, 68 and 161 of the Act read as under:

"**Section 53. (Provisions relating to safety and electricity supply):**

The Authority may in consultation with the State Government, specify suitable measures for –

(a) protecting the public (including the persons engaged in the generation, transmission or distribution or trading) from dangers

arising from the generation, transmission or distribution or trading of electricity, or use of electricity supplied or installation, maintenance or use of any electric line or electrical plant;

(b) eliminating or reducing the risks of personal injury to any person, or damage to property of any person or interference with use of such property ;

(c) prohibiting the supply or transmission of electricity except by

means of a system which conforms to the specification as may be

specified;

(d) giving notice in the specified form to the Appropriate Commission and the Electrical Inspector, of accidents and failures of supplies or transmissions of electricity;

(e) keeping by a generating company or licensee the maps, plans

and sections relating to supply or transmission of electricity;

(f) inspection of maps, plans and sections by any person authorised by it or by Electrical Inspector or by any person on payment of specified fee;

(g) specifying action to be taken in relation to any electric line or

electrical plant, or any electrical appliance under the control of a

consumer for the purpose of eliminating or reducing the risk of personal injury or damage to property or interference with its use.

Section 68. (Provisions relating to Overhead lines): ---- (1) An overhead line shall, with prior approval of the Appropriate Government, be installed or kept installed above ground in accordance with the provisions of sub-section (2).

(2) The provisions contained in sub-section (1) shall not apply-

(a) in relation to an electric line which has a nominal voltage not exceeding 11 kilovolts and is used or intended to be used for supplying to a single consumer;

(b) in relation to so much of an electric line as is or will be within premises in the occupation or control of the person responsible for its installation; or

(c) in such other cases, as may be prescribed.

(3) The Appropriate Government shall, while granting approval under subsection (1), impose such conditions (including conditions as to the ownership and operation of the line) as appear to it to be necessary.

(4) The Appropriate Government may vary or revoke the approval at any time after the end of such period as may be stipulated in the approval granted by it.

(5) Where any tree standing or lying near an overhead line or where any structure or other object which has been placed or has fallen near an overhead line subsequent to the placing of such line, interrupts or interferes with, or is likely to interrupt or interfere with, the conveyance or transmission of electricity or the accessibility of any works, an Executive Magistrate or authority specified by the Appropriate Government may, on the application of the licensee, cause the tree, structure or object to be removed or otherwise dealt with as he or it thinks fit.

(6) When disposing of an application under sub-section (5), an Executive Magistrate or authority specified under that sub-section shall, in the case of any tree in existence before the placing of the overhead line, award to the person interested in the tree such compensation as he thinks reasonable, and such person may recover the same from the licensee.

Explanation. - For the purposes of this section, the expression “tree” shall be deemed to include any shrub, hedge, jungle growth or other plant.

Section 161. (Notice of accidents and injuries): ---

(1) If any accident occurs in connection with the generation, transmission, distribution, supply or use of electricity in or in connection with, any part of the electric lines or electrical plant of any person and the accident results or is likely to have resulted in loss of human or animal life or in any injury to a human being or an animal, such person shall give notice of the occurrence and of any such loss or injury actually caused by the accident, in such form and within such time as may be prescribed, to the Electrical Inspector or such other person as aforesaid and to such other authorities as the Appropriate Government may by general or special order, direct.

(2) The Appropriate Government may, if it thinks fit, require any Electrical Inspector, or any other person appointed by it in this behalf, to inquire and report-

(a) as to the cause of any accident affecting the safety of the public, which may have been occasioned by or in connection with, the generation, transmission, distribution, supply or use of electricity, or

(b) as to the manner in, and extent to, which the provisions of this Act or rules and regulations made thereunder or of any licence, so far as those provisions affect the safety of any person, have been complied with.

(3) Every Electrical Inspector or other person holding an inquiry under subsection (2) shall have all the powers of a civil court under the Code of Civil Procedure, 1908 for the purpose of enforcing the attendance of witnesses and compelling the production of documents and material objects, and every person

required by an Electrical Inspector be legally bound to do so within the meaning of section 176 of the Indian Penal Code."

6. Section 185 (c) provides that the Indian Electricity Rules, 1956 (hereinafter referred to as the Rules) made under section 37 of the Indian Electricity Act, 1910 as it stood before such repeal shall continue to be in force till the regulations under section 53 of this Act are made.

7. The Central Government has also framed the Rules called the Intimation of Accidents (Form and time of service of notice) Rules, 2005. Rule 3 reads as under:

> "3. **Intimation of accidents**.- (1) If any accident occurs in connection with the generation, transmission, supply or use of electricity in or in connection with, any part of the electric lines or other works of any person and the accident results in or is likely to have resulted in loss of human or animal life or in any injury to a human being or an animal, such person or any authorized person of the generating company or licensee, not below the rank of a Junior Engineer or equivalent shall send to the Inspector a telegraphic report within 24 hours of the knowledge of the occurrence of the fatal accident and a report in writing in Form A within 48 hours of the knowledge of occurrence of fatal and all other accidents. Where possible a telephonic message should also be given to the Inspector immediately, if the accident comes to the knowledge of the authorized officer of the generating company/licensee or other person concerned.
>
> (2) For the intimation of the accident, telephone numbers, fax numbers and addresses of Chief Electrical Inspector or Electrical Inspectors, District Magistrate, police station, Fire Brigade and nearest hospital shall be displayed at the conspicuous place in the generating station, sub-station, enclosed substation/switching station and maintained in the Office of the in-charge/owner of the Medium Voltage (MV)/High Voltage (HV)/Extra High Voltage (EHV) installations."

8. Chapter IV of the Indian Electricity Rules, 1956 deals with general safety requirements. Rule 29 provides that all electric supply lines and apparatus shall be of sufficient ratings for power, insulation and estimated fault current and of sufficient mechanical strength, for the duty which they may be required to perform under the environmental conditions of installation, and shall be constructed, installed, protected, worked and maintained in such a manner as to ensure safety of human beings, animals and property. According to sub-rule (2) of Rule 29, the relevant code of practice of the Bureau of Indian Standards including National Electrical Code, if any, may be followed to carry out the purposes of this rule and in the event of any inconsistency, the provision of these rules would prevail. As per sub Rule (3) of Rule 29, the material and apparatus used shall conform to the relevant specifications of the Bureau of Indian Standards where such specifications have already been laid down. Rule 30 reads as under:

> "**30. Service lines and apparatus on consumer's premises-**
>
> (1) The supplier shall ensure that all electric supply lines, wires, fittings and apparatus belonging to him or under his control, which are on a consumer's premises, are in a safe condition and in all respects fit for supplying energy and the supplier shall take due precautions to avoid danger arising on such premises from such supply lines, wires, fittings and apparatus.
>
> (2) Service-lines placed by the supplier on the premises of a consumer which are underground or which are accessible shall be so insulated and

protected by the supplier as to be secured under all ordinary conditions against electrical, mechanical, chemical or other injury to the insulation.

(3) The consumer shall, as far as circumstances permit, take precautions for the safe custody of the equipment on his premises belonging to the supplier.

(4) The consumer shall also ensure that the installation under his control is maintained in a safe condition."

9. Rule 35 provides that the owner of every medium, high and extra-high voltage installation shall affix permanently in a conspicuous position a danger notice in Hindi or English and the local language of the district, with a sign of skull and bones. Rule 44-A provides that if accident occurs in connection with the generation, transmission, supply or use of energy in or in connection with, any part of the electric supply lines or other works of any person and the accident results in or is likely to have resulted in loss of human or animal life or in any injury to a human being or an animal, such person or any authorised person of the State Electricity Board/Supplier, not below the rank of a Junior Engineer or equivalent shall send to the Inspector a telegraphic report within 24 hours of the knowledge of the occurrence of the fatal accident and a written report in the form set out in Annexure XIII within 48 hours of the knowledge of occurrence of fatal and all other accidents.

10. Rule 46 provides for periodical inspection and testing of installation. Rule 51 provides for provisions required to be observed where energy at medium, high or extra-high voltage is supplied, converted, transformed or used. Rule 74 of the Rules provides that all conductors of overhead lines other than those specified in sub-rule (1) of rule 86 shall have a breaking strength of not less than 350 kg. Rule 77 provides for clearance above ground of the lowest conductor. Rules 79, 80 and 91 read as under:

"**79. Clearances from buildings of low and medium voltage lines and service lines-**

(1) Where a low or medium voltage, overhead line passes above or adjacent to or terminates on any building, the following minimum clearances from any accessible point, on the basis of maximum sag, shall be observed: -

(a) for any flat roof, open balcony, verandah roof and lean-to-roof-

(i) When the line passes above the building a vertical clearance of 2.5 metres from the highest point, and

(ii) When the line passes adjacent to the building a horizontal clearance of 1.2 metres from the nearest point, and

(b) For pitched roof-

(i) When the line passes above the building a vertical clearance of 2.5 metres immediately under the lines, and

(ii) When the line passes adjacent to the building a horizontal clearance of 1.2 metres.

(2) Any conductor so situated as to have a clearance less than that specified in sub-rule (1) shall be adequately insulated and shall be attached at suitable intervals to a bare earthed bearer wire having a breaking strength of not less than 350 kg.

(3) The horizontal clearance shall be measured when the line is at a maximum deflection from the vertical due to wind pressure.

[Explanation- For the purpose of this rule, expression "building" shall be deemed to include any structure, whether permanent or temporary]

80. Clearances from buildings of high and extra-high voltage lines-

(1) Where a high or extra-high voltage overhead line passes above or adjacent to any building or part of a building it shall have on the basis of maximum sag a vertical clearance above the highest part of the building immediately under such line, of not less than-

(a) For high voltage lines upto and including 33,000 volts — 3.7 metres

(b) For extra-high voltage lines — 3.7 metres plus 0.30 metre for every additional 33,000 volts or part thereof.

(2) The horizontal clearance between the nearest conductor and any part of such building shall, on the basis of maximum deflection due to wind pressure, be not less than-

(a) For high voltage lines upto and including 11,000 volts — 1.2 metres

(b) For high voltage lines above 11,000 volts and up to and including 33,000 volts — 2.0 metres

(c) For extra-high voltage lines — 2.0 metres plus 0.3 metre for every additional 33,000 volts for part thereof.

[Explanation- For the purpose of this rule expression "building" shall be deemed to include any structure, whether permanent or temporary]

91. Safety and protective devices-

(1) Every overhead line, (not being suspended from a dead bearer wire and not being covered with insulating material and not being a trolley-wire) erected over any part of street or other public place or in any factory or mine or on any consumers' premises shall be protected with a device approved by the Inspector for rendering the line electrically harmless in case it breaks.

(2) An Inspector may by notice in writing require the owner of any such overhead line wherever it may be erected to protect it in the manner specified in sub-rule(l).

[(3) The owner of every high and extra-high voltage overhead line shall make adequate arrangements to the satisfaction of the Inspector to prevent unauthorised persons from ascending any of the supports of such overhead lines which can be easily climbed upon without the help of a ladder or special appliances. Rails, reinforced cement concrete poles and pre-stressed cement concrete poles without steps, tubular poles, wooden supports without steps, I-sections and channels shall be deemed as supports which cannot be easily climbed upon for the purpose of this rule.]"

11. The combined reading of the Electricity Act and the Rules framed thereunder and the Indian Electricity Rules, 1956, quoted hereinabove, provides safety measures required to be observed for supply of electricity. The electricity is a dangerous commodity and it is the statutory duty of the person responsible for the supply and maintenance to abide by all the protective measures. In case respondents in the present case had installed all the safety devices and had taken precautions, the accident could have been avoided. It is not believable that 8 years boy would climb the rock and get electrocuted, as projected in the reply by respondents. The boy has come in contact with the live wire lying low when he had gone to bring vegetables with his mother. It was a high tension live wire called 'Lahru-Chowari Line'. Since it was lying low, no contributing negligence can be attributed to a boy aged 8 years. It is a fit case where

principle of '*res ipsa locator*' would apply. There is no merit in the contention of Mr. B.S.Ranjan, Advocate, that it was an act of God. Rather, it is a sheer act of negligence on the part of the respondents, who have failed to take necessary safety measures in maintaining high tension live wires called 'Lahru-Chowari Line'. It was the duty of the field officers concerned under Rule 44-A of the Electricity Rules, 1956 and as provided under Rule 3 of Intimation of Accidents (Form and time of service of notice) Rules, 2005 to give information of the accident to the higher authorities. There is no tangible material placed on record by respondents No. 2 & 3 in the reply that Rule 44-A of the Electricity Rules, 1956 or Rule 3 of the Intimation of Accidents (Form And Time Of Service Of Notice) Rules, 2005, have been complied with. The respondents have failed to conduct periodical inspections as visualized under the Act and Rules framed thereunder. They have failed to protect the life and property of the general public. The present case falls within the ambit of strict liability. There is a flagrant violation of the Act and Rules by the respondents by not providing any safeguards, checks and balances to prevent escape of energy which caused electrocution in the instant case. The hanging of 'Lahru-Chowari Line' at a low level was a potential danger and threat to public at large. The burden on the respondents was high involving the risk factor. The respondents have failed to discharge the onus placed upon them under the Statutes. There is also a criminal negligence on the part of the functionaries of respondents No. 2 & 3.

12. The petitioner has remained hospitalized w.e.f. 18.3.2012 to 3.5.2012 in Dr. Rajendra Prasad Medical Hospital, Tanda. He was operated upon on 25.3.2012. His both arms were amputated as per Annexure P-4. He has suffered 100% disability. The petitioner has been reduced to a vegetable form by the sheer negligence on the part of the Board and its functionaries. He has dis-continued his studies. He cannot look after himself. He needs attendant and nursing throughout his life. He comes from a scheduled tribe family and that too from a very remote area of the State of Himachal Pradesh. He is to be fed by his family members. He cannot take even his bath. We can take judicial notice of the fact that the help of the family would not be available to him throughout his life. He cannot marry with this condition. He and his family members have suffered trauma after the accident. The petitioner has suffered pain and agony. He has to be provided with sufficient compensation for his entire future life.

13. A person injured by the negligent act of others is definitely entitled to general damages for non-pecuniary loss such as pain, suffering and loss of amenities and also pecuniary loss, both past and future. He has incurred medical expenses as well. The petitioner is entitled for compensation/damages for the embarrassment for the disability and disfigurement. The petitioner is also entitled to damages for the loss of ability to use his limbs, including the loss of pride and pleasure and loss of marriage prospects.

14. Now, as far as damages/compensation under pecuniary loss is concerned, the principle of '*restitutio in integrum*' would apply. The petitioner is entitled to be put in the same position in which he would have been if he had not sustained the wrong.

15. Now, as far as the loss of future earning is concerned, the Court has to look into the entire gamut of facts and circumstances of the case, including the background of the petitioner. The petitioner was a brilliant student. He would have earned at least 30,000/- to 40,000/- per month, after attaining the age of majority or after completing his education. It would have been easier for him to get job from the Scheduled Tribe quota.

16. The Court has to apply the appropriate multiplier by taking into consideration life expectancy of a child. In the present case, taking into consideration all the facts and circumstances even on the conservative side, the

life expectancy of the petitioner with his disability would not be less than 70 years of age. The petitioner is also entitled to the empowerment of his ability to perform household chores. The petitioner has to employ house-keeper/servant etc. to perform them. Even if the family members are providing the chores performed by the petitioner, the petitioner is entitled to award of damages representing the value of those services. The petitioner is also entitled to medical and nursing expenses including special equipment which may be required for providing him artificial limbs and the cost of travel, to and fro journey to hospital and his family members.

17. Now, as far as the plea of act of God taken by the respondents is concerned, the principle is that the act of God amounts due to operation of natural force. In the present case, the plea of act of God raised by the respondents is not attracted. The child has come in contact with the live wire due to negligence and laxity of the functionaries of the respondents who have failed to maintain the supply lines by taking precautions required under the Act. There was no contributory negligence on behalf of the petitioner. The petitioner was only 8 years old. He could not foresee that the loose wire would be lying low on the ground.

18. The Privy Council in the case of ***Eastern and South African Telegraph Company, Limited vrs. Cape Town Tramways Companies Limited,*** reported in ***(1902) AC 381,*** has held that the principle of *Rylands v. Fletcher, (1868) L.R. 3 H.L. 330,* is not inconsistent with the Roman law. It imposes a liability on a proprietor which is measured by the non-natural user of his own property, not by that of his neighbor. It also applies to a proprietor who stores electricity on his land if it escapes therefrom and injures a person or the ordinary use of property. Their lordships have held as under:

> "The respondents contended that the escape of electricity from the tram-rails to the earth and thence into the appellants' cable did not constitute a "leak" within the meaning of the Act. The respondents further contended that the words of the Act giving a remedy for damage "caused at any time by electrolysis or otherwise" did not cover the sort of damage caused to the appellants. The respondents contended that the words "or otherwise" only included things ejusdem generis with electrolysis.
>
> To this the appellants answered that the word "leak", whether as ordinarily used by electricians and others or as used in this Act, meant an escape of electricity from the conductor provided to carry the electricity, and that in this case such electricity escaping from the rails which were intended to carry the current, and finding its way into the appellants' cable, which was not intended to carry such current, was a leak within the meaning of the section. They further contended that the words "or otherwise" as used in this section were intended to be comprehensive, and not intended to be cut down to the narrow meaning contended for by the respondents.
>
> Now, if regard be had solely to the action of the respondents in storing electricity on their lands, it must be allowed that the analogy is very close to the illustrations given in *Rylands v. Fletcher* of the kind of things which a proprietor can only do at his own peril. Electricity (in the quantity which we are now dealing with) is capable when uncontrolled of producing injury to life and limb and to property; and in the present instance it was artificially generated in such quantity, and it escaped from the respondents' premises and control. So far as the respondents are concerned, it appears to their Lordships that, given resulting injury such as a postulated in *Rylands v. Fletcher,* and the principle would apply."

19. In the case of ***Corporation of The City of Glasgow vrs. Taylor,*** reported in (***1922) 1 AC 44,*** the House of Lords have held that in the case of child eating poisonous berries, the proprietors and custodians of the garden are liable. Their lordships have held as under:

> "The father of a boy, aged seven, who died from eating the berries of a poisonous shrub growing in some public gardens in Glasgow, sued the Corporation as the proprietors and custodians of the gardens for damages for the death of his son. The pursuer averred that on a piece of fenced ground in the gardens the defenders grew, among other specimen plants, a shrub bearing poisonous berries which presented a tempting appearance to children; that this enclosed piece of ground was open to the public, access thereto being by a gate which could be easily opened by young children, and was in a part of the gardens much frequented by children; that the pursuer's son, with some other children, entered the gardens and ate some of the berries of this poisonous shrub and died; that the defenders knew that these berries were a deadly poison, but took no precautions to warn children of the danger of picking the berries of this shrub or to prevent them from doing so; and that there was no adequate notice in the gardens warning the public of the dangerous character of the specimen shrubs growing therein:-
>
> Held, that the pursuer's averments disclosed a good cause of action against the defenders, and that the action ought to proceed to trial.
>
> *Cooke V. Midland Great Western Railway Co. of Ireland (1909) A.C. 229 applied."*

20. In the case of ***Paine vrs. Colne Valley Electricity Supply Co., Ltd. And British Insulated Cables, Ltd.*** Reported in ***(1938) 4 All E.R. 803,*** it was held that as there was no efficient screening of the dangerous parts in accordance with the provisions of that Act, there was a breach of statutory duty by the first defendants and they were held liable. It was held as follows:

> "In these circumstances, counsel for the first defendants admitted that if the kiosk were an electrical station within the definition given in the Factory and Workshop Act, 1901, Sched. VI, he had no defence, owing to the lack of efficient screening. As an electrical station is defined in Sched. VI, para (20) as
>
> > …… any premises or that part of any premises in which electrical energy is generated or transformed for the purpose of supply by way of trade…….
>
> and as the transformer here was enclosed in a separate cubicle, he argued that only that cubicle was an electrical station, and that those in which the switches and the oil switch were housed were not. With all respect, that seems to me to be an impossible argument. I think that it is clear that the whole of the kiosk was an electrical station, and that the division into cubicles was only a method of screening or protection. The definition is dealing with places where current is either generated and then distributed, or delivered in bulk and transformed for distribution to a commercial voltage. It may be possible to have a transformer with no switches, but, if they are both under the same roof, as in this case, both must be protected. It follows, in my opinion, not only that there had been a breach of the Factory and Workshop Act, 1901, but also that the first defendants had failed to provide a safe place for their workmen, and had, therefore, committed a breach of their common law duty as recently laid down in *Wilsons & Clyde Coal Co., Ltd., v. English.* This is a duty which cannot be avoided by delegation. It is no answer to say, as counsel for the first defendants submitted: "We employed competent

contractors to provide a safe place or plant". The class of cases in which the employment of a competent contractor affords a defence belongs to a wholly different category in the law of negligence. I have no hesitation in holding that the first defendants have no defence whatever to the plaintiff's claim."

21. In the case of ***Yachuk & another vrs. Oliver Blais Co., Ltd.,*** reported in ***(1949) 2 All. E.R. 150,*** the Privy Council has held that when employee has given an explosive substance to a boy with a limited knowledge in respect of the likely effect of the explosion, the boy having done the act which the child of his years might be reasonably expected to do. This would not be a case of contributory negligence. It has been held as under:

> ".....It was contended on behalf of the plaintiffs that the learned Judge's findings were illogical and inconsistent. Black was negligent because he ought to have recognized that a boy of the age of the infant plaintiff not only lacked knowledge and experience, but was likely to have mischievous propensities. These defects being characteristic of the normal boy, it was impossible (so ran the argument) to impute to this boy, whatever exceptional training or experience he might have had and however reckless he might appear to have been, any failure to take reasonable care for his own safety. In other words, he could not be found guilty of contributory negligence. Their Lordships do not find it necessary to decide whether there is a necessary inconsistency, in all cases in which the defendant owes a duty to show special care in his dealings with a child, in a finding of negligence by the defendant coupled with one of contributory negligence by an infant plaintiff. If the evidence had shown that the infant plaintiff in the present case had, if fact, greater knowledge of the dangerous properties of gasoline than would be imputed normally to a child of his age, a more debatable question would have arisen. A careful examination of the evidence has satisfied their Lordships that the boy had no knowledge of the peculiarly dangerous quality of gasoline. He knew, no doubt, that an object soaked in gasoline could be ignited with a match. He did not know, and there is no evidence that he had ever been told, that gasoline was a volatile liquid capable of producing a highly inflammable vapour likely to burst into flame if heat were brought near it. He knew (he said in his evidence) that "it would burn like a match....after you strike it." His father said that he had never warned him about gasoline, because he did not think that a boy could buy it. The boy himself said, what is likely enough, that his father had told him to keep away from his gasoline torch, but that he was "pretty sure" that neither of his parents had ever warned him " to be careful with gasoline." On the evidence it is, in their Lordships view, impossible to regard him as any more capable of taking care of himself in the circumstances in which he was placed than a normal boy of his age might be expected to be. In the words of DENMAN, C.J., although he may be said to have acted " without prudence or thought", he "showed these qualities in as great a degree as he could be expected to possess them." It is a fair inference from the evidence that it was the very property of gasoline which he neither knew, nor could be expected to know, which brought about his misadventure. Their Lordships are, accordingly, of opinion, in agreement with the Court of Appeal for Ontario, that on the facts of this case the finding of contributory negligence cannot be supported.
>
> It follows from what their Lordships have already said that the attempt to attribute the disaster which happened solely to the acts of the infant plaintiff must fail. That defence cannot, indeed, be maintained in the light of the concurrent findings of fact in this case, for, when once the negligence of the plaintiff, it is impossible to say that a new cause

has intervened so as to relieve the defendant of all responsibility for the evil consequences which followed his wrongful act. Their Lordships will add, however, that even without regard to the rule of practice as to concurrent findings they would have had no difficulty in arriving at the same conclusion. However the case is put, the answer made by McRUER, J.A., in the Court of Appeal for Ontario, seems to their Lordships to be conclusive in the light of the evidence when he said ([1945] Ont. Rep. 33):

> "If one gives to a child an explosive substance and the child, with a limited knowledge in respect of the likely effect of the explosion, is tempted to meddle with it to his injury, it cannot be said in answer to a claim on behalf of the child that he did meddle to his own injury, or that he was tempted to do that which a child of his years might be reasonably expected to do."

22. In the case of ***Hawkins vrs. Coulsdon and Purley Urban District Council,*** reported in ***(1954) 1 All. E.R. 97,*** the Court of Appeal has held the requisitioning authority liable in the case of defective steps of requisitioned house. It has been held as follows:

> "If a licensor had actual knowledge of the physical condition of his property and a reasonable man would have realized that it was a danger, the licensor was under a duty to use reasonable care to prevent damage from the danger unless it was obvious, and he could not escape liability by showing that he himself did not appreciate the risk involved; the plaintiff had discharged the burden of proof which was on her, and, therefore, she was entitled to damages against the defendants.
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> Per DENNING and ROMER, L. JJ. When leaving the house in the dark, the plaintiff was entitled to assume that the steps were suitable for the purpose for which they were provided, and, therefore, the fact that the accident occurred during the hours of darkness was irrelevant.
>
> Per DENNING, L.J: The defendants, being an urban district council, were, of course, not the householder and could not be on the spot to warn visitors of the danger, but that does not rid them of their responsibility. It only means that, being unable to warn, they ought to have mended the step. They cannot shift their responsibility on to the occupants of the house for the simple reason that they retained the possession and control and are responsible in law. They cannot get rid of their responsibility by the plea that they are only a requisitioning authority. They ought to do whatever a reasonable man in their position would do, and that is, mend the step."

23. In the case of ***Hughes vrs. Lord Advocate,*** reported in ***1963 A.C. 837,*** the House of Lords have held that the workmen were in breach of duty of care to safeguard the boy against this type of occurrence which, arising from a known source of danger, the lamp, was reasonably foreseeable, although that source of danger acted in an unpredictable way. It was held as follows:

> "The open tent and manhole and the lighted lamps were an allurement and a source of danger to children whose presence could reasonably have been foreseen, as it could have been foreseen that they might interfere with the lamp or fall down the manhole and that, if the lamp was damaged, the child might be severely burned in the confined space. It is not necessary to show that the Post Office employees could have foreseen the exact circumstances constituting the accident or the exact extent of the injuries sustained, so long as it is shown that the accident which in fact occurred was of the same type as any accident which could reasonably have been foreseen. The accident which occurred was caused by the same agencies (the open manhole and the lighted lamps) and would have been prevented by the same precautions as a wide range of

accidents which should reasonably have been foreseen. The injuries sustained were of the same kind and the same order of severity as those which might have been anticipated as a result of a paraffin fire in a confined space. The injuries were largely caused by fire in the manhole after the explosion had subsided. The fact that the foreseeable combustion of the paraffin was unforeseeably rapid and violent does not change the character of the accident of which the chief features were foreseeable. The accident was within the risk created by the Post Office employees."

24. In the instant case, the respondents could always foresee that if the wire is loose and near the ground, it would result in electrocution.

25. In the case of ***Gough vrs. Throne,*** reported in ***(1966) 3 All. E.R. 398,*** it was held that an ordinary child of 13 ½ years (unlike an adult) could not reasonably be expected to pause to see for herself whether it was safe to go forward when the lorry driver had beckoned her on, and so the plaintiff had not been negligent in relying entirely on the lorry driver's signal to her to cross.

26. In the case of ***Croke (a minor) and another v. Wiseman and others,*** reported in ***(1981) 3 All. E.R. 852,*** the Hon'ble Judges ***Shaw and Griffiths,*** have held that the child would be entitled to be compensated for los of future earnings by applying the appropriate multiplier. It has been held as follows:

" I do not read those passages in the speeches of their Lordships in *Pickett's* case and in *Gammell v. Wilson (1981)I All ER 578, (1981) 2 WLR 248* in which they stress the difficulty of assessing an award of damages for the lost years in the case of a child as having general application to the claims of all children whose earning capacity has been diminished. In attempting to assess the value of a claim for the lost years, the court is faced with a peculiar difficulty. Not only does it have to assess what sum the plaintiff might have been earning, but it also has to make an assessment of the sum that would not have been spent on the plaintiff's own living expenses and would have therefore been available to spend on his dependants. In the case of a living plaintiff of mature years whose life expectation has been shortened and who has dependants, there are compelling social reasons for awarding a sum of money that he knows will be available for the support of his dependants after his death. It was this consideration that led to the result in *Pickett's case*. As a consequence of the decision in *Pickett's case,* the House of Lords in *Gammell's case* felt compelled to apply the same principle to a claim brought on behalf of the estate of the deceased person. If it could be shown that part of the deceased's income was available to be spent on his dependants, then a claim for that part of the income was available to cover the lost years of working life. In the case of a child, however, there are no dependants, and if a child is dead there can never be any dependants and, if the injuries are catastrophic, equally there will never be any dependants. It is the child that will be dependant. In such circumstances, it seems to me entirely right that the court should refuse to speculate whether in the future there might have been dependants for the purpose of providing a fund of money for persons who will in fact never exist. It was this consideration that led me in *Kandalla v. British Airways Board (1980)1 All ER 341, (1981) QB 158* to refuse to assess a sum for the lost years in respect of two unmarried doctors by speculating whether or not in the future they would have married and set aside some part of their income for husbands or children. I refused to enter into the realm of speculation about an impossible and hypothetical situation.

However, when one is considering the case of a gravely injured child who is going to live for many years into adult life, very different

considerations apply. There are compelling social reasons why a sum of money should be awarded for his future loss of earnings. The money will be required to care for him. Take the present case: the cost of future nursing care has been assessed on the basis of nurses coming in to care for him for part of the day and night. It is not a case where damages have been awarded which will provide a sufficient sum for him to go into a residential home and be cared for at all times. Damages awarded for his future loss of earnings will in the future be available to provide a home for him and to feed him and provide for such extra comforts as he can appreciate. It cannot be assumed that his parents will remain able to house, feed and care for him throughout the rest of his life. If of course damages have been awarded on the basis of the full cost of residential care so that they include the cost of roof and board, any award for future loss of earnings will be small because there will be a very large overlap between the two heads of damage. The plaintiff must not be awarded his future living expenses twice over; this would be unfair to the defendants.

I would therefore award this child a sum to compensate him for his loss of earnings during the period that he will live but I would not award any additional sum to compensate him for the lost years.

The judge assessed the future loss of earnings at £5,000 per annum. He arrived at this figure by taking the national average wage for a young man. In my view, he was justified in doing so. This child came from an excellent home, the father is an enterprising man starting his own business and the mother is a qualified teacher; they have shown the quality of their characters by the care they have given their child and their courage by the fact they have continued with their family even after this disaster befell them. The defendants cannot complain that they are unfair treated if against this background the judge assumes the child will grow up to lead a useful working life and be capable of at least earning the national average wage.

Assuming the child was able to start work at 18 and lived to the age of 40, his maximum working life would be 22 years. According to the actuarial tables put in at the trial, the appropriate multiplier to apply for such a period was 8.876. But that is a mathematical figure based on the certainty that earnings would have continued over that period. It makes no allowance for the large discount that must be given for the immediate receipt of the capital sum at least 11 years before earnings would commence; nor does it allow a discount for the possibility that the child might never have become an earner. Taking these factors into account, I think there should be a substantial further discount on the multiplier which I would reduce to five years. Accordingly, I would reduce the judge's award under this head from £45,000 to £ 25,000.

.....

Starting from this position, which has not really been disputed by counsel for the defendant authority, the next question that arises is whether any different principle applies in relation to loss of future earnings where the victim is a very young child as in this case. For my part, I fail to see why there should be any difference in the principles which determine what are the bases for the recovery of damages whatever the age of the victim. The assessment of the measure of damages may be more or less difficult but the right of the plaintiff to an assessment of damages for that element of damage cannot be brushed aside. The obligation of the court to make the best assessment it can is not to be avoided by treating compensation for loss of future earnings in the case of a young child as being so speculative as not to deserve to be

considered at all. On an actuarial basis a healthy child of two in a caring and comfortable home has a life expectation of some seventy years. I can see no valid reason for assuming that such a child is unlikely to reach adulthood or to achieve the capacity to earn a livelihood. I would adopt the approach of the judge. He assumed a life expectancy of 40, which was founded on the evidence of Professor Holt. Some criticism has been directed towards the acceptance of that evidence inasmuch as two expert witnesses spoke to a considerably shorter period as the probable expectation. Having read the respective testimonies of the witnesses on both sides, I see no reason for differing from Michael Davies J in this regard. I would support also the figure of £5,000 as representing the average annual earning the plaintiff would have achieved if he had not been rendered incapable. Where I part from the judge is in regard to the adoption of a multiplier of nine. With a life expectancy of 40, the plaintiff's conjectural working life would be about twenty years at the most. The judge's multiplier virtually divided that by two. This would have been appropriate if, at the time of the trial, the plaintiff was at the threshold of his working career; but he was then not eight years old and many years away from it.

In his meticulous judgment, to which I pay respectful tribute, Michael Davies J said that he had 'considered this particular aspect of the case very carefully'. In my view, however, he had not given due weight to this factor of doubly accelerated payment. Taking it into account I would adopt a multiplier of five so that the figure for loss of future earnings would become £25,000."

27. In the instant case also, the child was 8 years at the time of electrocution. His life expectancy, as noticed above, would be 70 years. He would have started earning at the time of 20 years. His working life would be 50 years and his loss of future earning has to be assessed by taking into consideration the law laid down in the English Law as well as by the Hon'ble Supreme Court and the various High Courts.

28. Their lordships of the Hon'ble Supreme Court in ***Civil Appeal No. 11466 of 2014***, titled as ***Raman vrs. Uttar Haryana Bijli Vitran Nigam Ltd. & ors.,*** decided on ***17th December, 2014***, which would be discussed by as at the later stage, has also upheld the judgment of the learned Single Judge of the Punjab and Haryana High Court, awarding compensation to the tune of Rs. 60,00,000/- to a child of the age of 4 years who died due to electrocution. Their lordships of the Hon'ble Supreme Court have taken into consideration the principles laid down under the English Law as well as by the Hon'ble Supreme Court and the various High Courts, for determining compensation under the Motor Vehicles Act for the purpose of applying multiplier and various heads for awarding damages, both pecuniary and non-pecuniary. Their lordships of the Hon'ble Supreme Court have observed that the amount of compensation awarded was less and not reasonable and having regard to the nature of 100 % permanent disability suffered by the appellant, it should have been much higher as the appellant requires permanent assistance of an attendant and treatment charges etc.

29. In the case of ***Manohar Lal Sobha Ram Gupta and others vrs. Madhya Pradesh Electricity Board,*** reported in ***1975 ACJ 494,*** the Division Bench has held that the Electricity Board is a statutory Authority and as such the standard of care required is high one owing to the dangerous nature of electricity. It has been held as under:

"[4] The defendant has a statutory authority under the Electricity Act, 1910, read with the Electricity Supply Act, 1948 to transmit electric energy. The defendant, therefore, cannot be made liable for nuisance for the escape of electrical energy on the principle accepted in the case of

Rylands v. Fletcher, (1866) LR 1 Ex 265. The defendant, however, is still liable for negligence. It is negligence to omit to use all reasonable known means to keep the electricity harmless; (see Clerk & Lindsell on Torts, 13th Edition, paragraph 1536), The burden of proving that there was no negligence is on the de- fendant and there is no obligiation on he plaintiff to prove negligence. Further, the standard of care required is a high one owing to the dangerous nature of electricity; (see Charlesworth on Negligence, 5th Edition, p. 531). If the defendant produces no material and offers no evidence to negative negligence, negligence will be presumed. This result will also follow on the principle of res ipsa loquitur. Live broken electric wires carrying, high tension energy are generally not found in a public place, street or road and, therefore, if such a thing happens a prima facie inference can be drawn that there has been some carelessness on the part of the defendant in transmitting electric energy or in properly maintaining the transmission lines. This inference is further supported by Rule 91 of the Indian Electricity Rules, 1956. This rule provides that every over head line which is not covered with insulating material and which is erected over any part of a street or other public place or any factory or mine or on any consumer's premises shall be protected with a device approved by the Inspector for rendering the line electrically harmless in ease it breaks. If the precaution under this rule is taken the line in case it breaks would become dead and harmless. The fact that the line after it broke did not become harmless shows that necessary precaution was not taken. As the defendant has not produced any evidence whatsoever to place the facts showing that all necessary precautions were taken and there was no negligence on its part, it must be held that the accident happened because of the negligence of the defendant."

30. In the case of ***Amul Ramchandra Gandhi vrs. Abhasbhai Kasambhai Diwan and others,*** reported in ***AIR 1979 Gujarat 14,*** the Division Bench has laid down the principles when the contributory negligence can be attributed to a child. It has been held as under:

"11. The principles which emerge on a review of the authorities may be thus summarized: A distinction must be necessarily drawn between children and adults when the question of contributory negligence arises for, a child cannot be expected to be as careful for his own safety as an adult. Where a child is of such an age as to be unable to fend for himself or to be naturally ignorant of danger, or where in doing an act which contributed to the accident, he was only following the instincts natural to his age and the circumstances, he is not guilty of contributory negligence. A child should be found guilty of contributory negligence only if it is established as a matter of fact on the evidence on record that he is of such an age and understanding as reasonably to be expected to take precautions for his own safety and the blame for the accident could be necessarily attached to him. In cases of road accidents, it must be borne in mind that a child is not possessed of the road sense or the experience of elders. Even if it transpires that he was taught road discipline either at home or at school and that, therefore, if he had bestowed some thought, he would have realized that it was his duty to take reasonable can for his own safety, still a normal child would not be held culpable in view, of his propensity to forget altogether what has been taught to him if something else is uppermost in his mind. A normal child is always momentarily forgetful of the perils of crossing and walking on a road, regretfully though, and under such circumstances, if he failed to notice even an on coming vehicle and got hurt by it, he cannot be held guilty of contributory negligence. In such a case, the question of the duty of the driver of the vehicle must be examined with greatest precision and unless the driver is in a position to show on establishment of, primary

facts that he was driving the vehicle in such a manner that he could have brought it to standstill in case of emergency and that the accident was inevitable or unavoidable, the inference of his negligence and. his alone must be raised almost as a matter of course."

31. In the case of ***The Kerala State Electricity Board Trivandrum vrs. Suresh Kumar,*** reported in ***AIR 1986 Kerala 72,*** the Division Bench has held that where the evidence in the case clearly show that the sagging was the consequence of sabotaging committed by the employees of the Board itself, the fact that sabotage was committed by the employees during the period of their strike cannot exonerate the Board from statutory duty cast upon it by provisions of the Act and Rules. It has been held as under:

"6. According to the plaintiff the 11 K..V. electric line which passes across the paddy field was sagging to a height of about 1 metre from the ground from 6th May 1978. PW 4, a resident of the locality swears to this fact The Assistant Executive Engineer examined as DW 1 swears that the employees of the. Board or their supporters have caused the sabotage. The defendant's case is that the employees had gone on strike from 4-5-1978, that they were engaged in sabotaging the electric lines and that the sagging of the electric line which caused the accident was the result of these activities of the- employees and their supporters and so the Board is not liable to pay any damages to the plaintiff. We find it very difficult to accept this argument. The Electricity Rules, 19% casts a duty on the Electricity Board to properly maintain the electrical installations and lines carrying the electrical energy. Rule 77(3) specifically imposes a duty on the Board to see that 11 K. V. overhead lines are held at a height not less than 4.572 metres (15 feet) above the ground. If the line is shown to be sagging to a height of up to 3 feet above the ground, prima facie negligence on the part of the Board can be inferred. The evidence in the case clearly goes to show that the sagging was the consequence of sabotgaging committed by the employees of the Board itself. Whether the sabotage was committed by the employees during the period of their strike or not, the Electricity Board cannot get itself exonerated from the statutory duties cast upon it by the provisions of Electricity Supply Act and the Electricity Rules, 1956. In this view of the matter we have no hesitation to hold that the sagging of the 11 K. V. line was the result of the negligence on the part of the Kerala State Electricity Board."

32. In the case of ***Smt. Angoori Devi and ors. Vrs. Municipal Corporation of Delhi***, reported in ***AIR 1988 Delhi 305***, the learned Single Judge has held that where a temporary electric connection by means of loose and naked wires had been taken in a wooden shack installed on the road side and as a result of such loose connections, the rain water which was collected around the shack and also the area around the shack got electrified and as a result thereof the boy died by way of electrocution, while crossing such area, the death of the boy was due to the gross negligence of the Board and its servants. It has been held as under:

"(5) I have heard the learned counsel for the parties and have perused the record of the case. My findings on the issues ere as under :-

Issue NO. 1:

The plaintiff No. 1 while appearing as Public Witness 2 has deposed that she is the widow of the deceased and plaintiffs No. 2 to 5 are his daughters and plaintiffs No. 6 to 9 are his sons. Not only her statement has remained un-challenged but there is no evidence in rebuttal. I have, therefore, no hesitation in holding that the plaintiffs are the legal representatives of deceased Gopi Ram. The issue is accordingly decided in favor of the plaintiffs and against the defendant.

Issues NO. 2 & 3:

Both these issues are inter-connected and being disposed of together. Public Witness I Kailash Chand and Public Witness 3 Ram Charan are the witnesses of the occurrence and both of them have their shops at the Madras Road near the scene of occurrence.

PW-1 Kailash Chand has deposed that near the Khokha in question there was a shop of fodder seller and the owner of the said shop had affixed a balance with the help of a nail in the wall of the khokha and that on 18th August, 1976 at about 8.15 A.M. while he was taking tea at his shop, he had noticed that the deceased and one chhote were stuck to the balance whereupon he picked a wooden stool and threw it on the scale which got moved with the result that the deceased and Chhote were released there from and Chhote fell on the left hand side and the deceased fell on the left hand side i.e. towards the khokha and died due to the electric shock. He further deposed that at that that there was current even in the water and he has lodged a report with the police: He proved the copy of the F.I.R. as Ex. P-1, He further deposed that after some time a linesman of the Desu came and cut off the electric connection from the khokha, with the result the current in the khokha as well as in the water disappeared. Ram Charan Public Witness 3 has corroborated the statement of Public Witness 1. D.W. 1 S.P. Chopra is the Executive Engineer of the Desu, who had joined the area office of the Desu in September 1976 and who is stated to have made enquiries from the members of the staff and prepared his report. He proved his report as Ex. DW-1/1 DW-2 is Raj Kumar, the Inspector of the DESU. This witness deposed that on receiving a complaint in his office on 19th August, 1976 about the leakage "at the spot, he had gone there Along with the Gang mistress and had got the electric connection tested but did not find any leakage at the spot. D.W/3 is Hari Ram, linesman who after going to the spot had disconnected the electric connection of the khokha on 18th August, 1976 after the occurrence. He deposed that there was no leakage either in the khokha or in the water but he had disconnected the electric connection as people were complaining about the current in the water and khokha. D.W.4 is Kameshwar, Head Mistry of the defendant who also went to the spot on 19th August, 1976 after learning about the electrocution of the deceased. He has deposed that with the help of all-time or he had tested the lines but found no leakage therein.

It may be noticed that the statement of Public Witness 1 that the deceased died due to electrocution firstly after getting stuck with the scale and thereafter by the side of khokha had remained unchallenged. The statement of Public Witness 3 Ram Charan in this regard has also not been challenged, in cross-examination and no evidence has been produced in rebuttal. Although Raj Kumar, Inspector appearing as D.W. 2 and Kameshwar, Head Mistry as D.W. 3 had deposed that test work were conducted at the spot no test report has been produced on record. Admittedly they reached the spot a day after the day of occurrence, when the electric connection had already been disconnected. Mr. S. P. Chopra, D.W. 1 came to the scene after about a month of the date of occurrence and the witnesses, whose statements he recorded during the course of the enquiry, have not been produced. Ex. DW-1/1 is the copy of the letter dated 30th November, 1976 written by Mr. S. P. Chopra, DW-1 to the S.H.O Kashmere Gate, Delhi slating that according to the enquiry conducted by him, the death did not occur due to the negligence but it is possible that the deceased died from an electric shock either from the water or from the scale hanging on the shack. It has been admitted by D.W. 2 Raj Kumar and D.W. 4 Kameshwar that there was no other structure near the khokha in question where the electricity connection

was available and Hari Ram, D.W. 3 in cross-examination deposed that he had not noticed any other structure near the khokha where electricity might have been provided. If there was no other structure near the khokha in question having electric connection and as noted above, if the deceased had died after receiving shock either from the current coming out of the balance or from the current in the water near the khokha, it is not explained as to how the current could be found either in the scale or in the water unless there had been leakage from the electric connection in the khokha. As noted above, the test report has also not been placed on record. The fact that the electric current leaked at the spot is itself a proof of negligence on the part of Desu and its employees, I have, therefore, no hesitation in holding that the deceased died because of electrocution and as a result of negligence of the defendant and its employees. Both these issues are accordingly decided in favor of the plaintiffs and against the defendant "

Issue No. 4:

The first thing to be seen is : as to what was the age of the deceased. It is of course true that the plaintiffs.No.1's statement that the deceased was 35 "years of age at the time of his death, has remained un-challenged in the cross-examination but in view of the fact that it has been pleaded in the plaint that he was 40 years old at the time of death, the age of the deceased cannot be taken to be 35 years at-that time. There being no evidence in rebuttal, I hold that the deceased was 40 years of age at the time of his death.

It has next to be seen as to what was the income, of the deceased at the time of his death. The statement of the plaintiff No. 1 that the deceased used to ply a bullock cart and carry goods on hire has also remained unchallenged and un-rebutted. It is correct that the statement of the plaintiff No. 1 that he used to give to her a sum of Rs. 25.00 to Rs. 301-every day for household expenses has remained un-challenged but in view of the fact that it has been pleaded in the plaint that the deceased used to make a net earning of Rs. 600.00 per month i.e. Rs. 20.00 per delay after meeting all the expenses and the said amount was being spent entirely on the plaintiffs it cannot be taken that the amount being spent paid by the deceased to the plaintiff No. 1 for house-hold expenses was more than Rs. 600/ per month, In these circumstances, I hold that the plaintiff No. 1 was getting from the deceased a sum of Rs. 600.00 per month by way of house-hold expenses. There were 10. members of the family including the deceased and even if the deceased share was 1/10th. i.e. Rs. 60.00 towards the-expenses, the remaining amount that was being spent on the plaintiffs, out of the earnings of deceased comes Rs. 540.00 per month. The family thus got Rs. 6480.00 per year the expenses and maintenance of the plaintiffs. Considering the life expectancy in these days it can easily be said that the deceased would have lived and worked till the age of 60 years. The plaintiffs who are the legal representatives of the deceased have thus lost his earnings for a period of 20 years. The amount thus lost would come to about Rs. 1,29,600/. Although on account of rise in price the benefit of lump sum payment become negligible, even if the amount on account of such payment is deducted @ 15 per cent the amount payable to the plaintiffs would be more than Rs. I lakh. The plaintiffs have however, claimed only a sum of Rs. 1 lakh way of damages from the defendant and consequently I hold that they are entitled to receive a sum of Rs. 1 lakh only (Rupees one lakh only) by way of damages from the defendant. The issue is decided accordingly."

33. In the case of ***Sagar Chand and anr. Vrs. State of J & K and anr.,*** reported in ***AIR 1999 J & K 154,*** the learned Single Judge has held that

when conductor of line which was just 3 feet above ground level remained unattended for 5 days, the negligence was on the part of lineman and the children were granted compensation. It has been held as under:

> *[4] Now the question involved is, whether illness of the lineman could be a ground to leave the repair work unattended for about five days without ensuring that no person other than the line-man of the area or a duly authorised persons of the Department could switch on the line which could prove fatal as it did?*
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> *On the admitted facts of the case, there is no escape from the conclusion that both, the children were electrocuted because of the criminal negligence of the Line-man of the area. In case the line-man was sick it was for the Department concerned to make alternative arrangement. So the failure of the Department to make alternative arrangement is further prove of the fact that the immediate officers to whom the line-man was subordinate did not act with promptitude and failed to take care and caution as expected of a reasonable person in the similar circumstances. No reasonable person could be expected to leave a sub-station manned by a Line-man unattended so as to allow anybody to switch on the power when part of the line was not only damaged but left in such a manner that its conductor was almost touching the ground. Assuming that the line was commissioned by an unauthorised person, as pleaded, it could lead to casualties, both human as well as live-stock because the line passes through open paddy fields of the village and any unsuspecting person may come in contact with the overhanging conductor. Infant children cannot be attributed the knowledge that coming into contact with such an object is not only dangerous, but fatal. Thus, the failure of the Line-man and the Department not to complete the repair work which admittedly had already commenced and leaving it unattended for so many days, is a case of gross negligence. Why in the absence of Line-man the work was not completed for so many days is not explained. It appears, the authorities ignored the danger of leaving an over-hanging conductor without ensuring that in the absence of line-man no one should switch on the line. The officials concerned, it appears, took every thing for granted because of which two budding children lost their lives leaving behind the grieving parents. Such gross negligence on the part of the officials concerned cannot be justified on any ground whatsoever. It is a case where the Line-man of the area and his immediate officers intended the consequence by their negligence. Negligence is defined as a breach of the duty caused by the omission to do something which a reasonable man, guided by those considerations which regulate the conduct of human affairs would do, or doing something which a prudent and a reasonable man would do. Actionable negligence consists in the neglect of the use of the ordinary care or skill towards a person to whom the defendant owes duty of observing ordinary care by which neglect the plaintiff has suffered injury to his person or property. In the instant case, the petitioners have suffered injuries because of the negligence of the line-man of the area who failed to take ordinary care by ensuring that the line under repairs did not remain unattended. According to Winfield." negligence as a tort is the breach of a duty to take care which results in damage, undesired by the defendant to the plaintiff. This definition involves three constituents of negligence:*
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> *(i) A legal duty to exercise due care on the part of the party complained of towards the party complaining the formers conduct within the scope of the duty; (ii) breach of the said duty; and (iii) consequential damage. All these constituents are present in the present case because it was the duty of the Line-man to maintain the electric supply. It was also his duty that in case of any damage to the line, the same should be repaired. Consequently, it follows that when the conductor was so loose as only three feet above the*

ground, he should have ensured that electric supply is not put on till the conductor is restored to its proper position. Since he left the station unattended, it was the breach of a duty he owes to the people of the locality of the unsuspecting passers-by through the open field where the conductor was hanging. This carelessness on the part of the Line-man to take care has caused the death of two innocent children of the petitioners. It is thus a case where maxim res-ipsa-loquitur applies because the circumstances constituting the accident proclaim the negligence of the Department. The electrocution of the two children is an accident of a kind which does not happen in the ordinary course of things. In such a case once the accident is admitted, as in this case, the respondent cannot escape the liability, as observed in Padma Behari Lal v. Orissa State Electricity Board, AIR 1992 Orissa 68, which reads as under :--

".....The rule of evidence accepted by all courts of law put the onus on the respondent to prove that the accident was not on account of negligence on its part where the circumstance leading to an accident is such that it is improbable that it would have occurred without the negligence of the respondent. The aforesaid rule of evidence is commonly known as "res ipsa loquitur". The said maxim applies in action for negligence in which the accident speaks for itself. In such cases, the claimant is not required to allege and prove any specific act or omission on the part of the respondent. If he proves the accident and the attending circumstances so as to make the aforesaid maxim applicable, it would be then for the respondent to establish that the accident happened due to some cause other than his/its negligence. The petitioner's son in this case was moving on a bicycle on the public road. His movement on the road on a bicycle was not the cause of his death. His death was due to electrocution having come in contact with the live electric wire. The electric wires have been carried supported by the electric poles, the maintenance of which is admittedly the duty of the Electricity Board. Any live wire getting detached from the pole is likely to cause loss of life. The responsibility of the Electricity Board is, therefore, all the more greater for its maintenance by replacement of wire, checking of the points where the wire has been joined or fixed to the pole and to take all precautions to use materials which would stand a stormy weather....."

In view of this, it is clear that the Line-man was negligent and since the conclusion as inescapable that since he was an employee of the respondent, the State is vicariously liable for his negligence.

[5] Now the question is what should be the quantum of compensation payable towards the petitioner. The determination of the quantum of compensation would evidently depend upon various factors including the age of the deceased at the time of accident, the earning capacity and the contribution he was making to the family of his income, if any. These facts can be established only in a civil suit which in fact is the only remedy available under law, except where the facts are admitted. However, the age of both the victims in this case being only 7 and 11, the question of income or contribution to the family does not arise. Still the question remains, what should be the amount of compensation? The minimum amount of compensation on account of no fault liability under Section 140 of the Motor Vehicles Act, 1988 in case of death irrespective of the age is Rs. fifty thousand. This should provide enough guide to determine the amount which is reasonable. Considering the age of the children who lost their lives, the petitioners are held to be entitled to an amount of Rs. 75,000/- and Rs. 60,000/- for the untimely death of Jatinder Singh and Puja respectively. This amount shall be paid with 12% annual interest from the date of this order. No costs."

34. In the case of ***Padma Behari Lal vrs. State Electricity Board and another,*** reported in ***AIR 1992 Orissa 68,*** the learned Single Judge has held that where cyclist came in contact with a live hanging wire detached from the electric pole, the Electricity Board was found negligent. It has been held as under:

> "6. In the given circumstances of this case, the question for determination is as to whether the petitioner is entitled to compensation from the opposite parties without proving as to how the accident took place. It is well established in law that in an action for damage in tort, the general rule is that onus to prove negligence on the part of the respondent rests on the claimant. But there are cases in which the claimant is not in a position to produce evidence as to the negligence of the respondent which caused the accident. In those cases it may be that the claimant would not be in a position to know the true cause of the unfortunate action. In some of the such cases the cause of accident, though not known to the claimant might be within the special knowledge of the respondent. The rule of evidence accepted by all courts of law put the onus on the respondent to prove that the accident was not on account of negligence on its part where the circumstance leading to an accident is such that it is improbable that it would have occurred without the negligence of the respondent. The aforesaid rule of evidence is commonly known as "res ipsa loquitur". The said maxim applies in action for negligence in which the accident speaks for itself. In such cases the claimant is not required to allege and prove any specific act or omission on the part of the respondent. If he proves the accident and the attending circumstances so as to make the aforesaid maxim applicable, it would be then for the respondent to establish that the accident happened due to some cause other than his/its negligence. The petitioner's son in this case was moving on a bicycle on the public road. His movement on the road on a bicycle was not the cause of his death. His death was due to electrocution having come in contact with the live electric Wire. The electric wires have been carried supported by the electric poles, the maintenance of which is admittedly the duty of the Electricity Board. Any live wire getting detached from the pole is likely to cause loss of life. The responsibility of the Electricity Board is, therefore, all the more greater for its maintenance by replacement of wire, checking of the points where the wire has been joined or fixed to the pole and to take all precautions to use materials which would stand a stormy weather. The very fact that live wire in a stormy weather which caused the death of the son of the petitioner was detached from the pole and was hanging over the road makes the maxim 'res ipsa loquitur' applicable and in such event, it is not for the petitioner to prove any specific act or omission amounting to negligence of the Electricity Board. In these circumstances, the burden lies on the opp, parties to establish that the Electricity Board was not negligent. The opp. parties have failed to establish that the accident occurred due to some cause other than the negligence of the Electricity Board. The petitioner is thus entitled to compensation from the opp. parties on account of the death of his son which in the circumstances must be held to be due to negligence of the Electricity Board in maintaining the electric wire running over the poles (vide 1987 ACJ 880 : (AIR 1988 Ker 206) Thressia v. Kerala State Electricity Board)."

35. In the case of ***Asa Ram and another vrs. M.C.D. and others,*** reported in ***AIR 1995 Delhi 164,*** the learned Single Judge has held that the principle of '*res ipsa loquitur*' would be attracted where un-insulated loose overhead electric wire caused death. In this case the multiplier of 30 was applied. It has been held as under:

"10. From the oral and documentary evidence discussed above one thing clearly emerges and that is that Karan Singh died due to coming in contact with the electric current. The point for consideration is whether there was any naked wire hanging on the staircase of plaintiff's house or whether deceased fiddled with the electric wire illegally and unauthorisedly. The defense set up by the defendants in their written statement was that the deceased fiddled with the electric main. But this defense was not put to plaintiff when he appeared as PW-1. Only a half-hearted suggestion was given about fiddling with the wire which of course was denied. PW-1 and PW-2 were not confronted with any material which could prove that deceased fiddled with electric mains in order to get illegal electricity. Even the fact that the transformer was defective and there was no electricity in the pole has not been established nor any suggestion in this regard was put to PW-1 and PW-3. Rather from the evidence it clearly emerges that the deceased came in contact with the loose wire hanging on his staircase which caused his death. Defendants have not been able to prove that there was no naked and un insulated wire hanging on the house of the plaintiff. On the contrary photograph Ex.PW-1/9 taken on the date of the accident show a loose wire separated from the main and hanging on the staircase of the house of the plaintiffs. According to plaintiffs' witnesses current was passing through this loose wire. Defendants have not been able to controvert the documentary and oral evidence led by plaintiff. PW-1/2 testimony that he lodged complaint on 6-7-85 regarding loose naked wire hanging and the current passing from the same crossing over his house, has remained unrebutted on the record. In fact defendant's own witness, DW-3 admitted that DESU maintained separate complaint register regarding the complaint of a naked hanging wire. But neither the said register was produced nor copy of the plaintiff's complaint was produced. For the non-production of these material documents an adverse inference can be drawn against the defendants. Had these material documents namely complaint register of hanging wire and the original complaint lodged by plaintiffs, been produced it would have gone against the defendants and would have falsified defendant's defense. Statement of PW-1 that he lodged complaint on 6th July, 1985 regarding a loose wire hanging on his staircase and current passing through it thus stand fully proved. Lodging of the report on 6th July, 1985 vide Entry No. 490687/490688 has not been denied by DW-2, rather Sh. A. K. Gupta admitted in no uncertain words that he did receive the complaint in the month of July, 1985 from the plaintiff. He also admitted that a separate complaint register was maintained in this regard. Hence, it does not lie in the mouth of the defendant now to contend that a loose wire was not hanging or that Karan Singh died because he was fiddling with electrical main. Heavy reliance has been placed by the counsel for defendant on Ex. DW-1/1 i.e. submission of detail by the Executive Engineer D-9 regarding the incident. Reading of Ex. DW-1/1 shows that this report was based on the information fed by Sh. Guru Adhar break down Superintendent of the DESU, He on receiving the information of Karan Singh's death switched off the supply and went to the site to enquire. The said Guru Adhar has not been examined nor his report has been proved on record. Perusal of Ex.DW-1/1 shows that it is in fact Guru Adhar who gathered the information about the death of Karan Singh. Since, neither Guru Adhar has been examined nor his report in original has been produced, therefore, no reliance can be placed on Ex. DW-1/1. It is not known as to from whom Sh. Guru Adhar enquired that Karan Singh with the help of a bamboo stick was trying to restore the electricity supply. In the absence of such details and more so Ex.DW-1/1 being based on hear say the same cannot be relied upon. Similarly Ex. DW-1/2 is an incident report given by Executive Engineer-D again based on the

alleged information given by Guru Adhar, Break-down Superintendent. Hence it cannot be relied upon. Any information which is based on an information given by someone else has no value unless the informer who gathered the information is produced and opposite party given an opportunity to cross-examine him. Ex.D W-1/1 and DW-1/2 show that copy of the same was addressed to Electrical Inspector, Delhi Administration for information. It had all along been the case of the plaintiffs that Electrical Inspector, after inspection found wire hanging and current passing through it. The said report has not been placed on record. A very feeble defense was given for the non-production of the said . report. According to defendant, the Electrical Inspector being not an employee of the DESU, hence his report was irrelevant. Secondly the said Electrical Inspector inspected the site on 5th August, 1985 but submitted his report in November, 1985. In these circumstances counsel contended that such a report of the electrical inspector is not worth reliance. It was only a waste paper. The said Electrical Inspector being not an employee of DESU hence his report has no value. To my mind, this submission has no merits. The Electrical Inspector being an independent Government official functionary, his report carried authenticity and, to my mind, more valuable piece of evidence than the oral testimony of defendants. His report would have thrown light on the actual position at site. In fact the whole controversy would have been solved. The contention of the defendants that the Electrical Inspector, Delhi Administration, has not the authority or that he was not competent to inspect and report is belied from defendants own conduct. If he had no authority then why the copy of exhibit DW-1/1 and DW-1/2 were sent to him. The Electrical Inspector being a person in authority, his report carries more authenticity. For the non-production of the said report it can be said that defendants are concealing true facts. To my mind, the non-production of that report is deliberate. Had that report been produced, it would have gone against the defendants. That is the reason it has not been produced. Contention of Mr. Jayant Nath that exhibit DW-2/1 was the only complaint received from plaintiffs in July 1985 and the reading of the same would show that plaintiff complained only about the non-supply of electricity and not of hanging wire. This argument has no force because as per D W-3 there were three kinds of complaint registers maintained by DESU namely (i) Meter Replacement Register, (ii) Service Line Replacement Register, and (iii) Complaint Register regarding naked wire known as service line register. The complaints regarding naked wire were registered in the Service Line Register. The said register was not produced nor Ex. DW-2/1 pertained to the said Line Register. Ex.DW-2/1 is only a copy of another Register. Hence the entries in Ex.DW-2/1 cannot be relied upon. The remarks made in Ex.DW-2/1 cannot be relied upon in the absence of original complaint lodged by plaintiff and the Service Line Register. The person who made these remarks has also not been produced to explain as to from where and on what basis he recorded the remarks in that register, copy of which is Ex.DW-2/1. Hence, plaintiffs claim and version cannot be nullified because of these remarks on Ex.DW-2/1. Even otherwise complaint regarding naked wire were registered in Service Line Register which Mr. Gupta, DW-2 did not produce. For this reason also DW-2/1 cannot be relied upon. In fact, the DESU/defendant has miserably failed to prove that the deceased was fiddling with the electric main and, therefore, got electrocuted. From the evidence discussed above one can safely conclude that defendants have not been able to establish that deceased illegally fiddled with the electric main in order to have electricity supply available at his house. Nor have the DESU been able to prove that on 4th August, 1985 there was no electricity in the house of the plaintiff or in the village. If this suggestion be accepted, then the defense of the defendant that

deceased was fiddling with the electricity main falls to the ground. This is contradictory to the defense set up in the written statement. It shows defendants are not sure of their stand. Defendants have failed even remotely to establish that there was any negligence on the part of the deceased in coming into contact with the electric wire which caused his death.

11. It is not disputed that the electric wire was crossing from the house of the plaintiffs. This fact find support from Ex.PW-1/9 a photograph taken on the dale of the accident. It shows a small loose wire hanging on the staircase of the plaintiffs. It is the statutory duty of the -DESU to ensure that every overhead line is covered with insulating material. Any overhead line erected over any part of the house, street, or public place should be protected with a devise by which the line crossing that house should become harmless, in case it breaks. But that care has not been taken in the case in hand. The uncontroverted evidence of the plaintiff coupled with the document Ex.PW-1/9 taken on the first available opportunity and the complaint lodged by the plaintiff with the DESU would show that loose live wire was hanging on the house of the plaintiff and while climbing the stairs, deceased came in contact with the same. In fact the defendants have not been able to prove the case as set up by them. Therefore, it can safely be said that this is a case where principle of res ipsa loquitur would apply. It can be said that deceased Karan Singh died because of the negligence and carelessness of the defendants. The burden was on the DESU to show that the deceased fiddled with the electric main illegally, but it failed to prove the same. On the other hand, plaintiffs by their testimony and from the testimony of the neighbour have been able to prove that DESU had been negligent and careless in maintaining the overhead lines crossing the house of the plaintiffs. Defendants have failed to prove that any necessary precaution against the danger of live wire hanging on the staircase of the plaintiffs was taken. DESU has not been able to prove that the accident in the instant case was due to the factors beyond their control. Deceased Karan Singh died having come in contact with the live wire hanging on the staircase of his house. This fact is also supported by the post-mortem report E.x.PW-2/1 in which cause of death has been stated to be electric current. His death has been proved on record by Ex. P-4. DD Report lodged to the police immediately upon the happening of the accident is proved as Ex.P-2."

36. In the case of ***M.P. State Road Transport Corporation and others vrs. Abdul Rahman and others,*** reported in ***AIR 1997 MP 248,*** the Division Bench has held that the concept of contributory negligence cannot be made applicable to a child. A child functions according to his own reasoning and his intelligence. It has been held as under:

"11. From the aforesaid discussion relating to contributory negligence on the part of a child of tender age there is no doubt that the concept of contributory negligence cannot be made applicable to a child. A child functions according to his own reasoning and his intelligence. Logicality and rationality are not expected from a child as a child of tender age has no continuous thinking process and is governed by his impulse, instinct and innocence. Can one ever conceive that a child, if would have been aware of the peril, would ever commit an act which is dangerous or hazardous for him? The answer has to be a categorical 'No', because a child's action is childlike and really innocent. Possibly for that reason, it has been said :--

"The Maker of the Stars and Sea, become a Child earth for me?"

A child remains a child in spite of all training and directions and if anything sparkles it is the glory of his innocence which makes him indifferent to the risks which an adult apprehends and pays attention.

In view of our aforesaid analysis, we conclude and hold that Riyaz, the child of four, was not liable for contributory negligence."

37. In the case of ***R.S.E.B. & another vrs. Jai Singh and others,*** reported in ***AIR 1997 Rajasthan 141,*** the learned Single Judge has held that all wires resulting in electrocution would attract the maxim '*res ipsa loquitur'*. The learned Single Judge has held as under:

"12. Khuman Singh, Helper, who is none but the employee of the Board itself, has clearly stated that on 15-2-1992 itself, after his duty was over he went to Charbhujaji arm he was told by Girija Shankar that the earth wire of 11 K.V. line was snapped at Tadawara and that an insulator pin was also detached and, therefore, after shutting down electricity supply, repairs are required to be carried out. However, he went to his village and learnt at about 11 p.m. in the same night through Phool Singh and Lehri Lal that because of damage to the live electric wires resulting in electrocution of the three deceased persons such an incident had taken place. Besides, the petitioner-defendants heaver pleaded that the sparks resulted from the live electricity passing wires resulted in setting grass lying on the terrace of the house of one Rafique Mohd, on fire as a result of which the wires melted and got snapped and its end fell on the ground which resulted in electrocution of the deceased. Assuming so, the sparks must have resulted due to fluctuation and trimming in the supply of electricity and besides, as per the pleadings of the petitioners themselves the grass was lying on the terrace of the house which was quite nearer to the overhead passing electric wires and, therefore, it was also negligent act by way of an omission from the side of the defendants in not having raised the height of the passing wires or to have removed the same from their present position. Besides, the plaintiffs have consistently maintained that such electric wires got snapped and broken on three or four occasions earlier since the same were old and damaged, it was incumbent on the defendants to have replaced the same and they must have taken every precaution as a result of which they could neither got snapped nor sparks could be released from there due to any disorder in supply of the electric wires. The defendants apparently failed to do so. Therefore, for the present, the defendants cannot dispute that they were, operating and maintaining supply of electricity through the electric poles located on both sides of the place of incident and electricity wires joints with both the poles were passing above the field of the deceased persons. Thus, the field whereon the residential house of the deceased was also situated, were agricultural fields the area was inhabited and, therefore, it was the duty of the officials/ agents of the R.S.E.B. that the electric lines passing over bead were perfectly in order and there was no visible possibility and apprehension of their being snapped and sparks being released from them resulting in electrocution and fire to the property. However, R.S.E.B. positively failed to do so which is an apparent omission on their part.

13. That being so, when the deceased I persons were not at the fault at all and on the contrary, the R.S.E.B. through its officials/ agents were negligent and at its faulting end, as held in the decision of Padam Beharilal case (AIR 1992 Orissa 68) (supra) by the Orissa High Court, since it was the positive duty of the R.S.E.B. to maintain the electric wire lines free from such incident. It is having failed to do so, the maxim res ipsa loquitur, it was not for the plaintiffs but, when admittedly parents of the petitioners along with his son Kishan Singh were electrocuted immediately and they were burnt on the spot, in such event it is not for

the plaintiffs to prove any such specific act or omission amounting to negligence of the R.S.E.B. but the burden shifts on the defendants to establish that the unfortunate incident was not a result of negligence on the part of the R.S.E.B."

38. In the case of ***T. Gajayalakshmi Thayumanavar and anr. Vrs. Secretary, Public Works Department, Govt. of Tamil Nadu, Madras and ors.,*** reported in ***AIR 1997 Madras 263,*** the Division Bench has held that when the wire snapped and fell on cycle rider and the cycle rider was electrocuted, the incident occurred due to negligence of Board as it has not maintained the electric system properly. It was further held that snapping of electric wire was not an act of God. It has been held as under:

> "20. On an appraisal of the evidence of P.Ws. 1 to 3 and R. W. 1, it is manifest that the Electricity Board had not maintained the fuse mechanism properly and had it been maintained properly, the death of Suryaprakash could have been avoided as the fuse would have been blown off automatically on the snapped electric overhead conductor falling on him and getting earthed through his body when he was lying on the ground. We are unable to accept the contention of the learned counsel for the Electricity Board that respondents 2 and 3 had taken the necessary precautions and that the death of Suryaprakash by electrocution could not have occurred due to the snapping wire falling on him. R.W. 1 had not witnessed the occurrence nor the respondents examined members of the public to show as to how the occurrence had taken place if it was not as categorically spoken to by P.W. 3. The snapping of the electric line is not disputed by respondents 2 and 3 in the counter affidavit filled before the Arbitrator. The fact that the conductor/live wire had snapped shows its negligent maintenance by the Tamil Nadu Electricity Board. We are also unable to accept the contention of the learned counsel for the Electricity Board that it was an unexpected incident due to rain and wind and that the snapping of the electric line was an Act of God. We are further unable to appreciate the contention of the learned counsel for the Electricity Board that the death of Suryaprakash took place only due to the negligence of Suryaprakash in his leaving the home that day in the rain and wind. We are of the view that the death of Suryaprakash had occurred due to the overhead electric line having snapped and falling on him in the circumstances narrated by P.W. 3 and it was due to the negligence on the part of the Electricity Board as it has not maintained the electric system properly. Therefore, we hold that respondents 2 and 3 are responsible for the death of Suryaprakash and that they are liable to pay compensation."

39. Their lordships of the Hon'ble Supreme Court in the case of ***M.P. Electricity Board vrs. Shail Kumar and others,*** reported in ***AIR 2002 SC 551,*** have held that the responsibility to supply electric energy in the particular locality was statutorily conferred on the Board. If the energy so transmitted causes injury or death of a human being, who gets unknowingly trapped into it, the primary liability to compensate the sufferer, is that of the supplier of the electric energy. Their lordships have further held that the Board is also liable under the strict liability rule and the basis of such liability is the forceable risk inherent in the very nature of such activity. Their lordships have held as under:

> "7. It is an admitted fact that the responsibility to supply electric energy in the particular locality was statutorily conferred on the Board. If the energy so transmitted causes injury or death of a human being, who gets unknowingly trapped into it the primary liability to compensate the sufferer is that of the supplier of the electric energy. So long as the voltage of electricity transmitted through the wires is potentially of

dangerous dimension the managers of its supply have the added duty to take all safety measures to prevent escape of such energy or to see that the wire snapped would not remain live on the road as users of such road would be under peril. It is no defence on the part of the management of the Board that somebody committed mischief by siphoning such energy to his private property and that the electrocution was from such diverted line. It is the look out of the managers of the supply system to prevent such pilferage by installing necessary devices. At any rate, if any live wire got snapped and fell on the public road the electric current thereon should automatically have been disrupted. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps.

8. Even assuming that all such measures have been adopted, a person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability". It differs from the liability which arises on account of the negligence or fault in this way i.e. the concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions. If the defendant did all that which could be done for avoiding the harm he cannot be held liable when the action is based on any negligence attributed. But such consideration is not relevant in cases of strict liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions.

10. There are seven exceptions formulated by means of case law to the doctrine of strict liability. It is unnecessary to enumerate those exceptions barring one which is this. "Act of stranger i.e. if the escape was caused by the unforeseeable act of a stranger, the rule doe snot apply". (vide Page 535 Winfield on Tort, 15th Edn.)

13. In the present case, the Board made an endeavour to rely on the exception to the rule of strict liability (Rylands v. Fletcher) being "an act of stranger". The said exception is not available to the Board as the act attributed to the third respondent should reasonably have been anticipated or at any rate its consequences should have been prevented by the appellant-Board. In Northwestern Utilities, Limited v. London Guarantee and Accident Company, Limited {1936 Appeal Cases 108}, the Privy Council repelled the contention of the defendant based on the aforesaid exception. In that case a hotel belonging to the plaintiffs was destroyed in a fire caused by the escape and ignition of natural gas. The gas had percolated into the hotel basement from a fractured welded joint in an intermediate pressure main situated below the street level and belonging to the defendants which was a public utility company. The fracture was caused during the construction involving underground work by a third party. The Privy Council held that the risk involved in the operation undertaken by the defendant was so great that a high degree care was expected of him since the defendant ought to have appreciated the possibility of such a leakage."

40. In the case of ***H.S.E.B. & ors. Vrs. Ram Nath and others,*** reported in ***(2004) 5 SCC 793,*** their lordships of the Hon'ble Supreme Court have held that it was the appellants' duty to ensure that the electricity wires were at a safe distance from the building. Their lordships have further held that where there was no denial in the written statement that the wires were loose and drooping and that the respondent had asked the appellants to tighten the wires, the writ was maintainable. It has been held as follows:

"4. In the written statement there is no denial to these averments. All that is claimed is that the entire colony was an unauthorised colony and that unauthorisedly the height of the houses had been raised. It is claimed that the wires were at the prescribed height of 20 feet from the ground level and that the height of the wire was as per the standard prescribed under the Rules.

5. It is submitted that these averments would show that there was a disputed question of fact as to whether or not the wires were touching the roof. We are unable to accept this submission. To the categoric averments set out hereinabove that the wires had become loose and were drooping and touching the roof of the houses, there is no denial. To the categoric averments that complaints had been made, both in writing and orally, requesting that the wires had to be tightened, there is no denial. A mere vague statement to the effect that the height was as per the prescribed limit does not detract from the fact that there is a deemed admission that the wires were drooping and touching the roofs.

6. The appellants are carrying on a business which is inherently dangerous. If a person were to come into contact with a high-tension wire, he is bound to receive serious injury and/or die. As they are carrying on business which is inherently dangerous, the appellants would have to ensure that no injury results from their activities. If they find that unauthorised constructions have been put up close to their wires it is their duty to ensure that that construction is got demolished by moving the appropriate authorities and if necessary, by moving a court of law. Otherwise, they would take consequences of their inaction. If there are complaints that these wires were drooping and almost touching houses, they have to ensure that the required distance is kept between the houses and the wires, even though the houses be unauthorised. In this case we do not find any disputed question of fact."

41. The learned Single Judge in the case of ***Ramesh Singh Pawar vrs. Madhya Pradesh Electricity Board and others,*** reported in ***AIR 2005 MP 2,*** has found the Electricity Board liable to pay compensation to the petitioner not only on the ground of negligence but on the principle of strict liability also. The learned Single Judge has held that the Writ petition was maintainable. It has been held as follows:

"16. Considering the totality of the facts and circumstances of the case, in the backdrop of discussion made hereinabove and keeping in view the specific findings recorded by the Supreme Court in the case of Shail Kumari and the observations made in Paras 8, 9, 11 and 13 reproduced hereinabove. There is no doubt that not only on the ground of negligence but on the principle of strict liability, the Board is liable to pay compensation to the petitioner.

18. Having heard, the petition is maintainable and the Board is liable to pay compensation in the present case. The next question that requires determination is as to what should be the compensation that should be awarded in such cases."

42. Their lordships of the Hon'ble Supreme Court in the case of ***Nilabati Behera vrs. State of Orissa and ors.,*** reported in ***(1993) 2 SCC 746,*** have held that a claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection, of such rights, and such a claim is based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right. It has been held as follows:

"17. It follows that 'a claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection

of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inap- plicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution. This is what was indicated in Rudul Sah and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights.

34. The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court molds the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of exempellary damages' awarded against the wrong doer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and persecute the offender under the penal law."

43. In the case of ***Sube Singh vrs. State of Haryana and ors.,*** reported in ***(2006) 3 SCC 178,*** their lordships of the Hon'ble Supreme Court have held that it is well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. It has been held as follows:

"38. It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved

person claiming additional compensation in a civil court, in enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under section 357 of Code of Civil Procedure."

44. In the present case, the boy had a right to life under Article 21 of the Constitution of India. Healthy and happy life has been curtailed by the criminal neglect of the respondents causing him serious and painful burn injuries. He has to live with a trauma and shall remain handicap throughout the life. The petitioner has to go through inconvenience, hardship, discomfort, disappointment, frustration and mental stress throughout his life.

45. Their lordships of the Hon'ble Supreme Court in the case of ***R.D.Hattangadi vrs. Pest Control (India) Pvt. Ltd. And ors.,*** reported in ***(1995) 1 SCC 551,*** have laid down the following principles to determine compensation for disability:

" 9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non- pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

46. Their lordships of the Hon'ble Supreme Court in the case of ***Rekha Jain vrs. National Insurance Company Limited and ors.,*** reported in ***(2013) 8 SCC 389,*** have reiterated the following principles for granting compensation for personal injury:

"40. It is well-settled principle that in granting compensation for personal injury, the injured has to be compensated (1) for pain and suffering; (2) for loss of amenities; (3) shortened expectation of life, if any; (4) loss of earnings or loss of earning capacity or in some cases for both; and (5) medical treatment and other special damages. In personal injury cases the two main elements are the personal loss and pecuniary loss. Chief Justice Cockburn in Fair's case, supra, distinguished the above two aspects thus:

"In assessing the compensation the jury should take into account two things, first, the pecuniary loss the plaintiff sustains by the accident : secondly, the injury he sustains in his person, or his physical capacity of enjoying life. When they come to the consideration of the pecuniary loss they have to take into account not only his present loss, but his incapacity to earn a future improved income".

41. McGregor on Damages (14th Edition) at paragraph no. 1157, referring to the heads of damages in personal injury actions, states as under:

> "The person physically injured may recover both for his pecuniary losses and his non-pecuniary losses. Of these the pecuniary losses themselves comprise two separate items, viz., the loss of earnings and other gains which the plaintiff would have made had he not been injured and the medical and other expenses to which he is put as a result of the injury, and the Courts have sub-divided the non- pecuniary losses into three categories, viz., pain and suffering, loss of amenities of life and loss of expectation of life".

Besides, the Court is well-advised to remember that the measures of damages in all these cases 'should be such as to enable even a tort feasor to say that he had amply atoned for his misadventure'. The observation of Lord Devlin that the proper approach to the problem or to adopt a test as to what contemporary society would deem to be a fair sum, such as would allow the wrongdoer to 'hold up his head among his neighbours and say with their approval that he has done the fair thing', is quite apposite to be kept in mind by the Court in assessing compensation in personal injury cases.

42. In R. Venkatesh v. P. Saravanan & Ors.[12], the High Court of Karnataka while dealing with a personal injury case wherein the claimant sustained certain crushing injuries due to which his left lower limb was amputated, held that in terms of functional disability, the disability sustained by the claimant is total and 100% though only the claimant's left lower limb was amputated. In paragraph 9 of the judgment, the Court held as under:

> "9. As a result of the amputation, the claimant had been rendered a cripple. He requires the help of crutches even for walking. He has become unfit for any kind of manual work. As he was earlier a loader doing manual work, the amputation of his left leg below knee, has rendered him unfit for any kind of manual work. He has no education. In such cases, it is well-settled that the economic and functional disability will have to be treated as total, even though the physical disability is not 100 per cent".

43. Lord Reid in Baker v. Willoughby, has said:

> "A man is not compensated for the physical injury; he is compensated for the loss which he suffers as a result of that injury. His loss is not in having a stiff leg; it is in his inability to lead a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned."

44. The aforesaid principles laid down by this Court, Appeal Cases, House of Lords and leading authors and experts referred to supra, whose opinions have been extracted above, with all fours, are applicable to the fact situation for awarding just and reasonable compensation in favour of the appellant as she had sustained grievous injuries on her face and other parts of the body which is assessed at 30% permanent disablement by competent doctors."

47. In the instant case, the petitioner has been crippled off throughout his life. His both arms have been amputated. He won't be able to lead and enjoy those comforts and amenities of life which depend on freedom of movement. Recently in ***Civil Appeal No. 11466 of 2014***, titled as ***Raman vrs.***

Uttar Haryana Bijli Vitran Nigam Ltd. & ors., decided on ***17th December, 2014***, their lordships of the Hon'ble Supreme Court have upheld the compensation of Rs. 60 lacs awarded by the learned Single Judge of Punjab and Haryana High Court, in the case of electrocution. Their lordships have held as under:

> "19. In view of the law laid down by this Court in the above referred cases which are extensively considered and granted just and reasonable compensation, in our considered view, the compensation awarded at Rs. 60 lakhs in the judgment of the learned Single Judge of the High Court, out of which 30 lakhs were to be deposited jointly in the name of the appellant represented by his parents as natural guardian and the Chief Engineer or his nominee representing the respondent-Nigam in a nationalised Bank in a fixed deposit till he attains the age of majority, is just and proper but we have to set aside that portion of the judgment of the learned Single Judge directing that if he survives, he is permitted to withdraw the amount, otherwise the deposit amount shall be reverted back to the respondents as the same is not legal and valid for the reason that once compensation amount is awarded by the court, it should go to the claimant/appellant. Therefore, the victims/claimants are legally entitled for compensation to be awarded in their favour as per the principles/guiding factors laid down by this Court in catena of cases, particularly, in Kunal Saha's case referred to supra. Therefore, the compensation awarded by the Motor Vehicle Tribunals/Consumer Forums/State Consumer Disputes Redressal Commissions/National Consumer Disputes Redressal Commission or the High Courts would absolutely belong to such victims/claimants. If the claimants die, then the Succession Act of their respective religion would apply to succeed to such estate by the legal heirs of victims/ claimants or legal representatives as per the testamentary document if they choose to execute the will indicating their desire as to whom such estate shall go after their death. For the aforesaid reasons, we hold that portion of the direction the of the learned Single Judge contained in sub-para (v), to the effect of Rs. 30 lakhs compensation to be awarded in favour of the appellant, if he is not alive at the time he attains majority, the same shall revert back to the respondent-Nigam after paying Rs.5 lakhs to the parents of the appellant, is wholly unsustainable and is liable to be set aside. Accordingly, we set aside the same and modify the same as indicated in the operative portion of the order.
>
> 20. The remaining compensation amount of Rs. 30 lakhs to be deposited in a fixed deposit account in the name of the petitioner (minor) under joint guardianship of the parents of Raman and the Engineer-in-Chief or his nominee representing the respondent-Nigam, in the Nationalised Bank as corpus fund, out of which an interest of Rs.20,000/- p.m. towards the expenses as indicated in sub-para (vi) of the order passed by the learned Single Judge, cannot be said to be on the higher side, but in our view, the said amount of compensation awarded is less and not reasonable and having regard to the nature of 100% permanent disability suffered by the appellant, it should have been much higher as the appellant requires permanent assistance of an attendant, treatment charges as he is suffering from agony and loss of marital life, which cannot be compensated by the amount of compensation awarded by the learned Singh Judge of the High Court. Hence, having regard to the facts and circumstances of the case, it would be just and proper for this Court to restore the judgment of the learned Single Judge on this count and we hold that the directions contained in the said judgment are justifiable to

the extent indicated above. The Division Bench while exercising its appellate jurisdiction should not have accepted the alleged requisite instructions received by the counsel on behalf of the appellant and treated as ad idem and modified the amount as provided under sub-para (vi) of the order of the learned Single Judge and substituted the para 4 in its judgment as indicated in the aforesaid portion of the judgment which is wholly unreasonable and therefore, it is unsustainable in law as it would affect the right of the appellant for getting his legal entitlement of just and reasonable compensation for the negligence on the part of the respondents.

21. In view of the foregoing reasons, after considering rival legal contentions and noticing the 100% permanent disability suffered by the appellant in the electrocution accident on account of which he lost all the amenities and become a deadwood throughout his life, and after adverting the law laid down by this Court in catena of cases in relation to the guiding principles to be followed to award just and reasonable compensation in favour of the appellant, we pass the following order:-

(I) The appeal is allowed after setting aside the substituted paragraph No.4 of the impugned judgment and order of the Division Bench of the High Court particularly, in place of sub para (vi) of the judgment and order of the learned Single Judge with modifications made by us in this judgment in the following terms.

(II) We restore the compensation awarded at sub-paras (v) and (vi) of the order of the learned single Judge:

(a) in the modified form that the compensation is awarded with direction to the respondents to keep Rs.30 lakhs in the Nationalised Bank in the name of the appellant represented by his father as a natural guardian till the age of attaining majority of the appellant.

(b) The further direction contained in the judgment of the learned Single Judge that if the appellant is not alive at the time of attaining the age of majority, the deposit amount shall be reverted to the respondents, is set aside.

(c) We further declare that the said amount of compensation of Rs.30 lakhs exclusively belongs to the appellant and after his demise it must go to the legal heirs or representatives as it is the exclusive estate of the appellant as the it is the compensation awarded to him for the 100% permanent disability suffered by him due to electrocution on account of the negligence of the respondents. The monthly interest that would be earned

during the period of his minority shall be withdrawn by the appellant's guardian and spend the same towards his monthly expenses and after he attains the majority, it is open for him either to continue the deposit or withdraw the same and appropriate for himself or his legal heirs or legal representative, if he does not survive.

(d) The deposit of Rs. 30 lakhs as corpus amount as directed at sub- para(vi) of the judgment of the learned Single Judge shall be in the name of the appellant exclusively represented by his natural guardians/parents till he attains majority, the income that would be earned on such deposit amount can be drawn by

the parents every month to be spent for personal expenses. The Bank in which the deposit is made in the name of Chief Engineer shall be deleted and the name of the appellant shall be entered as directed above. After attaining the age of majority, the appellant is at liberty to withdraw the above said amount also. If for any reason the appellant does not stay alive, his heirs/legal representatives can withdraw the said amount.

(e) The other directions in the judgment of the learned Single Judge to the respondents for compliance shall remain intact, the same shall be complied with and the report shall be submitted before the learned Single Judge."

48. Mr. B.S.Ranjan, Advocate, has also vehemently argued that the petitioner has only claimed a sum of Rs. 50,00,000/- towards compensation and he cannot be awarded compensation more than this amount. However, this issue is no more *res-integra* in view of the definitive law laid down by the Hon'ble Supreme Court in the case of ***Balram Prasad vrs. Kunal Saha and others & connected matters,*** reported in ***(2014) 1 SCC 384,*** wherein it has been held as follows:

"97. The claim for enhancement of compensation by the claimant in his appeal is justified for the following reasons.

98. The National Commission has rejected the claim of the claimant for "inflation" made by him without assigning any reason whatsoever. It is an undisputed fact that the claim of the complainant has been pending before the National Commission and this Court for the last 15 years. The value of money that was claimed in 1998 has been devalued to a great extent. This Court in various following cases has repeatedly affirmed that inflation of money should be considered while deciding the quantum of compensation:- In Reshma Kumari and Ors. Vs. Madan Mohan and Anr. (supra), this Court at para 47 has dealt with this aspect as under:

"47.One of the incidental issues which has also to be taken into consideration is inflation. Is the practice of taking inflation into consideration wholly incorrect? Unfortunately, unlike other developed countries in India there has been no scientific study. It is expected that with the rising inflation the rate of interest would go up. In India it does not happen. It, therefore, may be a relevant factor which may be taken into consideration for determining the actual ground reality. No hard-and-fast rule, however, can be laid down therefor."

99. In Govind Yadav Vs. New India Insurance Company Ltd.(supra), this court at para 15 observed as under which got re-iterated at paragraph 13 of Ibrahim Vs. Raju & Ors. (supra):-

15. In Reshma Kumari v. Madan Mohan this Court reiterated that the compensation awarded under the Act should be just and also identified the factors which should be kept in mind while determining the amount of compensation. The relevant portions of the judgment are extracted below: (SCC pp. 431-32 & 440-41, paras 26-27 & 46-47)

26. The compensation which is required to be determined must be just. While the claimants are required to be compensated for the loss of their dependency, the same should not be considered to be a windfall. Unjust enrichment should be discouraged. This Court cannot also lose sight of the fact that in given cases, as for example death of the only son to a mother, she can never be compensated in monetary terms.

> 27. The question as to the methodology required to be applied for determination of compensation as regards prospective loss of future earnings, however, as far as possible should be based on certain principles. A person may have a bright future prospect; he might have become eligible to promotion immediately; there might have been chances of an immediate pay revision, whereas in another (sic situation) the nature of employment was such that he might not have continued in service; his chance of promotion, having regard to the nature of employment may be distant or remote. It is, therefore, difficult for any court to lay down rigid tests which should be applied in all situations. There are divergent views. In some cases it has been suggested that some sort of hypotheses or guesswork may be inevitable. That may be so.
>
> 46. In the Indian context several other factors should be taken into consideration including education of the dependants and the nature of job. In the wake of changed societal conditions and global scenario, future prospects may have to be taken into consideration not only having regard to the status of the employee, his educational qualification; his past performance but also other relevant factors, namely, the higher salaries and perks which are being offered by the private companies these days. In fact while determining the multiplicand this Court in Oriental Insurance Co. Ltd. V. Jashuben held that even dearness allowance and perks with regard thereto from which the family would have derived monthly benefit, must be taken into consideration.
>
> 47. One of the incidental issues which has also to be taken into consideration is inflation. Is the practice of taking inflation into consideration wholly incorrect? Unfortunately, unlike other developed countries in India there has been no scientific study. It is expected that with the rising inflation the rate of interest would go up. In India it does not happen. It, therefore, may be a relevant factor which may be taken into consideration for determining the actual ground reality. No hard-and-fast rule, however, can be laid down therefor."

100. The C.I.I. is determined by the Finance Ministry of Union of India every year in order to appreciate the level of devaluation of money each year. Using the C.I.I. as published by the Government of India, the original claim of Rs.77.7 crores preferred by the claimant in 1998 would be equivalent to Rs.188.6 crores as of 2013 and, therefore the enhanced claim preferred by the claimant before the National Commission and before this Court is legally justifiable as this Court is required to determine the just, fair and reasonable compensation. Therefore, the contention urged by the appellant-doctors and the AMRI Hospital that in the absence of pleadings in the claim petition before the National Commission and also in the light of the incident that the subsequent application filed by the claimant seeking for amendment to the claim in the prayer of the complainant being rejected, the additional claim made by the claimant cannot be examined for grant of compensation under different heads is wholly unsustainable in law in view of the decisions rendered by this Court in the aforesaid cases. Therefore, this Court is required to consider the relevant aspect of the matter namely, that there has been steady inflation which should have been considered over period of 15 years and that money has been devalued greatly. Therefore, the decision of the National Commission in confining the grant of compensation to the original claim of Rs.77.7 crores preferred by the

claimant under different heads and awarding meager compensation under the different heads in the impugned judgment, is wholly unsustainable in law as the same is contrary to the legal principles laid down by this Court in catena of cases referred to supra. We, therefore, allow the claim of the claimant on enhancement of compensation to the extent to be directed by this Court in the following paragraphs.

101. Besides enhancement of compensation, the claimant has sought for additional compensation of about Rs.20 crores in addition to his initial claim made in 2011 to include the economic loss that he had suffered due to loss of his employment, home foreclosure and bankruptcy in U.S.A which would have never happened but for the wrongful death of his wife. The claimant has placed reliance on the fundamental principle to be followed by the Tribunals, District Consumer Forum, State Consumer Forum, and the National Commission and the courts for awarding "just compensation". In support of this contention, he has also strongly placed reliance upon the observations made at para 170 in the Malay Kumar Ganguly case referred to supra wherein this Court has made observations as thus:

> "170. Indisputably, grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of ecognized in integrum. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong. (See Livingstone v. Rawyards Coal Co.)"

102. The claimant made a claim under specific heads in great detail in justification for each one of the claim made by him. The National Commission, despite taking judicial notice of the claim made by the claimant in its judgment, has rejected the entire claim solely on the ground that the additional claim was not pleaded earlier, therefore, none of the claims made by him can be considered. The rejection of the additional claims by the National Commission without consideration on the assumption that the claims made by the claimant before the National Commission cannot be changed or modified without pleadings under any condition is contrary to the decisions of this Court rendered in catena of cases.

103. In support of his additional claim, the claimant places reliance upon such decisions as mentioned hereunder:

103.1. In Ningamma case (supra), this Court has observed at para 34 which reads thus:

> "34. Undoubtedly, Section 166 of the MVA deals with "just compensation" and even if in the pleadings no specific claim was made under Section 166 of the MVA, in our considered opinion a party should not be deprived from getting "just compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the court is duty- bound and entitled to award "just compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not."

103.2. In Malay Kumar Ganguly case, this Court by placing reliance on the decision of this Court in R.D. Hattangadi Vs. Pest Control (India) (P) Ltd.,(supra) made observation while remanding back the matter to National Commission solely for the determination of quantum of compensation, that compensation should include "loss of earning of profit up to the date of trial" and that it may also include any loss

'already suffered or is likely to be suffered in future'. Rightly, the claimant has contended that when original complaint was filed soon after the death of his wife in 1998, it would be impossible for him to file a claim for "just compensation" for the pain that the claimant suffered in the course of the 15 years long trial.

103.3. In Nizam Institute case supra, the complainant had sought a compensation of Rs.4.61 crores before the National Commission but he enhanced his claim to Rs 7.50 crores when the matter came up before this Court. In response to the claim, this Court held as under:

> 82. The complainant, who has argued his own case, has submitted written submissions now claiming about Rs 7.50 crores as compensation under various heads. He has, in addition sought a direction that a further sum of Rs 2 crores be set aside to be used by him should some developments beneficial to him in the medical field take place. Some of the claims are untenable and we have no hesitation in rejecting them. We, however, find that the claim with respect to some of the other items need to be allowed or enhanced in view of the peculiar facts of the case."

103.4. In Oriental Insurance Company Ltd. Vs. Jashuben & Ors.(supra), the initial claim was for Rs.12 lakhs which was subsequently raised to Rs.25 lakhs. The claim was partly allowed by this Court.

103.5. In R.D. Hattangadi Vs. Pest Control (India) (supra) the appellant made an initial compensation claim of Rs.4 lakhs but later on enhanced the claim to Rs.35 lakhs by this Court.

103.6. In Raj Rani & Ors. Vs. Oriental Insurance Company Ltd. & Ors.,(supra) this Court has observed that there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. The relevant paragraph reads as under:

"14. In Nagappa v. Gurudayal Singh this Court has held as under: (SCC p. 279, para 7)

> "7. Firstly, under the provisions of the Motor Vehicles Act, 1988, (hereinafter referred to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case, where from the evidence brought on record if the Tribunal/court considers that the claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. The only embargo is- it should be "just" compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the MV Act."

103.7. In Laxman @ Laxaman Mourya Vs. Divisional Manager, Oriental Insurance Co. Ltd. & Anr.,(supra) this Court awarded more compensation than what was claimed by the claimant after making the following categorical observations:-

> "24. ....in the absence of any bar in the Act, the Tribunal and for that reason, any competent court, is entitled to award higher compensation to the victim of an accident."

103.8. In Ibrahim Vs. Raju & Ors.,(supra) this Court awarded double the compensation sought for by the complainant after discussion of host of previous judgments.

104. In view of the aforesaid decisions of this Court referred to supra, wherein this Court has awarded "just compensation" more than what

was claimed by the claimants initially and therefore, the contention urged by learned senior counsel and other counsel on behalf of the appellant-doctors and the AMRI Hospital that the additional claim made by the claimant was rightly not considered by the National Commission for the reason that the same is not supported by pleadings by filing an application to amend the same regarding the quantum of compensation and the same could not have been amended as it is barred by the limitation provided under Section 23 of the Consumer Protection Act, 1986 and the claimant is also not entitled to seek enhanced compensation in view of Order II Rule 2 of the CPC as he had restricted his claim at Rs.77,07,45,000/-, is not sustainable in law. The claimant has appropriately placed reliance upon the decisions of this Court in justification of his additional claim and the finding of fact on the basis of which the National Commission rejected the claim is based on untenable reasons. We have to reject the contention urged by the learned senior counsel and other counsel on behalf of the appellant-doctors and the AMRI Hospital as it is wholly untenable in law and is contrary to the aforesaid decisions of this Court referred to supra. We have to accept the claim of the claimant as it is supported by the decisions of this Court and the same is well founded in law. It is the duty of the Tribunals, Commissions and the Courts to consider relevant facts and evidence in respect of facts and circumstances of each and every case for awarding just and reasonable compensation. Therefore, we are of the view that the claimant is entitled for enhanced compensation under certain items made by the claimant in additional claim preferred by him before the National Commission.

105. We have to keep in view the fact that this Court while remanding the case back to the National Commission only for the purpose of determination of quantum of compensation also made categorical observation that:

> "172. Loss of wife to a husband may always be truly compensated by way of mandatory compensation. How one would do it has been baffling the court for a long time. For compensating a husband for loss of his wife, therefore, the courts consider the loss of income to the family. It may not be difficult to do when she had been earning. Even otherwise a wife's contribution to the family in terms of money can always be worked out. Every housewife makes a contribution to his family. It is capable of being measured on monetary terms although emotional aspect of it cannot be. It depends upon her educational qualification, her own upbringing, status, husband's income, etc."

In this regard, this Court has also expressed similar view that status, future prospects and educational qualification of the deceased must be judged for deciding adequate, just and fair compensation as in the case of R.K. Malik & Anr. (supra).

106. Further, it is an undisputed fact that the victim was a graduate in psychology from a highly prestigious Ivy League school in New York. She had a brilliant future ahead of her. However, the National Commission has calculated the entire compensation and prospective loss of income solely based on a pay receipt showing a paltry income of only $30,000 per year which she was earning as a graduate student. Therefore, the National Commission has committed grave error in taking that figure to determine compensation under the head of loss of dependency and the same is contrary to the observations made by this Court in the case of Arvind Kumar Mishra Vs. New India Assurance which reads as under:

> "14. On completion of Bachelor of Engineering (Mechanical) from the prestigious institute like BIT, it can be reasonably assumed that he would have got a good job. The appellant has stated in his evidence that in the campus interview he was selected by Tata as well as Reliance Industries and was offered pay package of Rs. 3,50,000 per annum. Even if that is not accepted for want of any evidence in support thereof, there would not have been any difficulty for him in getting some decent job in the private sector. Had he decided to join government service and got selected, he would have been put in the pay scale for Assistant Engineer and would have at least earned Rs. 60,000 per annum. Wherever he joined, he had a fair chance of some promotion and remote chance of some high position. But uncertainties of life cannot be ignored taking relevant factors into consideration. In our opinion, it is fair and reasonable to assess his future earnings at Rs. 60,000 per annum taking the salary and allowances payable to an Assistant Engineer in public employment as the basis."

107. The claimant further placed reliance upon the decisions of this Court in Govind Yadav Vs. New India Insurance Co. Ltd.(supra), Sri Ramachandrappa Vs. Manager, Royal Sundaram Alliance Insurance (supra), Ibrahim Vs. Raju & Ors., Laxman @ Laxman Mourya Vs. Divisional Manager, Oriental Insurance Co. Ltd. (supra) and Kavita Vs. Dipak & Ors (supra) in support of his additional claim on loss of future prospect of income. However, these decisions do not have any relevance to the facts and circumstances of the present case. Moreover, these cases mention about "future loss of income" and not "future prospects of income" in terms of the potential of the victim and we are inclined to distinguish between the two.

108. We place reliance upon the decisions of this Court in Arvind Kumar Mishra's case (supra) and also in Susamma Thomas (supra), wherein this Court held thus:

> "24. In Susamma Thomas, this Court increased the income by nearly 100%, in Sarla Dixit the income was increased only by 50% and in Abati Bezbaruah the income was increased by a mere 7%. In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. (Where the annual income is in the taxable range, the words 'actual salary' should be read as 'actual salary less tax'). The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of the deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to ecognized the addition to avoid different yardsticks being applied or different methods of calculation being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments, etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances."

109. Further, to hold that the claimant is entitled to enhanced compensation under the heading of loss of future prospects of income of the victim, this Court in Santosh Devi Vs. National Insurance Company and Ors. (supra), held as under:

> "18. Therefore, we do not think that while making the observations in the last three lines of para 24 of Sarla Verma judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30% increase in his total income over a period of time and if he/she becomes the victim of an accident then the same formula deserves to be applied for calculating the amount of compensation."

110. In view of the aforesaid observations and law laid down by this Court with regard to the approach by the Commission in awarding just and reasonable compensation taking into consideration the future prospects of the deceased even in the absence of any expert's opinion must have been reasonably judged based on the income of the deceased and her future potential in U.S.A. However, in the present case the calculation of the future prospect of income of the deceased has also been scientifically done by economic expert Prof. John F. Burke. In this regard, the learned counsel for the other appellant-doctors and the Hospital have contended that without amending the claim petition the enhanced claim filed before the National Commission or an application filed in the appeal by the claimant cannot be accepted by this Court. In support of this contention, they have placed reliance upon the various provisions of the Consumer Protection Act and also decisions of this Court which have been adverted to in their submissions recorded in this judgment. The claimant strongly contended by placing reliance upon the additional claim by way of affidavit filed before the National Commission which was sought to be justified with reference to the liberty given by this Court in the earlier proceedings which arose when the application filed by the claimant was rejected and this Court has permitted him to file an affidavit before the National Commission and the same has been done. The ground urged by the claimant is that the National Commission has not considered the entire claim including the additional claim made before it.

111. The claimant has placed strong reliance upon V.P. Shantha's case (supra) in support of his contention wherein it was held as under:

> "53. Dealing with the present state of medical negligence cases in the United Kingdom it has been observed:
>
> The legal system, then, is faced with the classic problem of doing justice to both parties. The fears of the medical profession must be taken into account while the legitimate claims of the patient cannot be ignored.
>
> Medical negligence apart, in practice, the courts are increasingly reluctant to interfere in clinical matters. What was once perceived as a legal threat to medicine has disappeared a decade later. While the court will accept the absolute right of a patient to refuse treatment, they will, at the same time, refuse to dictate to doctors what treatment they should give. Indeed, the fear could be that, if anything, the pendulum has swung too far in favour of therapeutic immunity. (p. 16)
>
> It would be a mistake to think of doctors and hospitals as easy targets for the dissatisfied patient. It is still very difficult to raise an action of medical negligence in Britain; some, such as the Association of the Victims of Medical Accidents, would say that it is unacceptably difficult. Not only are there practical

> difficulties in linking the plaintiff's injury to medical treatment, but the standard of care in medical negligence cases is still effectively defined by the profession itself. All these factors, together with the sheer expense of bringing legal action and the denial of legal aid to all but the poorest, operate to inhibit medical litigation in a way in which the American system, with its contingency fees and its sympathetic juries, does not.
>
> A patient who has been injured by an act of medical negligence has suffered in a way which is ecognized by the law â€" and by the public at large â€" as deserving compensation. This loss may be continuing and what may seem like an unduly large award may be little more than that sum which is required to compensate him for such matters as loss of future earnings and the future cost of medical or nursing care. To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice. After all, there is no difference in legal theory between the plaintiff injured through medical negligence and the plaintiff injured in an industrial or motor accident. (pp. 192-93)
>
> (Mason's Law and Medical Ethics, 4th Edn.)"

112. The claimant has also placed reliance upon the Nizam Institute of Medical Sciences case referred to supra in support of his submission that if a case is made out, then the Court must not be chary of awarding adequate compensation. The relevant paragraph reads as under:

> "88. We must emphasise that the court has to strike a balance between the inflated and unreasonable demands of a victim and the equally untenable claim of the opposite party saying that nothing is payable. Sympathy for the victim does not, and should not, come in the way of making a correct assessment, but if a case is made out, the court must not be chary of awarding adequate compensation. The 'adequate compensation' that we speak of, must to some extent, be a rule of thumb measure, and as a balance has to be struck, it would be difficult to satisfy all the parties concerned."

113. The claimant has further rightly contended that with respect to the fundamental principle for awarding just and reasonable compensation, this Court in Malay Kumar Ganguly's case (supra) has categorically stated while remanding this case back to the National Commission that the principle for just and reasonable compensation is based on '*restitutio in integrum*' that is, the claimant must receive sum of money which would put him in the same position as he would have been if he had not sustained the wrong.

114. Further, the claimant has placed reliance upon the judgment of this Court in the case of Ningamma's case (supra) in support of the proposition of law that the Court is duty-bound and entitled to award "just compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. The relevant paragraph reads as under:

> "34. Undoubtedly, Section 166 of the MVA deals with "just compensation" and even if in the pleadings no specific claim was made under Section 166 of the MVA, in our considered opinion a party should not be deprived from getting "just compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the court is duty-bound and entitled to award

"just compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not."

115. He has also rightly placed reliance upon observations made in Malay Kumar Ganguly's case referred to supra wherein this Court has held the appellant doctors guilty of causing death of claimant's wife while remanding the matter back to the National Commission only for determination of quantum of compensation for medical negligence. This Court has further observed that compensation should include "loss of earning of profit up to the date of trial" and that it may also include any loss "already suffered or likely to be suffered in future". The claimant has also rightly submitted that when the original complaint was filed soon after the death of his wife in 1998, it would be impossible to file a claim for "just compensation". The claimant has suffered in the course of the 15 years long trial. In support of his contention he placed reliance on some other cases also where more compensation was awarded than what was claimed, such as Oriental Insurance Company Ltd. Vs. Jashuben & Ors., R.D. Hattangadi , Raj Rani & Ors, Laxman @ Laxaman Mourya all cases referred to supra. Therefore, the relevant paragraphs from the said judgments in-seriatum extracted above show that this Court has got the power under Article 136 of the Constitution and the duty to award just and reasonable compensation to do complete justice to the affected claimant.

116. In view of the aforesaid reasons stated by us, it is wholly untenable in law with regard to the legal contentions urged on behalf of the AMRI Hospital and the doctors that without there being an amendment to the claim petition, the claimant is not entitled to seek the additional claims by way of affidavit, the claim is barred by limitation and the same has not been rightly accepted by the National Commission."

49. Now, we have to award the just and fair compensation as per the principles laid down in the judgments cited hereinabove, taking into consideration the 100% disability of 8 years old boy at the time of electrocution. According to the averments made in the petition, he was a brilliant student. The petitioner would normally had started earning at least Rs. 30,000/- per month after attaining the age of 20 years. His life expectancy can safely be taken as per the prevailing trends to 70 years. He would have safely worked for 38 years. The appropriate multiplier, in the present case, would be 25. There is no possibility of marriage of the petitioner, therefore, no standard deductions can be made from the income. The income in entirety has to be taken into consideration. The annual income of the petitioner would be Rs. 3,60,000/-, which is required to be multiplied by 25. The total future loss of the income of the petitioner comes to (30,000 x 12 x 25 = 90,00,000/-) i.e rupees ninety lacs. The petitioner is also entitled to standard damages of Rs. 10,00,000/- towards loss of companionship, life amenities/pleasures and loss of happiness. The petitioner is entitled to Rs. 10,00,000/- for pain and suffering, including mental distress, trauma and discomfort and inconvenience. He is entitled to Rs. 10,00,000/- towards attendant/nursing expenses for his life. He is also entitled to a sum of Rs. 5,00,000/- for securing artificial/robotic limbs and future medical expenses.

50. The writ petition is allowed and in order to secure financial amenities for future of the petitioner, the respondents No. 2 & 3 would pay compensation of Rs. 1,25,00,000/- (Rupees one crore twenty five lacs) to the petitioner. The amount will be deposited in a Fixed Deposit in the name of the petitioner under joint guardianship of his mother at Nationalized Bank, Chowari, Distt. Chamba, H.P., within a period of 60 days of the receipt of certified copy of this judgment, failing which, the amount shall carry interest @ 9% p.a. till deposited in the bank. The interest so accrued will be transferred in a separate Savings Account to be opened in the same Branch in the name of the

petitioner, to be operated jointly by the parents, payable to the petitioner on regular monthly basis. The Manager, Nationalized Bank, Chowari, where the compensation amount shall be deposited, would release a sum of Rs. 10,000/- per month to the petitioner, through his guardian, to meet his daily expenses. This amount would take care of the petitioner's educational expenses, nutritious food and cost of attendant. A sum of Rs. 5,00,000/- deposited in this Court shall be adjusted towards the amount to be paid to the petitioner as ordered hereinabove. The respondents No. 2 & 3 are directed to take all remedial measures to raise the height of the 'Lahru-Chowari Line' to make it safe and render the inhabitants electrically harmless and to make it beyond the reach of children and local residents of the inhabited localities.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd. .....Appellant.
Versus
Smt. Anju and others ...Respondents

FAO (MVA) No. 5 of 2012.
Judgment reserved on 2.1.2015
Date of decision: 09 January, 2015.

Motor Vehicle Act, 1988- Section 149- Deceased was travelling in a truck as a representative of the owner of the goods- truck met with an accident due to rash and negligent driving of the driver- Insurance Company had not led any evidence to prove that passenger was travelling in the vehicle as a gratuitous passenger – sitting capacity of the vehicle was '3'- risk of the driver was covered – no evidence was led to prove that risk of the owner of the goods was covered- held, that insurer had not committed breach of the terms of the policy and the Insurer was rightly held liable. (Para- 12 to 20)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh & others, reported in AIR 2004 SC 1531
Manager National Insurance Co. Ltd. vs. Saju P. Paul and another reported in 2013 AIR SCW 609
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another reported in AIR 2009 SC3104
Reshma Kumari and others versus Madan Mohan and another reported in 2013 AIR SCW 3120

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr.Varun Thakur, Advocate, for respondent No.1.
Mr. Karan Singh Kanwar, Advocate, for respondent No. 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice .

Challenge in this appeal is to the judgment and award dated 29.10.2011, made by the Motor Accident Claims Tribunal-I, Solan, District Solan for short "the Tribunal" in MAC Petition No. 1-S/2 of 2009, titled *Smt. Anju versus Smt. Promila Devi and others,* whereby compensation to the tune of Rs.5,65,000/- with 7.5% interest, came to be awarded in favour of the claimant

and against the respondent-appellant herein, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. Smt. Anju-claimant had invoked the jurisdiction of the Motor Accident Claims Tribunal for the grant of compensation to the tune of Rs.15 lacs, on the grounds and as per break-ups given in the claim petition.

3. Precisely, the case of the claimant was that on 6.12.2006 deceased Raj Kumar was travelling in the truck bearing registration No. HP-16-1846 as a representative of the owner of the goods, met with an accident at 3.30 a.m. at Yashwant Nagar on Solan Rajgarh Road in which he lost his life, which was caused by its driver, namely, Vijay Kumar, while driving the aforesaid offending truck rashly and negligently. FIR No. 102/2006 dated 6.12.2006, of the said accident was lodged in police station Rajgarh. It is further averred that the deceased was working as welder at the welding shop of Babu Ram, owner of the Truck and was earning Rs.4500/- per month as salary and Rs.1500/- per month by doing extra work. The deceased was a skilled worker and claimant has been deprived of her source of income, matrimonial home and virtually she has lost everything.

4. Respondents No. 1 and 3 filed separate replies to the claim petition before the Tribunal. Respondent No. 2 Vijay Kumar, driver was set *ex parte* before the Tribunal in the claim petition.

5. The Tribunal on the pleadings of the parties framed following issues:

(i) *Whether the deceased Raj Kumar died in an accident caused due to rash and negligent driving of the respondents No. 2 while driving the vehicle of respondent No.1 ?OPP.*

(ii) If issue No.1 is proved in affirmative, to what amount of compensation, the petitioner is entitled and from whom? OPP.

*(iii) Whether the vehicle was being plied in violation of terms and conditions of the insurance policy and the respondents No. 3 is not liable to pay the amount of compensation? OPR-*3.

(iv) Relief.

6. Claimant has examined three witnesses in all, namely, Kamal Sharma (PW1), Narain Dutt Sharma (PW2) and Ramesh Sharma, (PW3).

7. On the other hand, respondents, in the claim petition, have examined four witnesses, namely, Ram Lal (RW1), Promila (RW2), Rajinder Singh (RW3) and Mahinder Kumar (RW4).

8. The Tribunal, after scanning the evidence on record held that the claimant has proved by leading evidence that Vijay Kumar driver of the offending truck has rashly and negligently driven the aforesaid vehicle and caused the accident on 6.12.2006 at about 3 30. a.m. near Yashwant Nagar on Solan Rajgarh Road in which deceased Raj Kumar sustained injuries and succumbed to the same, who was travelling in the said vehicle as a representative of the owner of the goods.

9. The widow-claimant, owner and driver have not questioned the findings returned by the Tribunal on Issue No.1.

10. I have gone through the records. The tribunal has rightly returned the findings on this issue. Accordingly, the findings returned on issue No. 1 are upheld.

11. Issues No. 2 and 3 are inter-dependent, hence are taken up together for determination.

12. The Tribunal, while determining issue No. 3, held that the owner has not committed any willful breach and the said issue came to be decided against the insurer. The insurer has specifically averred in the reply that the deceased was not travelling in the vehicle as a representative of the owner of the goods, but was travelling in the said vehicle as a gratuitous passenger, has not led any evidence to prove the same. It was for the insurer to plead and prove that the deceased was travelling in the said vehicle as a gratuitous passenger. Therefore, the insurer is not liable to indemnify the award.

13. This Court in FAO No. 362 of 2012 titled ***ICICI Lombard General Insurance Company versus Sumitra Devi and others***, in terms of the apex Court judgment in case titled ***National Insurance Co. Ltd. versus Swaran Singh & others***, reported in ***AIR 2004 SC 1531***, held that the insurer has to plead and prove that the deceased was a gratuitous passenger, which they have failed to do so. The relevant portion of para 105 of the apex Court judgment, supra reads as under:-

> *"105..*
>
> *(i)….*
>
> *(ii)…..*
>
> *(iii)…..*
>
> *(iv) The insurance company 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."*

14. In FAO No. 169 of 2011 titled ***Shanti Devi versus National Insurance Company & others*** decided on 25.7.2014, along with connected matters, this Court also took the same view and held that the Insurer has to prove that deceased was travelling in the vehicle as a gratuitous passenger.

15. The apex Court in ***Manager National Insurance Co. Ltd. vs. Saju P. Paul and anothe****r* reported in ***2013 AIR SCW 609*** in para 16 has also laid down the same principles.

16. The same view has been taken by this Court in FAO No. 63 of 2012 titled ***Nand Lal and another vs. Meena Devi and others*** decided on 22.8.2014, FAO No. 197 of 2012 titled ***United India Insurance Co. Ltd. vs. Kamla Devi and others*** decided on 1.8.2014, FAO No. 273 of 2011 along with connected matters titled ***Oriental Insurance Company vs. Veena Devi and others*** decided on 19th September, 2014, and FAO No. 343 of 2008 alongwith connected matters titled ***Sh. Rajeev Chauhan vs. Sh. Hari Chand Bramta and others*** decided on 19th September, 2014.

17. The learned counsel for the appellant argued that at the time of the accident, insured/owner of the Truck Sh. Babu Ram was also travelling in the said vehicle as owner of the goods thus, the risk of representative of the owner of goods is not covered and has tried to carve out a case, in terms of the mandate of Section 147 (b) of the Motor Vehicles Act, for short "the Act".

18. The learned counsel for the appellant was asked to show whether he has taken such a ground in the reply filed before the Tribunal or in the memo of appeal, has failed to satisfy this Court. However, I have gone through the reply filed before the Tribunal to the claim petition. No such ground was taken in the reply before the Tribunal by the insurer. It had only resisted the claim

petition on the ground that the deceased was travelling in the said vehicle as a gratuitous passenger, which it failed to prove. The said ground was not taken by the appellant before the Tribunal. Thus, the argument advanced is beyond pleadings, cannot be entertained.

19. The insurance policy Ext. RY is on the record. The sitting capacity of the vehicle is three and the risk of driver is also covered. The appellant-insurer has not led any evidence to prove that the risk of agent of the owner of the goods or insured/owner of the Truck was not covered, in terms of Insurance Policy Ext. RY. It was for the insurer to plead and prove that risk of representative of the goods or representative of the owner was not covered. This argument also merits to be turned down and is accordingly, turned down.

20. The insured has not committed any breach in terms of the mandate of Section 149 read with the terms and conditions of the Insurance Policy Ext. RY. Accordingly, issue No. 3 is decided in favour of the insured-owner and against the insurer. Thus, the findings returned by the Tribunal on this issue are upheld.

21. **Issue No. 2.** The insurer-appellant has not questioned the adequacy of the compensation. It appears that the discussion made by the Tribunal in paras 11 and 12 of the impugned judgment and award is legal one, needs no interference. The Tribunal held that the claimant has pleaded and proved that deceased was working as welder in the shop of Babu Ram, owner of the offending vehicle, earning Rs.4500/- per month and after deducting 1/3rd held that the claimant has lost source of dependency to the tune of Rs.3000/- per month, accordingly applied the multiplier of "15" while keeping in view the age of the deceased read with ***Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another reported in AIR 2009 SC3104*** and upheld by a larger Bench of the apex Court in the case titled as ***Reshma Kumari and others versus Madan Mohan and another*** reported in ***2013 AIR SCW 3120.***

22. Thus, it cannot be said that the compensation awarded is excessive.

23. Having said so, the appeal merits dismissal and is accordingly dismissed and the impugned award is upheld. Send down the record forthwith after placing a copy of this judgment.

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

State of Himachal Pradesh. ....Appellant.

Vs.

Anil Kumar son of Sh Kali Ram. ....Respondent.

Cr. Appeal No.4196 of 2013.
Judgment reserved on: 5.11.2014.
Date of Decision: January 9, 2015,

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 6 Kg. 500 grams of charas- Investigating Officer had not made any efforts to associate any independent witness despite the fact that vehicles were plying on the road at the time of incident- failure to join the independent witnesses despite the opportunity would make the prosecution case doubtful- special report was also not placed on record and no reason was assigned for the same- column No. 9 to 11 of NCB form were kept blank- contraband was not re-sealed by SHO – there was a difference between the time of recovery recorded in the seizure memo and

NCB forms- the person who effected the recovery conducted the investigation- original seal was not produced before the Court- held that, in these circumstances, accused was rightly acquitted. (Para-11 to 18)

Cases referred:

Rattan Lal vs. State (1987)2 Crimes 29 (Delhi High Court)
Bhagwan Singh vs. The State of Rajasthan AIR 1976 SC 985
Gyan Chand vs. State of Rajasthan 1993 Criminal Law Journal 3716
Nanha vs. State Latest HLJ 2011 HP 1195 (DB)
State of Rajasthan vs. Gopal 1998 (8) SCC 449
Mookkiah and another vs. State (2013)2 SCC 89
State of Rajasthan vs. Talevar 2011(11) SCC 666
Surendra vs. State of Rajasthan AIR 2012 SC (Supp) 78
State of Rajasthan vs. Shera Ram @ Vishnu Dutta 2012(1) SCC 602
Balak Ram and another vs. State of U.P. AIR 1974 SC 2165
Allarakha K. Mansuri vs. State of Gujarat (2002)3 SCC 57
Raghunath vs. State of Haryana (2003)1 SCC 398
State of U.P. vs. Ram Veer Singh and others AIR 2007 SC 3075
S. Rama Krishna vs. S. Rami Raddy (D) by his LRs. & others AIR 2008 SC 2066
Sambhaji Hindurao Deshmukh and others vs. State of Maharashtra (2008) 11 SCC 186
Arulvelu and another vs. State (2009)10 SCC 206
Perla Somasekhara Reddy and others vs. State of A.P. (2009)16 SCC 98
Ram Singh @ Chhaju vs. State of Himachal Pradesh (2010)2 SCC 445

For the appellant: Mr. B.S.Parmar Addl. Advocate General with Mr.J.S.Guleria, Asstt. Advocate General.
For the respondent: Mr.S.M.Goel Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment passed by the learned Special Judge-I Sirmour District at Nahan in Sessions Trial No. 3-ST/7 of 2012.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 8.11.2011 at 3.30 PM at bifurcation Ronhat-Bela Baswa road accused was found in exclusive and conscious possession of 650 grams charas. It is alleged by prosecution that on dated 8.11.2011 PW7 ASI Partap Singh along with PW1 HC Bishan Singh, PW2 HHC Rajinder Singh and PW3 Kaku Chauhan left Police Station Shillai in official vehicle No HP-18A-0233 which was driven by PW4 Constable Heera Singh towards Rohnat side in connection with traffic checking and detection of cases. It is alleged by prosecution that at about 3.30 PM when the aforesaid police party was present at place Bella bifurcation accused came from Rohnat side carrying a bag in his hand and on seeing the police officials accused threw his bag down from the road and tried to run away from the spot. It is alleged by prosecution that thereafter accused was chased and apprehended and thereafter the bag thrown by accused was lifted by PW7 ASI Partap Singh and on checking it was found that bag contained contraband of charas. It is alleged by prosecution that thereafter PW7 Partap Singh sent PW3 Kaku Chauhan for bringing weight and scale which was brought from Shillai

market and on weighment 650 gram charas was found. It is alleged by prosecution that thereafter charas was put back into same polythene envelope and sealed with seal impression 'S'. It is alleged by prosecution that thereafter NCB form Ext PW6/C were filled in triplicate and thereafter sample of seal Ext PW1/B was handed over to PW1 HC Bishan Singh. It is alleged by prosecution that thereafter search and seizure memo Ext PW1/C were prepared and rukka Ext PW2/A was sent to Police Station Shillai through PW2 HHC Rajinder Singh along with case property. It is alleged by prosecution that thereafter PW2 Rajinder Singh delivered rukka Ext PW2/A to PW6 MHC Chattar Singh on the basis of which FIR Ext PW2/B was registered. It is alleged by prosecution that PW2 deposited case property with PW6 in malkhana and entry in malkhana register at serial No.298 was recorded. It is alleged by prosecution that extract of malkhana register is Ext PW6/A. It is alleged by prosecution that thereafter PW7 Partap Singh prepared site plan Ext PW7/B and got photographs Ext P4 to P8 clicked by PW4 Constable Heera Singh from his mobile camera. It is alleged by prosecution that grounds of arrest were conveyed to accused. It is alleged by prosecution that thereafter on dated 9.11.2011 PW7 Partap Singh sent case property to FSL Junga through PW5 Constable Sunil Dutt vide RC No.53/2011 who after depositing the same in laboratory obtained its receipt which was handed over by him to PW6 Chattar Singh on his return to Police Station. It is alleged by prosecution that after receiving the report of Chemical Examiner Ext PW7/D SI Balak Ram prepared challan in the present case. Charge was framed against the accused on dated 21.9.2012 under Section 20 of Narcotic Drugs and Psychotropic Substances Act 1985. Accused did not plead guilty and claimed trial.

3. Prosecution examined as many as seven witnesses in support of its case.

Sr.No.	Name of Witness
PW1	Bishan Singh
PW2	Rajinder Singh
PW3	Kaku Chauhan
PW4	Heera Singh
PW5	Sunil Dutt
PW6	Chatter Singh
PW7	Partap Singh

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

Sr.No.	*Description.*
Ext PW/A	*Memo regarding identification of Charas*
Ext PW1/B	*Sample of seals*
Ext.PW1/C	*Seizure memo of charas*
Ext.PW2/A	*Rukka*
Ext.PW2/B	*FIR*
Ext.PW2/C	*Endorsement in rukka*
Ext.P4 to P8 & P9	*Photographs & CD*

Ext.PW6/A	*Entry in malkhana register*
Ext PW6/B	*Copy of RC*
Ext PW6/C	*NCB Form*
Ext PW7/A	*Copy of DD No.9(A)*
Ext PW7/B	*Site Plan*
Ext PW7/C	*Memo regarding information of arrest*
Ext PW7/D	*Report of chemical examiner*

5. Statement of accused was also recorded under Section 313 Cr.P.C. He has stated that he is innocent and false case has been filed against him. He has stated that no independent witness was associated. Accused did not lead any defence evidence. Learned trial Court acquitted the accused.

6. Feeling aggrieved against judgment passed by learned Special Judge-I, Sirmour District at Nahan appellant-State filed present appeal.

7. We have heard learned Additional Advocate General appearing on behalf of the State and learned Advocate appearing on behalf of the respondent and also perused entire record carefully.

8. Point for determination in the present appeal is whether learned trial Court did not properly appreciate oral as well as documentary evidence adduced by the parties and caused miscarriage of justice to the appellant as alleged in memorandum of grounds of appeal.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9 PW1 HC Bishan Singh has stated that he was posted as Investigating Officer at Police Station Shillai. He has stated that on dated 8.11.2011 he along with ASI Partap Singh HHC Rajinder Singh and Constable Kaku Chauhan had left Police Station Shillai in official vehicle No. HP-18A-0233 which was driven by Constable Hira Singh towards Ronhat side in connection with traffic checking and when accused saw police officials he threw his bag down from the road and turned back and started running towards Ronhat. He has stated that thereafter police officials chased accused and apprehended the accused and bag which was thrown down the road by accused was took by ASI Partap Singh and on checking one polythene envelope containing charas in the shape of sticks was recovered. He has stated that thereafter Constable Kaku Chauhan was sent to procure weights and scales which he brought from Shillai market and on weighing the charas present in the polythene envelope was found 650 grams in the shape of sticks. He has stated that thereafter charas was put back in the same polythene envelope and sealed with seal impression 'S'. He has stated that NCB form was prepared in triplicate and thereafter sample of seal Ext PW1/B was drawn and seal was handed over to him. He has stated that search and seizure memo Ext PW1/C was prepared which was witnessed by him. He has stated that thereafter ASI Partap Singh scribed rukka and sent the same to Police Station through HHC Rajinder Singh. He has stated that parcel cover is Ext P1 which bears his signature. He has stated that polythene containing charas is Ext P2 which was recovered from accused. He has stated that bag is Ext P3. He has stated that they did not make any efforts to associate any independent witness though the vehicles were plying on the road. He has stated that they did not call any independent witness while sealing charas. He has stated that he did not re-collect whether a bus of Sharma travelers crossed from that place which plies between Gatta Dhar to Shillai. He has denied suggestion that accused was not apprehended at the spot. He denied suggestion that no contraband was recovered from the possession of accused. He denied

suggestion that false proceedings have been carried out against the accused. He denied suggestion that accused was took to the spot and thereafter photographs were clicked. He denied suggestion that he deposed falsely being police officials.

9.1 PW2 HHC Rajinder Singh has stated that during the year 2011 he was posted as HHC in Police Station Shillai. He has stated that on dated 8.11.2011 he along with ASI Partap Singh, HC Bishan Singh and Constable Kaku Chauhan left Police Station Shillai at 2.45 PM towards Ronhat side in connection with traffic checking in official vehicle No HP-18A-0233 which was driven by Constable Hira Singh. He has stated that at about 3.30 PM when they were present at Bella Baswa bifurcation accused Anil Kumar came from Ronhat side and was in possession of bag in his hand. He has stated that when accused saw police officials accused turned back and threw bag down the road. He has stated that thereafter they chased the accused and apprehended him. He has stated that thereafter the bag which was thrown down the road by accused was picked up by ASI Partap Singh and after checking bag 650 grams charas was found. He has stated that charas was put back in the same polythene envelope and put into a parcel and sealed with seal impression 'S'. He has stated that NCB form in triplicate was prepared. He has stated that sample of seal Ext PW1/B was drawn and seal was handed over to HC Bishan Singh. He has stated that search and seizure memo Ext PW1/C was prepared which was witnessed by him. He has stated that thereafter ASI Partap Singh drawn rukka Ext PW2/A and handed over the same to him which he delivered to MHC Chatter Singh on the basis of which he recorded FIR Ext PW2/B. He has stated that after making endorsement Ext PW2/C on rukka he handed over case file to him which he delivered to ASI Partap Singh at the spot. He has stated that he also took case property to Police Station along with NCB form and deposited the same with MHC. He has stated that parcel cover Ext P1, polythene containing charas Ext P2 and bag Ext P3 are the same which were sealed at the spot. He has stated that during the period when they remained present at the spot several vehicles crossed. He has stated that during the proceedings no efforts were made to join independent witness. He has stated that he does not know whether information with regard to incident was given to superior officer or not. He has denied suggestion that false case has been filed against accused. He denied suggestion that no contraband was recovered from accused. He denied suggestion that no rukka was sent through him. He denied suggestion that he deposed falsely being police official.

9.2 PW3 Kaku Chauhan has stated that he was posted as Constable General Duty at Police Station Shillai since 2010. He has stated that on dated 8.11.2011 he along with ASI Partap Singh, HC Bishan Singh and HHC Rajinder Singh left Police Station at 2.45 PM towards Ronhat side in connection with traffic checking in official vehicle No. HP-18A-0233. He has stated that at about 3.30 PM when they were present at place Bell Baswa bifurcation accused Anil came from Ronhat side. He has stated that accused was in possession of bag in his hand. He has stated that when accused saw police officials accused threw his bag down the road and turned back and tried to run away. He has stated that accused was chased and apprehended. He has stated that thereafter ASI Partap Singh picked up bag which was thrown down the road by accused. He has stated that thereafter bag was checked and 650 grams charas was found in bag. He has stated that after weighing the charas it was put into a parcel and sealed with seal impression 'S' and seizure memo was prepared. He has stated that NCB form was prepared and rukka was sent to Police Station Shillai through HHC Rajinder Singh. He has stated that thereafter ASI Partap Singh prepared site plan and recorded the statements of the witnesses. He has stated that no photograph was taken of the place where the bag was actually found. He has denied suggestion that no contraband was recovered from accused. He denied suggestion that no scale and weights were brought by him from Shillai market. He denied suggestion that no proceedings were drawn in his presence.

9.3 PW4 Heera Singh has stated that during the year 2011 he was posted as Constable Driver in Police Station Shillai. He has stated that on dated 8.11.2011 he left police station Shillai by driving official vehicle No HP 18-A-0233 along with police officials headed by ASI Partap Singh towards Ronhat side in connection with traffic checking. He has stated that they reached at place Bella bifurcation at 3 PM. He has stated that at about 3.30 PM accused Anil Kumar came from Ronhat side carrying a bag in his hand. He has stated that on seeing the police officials accused threw down bag from the road and turned back and tried to run away. He has stated that accused was chased and apprehended by police officials. He has stated that ASI Partap Singh picked up bag which was thrown by accused and on checking it was found charas in the shape of sticks. He has stated that thereafter constable Kaku Chauhan was sent for procuring scale and weights which he brought from Shillai market. He has stated that on weighment the charas was found 650 grams and thereafter charas was put back in the same polythene envelope and sealed with seal impression 'S'. He has stated that thereafter seal was handed over to HC Bishan Singh. He has stated that thereafter NCB form and seizure memo was prepared. He has stated that rukka was drawn and sent to Police Station through HHC Rajinder Singh. He has stated that he clicked photographs Ext P4 to P8 from his mobile phone camera. He has stated that CD is Ext P9. He has stated that bag was lying five metres below the road. He has stated that from police station they directly went to Bella bifurcation and reached there at 3 PM. He has stated that the distance of Bella bifurcation from Police Station is about 1.5 Km. He has stated that no prior information was received qua contraband. He has stated that no vehicle was checked. He has stated that they reached back in police station at about 7.30 PM. He has stated that several vehicles crossed the spot when they were present at the spot. He has stated that they did not make any efforts to associate any independent witness.

9.4 PW5 Sunil Dutt has stated that he was posted as Constable General Duty in Police Station Shillai since 2011. He has stated that on dated 9.11.2011 MHC Chatter Singh had handed over case property of case comprising one sealed parcel which was sealed with seal impression 'S' along with sample of seal and NCB form in triplicate and a docket vide RC No.53/2011. He has stated that he delivered the same in FSL Junga on dated 11.11.2011. He has stated that case property remained intact in his custody.

9.5 PW6 Chattar Singh has stated that during the year 2011 he remained posted as MHC in Police Station Shillai. He has stated that on dated 8.11.2011 at 5.35 PM HHC Rajinder Singh had delivered rukka Ext PW2/A to him on the basis of which he recorded FIR Ext PW2/B and after registration of case he made endorsement on rukka Ext PW2/C and handed over case file to HHC Rajinder Singh for being delivered to ASI Partap Singh. He has stated that on the same day at 6 PM HHC Rajinder Singh deposited one sealed parcel along with sample of seal in malkhana. He has stated that he recorded entry in malkhana register at serial No.298 and its extract is Ext PW6/A. He has stated that the same is true copy of original malkhana register. He has stated that on dated 9.11.2011 he sent case property to FSL Junga through constable Sunil Dutt vide RC No.53/2011. He has stated that case property remained intact and was not tampered. He has stated that no resealing was conducted.

9.6 PW7 Partap Singh has stated that during the year 2011 he remained posted as Investigating Officer in Police Station Shillai. He has stated that on dated 8.11.2011 he along with his subordinate officials left Police Station Shillai in official vehicle No. HP-18A-0233 vide DD No.9 copy of which is Ext PW7/A. He has stated that at about 3.30 PM when they were present at place Bella Bashwa bifurcation accused Anil Kumar came from Ronhat side. He has stated that accused was in possession of bag in his right hand and threw the bag on the side of the road and turned back and tried to run away. He has stated that accused was chased and overpowered and thereafter he lifted the

bag. He has stated that after checking the bag one green colour polythene envelope was found containing charas in the shape of sticks. He has stated that thereafter Constable Kaku Chauhan was sent to Shillai market for bringing weighing scales. He has stated that thereafter charas was placed in the same polythene and bag and thereafter the bag was sealed with nine seals impression 'S'. He has stated that a column of NCB form was filled. He has stated that seal was handed over to HC Bishan Singh. He has stated that thereafter search and seizure memo Ext PW1/C was prepared in the presence of HC Bishan Singh and HHC Rajinder Singh. He has stated that thereafter rukka Ext PW2/A was prepared which was sent to Police Station along with case property, sample seal and NCB forms. He has stated that thereafter he prepared site plan Ext PW7/B and recorded the statements of witnesses. He has stated that after the receipt of report of chemical examiner Ext PW7/D case file was handed over to SHO Balak Ram for preparation of challan. He has stated that parcel cover Ext P1 bears his signature. He has stated that polythene containing charas Ext P2 and bag Ext P3 are the same which was sealed at the spot by him. He has stated that special report is not on record. He has stated that there is no reference of special report and sending the same to SDPO Paonta Sahib. He has denied suggestion that an abandoned bag was found by the police. He denied suggestion that contraband was falsely planted upon the accused. He has admitted that column Nos. 9 and 11 have not been filled in NCB form. He denied suggestion that there is discrepancy in the time of recovery of contraband in seizure memo and in the NCB form. He denied suggestion that accused has been falsely implicated in the present case in order to get reward and promotion.

10. Submission of learned Additional Advocate General appearing on behalf of State that no reason has been assigned by learned trial Court for discarding the versions of official witnesses and further submission of learned Additional Advocate General appearing on behalf of State that there was no occasion on the part of police officials to falsely implicate the accused and reliance should have been placed on testimonies of PWs and submission of learned Additional Advocate General appearing on behalf of State that learned trial Court has given undue weightage to minor contradictions and on these grounds appeal filed by State be accepted is rejected being devoid of any force for the reasons hereinafter mentioned.

Non-joining of independent witness in present case is fatal to prosecution despite availability of independent witnesses

11. PW1 H.C. Bishan Singh eye witness of incident has specifically stated in positive cogent and reliable manner that Investigating Officer did not make any effort to associate any independent witness despite the fact that vehicles were plying on the road at the time of alleged incident. Even PW2 HHC Rajinder Singh has also specifically stated in positive manner that no efforts were made to join independent witness by Investigating Officer. Even PW4 C. Heera Singh has stated that a number of vehicles crossed when police party was present at the spot but no efforts were made to join the independent witnesses in present case. It was held in case reported in ***(1987)2 Crimes 29 (Delhi High Court) titled Rattan Lal vs. State*** that if public witnesses were deliberately not associated in the search and seizure proceedings in narcotic drugs and psychotropic substances cases then prosecution case is not free from doubt. As per testimonies of PW1 Head Constable Bishan Singh and PW2 Rajinder Singh and PW4 C. Heera Singh a number of vehicles were crossing on the place of incident at the time of preparation of seizure memo but Investigating Officer did not associate any independent witness in search and seizure proceedings and no efforts were made by Investigating Officer to associate independent witnesses in investigation of case. There is no evidence on record that independent witnesses refused to join the search and seizure proceedings despite efforts made by Investigating Officer to join them as independent witnesses. Hence we are of the opinion that non-joining of independent witnesses by prosecution at the time of

preparation of search and seizure memo despite the availability of independent witnesses has caused miscarriage of justice to accused in present case in order to prove impartial investigation on the part of Investigating Officer. Hence it is held that testimonies of PW1 HC Bishan Singh, testimony of PW2 HHC Rajinder Singh and PW4 Constable Heera Singh that many vehicles crossed from the place of incident at the time of preparation of search and seizure and no efforts made by Investigating Officer to join independent witnesses are fatal to the prosecution in the present case.

Non-placing of special report on record is also fatal to the prosecution.

12. PW7 ASI Partap Singh has specifically stated in positive manner that special report was not placed on record and he has further stated that no reference of sending the special report to SDPO was mentioned in challan is also fatal to prosecution. No reason has been assigned by prosecution as to why special report was not placed on record and no reason has been assigned by prosecution that as to why reference of special report was not mentioned in list of documents filed along with challan. Non-placing of special report on record and non-mentioning of reference of special report in challan has caused miscarriage of justice to accused and same is fatal to the prosecution.

Non-filling of column Nos. 9 and 11 of NCB form is fatal to the prosecution

13. Investigating Officer PW7 ASI Partap Singh has specifically stated in positive manner that column Nos. 9 and 11 of NCB form qua resealing of parcel by SHO of Police Station were kept blank. We have carefully perused the NCB form and found that column Nos. 9 and 11 of NCB form qua resealing by SHO have been kept blank. Hence it is held that same are fatal to the prosecution and create doubt in the mind of Court and same has caused miscarriage of justice to accused.

Non resealing of process of contraband by SHO Police Station is fatal to prosecution

14. PW6 HC Chatter Singh has specifically stated in positive manner that no resealing of parcels by SHO was conducted. It was held in case reported in 1995 Criminal Law Journal page 744 titled State of Punjab Vs. Kulwant Singh (P&H Full Bench) that prosecution case would become doubtful when sealing and resealing process was defective. It was held that all sample taken from seized material have necessarily to be sealed with the seal of an officer incharge of Police Station. It was further held that same is mandate of law. It was further held that words used as 'shall' of Section 55 of Narcotic Drugs & Psychotropic Substance Act is mandatory in nature to protect tampering of parcel because punishment mentioned in NDPS case is grave in nature. Hence we are of the opinion that same is fatal to the prosecution and has caused miscarriage of justice to accused.

Difference between time of recovery of contraband in seizure memo and NCB form creates doubt in the mind of Court

15. As per First Information Report and seizure memo recovery of contraband was effected on dated 8.11.2001 at 3.30 hours and as per entries of NCB form recovery of contraband was effected at 4 PM. This has created doubt in the mind of Court. Difference of time qua search and seizure of contraband in NCB form and seizure memo has created doubt in the mind of Court.

Entire investigation conducted by complainant himself is also fatal to the prosecution

16. As per FIR complainant in present case is ASI Partap Singh and it is proved on record that complainant ASI Partap Singh himself investigated the entire case and he himself seized the contraband, sealed the parcels, sent the ruka, prepared site plan and recorded statements of prosecution witnesses. In

present case whole investigation was conducted by complainant himself which is against the criminal jurisprudence and *ipso facto c*ontrary to law and same has caused miscarriage of justice to accused. It is not the case of prosecution that no other independent Investigating Officer was available. We are of the opinion that entire investigation in present case conducted by complainant namely ASI Partap Singh has caused miscarriage of justice to accused. Entire investigation by complainant himself was deprecated by Hon'ble Apex Court of India in case reported in ***AIR 1976 SC 985 titled Bhagwan Singh vs. The State of Rajasthan. Also see 1993 Criminal Law Journal 3716 titled Gyan Chand vs. State of Rajasthan.***

Non-production of original seal in Court for comparison is fatal to prosecution

17. In present case prosecution did not produce original seal in Court for comparison purpose. It was held in case reported in ***Latest HLJ 2011 HP 1195 (DB) titled Nanha vs. State*** that if original seal is not produced in court for comparison then conviction could not be recorded. ***See 1998 (8) SCC 449 titled State of Rajasthan vs. Gopal)*** It is well settled principle of law that if two reasonable conclusions are possible on the basis of the evidence on record the appellate Court should not disturb the finding of acquittal recorded by the learned trial Court. ***(See (2013)2 SCC 89 titled Mookkiah and another vs. State See 2011(11) SCC 666 titled State of Rajasthan vs. Talevar***, ***See AIR 2012 SC (Supp) 78 titled Surendra vs. State of Rajasthan*** , ***See 2012(1) SCC 602 State of Rajasthan vs. Shera Ram @ Vishnu Dutta.)*** It is also well settled principle of law (i) That Appellant Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal appellant Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise unsustainable. (iii) That Appellate Court is entitled to consider whether in arriving at a finding of fact learned trial Court failed to take into considered any admissible fact (iv) That learned trial Court failed to take into consideration evidence brought on record contrary to law. ***(See AIR 1974 SC 2165 titled Balak Ram and another vs. State of U.P., See (2002)3 SCC 57, titled Allarakha K. Mansuri vs. State of Gujarat, See (2003)1 SCC 398 Raghunath vs. State of Haryana, See AIR 2007 SC 3075 State of U.P. vs. Ram Veer Singh and others, See AIR 2008 SC 2066 (2008) 11 SCC 186 S. Rama Krishna vs. S. Rami Raddy (D) by his LRs. & others. Sambhaji Hindurao Deshmukh and others vs. State of Maharashtra, (2009)10 SCC 206 titled Arulvelu and another vs. State, (2009)16 SCC 98 Perla Somasekhara Reddy and others vs. State of A.P. and (2010)2 SCC 445 titled Ram Singh @ Chhaju vs. State of Himachal Pradesh.)***

18. Submission of learned Additional Advocate General appearing on behalf of State that conviction could be sustained on the testimonies of police officials in absence of prior enmity of police official and on this ground appeal filed by State be accepted is rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that conviction can be sustained on testimony of police officials if same is trustworthy reliable and inspires confidence of Court. It is also well settled law that conviction could be sustained on testimony of police officials if independent witnesses could not be procured despite best efforts by Investigating Agency. In present case it is proved on record beyond reasonable doubt that many vehicles passed at the time of preparation of search and seizure memo on public road. It is proved on record that Investigating Agency intentionally did not associate the independent witnesses in present case and it is not the case of prosecution that independent witnesses were not available despite best efforts. Nonjoining of independent witnesses by Investigating Agency intentionally despite availability of independent witness has created doubt about the fair investigation of case in the

mind of Court. Hence we are of the opinion that it is not expedient in the ends of justice to convict the accused solely on testimonies of police officials because as per prosecution story recovery of 650 grams charas at 3.30 PM was effected upon the public road and many vehicles have crossed the place of incident at the time of preparing the search and seizure memos but investigating agency did not associate any independent witnesses in recovery and seizure memos which has created doubt about the impartial investigation of present case in the mind of Court and same has caused miscarriage of justice to accused.

19. In view of above stated facts appeal filed by State is dismissed and judgment passed by learned trial Court is affirmed. Accused is acquitted by way of giving him benefit of doubt. Contraband will be forfeited in favour of State of H.P. in accordance with law after the expiry of limitation for filing further proceedings. Appeal stands disposed of. File of learned trial Court along with certified copy of this judgment be sent back forthwith. All pending miscellaneous application(s) if any also stands disposed of.

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

State of H.P. .....Appellant.
Versus
Het Ram and others .....Respondents.

Cr. Appeal No. 750 OF 2008.
Reserved on: 7th January, 2015.
Date of Decision : 9th January, 2015.

Indian Penal Code, 1860- Sections 307, 341, 323 and 506 of IPC – accused had given beating to 'J' who suffered grievous injuries on his head and ear - blood started oozing out from the injuries- Medical Officer admitted in cross-examination that injuries were not dangerous to life and could have been caused by way of fall- testimonies of eye-witnesses were contradictory – stone with which injury was caused was not recovered- held, that in these circumstances, prosecution version was not proved beyond reasonable doubt and the acquittal of the accused was justified. (Para-11 to 15)

For the Appellant: Mr. P.M. Negi, Deputy Advocate General.
For the Respondents: Ms. Shilpa Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the State against the impugned judgment rendered on 26.8.2008 by the learned Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P. in Sessions Trial No.55/2007 whereby the learned trial Court acquitted the accused/respondents for theirs having committed the offences under Sections 307, 341, 323 and 506 of the IPC.

2. Briefly stated the facts of the prosecution case are that Ram Kishan, President Gram Panchayat, Dadaur recorded a statement under Section 154 of the Cr.P.C. before the SI/SHO Om Prakash at Kansha Chowk to the effect that on 24.6.2006 at about 6 p.m. he and Param Dev, Vice President, Gram panchayat, Dadaur were present at Kancha Chowk and at the same time Jagat Ram s/o Dida Ram came from the side of his house. In their presence accused Dida Ram and Het Ram alias Sanjay father and brother of Sh. Jagat Ram had stopped him and thereafter they started giving beating to him. The wife

of accused Het Ram alias Sanjay and sister Indira Devi were also with the above referred accused and they also gave leg fist blows to Sh. Jagat Ram. Thereafter, the accused Het Ram alias Sanjay suddenly picked up a stone and gave stone blow on the head of Jagat Ram as a result of which he got grievous injuries on his head and ear and blood started oozing out from the injuries. Sh. Jagat Ram then became unconscious. The accused were further saying that Jagat Ram has defamed them, as such, he shall be killed. On their raising an alarm, all the accused fled away from the spot. He send Jagat Ram injured to Civil Hospital, Ratti for medical treatment and informed the police through telephone. On the basis of aforesaid statement an FIR was registered against the accused in the police station, Balh and the investigation was carried out. During the course of investigation , the police visited the spot, prepared the site plan, took into possession brick and procured the MLC of the injured and also obtained the opinion of the doctor qua the injuries sustained by the injured as also arrested the accused.

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

4. The accused were charged for theirs having committed offences punishable under Sections 341, 307, 323 and 506 of the IPC by the learned trial Court, to which they pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined six witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which they pleaded innocence and claimed false implication.

5. On appraisal of the evidence on record, the learned trial Court returned findings of acquittal against the accused.

6. The State of H.P., is, aggrieved by the judgment of acquittal recorded by the learned Trial Court in favour of the accused/respondents. Mr. P.M. Negi, the learned Deputy Advocate General has concertedly and vigorously contended, that the findings of acquittal recorded by the learned trial Court below are not based on a proper appreciation of the evidence on record rather, they are sequelled by gross mis-appreciation of the material evidence on record. Hence, he, contends that the findings of acquittal be reversed by this Court in exercise of its appellate jurisdiction and be replaced by findings of conviction and concomitantly, an appropriate sentence be imposed upon the accused/respondents.

7. On the other hand, the learned defence counsel has with considerable force and vigour contended that the findings of acquittal recorded by the Court below are based on a mature and balanced appreciation of the 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 injured/victim of the offences allegedly attributed to the accused is Jagat Ram, PW-3. A complaint qua the incident was lodged by PW-2. The complaint is comprised in Ex.PW2/A. PW-1 subjected the injured/victim to medical examination and during the course of the recording of his deposition in Court, proved MLC Ex.PW1/A. He has deposed in Court that on examination of the injured/victim PW-3, he had observed the existence of lacerated wound over left parietal area with irregular margins with fresh bleeding about 2x1.5 inch in size Tenderness around the wound was present and also the existence of contused lacerated wound over forehead left side present with irregular margins 2.5 X1 inch in size. There also exists an admission in his deposition that the injuries observed by him on the person of PW-3 during the course of his

examining the latter may owe their existence to fall on hard surface. He has also deposed in Court that both the injuries reflected in MLC Ex.PW1/A are not dangerous to the life of the injured/victim. A revelation in the deposition of PW-1 of the injuries sustained by the victim/injured in the incident in which attribution of culpability is fastened by eye witnesses PW-2 and PW-4 to the accused, possibly owning their existence to a fall on hard surface does goad this Court to, in tandem with the aforesaid possibility of injuries noticed by PW-1 on the person of the injured owing their existence to fall on hard surface tentatively conclude that the injuries allegedly sustained by the victim/injured PW-3 are attributable to his falling on a hard surface. However, the tentative conclusion of the aforesaid injuries sustained by PW-3 being attributable to the latter falling on hard surface would rather attain formidability and tenacity only in the event of this Court on an incisive and circumspect reading of the testimonies of PW-2, the complainant, PW-3, the injured/victim and PW-4 also an eye witness to the occurrence, for unearthing the existence of any contradictions, improvements and embellishments over and upon their previous statements recorded in writing or contradictions inter se their respective testimonies existing in their respective examinations-in-chief and cross-examinations, besides existence of intra se contradictions in their respective testimonies recorded in Court comes to, hence, disinter contradictions, improvements and embellishments on all the scores aforesaid. However, in the event of their testimonies being bereft of any contradictions and improvements over their previous testimonies recorded in writing as also theirs being bereft of any inter se contradictions vis-à-vis in their depositions comprised in their respective examinations-in-chief and cross-examinations, as also for want of any intra se contradictions inter se their respective testimonies would then constrain this Court to impute credibility to their respective testimonies qua the genesis of occurrence.

10. For rendering a finding qua hence whether PW-2, PW-3 and PW-4 have deposed in harmony, hence, corroborated their respective depositions or not, it is apt at this stage to advert to the testimonies of PW-2, PW-3 and PW-4.

11. Initially this Court proceeds to test the veracity of the testimony of PW-2, who recorded complaint Ex.PW2/A. In his version qua the incident comprised in Ex.PW2/A, he has deposed that he had witnessed all the accused to be delivering fist blows on the person of the injured/victim Jagat Ram. He has attributed to accused Het Ram alias Sanjay the role of his having picked upon a stone and pelted it on the head of Jagat Ram which sequeled his sustaining grievous injuries on his head and consequent oozing of blood therefrom. However, during the course of the recording of his deposition in Court, he in his examination-in-chief has deposed that all the accused inflicted injuries upon Jagat Ram, PW-3 with stones and bricks. Obviously a rife contradiction emerges qua the genesis of the incident recorded in Ex.PW2/A, inasmuch as therein he attributes to all the accused the role of theirs having delivered fist blows upon PW-3 Jagat Ram and of only Het Ram alias Sanjay having pelted a stone at the head of Jagat Ram, the victim/injured, whereas in his deposition comprised in his examination-in-Chief he attributes to all the accused the purported inculpatory role of theirs hurling both stones and bricks at the victim/injured PW-3 Jagat Ram. The contradiction aforesaid renders his version qua the incident to be robbed of its veracity. The further contradiction vis-à-vis the version qua the incident comprised in Ex.PW2/A and which sequelly erodes the veracity of the genesis of the prosecution version, emerges from the factum of his proceeding to depose in his examination-in-chief of all the accused besides having used stones, bricks and fist blows to inflict injuries upon the victim/injured, PW-3 Jagat Ram, theirs having also used “dandas” to perpetrate the assault on the person of the injured/victim. Moreover, in his cross-examination, he deposes that a pool of blood had accumulated on the spot, besides he deposes that bricks lying on the spot were smeared with blood. The relevance and probative worth of recovery of brick, Ex.P-1 which, however, does not bear any stain of blood assumes significance, especially when in the face of

its being un-smeared with blood, hence, mobilizes an inference that it was not used in the perpetration of assault by the accused on the person of the victim/injured. The said inference for reiteration attains momentum and tenacity in the face of PW-4, the witness of recovery having deposed that brick Ex.P-1 was taken into possession from the spot. The factum of its recovery having been, hence, not effectuated in the legally efficacious manner, inasmuch as it not having been effected at the instance of the accused renders hence its recovery to be neither gathering nor mobilizing any probative worth. Consequently, given the rife contradictions aforesaid existing in the testimony of the complainant with the sequeling effect of such contradictions eroding the veracity of the prosecution version, for the reasons aforesaid, the further lack of efficacious recovery of Ex.P-1, brick purportedly used by the accused to deliver a blow on the head of the victim/injured construed in conjunction with the factum that it does not bear or is not smeared with blood, though PW-2 in his cross-examination has deposed that a pool of blood as had oozed out from the injuries purportedly inflicted on the person of the injured/victim had accumulated or was found on the spot, too renders the purported weapon of offence brick Ex.P-1 to be an invention or concoction. In aftermath, it can also be concluded that hence the deposition of PW-1 of the injuries noticed by him to be existing on the person of PW-3 owing their existence to a fall on hard surface may gather an aura of truth. If the above deduction is arriveable then reiteratedly as a natural corollary, it can be held that the injuries as existed on the person of PW-3 may owe their existence to his falling on hard surface. Naturally then, no incriminatory role can be attributed to the accused of theirs having caused injuries on the person of the victim/injured.

12. Apart therefrom, the injured/victim while deposing as PW-3 has in his deposition comprised in his examination-in-chief omitted to lend corroboration to the genesis of the occurrence as propounded by PW-2 in his complaint Ex.PW2/A, inasmuch as in Ex.PW2/A, the complainant therein attributes to all the accused an incriminatory role of theirs having delivered fist blow to PW-3 and of accused Het Ram having pelted stone on the head of the injured/victim sequelling injuries on the head of the latter, whereas PW-3 in contradiction thereto has attributed to all the accused the role of theirs having pelted bricks and stones on the head of the victim/injured besides with his having been contradicted the genesis of the occurrence comprised in Ex.PW2/A, he has also indulged in an improvement or embellishment upon his previous statement recorded in writing which factum emanates from a reading of his examination-in-chief wherein he has attributed to all the accused the role of theirs hurling bricks and stones on the head of PW-3 which factum when omitted to be recorded by him in his previous statement recorded under Section 161 of the Cr.P.C. constitutes it to be, as such, an embellishment and an improvement. Therefore, when PW-3 has deposed an improved and embellished version over his previous statement recorded in writing as such it erodes the truth of his testimony as also belittles its probative tenacity. Naturally then, the contradictions referred to hereinabove render the prosecution version qua the incident to be not proved beyond reasonable doubt.

13. Even otherwise, the factum of brick Ex.P-1 cannot be concluded to be either lifted or hurled by accused Sanjay Kumar alias Het Ram on the head of PW-3, in the face of the reasons assigned hereinabove unfolding its recovery having been concluded to have not been effected in the legally efficacious manner, rather the factum of PW-2 in Ex.PW2/A having unraveled therein of accused Het Ram alias Sanjay Kumar having picked up a stone rather purportedly constituted the latter to be a weapon of offence, which however has remained un-recovered. The contradistinction inter se the weapon of offence attributed by PW-2 in Ex.PW2/A to be used by accused Het Ram alias Sanjay Kumar and ultimately Ex. P-1 brick having come to be recovered from the site of occurrence and that too in a legally inefficacious manner wholly permeates

the factum of its user as well as its recovery to be imbued with falsity as well as prevarication.

14. The deposition of PW-4 also does not lend corroboration to the deposition of PW-2, who recorded the complaint qua the incident comprised in Ex.PW1/A, inasmuch as in his deposition comprised in his examination-in-chief he has with specificity attributed to each of the accused the role of theirs handling respectively brick, stone and danda which attribution with specificity of handling of each of the aforesaid weapons of offence by each of aforesaid has not occurred in the deposition of PW-2. Naturally then the attribution with specificity in the deposition of PW-4 of each of the accused handling respective weapons of offence and lack of such attribution by PW-2 with specificity of handling by each of accused of such respective weapons of offence constitutes a rife and open contradictions intra se testimonies of PW-2 and PW-4 sequeling an inference that PW-4 was not an eye witness to the occurrence, consequently his testimony too does not acquire credibility.

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

16. Hence, the appeal is dismissed and the impugned judgment of the learned trial Court is affirmed and maintained. Records be sent back.

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

Subhash Chand Sharma ...Appellant/Defendant.

Versus

Smt. Shakuntla Devi (deceased) through her LRs:
Dr. Chander Shekhar and another ..Respondents/Plaintiff

R.S.A. No. 481 of 2002
Judgment reserved on: 2.1.2015
Date of decision: 9.1. 2015

Himachal Pradesh Urban Rent Control Act, 1987- Section 2(j)- Defendant claimed that he is legal heir of original tenant and is entitled to succeed to the tenancy- evidence showed that he was not residing in the premises but his children were residing – no electricity bills were produced to show the consumption of electricity- he was government servant serving at Shimla and could not have resided with his father who was residing at Garli - therefore, he cannot be called to be a tenant. (Para-12 to 18)

Practice and Procedure- Abuses of the process of the Court- Defendant claimed to be a tenant in the premises- he admitted in the application, for bringing on record the legal representatives, that he was occupying a premises at Khalini Shimla which showed that he was residing somewhere else- he had raised false and frivolous pleas to retain the premises- he had abused the Court process and had brought the judicial system to stand still- landlady was deprived of the possession for more than two decades – hence, in these circumstances, petition dismissed with cost of Rs. 50,000/-. (Para-19 to 26)

Cases referred:

Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370

Dalip Singh v. State of U.P., (2010) 2 SCC 114

Satyender Singh v. Gulab Singh, 2012 (129) DRJ, 128
Sky Land International Pvt. Ltd. v. Kavita P. Lalwani, (2012) 191 DLT 594
Amar Singh vs. Shiv Dutt and others, RFA No. 646 of 2012 decided on 30.7.2014
Indian Council for Enviro-Legal Action vs. Union of India and others (2011) 8 SCC 161

For the Appellant	:	Mr. Subhash Sharma, Advocate.
For the Respondents	:	Mr. N.K.Sood, Senior Advocate, with Mr. Aman Sood, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The defendant is the appellant, who is aggrieved by the judgment and decree dated 4.9.2002 passed by learned District Judge, Shimla in Civil Appeal No. 34-S/13 of 2002/2001 whereby he reversed the judgment and decree dated 29.12.2000 passed by learned Sub Judge (3), Shimla in Civil Suit No. 490/1 of 1996/93 dismissing the suit filed by the plaintiff.

The facts in brief may be noticed.

2. The original plaintiff Smt. Shakuntla Devi filed suit against the appellant/defendant for issuance of mandatory injunction directing the defendant to withdraw from the one room/eastern godown, in the ground floor of building No.2, Alley No. 15, the Mall, Shimla and to hand over the same to the plaintiff and also for recovery of Rs. Nil on account of use and occupation charges. The case set out by the plaintiff is that she is the absolute owner of half (western) portion of the building No.2, Alley No.15, The Mall, Shimla, which is three storeyed structure. First and top floor of the building is in her own occupation. In the ground floor, there are two rooms/godowns. One godown/room, measuring about 3 metres x 5 metres as shown in red colour in the plan attached to the plaint was in occupation of Pandit Jagan Nath, tenant, who died in the month of March, 1991; and consequently his tenancy came to an end. The defendant, who is a major son of deceased Jagan Nath was not ordinarily residing with his father. He is employed as a government servant and had his independent family establishment even during the life time of his father and used to reside in premises, bearing No. 120/2, Lower Bazar, Shimla. It was alleged that the defendant after the death of his father is inter-meddling with his estate and being in constructive control of the aforesaid godown is under every legal obligation to withdraw from the same as there exists no right, title or interest in his favour to either control, inter-meddle or deal with the said room/godown in any manner. After the death of Sh. Jagan Nath, the defendant was time and again asked to take out all the belongings of his deceased father from the said godown/room but on one pretext or the other he had been avoiding to vacate the premises despite issuance of notice, dated 30.9.1992. It was also alleged that after the death of Sh. Jagan Nath, the defendant, having not withdrawn from the said room is liable to pay Rs. 200/- per month on account of use and occupation charges with effect from April, 1991 as he has kept the said room locked after the death of Sh. Jagan Nath. It was also averred that as the defendant is not withdrawing from the premises, the plaintiff is entitled to the relief of mandatory injunction and that the plaintiff voluntarily foregoes and relinquish her claim qua the past amount of use and occupation charges and reserves her right to recover the same for the future period. It was also averred that if the relief claimed by the plaintiff is not granted, an irreparable loss and injury shall be caused to her and that there is no other efficacious remedy available to the plaintiff, than to file the present suit.

3. The defendant/appellant while resisting the suit, raised preliminary objection that suit is not maintainable in view of the provisions laid down in H.P. Urban Rent Control Act, 1987. It was denied that the plaintiff is the absolute owner of the western half portion of the building No.2, Alley No. 15, The Mall, Shimla. It was pointed out that first and top floor of the said building are in occupation of Sh. Chander Shekhar and Sh. Sudarshan Kumar, respectively. It was further pointed out that there are three rooms in the ground floor of the said building, out of which one room was in occupation of Sh. Jagadhar and the other two rooms are in occupation of the defendant and family. It was averred that after the death of Sh. Jagan Nath, his tenancy has been inherited by all his legal heirs, who were ordinarily residing with him. It was a joint family. It was denied that the defendant at the time of death of Sh. Jagan Nath, tenant was not ordinarily residing with him. It was asserted that the defendant is no doubt in government service but was residing jointly with his father. The joint family was sharing both the accommodations i.e. the premises in dispute and the other premises i.e. No. 120/2 (middle flat), Lower Bazar, Shimla, which hardly consists of one small room, one pantry (which is used as passage to room and kitchen) and one small kitchen, bath and latrine. It was averred that the other accommodation was taken due to paucity of accommodation in the disputed set, in view of the large joint family. It was also averred that "the defendant is in constructive and legal possession of the said set and he and other legal heirs have got every legal right to occupy the set". It was denied that the tenanted set is not in physical possession of the defendant. It was clarified that the defendant alongwith other legal heirs of late Sh. Jagan Nath are the joint tenants qua the disputed set and their landlord is Sh. Sudarshan Sood.

4. Replication was filed by the plaintiff wherein the allegations made in the written statement were denied and that of plaint are re-asserted.

5. On 22.4.1998, the learned trial Court framed the following issues:

1. Whether the plaintiff is entitled to the relief of mandatory injunction as prayed? OPP.

2. Whether the plaintiff is entitled to recover the amount on account of use and occupation charges as prayed? OPP.

3. Whether the suit in the present form is not maintainable, as alleged? OPD.

4. Relief.

6. After recording the evidence, the learned trial Court dismissed the suit. However, the appeal preferred against the said judgment and decree was accepted by the learned lower Appellate Court and the suit of the plaintiff was ordered to be decreed as prayed for.

7. Aggrieved by the judgment and decree passed by the learned lower Appellate Court, the defendant/appellant has preferred this second appeal before this Court.

8. Vide order dated 28.10.2002, the appeal was ordered to be admitted on the following substantial questions of law:

1. *Whether the lower Appellate Court has committed grave procedural illegality in not appreciating that the suit for mandatory injunction as filed by the plaintiff-respondent was not maintainable?*

2. *Whether the learned District Judge has mis-appreciated and misapplied the provisions of Section 2 (j) of the H.P.Urban Rent Control Act and the definition of tenant contained therein?*

3. *Whether the findings of the learned District Judge considering the defendant-appellant to be in unauthorized occupation on the ground that he was not ordinarily residing with late Sh. Jagan Nath are illegal, erroneous and perverse, having been returned by discarding the material evidence and taking into consideration the irrelevant circumstance?*

4. *Whether the learned District Judge has committed procedural illegality in not considering that the suit was not properly valued for the purpose of court fees and jurisdiction which was not only affecting the jurisdiction of the trial court but the Appellate Court also?*

5. *Whether the learned District Judge has misapplied the provisions of Evidence Act and has wrongly applied the proper ratio laid down in the main judgment resulting in wrong conclusion?*

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

Substantial questions of law No. 1, 4 and 5:

10. Learned counsel for the appellant addressed arguments only on substantial questions of law No. 2 and 3, while no arguments were addressed on substantial questions of law No. 1, 4 and 5. Even otherwise, there is nothing on the record to suggest that the suit filed by the plaintiff was not maintainable or had not been properly valued for the purpose of court fees and jurisdiction and further it is not forthcoming as to how the learned District Judge has misapplied the provisions of the Evidence Act and how he has wrongly applied the so called proper ratio as laid down in the main judgment resulting in wrong decision as alleged. Accordingly, substantial questions of law No. 1, 4 and 5 are answered against the appellants.

Substantial questions of law No. 2 and 3:

Since these substantial questions of law are inter-related and inter-connected, therefore, they are taken up together for consideration and I proceed to decide the same through common reasoning.

11. The premises in dispute consist of one room, one store and sans bath room, toilet or even kitchen, whereas the premises situate at 120/2, Lower Bazar, Shimla, is a full fledge two room set having all amenities. Bearing in mind this important factual aspect, I proceed to determine the merits of the case.

12. It is not disputed that the appellant is the legal heir of original tenant Jagan Nath, but then the question is as to whether he is entitled to inherit the tenancy because pre-condition on the basis of which a legal heir can claim inheritance of tenancy is that he at the time of death of the tenant should have ordinarily been residing with him. Section 2 (j) of the H.P. Urban Rent Control Act, 1987 reads as under:

> *"2.(j) "tenant" means any person by whom or on whose account rent is payable for a residential or non-residential building or rented land and includes a tenant continuing in possession after termination of the tenancy, a deserted wife or a tenant who has been or is entitled to be in occupation of the matrimonial home or tenanted premises of husband, a divorced wife of a tenant who has a decree of divorce in which the right of residence in the matrimonial home or tenanted premises has been incorporated as one of the condition of the decree of divorce and in event of the death of such person such of his heirs as are mentioned in Schedule-I to this Act and who were ordinarily residing with him or carrying on business in the premises at the time of his death, subject to the order of succession and conditions specified, respectively in Explanation-I and*

Explanation-II to this clause, but does not include a person placed in occupation of a building or rented ladn by its tenant, except with the written consent of the landlord, or a person to whom the collection of rent or fees in a public market, cart stand or slaughter house or of rents for shops has been framed out or leased by a Municipal Corporation or a Municipal Council or a Nagar Panchayat, or a Cantonment Board;

Explanation-I. *The order of succession in the event of the death of the person continuing in possession after the termination of his tenancy shall be as follows:-*

(a) firstly, his surviving spouse;

(b) secondly, his son or daughter, or both, if there is no surviving spouse, or if the surviving spouse did not ordinarily live with the deceased persons as a member of his family up to the date of his death;

(c) thirdly, his parent(s), if there is no surviving spouse, son or daughter of the deceased person, or if such surviving spouse, son, daughter or any of them, did not ordinarily live in the premises as a member of the family of the deceased person up to the date of his death; and

(d) fourthly, his daughter-in-law, being the widow of his pre-deceased son, if there is no surviving spouse, son, daughter or parent(s) of the deceased person or if such surviving spouse, son, daughter or parent(s), or any of them, did not ordinarily live in the premises as a member of the family of the deceased person up to the date of his death;

Provided that the successor has ordinarily been living or carrying on business in the premises with the deceased tenant as a member of his family up to the date of his death and was dependent on the deceased tenant:

Provided further that a right of tenancy shall not devolve upon a successor in case he or his spouse or any of his dependent son or daughter is owning or occupying a premises in the urban area in relation to the premises let.

Explanation-II. *The right of every successor, referred to in Explanation-I, to continue in possession after the termination of the tenancy, shall be personal to him and shall not, on the death of such successor, devolve on any of his heirs; and.]*

13. In order to prove that he as well as his siblings had been ordinarily residing together with the deceased father in the disputed premises the appellant had examined himself as DW-5 and in his statement, he had stated that Jagan Nath had three daughters, who are married and are residing with the matrimonial homes. His one brother Piare Lal was earning his livelihood while doing "Panditai" and permanently residing at village Garli, Paragpur in Kangra District, while his other brother was employed and was working in a Bank and was permanently residing at Palampur. The deceased Jagan Nath had shifted to Garli Paragpur in the year 1989 and died there in March 1991. Prior to his death, the mother of the appellant had died in the year 1987. It has further come in the evidence of the appellant that he was not residing in the premises in dispute though he claimed that his children had been residing there.

14. Further the appellant in support of his case examined one Naresh Lakhanpal as DW-4, who has stated that at the time of death of Jagan Nath, all his children i.e. three daughters and three sons had been residing with him and thereafter it is only the appellant, who is residing in the premises. In cross-examination, this witness has clearly admitted that the accommodation in Lower

Bazar, consists of two rooms and is having all basic amenities while the disputed accommodation does not have a kitchen, bath room or toilet.

15. Now, in case the entire evidence led by the defendant/ appellant is perused, it would be seen that the defendant himself is not residing in the premises in dispute and claims that his children were residing therein. Interestingly, it has been testified by the defendant that he is consuming the electricity and also enjoying the facility of water while residing in the disputed premises, but then he has failed to place on record the bills showing consumption of electricity and water. This was the best evidence available to the appellant and having failed to place the same on record, I am constrained to draw an adverse inference against the appellant.

16. Admittedly, the appellant was a Government servant and could not have looked after his father at the time of his death because his father had been residing at Garli, while the appellant was residing at Shimla. In fact, deceased Jagan Nath had already ceased to occupy the premises when he left for Garli in November, 1989 never to return to Shimla, then how was the defendant ordinarily residing with the tenant i.e. Jagan Nath at the time of his death, is not forthcoming.

17. No doubt, the appellant has sought to claim that the premises comprised in 120/2, Lower Bazar, Shimla were joint between him and his deceased father, but this does not in any manner improve the case of the appellant because admittedly the premises in dispute were in the sole tenancy of deceased Jagan Nath.

18. On a pointed query from this Court as to whether the appellant is still residing in the premises in dispute, learned counsel for the appellant candidly admitted that he is not residing there but then taking strong exception to such query claimed that the Court was not concerned with this fact since *terminus a quo* and *terminus ad quem* under the statute was the date of the death of the tenant and this Court had no concern for any event subsequent thereto because the same could not be taken into consideration.

19. The appellant in CMP(M) No. 259 of 2014, which is an application for bringing on record the legal representatives of original landlord late Smt. Shakuntala Devi, has specifically averred that he retired on 31.7.2007 and came to occupy the residential premises in Santoshi Complex, Khalini, Shimla and started living with his spouse in the new premises. His two sons are employed away from Shimla and both the appellant and his wife are spending substantial time of the year with the said sons. It is apt to reproduce paragraph 2 of the application which reads thus:

> *"2. That the above noted appeal was admitted on 28.10.2002. At the relevant time, applicant/appellant was serving State of H.P. at Shimla. On attaining the age of superannuation, applicant/appellant was retired on 31.7.2007. Thereafter, applicant/appellant came to occupy residential premises in Santoshi Complex, Khalini, Shimla and started living with his spouse in the new premises. Also, the two sons of the applicant/appellant are employed away from Shimla and both the applicant and his wife are spending substantial time of the year with the said sons. In the circumstances, the information of the death of the deceased-respondent did not come to the knowledge of the applicant/appellant."*

Thus, it is proved on record that the appellant though is not residing in the premises but yet wants to retain the possession of the same. Therefore, the question which arises for consideration is as to whether the right of a person claiming himself to be a tenant to squat over the property belonging to another person can be put above the right of the land owner to get possession of the property bonafide for his own use especially when the person alleging himself to be a tenant is not residing there.

20. The Hon'ble Supreme Court has repeatedly pointed out that rent acts have not been enacted only to protect the tenants from unjust eviction but have been enacted to equally enforce the lawful right of the landlords to obtain a possession of their own property in the event of satisfying the grounds prescribed for eviction. In this case the appellant is not even tenant and yet he has succeeded in retaining the premises by not residing but putting a lock on the same.

21. It is proved on record that the defence set up by the appellant was absolutely false. ***In Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370,*** the Supreme Court held that false claims and defences are serious problems with the litigation. The Supreme Court held as under:-

> "False claims and false defences
>
> *84. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent."*

In ***Dalip Singh v. State of U.P., (2010) 2 SCC 114***, the Supreme Court observed that a new creed of litigants have cropped up in the last 40 years who do not have any respect for truth and shamelessly resort to falsehood and unethical means for achieving their goals. The observations of the Supreme Court are as under:-

> *"1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has over shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.*
>
> *2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."*

In ***Satyender Singh v. Gulab Singh, 2012 (129) DRJ, 128***, the Division Bench of Delhi High Court following Dalip Singh v. State of U.P. (supra) observed that the Courts are flooded with litigation with false and incoherent pleas and tainted evidence led by the parties due to which the judicial system in the country is choked and such litigants are consuming Courts" time for a wrong cause."

The observations of Court are as under:-

"2. As rightly observed by the Supreme Court, Satya is a basic value of life which was required to be followed by everybody and is recognized since many centuries. In spite of caution, courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts„ time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court. Indeed, it is a nightmare faced by a Trier of Facts; required to stitch a garment, when confronted with a fabric where the weft, shuttling back and forth across the warp in weaving, is nothing but lies. As the threads of the weft fall, the yarn of the warp also collapses; and there is no fabric left."

In **Sky Land International Pvt. Ltd. v. Kavita P. Lalwani,** (2012) 191 DLT 594, Delhi High Court held as under:-

"26.20 Dishonest and unnecessary litigations are a huge strain on the judicial system. The Courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts„ time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court.

xxx xxx xxx

26.22 Unless the Courts ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that the Courts" scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases. It becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation, ultimately they must suffer the costs. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that the dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

22. The judicial system has been abused and virtually brought to its knees by unscrupulous litigants like the defendant/appellant in this case. It has to be remembered that Court's proceedings are sacrosanct and should not be polluted by unscrupulous litigants. The defendant/ appellant has abused the process of the Court. What is 'abuse of the process of the Court' has been dealt with in detail by this Court in ***Amar Singh*** vs. ***Shiv Dutt and others, RFA No. 646 of 2012 decided on 30.7.2014*** wherein it was held:

"9. .....Therefore, the question at this stage, would than arise as to whether a party can be permitted to indulge in filing frivolous and vexatious proceedings and whether the same amount to abuse of process of Court.

*10. The Hon'ble Supreme Court in **K.K.Modi vrs. K.N.Modi and others, reported in (1998) 3 SCC 573** has dealt in detail with the proposition as to what would constitute an abuse of the process of the Court, one of which pertains to re-litigation. It has been held at paragraphs 43 to 46 as follows:*

43. The Supreme Court Practice 1995 published by Sweet & Maxwell in paragraph 18/19/33 (page 344) explains the phrase

"abuse of the process of the Court" thus: "This terms connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. . . . . .

The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material."

44. One of the examples cited as an abuse of the process of Court is re-litigation. It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the Court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the Court. Frivolous or vexatious proceedings may also amount to an abuse of the process of Court especially where the proceedings are absolutely groundless. The Court then has the power to stop such proceedings summarily and prevent the time of the public and the Court from being wasted. Undoubtedly, it is a matter of Courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The Court should also be satisfied that there is no chance of the suit succeeding.

45. In the case of Greenhalgh v. Mallard (1947) 2 All ER 255, the Court had to consider different proceedings on the same cause of action for conspiracy, but supported by different averments. The Court held that if the plaintiff has chosen to put his case in one way, he cannot thereafter bring the same transaction before the Court, put his case in another way and say that he is relying on a new cause of action. In such circumstances he can be met with the plea of res judicata or the statement or plaint may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of the Court.

46. In Mcllkenny v. Chief Constable of West Midlands Police Force (1980) 2 All ER 227, the Court of Appeal in England struck out the pleading on the ground that the action was an abuse of the process of the Court since it raised an issue identical to that which had been finally determined at the plaintiffs ' earlier criminal trial. The Court said even when it is not possible to strike out the plaint on the ground of issue estoppel, the action can be struck out as an abuse of the process of the Court because it is an abuse for a party to re-litigate a question or issue which has already been decided against him even though the other party cannot satisfy the strict rule of res judicata or the requirement of issue estoppels.

11. Similarly, the Hon'ble Supreme Court in Kishore Samrite vs. State of Uttar Pradesh and others, reported in (2013(2) SCC 398, has dealt in detail with "abuse of process of Court" in the following terms:

Abuse of the process of Court :

"31. Now, we shall deal with the question whether both or any of the petitioners in Civil Writ Petition Nos. 111/2011 and 125/2011 are guilty of suppression of material facts, not approaching the Court with clean hands, and thereby abusing the process of the Court. Before we dwell upon the facts and circumstances of the case in hand, let us refer to some case laws which would help us in dealing with the present situation with greater precision.

32. The cases of abuse of the process of court and such allied matters have been arising before the Courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of the process of court. We may recapitulate and state some of the principles. It is difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:

32.1. Courts have, over the centuries,frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

32.2. The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

32.3. The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

32.4. Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.

32.5. A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

32.6. The Court must ensure that its process is not abused and in order to prevent abuse of the process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.

32.7. Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

32.8. The Court, especially the Supreme Court, has to maintain strictest vigilance over the abuse of the process of court and ordinarily meddlesome bystanders should not be granted "visa". Many societal pollutants create new problems of unredressed grievances and the Court should endure to take cases where the justice of the lis well-justifies it. [Refer : Dalip Singh v. State of U.P. & Ors. (2010) 2 SCC 114; Amar Singh v. Union of India & Ors.

(2011) 7 SCC 69 and State of Uttaranchal v Balwant Singh Chaufal & Ors. (2010) 3 SCC 402].

33. Access jurisprudence requires Courts to deal with the legitimate litigation whatever be its form but decline to exercise jurisdiction, if such litigation is an abuse of the process of the Court. In P.S.R.Sadhanantham v. Arunachalam & Anr. (1980) 3 SCC 141, the Court held:

> *"15. The crucial significance of access jurisprudence has been best expressed by Cappelletti:*
>
> > *"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured be a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement the most basic 'human-right' of a system which purports to guarantee legal rights."*
> >
> > *16. We are thus satisfied that the bogey of busybodies blackmailing adversaries through frivolous invocation of Article 136 is chimerical. Access to justice to every bona fide seeker is a democratic dimension of remedial jurisprudence even as public interest litigation, class action, pro bono proceedings, are. We cannot dwell in the home of processual obsolescence when our Constitution highlights social justice as a goal. We hold that there is no merit in the contentions of the writ petitioner and dismiss the petition."*

34. It has been consistently stated by this Court that the entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties, as truth is the basis of the Justice Delivery System.

35. With the passage of time, it has been realised that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs.

36. The party not approaching the Court with clean hands would be liable to be non-suited and such party, who has also succeeded in polluting the stream of justice by making patently false statements, cannot claim relief, especially under Article 136 of the Constitution. While approaching the court, a litigant must state correct facts and come with clean hands. Where such statement of facts is based on some information, the source of such information must also be disclosed. Totally misconceived petition amounts to abuse of the process of the court and such a litigant is not required to be dealt with lightly, as a petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the court. A litigant is bound to make "full and true disclosure of facts". (Refer : Tilokchand H.B. Motichand & Ors. v. Munshi & Anr. [1969 (1) SCC 110]; A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Pari palanai Sangam & Anr. [(2012) 6 SCC 430]; Chandra Shashi v. Anil Kumar Verma [(1995) SCC 1, 421]; Abhyudya Sanstha v. Union of India & Ors. [(2011) 6 SCC 145]; State of Madhya Pradesh v. Narmada Bachao Andolan & Anr. [(2011) 7 SCC 639]; Kalyaneshwari v. Union of India & Anr. [(2011) 3 SCC 287)].

37. The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation. The legal maxim jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem, which means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for Courts. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands.

38. No litigant can play 'hide and seek with the courts or adopt 'pick and choose'. True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of the court. [K.D. Sharma v. Steel Authority of India Ltd. & Ors. [(2008) 12 SCC 481].

39. Another settled canon of administration of justice is that no litigant should be permitted to misuse the judicial process by filing frivolous petitions. No litigant has a right to unlimited drought upon the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be used as a licence to file misconceived and frivolous petitions. (Buddhi Kota Subbarao (Dr.) v. K. Parasaran, (1996) 5 SCC 530)."

12. Now, it is to be seen as to whether the conduct of the respondents was infact in abuse of the process of the Court. What is "abuse of process of Court" of course has not been defined or given any meaning in the Code of Civil Procedure. However, a party to a litigation can be said to be guilty of abuse of process of the Court in any of the following cases as held by the Hon'ble Madras High Court in Ranipet Municipality Rep. by its.... Vs. M. Shamsheerkhan, reported in 1998 (1) CTC 66 at paragraph 9. To quote:

> *" 9. It is this conduct of the respondent that is attacked by the petitioner as abuse of process of Court. What is 'abuse of the process of the Court'? Of course, for the term 'abuse of the process of the Court' the Code of Civil Procedure has not given any definition. A party to a litigation is said to be guilty of abuse of process of the Court, in any of the following cases:-*
>
> *(1) Gaining an unfair advantage by the use of a rule of procedure.*
>
> *(2) Contempt of the authority of the Court by a party or stranger.*
>
> *(3) Fraud or collusion in Court proceedings as between parties.*
>
> *(4) Retention of a benefit wrongly received.*
>
> *(5) Resorting to and encouraging multiplicity of proceedings.*
>
> *(6) Circumventing of the law by indirect means.*
>
> *(7) Presence of witness during examination of previous witness.*
>
> *(8) Institution vexatious, obstructive or dilatory actions.*
>
> *(9) Introduction of Scandalous or objectionable matter in proceedings.*
>
> *(10) Executing a decree manifestly at variance with its purpose and intent.*
>
> *(11) Institution of a suit by a puppet plaintiff.*
>
> *(12) Institution of a suit in the name of the firm by one partner against the majority opinion of other partners etc."*

The above are only some of the instances where a party may be said to be guilty of committing of "abuse of process of the Court".

23. The appellant by keeping these proceedings alive has gained an undeserved and unfair advantage. The appellant has successful in dragging the proceedings for a very long time on one count or the other and because of his wrongful possession he has drawn delight in delay in disposal of the cases by taking undue advantage of procedural complications. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. One has only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. The Court has been used as a tool by the defendant/appellant to perpetuate illegalities and has perpetuated an illegal possession. It is on account of such frivolous litigation that the court dockets are overflowing. Here it is apt to reproduce the observations made by the Hon'ble Supreme Court in paras 174, 175 and 197 of the judgment in ***Indian Council for Enviro-Legal Action vs. Union of India and others (2011) 8 SCC 161*** which are as under:

> *174. In Padmawati vs Harijan Sewak Sangh, (2008) 154 DLT 411 (Del) decided by the Delhi high Court on 6.11.2008, the court held as under: (DLT p.413, para 6)*
>
> > *"6.The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check*

the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Court. One of the aims of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person."

We approve the findings of the High Court of Delhi in the aforementioned case.

175. The Court also stated: (Padmawati case, DLT pp. 414-15, para 9)

"Before parting with this case, we consider it necessary to observe that one of the main reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrongdoer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrongdoers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

197. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view.

1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.

3. Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.

4. A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

5. No litigant can derive benefit from the mere pendency of a case in a court of law.

6. A party cannot be allowed to take any benefit of his own wrongs.

7. Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

8. The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."

24. The suit was filed more than two decades back on 5.7.1993, but the land-lady, who died during the pendency of this appeal, has been deprived of the possession of the premises despite the appellant not residing in the same. The appellant at different occasions has sought time to settle the matter amicably which only suggests that the appellant was only seeking some illegal benefit and adopting hand twisting tactic to vacate the premises which he had retained on the condition of paying a paltry amount of Rs.200/- per month which had been fixed by this Court more than a decade back vide its order dated 3.9.2003.

25. No doubt, the rent legislations continue to protect the tenants against arbitrary and unfair demand for eviction or enhancement of rents at the instance of the landlord but they do not also protect the tenant when such unfair demands are raised. It is on account of persons like the appellant that there is a visible reluctance amongst the owners to let out the available accommodation for fear of losing the same altogether. As observed earlier, the appellant is not even tenant and yet he has succeeded in retaining the premises by not residing but putting a lock on the same. I have no hesitation to conclude that the appellant under the garb of his so called inherited tenancy has abused the process of the Court and despite his not even being a tenant, he has been successful in exploiting the system and depriving the landlord of the possession of the disputed premises for over two decades that too, without residing in the same.

Substantial questions of law No. 2 and 3 are accordingly answered against the appellant.

26. In view of aforesaid discussion, there is no merit in this appeal and the same is dismissed. As observed earlier, the defendant/appellant has illegally deprived the respondents of the possession of the property of which he is not even in occupation nor he has any right, title or interest over the same. He has perpetuated by illegally retaining the same for decades together. Therefore, it is the duty of the Court to see that such wrongdoers are discouraged at every step and even if he has succeeded in prolonging the litigation, then he must suffer the costs of all these years for long litigation and also bear the expenses of such unwanted and otherwise avoidable litigation, therefore, the appellant is burdened with costs which has assessed at Rs.50,000/-. Pending applications, if any, are also disposed of.

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

CWP No.9480 of 2014 along with CWP No.8246 of 2014.
Judgment reserved on : 30.12.2014.
Date of decision: January 09, 2015.

1. CWP No.9480 of 2014.

Vijay Kumar Gupta .....Petitioner.

Versus

State of Himachal Pradesh & others .....Respondents.

For the Petitioner : Mr. Anand Sharma, Advocate.
For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr.Romesh Verma, Mr. M.A.Khan, Additional Advocate Generals and Mr.J.K.Verma, Deputy Advocate General, for respondents No.1,5,6 and 8.
Mr.Peeyush Verma, Advocate, for respondents No.2 to 4 and 7.
Ms.Jyotsna Rewal Dua, Advocate, for respondents No.9 to 12.

2. <u>CWP No.8246 of 2014.</u>

Rajeev Bansal .....Petitioner.
Versus
State of Himachal Pradesh & others .....Respondents.

For the Petitioner : Mr. Anand Sharma, Advocate.
For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr.Romesh Verma, Mr. M.A.Khan, Additional Advocate Generals and Mr.J.K.Verma, Deputy Advocate General, for respondents No.1,5 and 6.
Mr.Peeyush Verma, Advocate, for respondents No.2 to 4.
Ms.Jyotsna Rewal Dua, Advocate, for respondents No.7 to 10.

Constitution of India, 1950- Article 226- Petitioners claiming themselves to be "public spirited persons" doing social work are aggrieved by action of the respondents No. 1 to 6 whereby they had permitted handing over of the godown to the Food Corporation of India situated on the bank of the rivulet on the ground that rent of the new premises is more than 1600 times of the rent being paid for existing godown- there was a danger to the godown being washed away- held, that public interest litigation is meant to protect basic human rights of the weak and disadvantaged- it is to be used with great care and circumspection for delivering justice to citizens- petitioner had only made a bald statement that he is public spirited person and was doing social work- he was beneficiary of the existing godown as his weigh bridge was there- he had approached Food Corporation of India for hiring his weigh bridge which request was not considered-in these circumstances, conduct of the petitioner is not above suspicion and the petition has not been preferred to vindicate public interest- petitioner cannot be said to be acting bonafidely and has no locus standi.

(Para-16 to 31)

Constitution of India, 1950- Article 226- Petitioner is aggrieved by hiring of godown by Food Corporation of India- held, that hiring of godown by FCI is a policy decision and cannot be made a subject-matter of the writ petition, unless there is arbitrariness in the process- public interest litigation cannot be used to challenge the financial or economic decisions taken in exercise of Administrative power. (Para-32 to 34)

Cases referred:

Shri Sachidanand Pandey and another versus The State of West Bengal and others AIR 1987 SC 1109

S.P.Anand, Indore versus H.D.Deve Gowda and others (1996) 6 SCC 734

Mr. 'X' versus Hospital 'Z' (1998) 8 SCC 296

Balco Employees' Union (Regd.) versus Union of India and others (2002) 2 SCC 333

Ashok Kumar Pandey versus State of W.B. (2004) 3 SCC 349

Dr. B. Singh versus Union of India and others (2004) 3 SCC 363

R & M Trust versus Koramangala Residents Vigilance Group and others (2005) 3 SCC 91

Gurpal Singh versus State of Punjab and others (2005) 5 SCC 136
Kushum Lata versus Union of India and others (2006) 6 SCC 180
Common Cause (A Regd. Society) versus Union of India and others (2008) 5 SCC 511
State of Uttaranchal versus Balwant Singh Chaufal and Ors., reported in (2010) 3 SCC 402
Jaipur Shahar Hindu Vikas Samiti versus State of Rajasthan and others (2014) 5 SCC 530
Nand Lal and another versus State of Himachal Pradesh and others 2014 (2) Him.L.R.(D.B.) 982
Prestige Lights Ltd. versus State Bank of India (2007) 8 SCC 449
Indian Council for Enviro-Legal Action versus Union of India and others (2011) 8 SCC 161

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The claim raised and relief claimed in both these petitions are same and similar, therefore, they are taken up together for disposal.

2. Since the pleadings are complete in CWP No.8246 of 2014, therefore, reference is only being made to the pleadings in this case.

3. The petitioner(s) in both the petitions claim themselves to be "public spirited persons" carrying on their vocation at Nahan and also claim to be doing social work in the interest of public at large since long. They alongwith public at large surrounding Nahan, District Sirmaur, claim to be aggrieved by the action of respondents No. 1 to 6 whereby they have permitted handing over of the godown to the Food Corporation of India (for short 'FCI') which is alleged to be situated just on the bank/riverlet and because of its location, not only the building, but even food grains stored therein would be destroyed in the near future.

4. It is averred that the 'FCI' at present is already having a District level godown at Tehsil Nahan which is being run in a government building at nominal monthly rent of Rs.600/- per month while the rent for the new premises is more than 1600 times at the rate of Rs.10 lacs per month. It is also alleged that the hiring of such godown is only to confer undue benefit upon respondents 7 to 10, who otherwise, are not entitled to be considered much less awarded contract because the land in question is already in dispute while there was a specific condition in the tender document that the land should be free from all encumbrances. It is also alleged that undue benefit conferred upon the private respondents 7 to 10 is proved from the fact when the revenue entries from "gair mumkin khala" were abruptly within a short span of 24 hours changed to "banjar kadim" because in case the land would have remained classified as "gair mumkin khala" which means rivulet, then there would have been no occasion for the respondents to have awarded the tender in favour of respondents 7 to 10 as the official respondents would not have permitted their grains to be stored in a godown built over a rivulet. The petitioner(s) lastly claim that no permission from the Town and Country Planning Department has been obtained before raising the construction.

5. The respondents 7 to 10 have contested the petition by filing reply wherein preliminary objections regarding maintainability of the petition has been raised. It is further claimed that the petitioner has not approached this Court with clean hands and the petition has not been filed in public interest as is otherwise professed in the writ petition. A specific allegation has been made to the effect that the writ petitioner has not disclosed that he is a business rival and is running a weigh bridge at Nahan which is surviving only on the basis of

business provided by the 'FCI' while running its old and shabby godown at Nahan. It is then averred that the 'FCI' has taken a conscious decision to shift its godown in larger public interest but then this would affect the petitioner's business interest and, therefore, the present petition has been preferred. It has been denied that this petition raises any issue of public interest rather the same has been filed only to secure private interest. The 'FCI' had issued notice inviting tenders in 2012 for establishing modern food storage godown in various Districts across the State in which the tender of the replying respondents was accepted whereafter massive construction of huge food storage godown at the cost of Rs.11.11 crores was undertaken after obtaining loans from various financial institutions.

6. On merits, apart from reiterating the preliminary objections and denying the averments made in the petition, it is submitted that as against 200 square metres area with 410 metric tonnes capacity of the old godown, a new godown is 20000 square metres having storage capacity of 11670 metric tonnes. The old location has no parking place or office block and also no weigh bridge, whereas, the new godown was equipped with office block and also had a in-house weigh bridge facility. It is further stated that the new godown has been insured for Rs.8,15,00,000/- with the National Insurance Company.

7. Insofar as the location is concerned, it is averred that the land is not abutting "Markandey Rivulet", but is at a distance of about 500 feet from that of the seasonal rivulet. This shows that the same is neither perennial nor is it swollen. Not only this, there are number of factories located in and around this godown some of which are at a distance of just about 30 feet from this seasonal rivulet. Besides, there are number of hotels operating from this area.

8. The allegation regarding pendency of the civil suit has been admitted but it has been stated that there has been no objection of any of the plaintiffs with regard to construction of godowns over the lands owned by the replying respondents. It is specifically pointed out that the land referred to in the civil suit is not the land over which the godowns have been constructed and pertain to some other land.

9. As regards change of revenue entries, it is claimed that the land had been wrongly recorded in the revenue record as "gair mumkin khala" and the same was rightly corrected and classified as "banjar kadim" by the competent authority.

10. The Secretary (Food and Supplies) and Deputy Commissioner, Sirmaur, have filed joint reply wherein the locus-standi and maintainability of the petition have been questioned by way of preliminary objections. On merits, it is claimed that the entry in the revenue record from "gair mumkin khala" to "banjar kadim" was carried out after inspecting the spot as per procedure prescribed for the purpose.

11. The 'FCI' has filed its separate reply wherein apart from raising preliminary objections regarding cause of action and maintainability, it has been claimed that the petitioner has not approached this Court with clean hands and is guilty of deliberate and intentional mis-statement and concealment of facts. It is claimed that the petitioner infact at one point of time had applied to the replying respondents to hire his weigh bridge for the purpose of weighing of food grains supplied by the 'FCI' which application of the petitioner had not been considered favourably. It is then claimed that the 'FCI' is having storage capacity to the tune of 33930 MT of food grains in the State of Himachal Pradesh, whereas, monthly off-take of wheat and rice under the Public Distribution System (PDS) and Other Welfare Schemes (OWS) of the Government of India is about 45000 MT per month. As per the policy of the Government of India, the storage gap of 142550 MT was identified at various Centres of the State. In order to fill-up the storage gap, the Private Entrepreneur Guarantee (PEG)

Scheme, 2008, was introduced for construction of godowns through private parties. A storage gap of 11670 MT was identified for the Nahan Centre. The existing capacity of the godown at Nahan is hardly 410 MT which comparatively is far too less to the allotment under PDS and OWS supply which is about 3500 MT per month. In support of such contention, the statement for the financial year 2013-14 has been annexed as Annexure R-B. The respondent has then given a detailed reference spelling out therein the mode and manner in which the tender came to be allotted in favour of respondents 7 to 10.

12. In rejoinder to the reply of respondents 7 to 10 in whose favour the tender has been allotted, a certificate by the Pradhan of the Gram Panchayat has been appended to show that the Khasra Number over which the godown has been constructed is adjacent to the "Markandey Canal". Rapat No.612 has been annexed to show that as per the statement of one Pardeep Singh, one industrial unit by the name of M/s Vashishth Chemicals had previously been washed away. To similar effect is a certificate issued by the Patwari on 10.12.2002. Rapats No.948 and 949 have been placed on record to show that in the year 1960 one pillar of the bridge had been damaged due to heavy flow of water and it was suspected that about 15 persons had been washed away while three had sustained injuries. Rapat No.966 dated 23.07.2006 has been appended to show that on the night of 22.07.2006 the retaining wall of Vashishth Chemical, Ogla, had given way thereby causing a loss of several lakhs of rupees. Report No.965 has been placed on record which has been lodged by one Ashok Kumar over the telephone to inform that the unit M/s Bhagwati Enterprises had been flooded by the water of "Markandey River" due to which they had sustained loss of about Rs.15 lacs. It is claimed that the matter with regard to change of revenue entries is pending inquiry before the Sub Divisional Magistrate. Rests of the averments made in the reply are stated to be wrong and denied.

13. In sur-rejoinder filed by respondents 7 to 10, it has been reiterated that the petitioner in guise of the alleged public interest has filed this writ petition in personal interest for securing business of weighing trucks at the weigh bridge owned by him which is located near the existing godown. It is also stated that there are as many as 40 industries located in the area in question some of which have been established about 30 years ago.

14. In rejoinder to the reply filed by the 'FCI', the averments made in the rejoinder filed to the reply of respondents 7 to 10 have been reiterated.

15. The Town and Country Planning Department has filed its separate reply wherein it is stated that the respondents 7 to 10 had applied for the Planning for permission for construction of godown which proposal was examined and permission for construction of godowns/sheds was accorded by the Office and thereafter revised case for regularization of office block was submitted which too was sanctioned by the Office. No rejoinder to the said reply has been filed.

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

16. The petitioner (s) claim to have filed these petitions as *Pro Bono Publico*, whereas, the respondents have challenged the locus-standi by contending that the petition has not been filed in public interest, but has been filed to protect private interest. In such circumstances, this Court is required to first satisfy itself regarding the credentials of the petitioner(s), the prima-facie correctness of the information given by them because after all the attractive brand name of public interest litigation cannot be used for suspicious products of mischief. It has to be aimed at redressal of genuine public wrong or public injury and not publicity-oriented or founded on personal vendetta or private motive. The process of the Court cannot be abused for oblique considerations by masked phantoms who monitor at times from behind. The common rule of

locus-standi in such cases is relaxed so as to enable the Court to look into the grievances complained of on behalf of the poor, deprive, deprivation, illiterate and the disabled and who cannot vindicate the legal wrong or legal injury caused to them for any violation of any constitutional or legal right. But, then while protecting the rights of the people from being violated in any manner, utmost care has to be taken that the Court does not transgress its jurisdiction nor does it entertain petitions which are motivated. After all, public interest litigation is not a pill or panacea for all wrongs. It is essentially meant to protect basic human rights of the weak and disadvantaged. Public interest litigation is a weapon which has to be used with great care and circumspection and the Judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or public interest seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering justice to the citizens. Courts must do justice by promotion of good faith and prevent law from crafty invasions. It is for this reason that the Court must maintain social balance by interfering for the sake of justice and refuse to entertain where it is against the social justice and public good.

17. In the case of ***Shri Sachidanand Pandey and another*** *versus* ***The State of West Bengal and others AIR 1987 SC 1109,*** the Hon'ble Supreme Court observed as follows:-

> ***"Today public spirited litigants rush to Courts to file cases in profusion under this attractive name. They must inspire confidence in Courts and among the public. They must be above suspicion. Public Interest Litigation has now come to stay. But one is led to think that it poses a threat to Courts and public alike. Such cases are now filed without any rhyme or reason. It is therefore necessary to lay down clear guidelines and to outline the correct parameters for entertainment of such petitions. If Courts do no restrict the free flow of such cases in the name of Public Interest Litigations, the traditional litigation will suffer and the Courts of law, instead of dispensing justice, will have to take upon themselves Administrative and executive functions. This does not mean that traditional litigation should stay out. They have to be tackled by other effective methods, like decentralizing the judicial system and entrusting majority of traditional litigation to Village Courts and Lok Adalats without the usual populist stance and by a complete restructuring of the procedural law which is the villain in delaying disposal of cases...***
>
> ***It is only when Courts are apprised of gross violation of fundamental rights by a group or a class action or when basis human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the Courts, especially the Supreme Court, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the underdog and the neglected. It is necessary to have some self-imposed restraint on Public Interest Litigants."***

18. In ***S.P.Anand, Indore*** *versus* ***H.D.Deve Gowda and others (1996) 6 SCC 734,*** the Hon'ble Supreme Court held as under:-

> ***"18..... It is of utmost importance that those who invoke this Court's jurisdiction seeking a waiver of the locus standi rule must exercise restraint in moving the Court by not plunging in areas wherein they are not well-versed. Such a litigant must not succumb to spasmodic sentiments and behave like a knight-errant roaming at will in pursuit of issues providing publicity. He must remember***

that as a person seeking to espouse a public cause, he owes it to the public as well as to the Court that he does not rush to Court without undertaking a research, even if he is qualified or competent to raise the issue. Besides, it must be remembered that a good cause can be lost if petitions are filed on half-baked information without proper research or by persons who are not qualified and competent to raise such issues as the rejection of such a petition may affect third party rights. Lastly, it must also be borne in mind that no one has a right to the waiver of the locus standi rule and the Court should permit it only when it is satisfied that the carriage of proceedings is in the competent hands of a person who is genuinely concerned in public interest and is not moved by other extraneous considerations. So also the Court must be careful to ensure that the process of the Court is not sought to be abused by a person who desires to persist with his point of view, almost carrying it to the point of obstinacy, by filing a series of petitions refusing to accept the Court's earlier decisions as concluding the point. We say this because when we drew the attention of the petitioner to earlier decisions of this Court, he brushed them aside, without so much as showing willingness to deal with them and without giving them a second look, as having become stale and irrelevant by passage of time and challenged their correctness on the specious plea that they needed reconsideration. Except for saying that they needed reconsideration he had no answer to the correctness of the decisions. Such a casual approach to considered decisions of this Court even by a person well-versed in law would not be countenanced. Instead, as pointed out earlier, he referred to decisions having no bearing on the question, like the decisions on cow slaughter cases, freedom of speech and expression, uniform civil code, etc; we need say no more except to point out that indiscriminate use of this important lever of public interest litigation would blunt the lever itself."

19. The Hon'ble Supreme Court in ***Mr. 'X'*** *versus* ***Hospital 'Z' (1998) 8 SCC 296*** held as follows:-

"15. "Right" is an interest recognised and protected by moral or legal rules. It is an interest the violation of which would be a legal wrong. Respect for such interest would be a legal duty. That is how Salmond has defined "Right". In order, therefore, that an interest becomes the subject of a legal right, it has to have not merely legal protection but also legal recognition, the elements of a "legal right" are that the 'right' is vested in a person and is available against a person who is under a corresponding obligation and duty to respect that right and has to act or forbear from acting in a manner so as to prevent the violation of the right, If, therefore, there is a legal right vested in a .person, the latter can seek its protection against a person who is bound by a corresponding duty not to violate that right."

20. The Hon'ble Supreme Court in ***Balco Employees' Union (Regd.)*** *versus* ***Union of India and others (2002) 2 SCC 333*** held as under:-

"77.Public interest litigation, or PIL as it is more commonly known, entered the Indian judicial process in 1970. It will not be incorrect to say that it is primarily the judges who have innovated this type of litigation as there was a dire need for it. At that stage, it was intended to vindicate public interest where fundamental and other rights of the people who were poor, ignorant or in socially or economically disadvantageous position and were unable to seek

legal redress, were required to be espoused. PIL was not meant to be adversarial in nature and was to be a co-operative and collaborative effort of the parties and the Court, so as to secure justice for the poor and the weaker sections of the community who were not in a position to protect their own interests. Public interest litigation was intended to mean nothing more than what words themselves said viz., "litigation in the interest of the public"."

21. In ***Ashok Kumar Pandey*** *versus* ***State of W.B. (2004) 3 SCC 349,*** the Hon'ble Apex Court after considering few decisions on the aspect of public interest litigation observed as follows:-

"4. When there is material to show that a petition styled as a public interest litigation is nothing but a camouflage to foster personal disputes, said petition is to be thrown out. Before we grapple with the issue involved in the present case, we feel it necessary to consider the issue regarding public interest aspect. Public Interest Litigation which has now come to occupy an important field in the administration of law should not be "publicity interest litigation" or "private interest litigation" or "politics interest litigation" or the latest trend "paise income litigation". If not properly regulated and abuse averted it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of a knight errant or poke ones nose into for a probe. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have a locus standi and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration. These aspects were highlighted by this Court in The Janta Dal versus H.S.Chowdhary (1992) 4 SCC 305 and Kazi Lhendup Dorji vs. Central Bureau of Investigation, (1994 Supp (2) SCC 116). A writ petitioner who comes to the Court for relief in public interest must come not only with clean hands like any other writ petitioner but also with a clean heart, clean mind and clean objective. See Ramjas Foundation vs. Union of India, (AIR 1993 SC 852) and K.R. Srinivas vs. R.M. Premchand, (1994 (6) SCC 620)."

5.It is necessary to take note of the meaning of expression 'public interest litigation'. In Strouds Judicial Dictionary, Volume 4 (IV Edition), 'Public Interest' is defined thus:

> ***"Public Interest (1) a matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."***

6.In Black's Law Dictionary (Sixth Edition), "public interest" is defined as follows :

> ***"Public Interest something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are***

affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, State or national government."

7.In Janata Dal case (supra) this Court considered the scope of public interest litigation. In para 53 of the said judgment, after considering what is public interest, the Court has laid down as follows : (SCC p.331)

"53.The expression 'litigation' means a legal action including all proceedings therein initiated in a Court of law with the purpose of enforcing a right or seeking a remedy. Therefore, lexically the expression "PIL" means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

8.In paras 60, 61 and 62 of the said judgment, it was pointed out as follows: (SCC p.334)

"62.Be that as it may, it is needless to emphasis that the requirement of locus standi of a party to a litigation is mandatory, because the legal capacity of the party to any litigation whether in private or public action in relation to any specific remedy sought for has to be primarily ascertained at the threshold."

9.In para 98 of the said judgment, it has further been pointed out as follows : (SCC pp.345-346)

"98.While this Court has laid down a chain of notable decisions with all emphasis at their command about the importance and significance of this newly developed doctrine of PIL, it has also hastened to sound a red alert and a note of severe warning that Courts should not allow its process to be abused by a mere busy body or a meddlesome interloper or wayfarer or officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration."

10. In subsequent paras of the said judgment, it was observed as follows: (SCC p.348, para 109)

"109.It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have a locus standi and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly a vexatious petition under the colour of PIL, brought before the Court for vindicating any personal grievance, deserves rejection at the threshold."

11.It is depressing to note that on account of such trumpery proceedings initiated before the Courts, innumerable days are wasted, which time otherwise could have been spent for the disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the

oppressed and the needy whose fundamental rights are infringed and violated and whose grievance go unnoticed, un-represented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death and facing the gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters - government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorized collection of tax amounts are locked up, detenu expecting their release from the detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the Courts and having their grievances redressed, the busy bodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffing their faces by wearing the mask of public interest litigation and get into the Courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the Courts and as a result of which the queue standing outside the doors of the court never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they loose faith in the administration of our judicial system.

12.Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

13.The Council for Public Interest Law set up by the Ford Foundation in USA defined the "public interest litigation" in its report of Public Interest Law, USA, 1976 as follows:

> ***"Public Interest Law is the name that has recently been given to efforts that provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the proper***

environmentalists, consumers, racial and ethnic minorities and others."

14.The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; and (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busy bodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect.

15. Courts must do justice by promotion of good faith, and prevent law from crafty invasions. Courts must maintain the social balance by interfering where necessary for the sake of justice and refuse to interfere where it is against the social interest and public good. (See State of Maharashtra vs. Prabhu, (1994 (2) SCC 481), and Andhra Pradesh State Financial Corporation vs. M/s GAR Re-Rolling Mills and Anr., (AIR 1994 SC 2151). No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. (See Dr. B.K. Subbarao vs. Mr. K. Parasaran, JT (1996) 7 SC 265). Today people rush to Courts to file cases in profusion under this attractive name of public interest. They must inspire confidence in Courts and among the public.

16. As noted supra, a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that Courts are flooded with large number of so called public interest litigations where even a minuscule percentage can legitimately be called public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives, Courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. Though in Dr. Duryodhan Sahu and Ors. v. Jitendra Kumar Mishra and Ors. (AIR 1999 SC 114), this Court held that in service matters PILs should not be entertained, the inflow of so-called PILs involving service matters continues unabated in the Courts and strangely are entertained. The least the High Courts could do is to throw them out on the basis of the said decision. The other interesting aspect is that in the PILs, official documents are being annexed without even indicating as to how the petitioner came to possess them. In one case, it was noticed that an interesting answer was given as to its possession. It was stated that a packet was lying on the road and when out of curiosity the petitioner opened it, he found copies of the official documents. Whenever such frivolous pleas are taken to explain possession, the

Court should do well not only to dismiss the petitions but also to impose exemplary costs. It would be desirable for the Courts to filter out the frivolous petitions and dismiss them with costs as afore-stated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts.

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18.In S.P.Gupta versus Union of India 1981 Supp. SCC 87 it was emphatically pointed out that the relaxation of the rule of locus standi in the field of PIL does not give any right to a busybody or meddlesome interloper to approach the Court under the guise of a public interest litigant. It has also left the following note of caution: (SCC p.219, para 24)

> ***"24. But we must be careful to see that the member of the public, who approaches the court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective."***

19.In State of H.P. vs. A Parent of a Student of Medical College, Simla and Ors. (1985 (3) SCC 169), it has been said that public interest litigation is a weapon which has to be used with great care and circumspection.

20.Khalid, J. in his separate supplementing judgment in Sachidanand Pandey vs. State of W.B., (1987 (2) SCC 295, (SCC at page 331) said:

> ***"Today public spirited litigants rush to courts to file cases in profusion under this attractive name. They must inspire confidence in courts and among the public. They must be above suspicion. (SCC p. 331, para 46)***
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> * * *
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> ***Public interest litigation has now come to stay. But one is led to think that it poses a threat to courts and public alike. Such cases are now filed without any rhyme or reason. It is, therefore, necessary to lay down clear guidelines and to outline the correct parameters for entertainment of such petitions. If courts do not restrict the free flow of such cases in the name of public interest litigations, the traditional litigation will suffer and the courts of law, instead of dispensing justice, will have to take upon themselves administrative and executive functions. (SCC p.334, para 59)***
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> ***I will be second to none in extending help when such help is required. But this does not mean that the doors of this Court are always open for anyone to walk in. It is necessary to have some self- imposed restraint on public interest litigants. (SCC p.335, para 61)"***

21. Sabyasachi Mukharji, J. (as he then was) speaking for the Bench in Ramsharan Autyanuprasi vs. Union of India, (1989 Supp (1) SCC 251), was in full agreement with the view expressed by Khalid, J. in Sachidanand Pandey's case (supra) and added that

'public interest litigation' is an instrument of the administration of justice to be used properly in proper cases. See also separate judgment by Pathak, J. (as he then was) in Bandhua Mukti Morcha vs. Union of India, (1984 (3) SCC 161).

22.Sarkaria, J. in Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmed & Ors. (1976 (1) SCC 671) expressed his view that the application of a busybody should be rejected at the threshold in the following terms: (SCC p. 683, para 37)

> *"37. It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories : (i) 'person aggrieved'; (ii) 'stranger'; (iii) busybody or meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold."*

23.Krishna Iyer, J. in Fertilizer Corporation Kamgar Union (Regd.) Sundri and Ors. v. Union of India, (1981 (1) SCC 568) in stronger terms stated: (SCC p.589, para 48)

> *"48.If a citizen is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any one of the 660 million people of this country, the door of the court will not be ajar for him."*

24.In Chhetriya Pardushan Mukti Sangharsh Samiti v. State of U.P., (1990 (4) SCC 449), Sabyasachi Mukharji, C.J. observed: (SCC p.452, para 8)

> *" While it is the duty of this Court to enforce fundamental rights, it is also the duty of this Court to ensure that this weapon under Article 32 should not be misused or permitted to be misused creating a bottleneck in the superior court preventing other genuine violation of fundamental rights being considered by the court."*

25. In Union Carbide Corporation v. Union of India, (1991 (4) SCC 584, 610), Ranganath Mishra, C.J. in his separate judgment while concurring with the conclusions of the majority judgment has said thus: (SCC p.610, para 21)

> *" I am prepared to assume, nay, concede, that public activists should also be permitted to espouse the cause of the poor citizens but there must be a limit set to such activity and nothing perhaps should be done which would affect the dignity of the Court and bring down the serviceability of the institution to the people at large. Those who are acquainted with jurisprudence and enjoy social privilege as men educated in law owe an obligation to the*

community of educating it properly and allowing the judicial process to continue unsoiled."

26.In Subhash Kumar v. State of Bihar, (1991 (1) SCC 598) it was observed as follows: (SCC pp.604-05, para 7)

> ***"Public interest litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge and enmity. If such petitions under Article 32, are entertained it would amount to abuse of process of the court, preventing speedy remedy to other genuine petitioners from this Court. Personal interest cannot be enforced through the process of this Court under Article 32 of the Constitution in the garb of a public interest litigation. Public interest litigation contemplates legal proceeding for vindication or enforcement of fundamental rights of a group of persons or community which are not able to enforce their fundamental rights on account of their incapacity, poverty or ignorance of law. A person invoking the jurisdiction of this Court under Article 32 must approach this Court for the vindication of the fundamental rights of affected persons and not for the purpose of vindication of his personal grudge or enmity. It is the duty of this Court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants by invoking the extraordinary jurisdiction of this Court for personal matters under the garb of the public interest litigation."***

27.In the words of Bhagwati, J. (as he then was) "the courts must be careful in entertaining public interest litigations" or in the words of Sarkaria, J. "the applications of the busybodies should be rejected at the threshold itself" and as Krishna Iyer, J. has pointed out, "the doors of the courts should not be ajar for such vexatious litigants."

22. In ***Dr. B. Singh*** *versus* ***Union of India and others (2004) 3 SCC 363,*** the Hon'ble Supreme Court held thus:-

> ***"12. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity-oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the past time of meddling with judicial process either by force of habit or from improper motives and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."***

23. In ***R & M Trust*** *versus* ***Koramangala Residents Vigilance Group and others (2005) 3 SCC 91***, the Hon'ble Supreme Court observed as under:-

> ***"23. Next question is whether such Public Interest Litigation should at all be entertained & laches thereon. This sacrosanct jurisdiction of Public Interest Litigation should be invoked very sparingly and in favour of vigilant litigant and not for the persons who invoke this jurisdiction for the sake of publicity or for the purpose of serving their private ends.***
>
> ***24. Public Interest Litigation is no doubt a very useful handle for redressing the grievances of the people but unfortunately lately it has been abused by some interested persons and it has brought very bad name. Courts should be very very slow in entertaining petitions involving public interest in a very rare cases where public at large stand to suffer. This jurisdiction is meant for the purpose of coming to the rescue of the down trodden and not for the purpose of serving private ends. It has now become common for unscrupulous people to serve their private ends and jeopardize the rights of innocent people so as to wreak vengeance for their personal ends. This has become very handy to the developers and in matters of public contracts. In order to serve their professional rivalry they utilize the service of the innocent people or organization in filing public interest litigation. The Courts are sometimes persuaded to issue certain directions without understanding implication and giving a handle in the hands of the authorities to misuse it. Therefore, the courts should not exercise this jurisdiction lightly but should exercise in a very rare and few cases involving public interest of large number of people who cannot afford litigation and are made to suffer at the hands of the authorities……."***

24. In ***Gurpal Singh*** *versus* ***State of Punjab and others (2005) 5 SCC 136***, the Hon'ble Supreme Court held as under:-

> ***"5. The scope of entertaining a petition styled as a public interest litigation, locus standi of the petitioner particularly in matters involving service of an employee has been examined by this Court in various cases. The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the Court cannot, afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busy bodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect.***
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> ***7. As noted supra, a time has come to weed out the petitions, which though titled as public interest litigations are in essence***

something else. It is shocking to note that Courts are flooded with large number of so called public interest litigations where only a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives. High Courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. Though in Dr. Duryodhan Sahu and others v. Jitendra Kumar Mishra and others (AIR 1999 SC 114), this Court held that in service matters PILs should not be entertained, the inflow of so-called PILs involving service matters continues unabated in the Courts and strangely are entertained. The least the High Courts could do is to throw them out on the basis of the said decision. The other interesting aspect is that in the PILs, official documents are being annexed without even indicating as to how the petitioner came to possess them. In one case, it was noticed that an interesting answer was given as to its possession. It was stated that a packet was lying on the road and when out of curiosity the petitioner opened it, he found copies of the official documents. Whenever such frivolous pleas are taken to explain possession, the Court should do well not only to dismiss the petitions but also to impose exemplary costs. It would be desirable for the Courts to filter out the frivolous petitions and dismiss them with costs as aforestated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts.

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9. It is depressing to note that on account of such trumpery proceedings initiated before the Courts innumerable days are wasted, which time otherwise could have been spent for the disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, unrepresented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and substantial rights and criminal cases in which persons sentenced to death facing the gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters - government or private, persons awaiting the disposal of tax cases wherein huge amounts of public revenue or unauthorised collection of tax amounts are locked up, detenu expecting their release from the detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the Courts and having their grievances redressed, the busy bodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no real public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffing their faces by wearing the mask of public interest litigation and get into the Courts by filing vexatious and frivolous petitions of luxury litigants who have nothing to loose but trying to gain for nothing and thus criminally waste the valuable time of the Courts and as a result of which the queue standing outside the

doors of the Court never moves, which piquant situation creates frustration in the minds of the genuine litigants.

10. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."

25. In ***Kushum Lata*** *versus* ***Union of India and others (2006) 6 SCC 180,*** the Hon'ble Supreme Court held thus:-

"5. When there is material to show that a petition styled as a public interest litigation is nothing but a camouflage to foster personal disputes, said petition is to be thrown out. Before we grapple with the issue involved in the present case, we feel it necessary to consider the issue regarding public interest aspect. Public Interest Litigation which has now come to occupy an important field in the administration of law should not be "publicity interest litigation" or "private interest litigation" or "politics interest litigation" or the latest trend "paise income litigation". The High Court has found that the case at hand belongs to the second category. If not properly regulated and abuse averted, it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of knight errant borne out of wishful thinking. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. The Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have a locus standi and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration. These aspects were highlighted by this Court in The Janta Dal v. H.S. Chowdhary (1992 (4) SCC 305) and Kazi Lhendup Dorji vs. Central Bureau of Investigation, (1994 Supp (2) SCC 116). A writ petitioner who comes to the Court for relief in public interest must come not only with clean hands like any other writ petitioner but also with a clean

heart, clean mind and clean objective. (See Ramjas Foundation vs. Union of India, (AIR 1993 SC 852) and K.R. Srinivas v. R.M. Premchand, (1994 (6) SCC 620).”

26. The Hon’ble Supreme Court in ***Common Cause (A Regd. Society)*** *versus* ***Union of India and others (2008) 5 SCC 511*** observed as under:-

“59. Unfortunately, the truth is that PILs are being entertained by many courts as a routine and the result is that the dockets of most of the superior courts are flooded with PILs, most of which are frivolous or for which the judiciary has no remedy. As stated in Dattaraj Nathuji Thaware's versus State of Maharashtra (2005) 1 SCC 590, public interest litigation has nowadays largely become “publicity interest litigation”, “private interest litigation”, or “politics interest litigation” or the latest trend “paise income litigation”. Much of PIL is really blackmail.

60. Thus, Public Interest Litigation which was initially created as a useful judicial tool to help the poor and weaker section of society who could not afford to come to courts, has, in course of time, largely developed into an uncontrollable Frankenstein and a nuisance which is threatening to choke the dockets of the superior courts obstructing the hearing of the genuine and regular cases which have been waiting to be taken up for years together.”

27. The Hon’ble Supreme Court in the case of ***State of Uttaranchal*** *versus* ***Balwant Singh Chaufal and Ors.,*** reported in ***(2010) 3 SCC 402***, in paragraphs 178, 179, 180 and 181, laid down the following guidelines relating to Public Interest Litigation:-

“178.We must abundantly make it clear that we are not discouraging the Public Interest Litigation in any manner, what we are trying to curb is its misuse and abuse. According to us, this is a very important branch and, in a large number of PIL petitions, significant directions have been given by the Courts for improving ecology and environment, and the directions helped in preservation of forests, wildlife, marine life etc. etc. It is the bounden duty and obligation of the Courts to encourage genuine bonafide PIL petitions and pass directions and orders in the public interest which are in consonance with the Constitution and the laws.

179. The Public Interest Litigation, which has been in existence in our country for more than four decades, has a glorious record. This Court and the High Courts by their judicial creativity and craftsmanship have passed a number of directions in the larger public interest in consonance with the inherent spirits of the Constitution. The conditions of marginalized and vulnerable section of society have significantly improved on account of Court’s directions in PIL.

180. In our considered view, now it has become imperative to streamline the PIL.

181.We have carefully considered the facts of the present case. We have also examined the law declared by this Court and other Courts in a number of judgments. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:-

(1) The Courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.

(3) The Courts should prima facie verify the credentials of the petitioner before entertaining a PIL.

(4) The Court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The Courts should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The Courts should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The Courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The Court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(8) The Courts should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations."

28. In a recent decision in ***Jaipur Shahar Hindu Vikas Samiti*** *versus* ***State of Rajasthan and others*** (***2014) 5 SCC 530***, a Bench comprising of three Hon'ble Judges of the Hon'ble Supreme Court observed as under:-

"49.The concept of public interest litigation is a phenomenon which is evolved to bring justice to the reach of people who are handicapped by ignorance, indigence, illiteracy and other downtrodden people. Through the public interest litigation, the cause of several people who are not able to approach the court is espoused. In the guise of public interest litigation, we are coming across several cases where it is exploited for the benefit of certain individuals. The courts have to be very cautious and careful while entertaining public interest litigation. The judiciary should deal with the misuse of public interest litigation with iron hand. If the public interest litigation is permitted to be misused the very purpose for which it is conceived, namely, to come to the rescue of the poor and downtrodden will be defeated. The courts should discourage the unjustified litigants at the initial stage itself and the person who misuses the forum should be made accountable for it. In the realm of public interest litigation, the courts while protecting the larger public interest involved, should at the same time have to look at the effective way in which the relief can be granted to the people whose rights are adversely affected or are at stake. When their interest can be protected and the controversy or the dispute can be adjudicated by a mechanism created under the particular statute, the parties should be relegated to the

appropriate forum instead of entertaining the writ petition filed as public interest litigation."

29. From the aforesaid exposition of law, it can safely be concluded that the Court would allow litigation in public interest only if it is found:-

(i) That the impugned action is violative of any of the rights enshrined in Part III of the Constitution of India or any other legal right and relief is sought for its enforcement;

(ii) That the action complained of is palpably illegal or malafide and affects the group of persons who are not in a position to protect their own interest or on account of poverty, incapacity or ignorance;

(iii) That the person or a group of persons were approaching the Court in public interest for redressal of public injury arising from the breach of public duty or from violation of some provision of the Constitutional law;

(iv) That such person or group of persons is not a busy body or a meddlesome inter-loper and have not approached with mala fide intention of vindicating their personal vengeance or grievance;

(v) That the process of public interest litigation was not being abused by politicians or other busy bodies for political or unrelated objective. Every default on the part of the State or Public Authority being not justiciable in such litigation;

(vi) That the litigation initiated in public interest was such that if not remedied or prevented would weaken the faith of the common man in the institution of the judicial and the democratic set up of the country;

(vii) That the State action was being tried to be covered under the carpet and intended to be thrown out on technicalities;

(viii) Public interest litigation may be initiated either upon a petition filed or on the basis of a letter or other information received but upon satisfaction that the information laid before the Court was of such a nature which required examination;

(ix) That the person approaching the Court has come with clean hands, clean heart and clean objectives;

(x) That before taking any action in public interest the Court must be satisfied that its forum was not being misused by any unscrupulous litigant, politicians, busy body or persons of groups with mala fide objective or either for vindication of their personal grievance or by resorting to black-mailing or considerations extraneous to public interest.

30. Keeping in mind the aforesaid parameters, now in case the credentials of the petitioner in CWP No.8246 of 2014 are examined, save and except, for a bald statement that he is a "public spirited person" and is doing social work, there is no other worth-noting credential to his credit. While, on the other hand, it has specifically come on record that the petitioner has his own axe to grind because he himself was not only the beneficiary of the existing godown of the 'FCI' at Nahan because his weigh bridge (Dharamkanta) was there, but at one point of time, he had even approached the 'FCI' for hiring his weigh bridge which request had not been considered favourably.

31. Notably, these facts have not been denied by the petitioner and, therefore, it can safely be concluded that the conduct of the petitioner is not above suspicion and the present petition has not been preferred to vindicate

public interest where fundamental and other rights of the people, who are poor, ignorant or socially and economically disadvantageous position and are unable to seek redressal, is required to be espoused. The present petition is definitely adversarial whereby the petitioner has sought to protect his own interest. Not only the credentials of the petitioner(s) are doubtful, but even issues raised in these petitions are only meant to subserve the interest of the petitioner(s) alone and the present petitions do not involve larger public interest aimed at redressal of genuine harm and public injury. It can definitely be said to have been filed for personal gain and oblique motive. The petitioner(s) cannot be said to be acting bonafidely and having sufficient interest in the proceedings and, therefore, does not have locus-standi to file and maintain the present petition. Realizing that he has no locus-standi, the petitioner in CWP No.8246 of 2014, then as a cover-up, appears to have got instituted the other petition being CWP No.9480 of 2014 through Vijay Kumar Gupta on same and similar lines. We observe so because the reply on behalf of respondents 7 to 10 in CWP No.8246 of 2014 had been filed on 2nd December 2014 wherein these respondents had specifically questioned the locus-standi of the petitioner. Whereas, CWP No.9480 of 2014 has been prepared after filing of the abovesaid reply on 08.12.2014 and filed on 09.12.2014.

32. The matter can be looked at from a different angle. Where, how and of what capacity the godown of the 'FCI' should be, is a matter within the exclusive domain of 'FCI' and being in the realm of a policy decision, the same cannot be a subject-matter of a writ petition, unless arbitrariness is shown in the decision making process. This was so held by this Bench in ***Nand Lal and another*** *versus* ***State of Himachal Pradesh and others 2014 (2) Him.L.R.(D.B.) 982,*** wherein it was held as under:-

> *9. The Apex Court in* ***Sidheshwar Sahakari Sakhar Karkhana Ltd. Vs. Union of India and others, 2005 AIR SCW 1399****, has laid down the guidelines and held that Courts should not interfere in policy decision of the Government, unless there is arbitrariness on the face of it.*
>
> *10. The Apex Court in a latest decision reported in* ***Manohar Lal Sharma Vs. Union of India and another, (2013) 6 SCC 616,*** *also held that interference by the Court on the ground of efficacy of the policy is not permissible. It is apt to reproduce paragraph 14 of the said decision as under:*
>
> > *"14.* ***On matters affecting policy, this Court does not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. The impugned policy that allows FDI up to 51% in multi-brand retail trading does not appear to suffer from any***
> >
> > ***of these vices****."*
>
> *14. The Apex Court in the case titled as* ***Mrs. Asha Sharma versus Chandigarh Administration and others,*** *reported in* ***2011 AIR SCW 5636*** *has held that policy decision cannot be quashed on the ground that another decision would have been more fair, wise, scientific or logical and in the interest of society. It is apt to reproduce para 10 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 nonarbitrariness in governmental action is the core of our constitutional***

scheme and structure. Its interpretation will always depend upon the facts and circumstances of a given case. Reference in this regard can also be made to Netai Bag v. State of West Bengal [(2000) 8 SCC 262 : (AIR 2000 SC 3313)].”

15. It appears that the respondents have examined all aspects and made the decision. Thus, it cannot be said that the decision making process is bad. The Court can not sit in appeal and examine correctness of policy decision. The Apex Court in the case titled as ***Bhubaneswar Development Authority and another versus Adikanda Biswal and others,*** *reported in* ***(2012) 11 SCC 731*** *laid down the same principle. It is apt to reproduce para 19 of the judgment herein:*

“19. We are of the view that the High Court was not justified in sitting in appeal over the decision taken by the statutory authority under Article 226 of the Constitution of India. It is trite law that the power of judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. The judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. The Court confines itself to the question of legality and is concerned only with, whether the decision making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasonable decision or abused its powers.”

33. Further, the Hon’ble Apex Court in ***Balco Employees’ case*** (supra), in para-88 held that public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in exercise of its administrative power. No doubt, a person personally aggrieved by any such decision, which he regards as illegal, can impugn the same in the Court of law, but a public interest litigation cannot be entertained. Para-88 of the above ruling reads as under:-

“88. It will be seen that whenever the Court has interfered and given directions while entertaining PIL it has mainly been where there has been an element of violation of Article 21 or of human rights or where the litigation has been initiated for the benefit of the poor and the underprivileged who are unable to come to court due to some disadvantage. In those cases also it is the legal rights which are secured by the courts. We may, however, add that public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in exercise of their administrative power. No doubt, a person personally aggrieved by any such decision, which he regards as illegal, can impugn the same in a court of law, but, a public interest litigation at the behest of a stranger ought not to be entertained. Such a litigation cannot per se be on behalf of the poor and the downtrodden, unless the court is satisfied that there has been violation of Article 21 and the persons adversely affected are unable to approach the court.”

34. In view of the aforesaid, it can safely be concluded that even on merits the decision of the ‘FCI’ is not open to challenge as it relates to policy.

35. This petition, otherwise, cannot be considered to be a public interest litigation as it does not fall within the purview of Rule-3 of the Himachal Pradesh High Court Public Interest Litigation Rules, 2010, which were framed

pursuant to the directions issued by the Hon'ble Supreme Court in ***Balwant Singh Chaufal's case*** (supra). The petition does not even fulfill the mandate of Rule-9 of the Himachal Pradesh High Court Public Interest Litigation Rules, 2010 and, therefore, is not maintainable.

36. The last weapon in the armoury of the petitioner then is the order passed by the SDM, Nahan, to contend that overnight the entries of the land from "gair mumkin khala"/ "rivulet" have been changed to "banjar kadim" and said fact has been affirmed in the aforesaid inquiry. We have gone through the order passed by the SDM which was placed before us during the course of final hearing in the open Court and find that the SDM in her report has not commented upon the correctness of the mutation, but has only expressed her suspicion in the mode and manner in which the mutation was carried out. Infact, the SDM in her report has clearly recorded that out of 38-13 bighas of total land comprised in Khasra No.508/393/4, there was a godown standing over the land measuring 12-11 bighas while the rest of the land was fallow land. Similarly, over the total area measuring 23-15 bighas land comprised in Khasra No.620/569/513/2/3, godown had been erected over land measuring 5-19 bighas while the rest of the land was lying fallow. If the entire report is perused, it would be seen that the SDM has nowhere recorded that the land infact was "gair mumkin khala" or that there was a danger to the godown being destroyed/washed away. Even otherwise, the interest of 'FCI' has been adequately safeguarded as it has specifically come on record that the respondents 7 to 10 have already compulsorily insured the godown for a sum of Rs.8,15,00,000/-.

37. It is the specific case of the respondents that the site of the godown does not abut "Markandey Rivulet" and they have further stated that there are number of hotels and industries located in and around that area, some of which are there for the past 30 years, which fact has not been denied by the petitioner. This being the position, it cannot be held that the location of the godown is such that it would face the risk of being washed away. Even, the reports annexed with the rejoinder to the reply of respondents 7 to 10 are not relatable to the land over which the godown has been constructed and, therefore, are of no avail to the petitioner.

38. Before parting, we may also take into consideration another disturbing feature of this case. Indisputably, the tenders had been floated by the 'FCI' in the year 2012 and the godown which has been constructed at the cost Rs.11.11 crores must have taken considerable time to construct. Then, what prevented the petitioner from approaching the authorities or this Court for the redressal of his so-called grievance, is not forthcoming. In case, the petitioner had bonafide grievance, he would not have been a silent spectator and would have approached the competent authority atleast, if not this Court.

39. On the basis of the averments made in the writ petition, the petitioner had obtained ex parte ad interim orders in his favour which are continuing till date. It has now come on record that the respondents 7 to 10 had spent huge amount of Rs.11.11 crores in carrying on the construction and were to be paid a sum of Rs.10 lacs as rental which they have been deprived because of the interim orders.

40. As observed earlier, the petitioner has grossly misused and abused the process of the Court and has filed this vexatious petition under the colour of public interest litigation for vindicating his personal grievance. The attractive brand name of the public interest litigation has been used for suspicious products of mischief. The petitioner has wasted the precious time of this Court. The judicial system has been abused and virtually brought to its knees by unscrupulous litigants like the petitioner in this case. The Court proceedings are sacrosanct and should not be polluted by unscrupulous litigants. A litigant has to approach the Court with clean hands, clean mind,

clean heart and clean objective. The Court proceeding is not a game of chess. At no cost, the stream of justice can be permitted to be polluted by unscrupulous litigants. (***See: Prestige Lights Ltd.*** *versus* ***State Bank of India (2007) 8 SCC 449****).*

41. The Hon'ble Apex Court in ***Indian Council for Enviro-Legal Action*** *versus* ***Union of India and others (2011) 8 SCC 161*** examined the principles of restitution and the abuse of process of Court and issue of doctrine of unjust enrichment of unscrupulous litigants and in order to ensure that the abuse of legal process is not done, it was also held that Court should adopt a pragmatic approach and also impose realistic costs since litigation has been turned into a fruitful industry by such litigants. The relevant observations of the Hon'ble Apex Court are as under:-

> ***"191. In consonance with the principles of equity, justice and good conscience Judges should ensure that the legal process is not abused by the litigants in any manner. The court should never permit a litigant to perpetuate illegality by abusing the legal process. It is the bounden duty of the court to ensure that dishonesty and any attempt to abuse the legal process must be effectively curbed and the court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of the process of the court. One way to curb this tendency is to impose realistic costs, which the respondent or the defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused. No one should be permitted to use the judicial process for earning undeserved gains or unjust profits. The court must effectively discourage fraudulent, unscrupulous and dishonest litigation.***
>
> ***192. The court's constant endeavour must be to ensure that everyone gets just and fair treatment. The court while rendering justice must adopt a pragmatic approach and in appropriate cases realistic costs and compensation be ordered in order to discourage dishonest litigation. The object and true meaning of the concept of restitution cannot be achieved or accomplished unless the courts adopt a pragmatic approach in dealing with the cases.***
>
> ***197. The other aspect which has been dealt with in great detail is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view:-***
>
> ***(1) It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.***
>
> ***(2) When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.***
>
> ***(3) Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the court.***
>
> ***(4) A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises***

fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

(5) No litigant can derive benefit from the mere pendency of a case in a court of law.

(6) A party cannot be allowed to take any benefit of his own wrong.

(7) Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

(8) The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."

42. For all the reasons stated above, we find no merit in these petitions and accordingly the same are dismissed with costs of Rs.50,000/- each, out of which Rs.40,000/- shall be paid to the private respondents in each petition while remaining Rs.10,000/- in each petition shall be paid to the H.P. State Legal Services Authority.

43. Pending application(s), if any, also stands disposed of.

44. The Registry is directed to place a copy of this judgment on the file of connected matter.

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

Vinay Kumar son of late Shri Shanker Dass ....Applicant

Versus

State of H.P. ....Non-applicant

Cr.MP(M) No. 1396 of 2014
Order Reserved on 24th December, 2014
Date of Order 09th January, 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the applicant for the commission of offences punishable under Sections 420 and 120-B of IPC- held, that 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- no recovery is to be effected from the accused- other accused have already been released on bail- therefore, bail application is allowed. (Para- 6 to 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 Applicant: Mr. B.S. Chauhan, Advocate

For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General with Mr. Puneet Rajta, Deputy Advocate General and Mr.J.S. Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present anticipatory bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 53 of 2014 dated 20.9.2014 registered under Sections 420 and 120-B of IPC in Police Station Kotkhai District Shimla (HP).

2. It is pleaded that applicant is innocent and applicant undertakes not to influence or induce the prosecution witnesses and will abide by the conditions to be imposed by the Court. It is pleaded that applicant will join the investigation of case as and when required. Prayer for acceptance of anticipatory bail application filed under Section 438 Cr.P.C. is sought.

3. Per contra police report filed. As per police report, FIR No. 53 of 2014 dated 20.9.2014 registered under Sections 420 and 120-B IPC at police station Kotkhai District Shimla. There is recital in police report that complainant and his family members are agriculturists and horticulturists by profession for so many generations and having big orchard and revenue at village Chol Tehsil Kotkhai District Shimla. There is recital in police report that complainant and his family members had a very good apple crop during this apple season and accused persons namely Suresh Kumar, Gulshan Kumar and Vinay Kumar claimed that they are registered commission agents with Agriculture Produce Marketing Committee Dhalli and performing there the business under trade mark Jai Durga Trading at Shop No. 7 APMC Market Subzi Mandi Gumma Tehsil Kotkhai District Shimla. There is further recital in police report that in the starting of apple season the accused persons approached the complainant at their native place village Chol and requested the complainant to supply apple boxes and gunny bags of apple for sale at their business center at Hulli near Gumma Tehsil Kotkhai. There is further recital in police report that accused agreed that payment of the whole apple crop will be made to complainant within one week from the last supply of apple boxes. There is further recital in police report that complainant Sukh Dev had supplied 1755 apple boxes and 63 gunny bags of apple to accused persons during the apple season from dated 5.8.2014 to 20.8.2014 on various dates on 23 occasions and total sale price approximately comes to Rs.25,70,905/- (Rupees twenty five lacs seventy thousand nine hundred five only) which is payable to complainant. There is recital in police report that accused assured the complainant that within one week from the last supply of apple boxes the payment would be given. There is further recital in police report that complainant supplied the apple boxes and gunny boxes of apple to accused persons. There is further recital in police report that complainant went to the shop of accused for payment of Rs.25,70,905/- (Rupees twenty five lacs seventy thousand nine hundred five only) but accused persons have left the business from Hulli (Gumma) and accused persons had cheated so many apple growers during this apple season. There is recital in police report that thereafter complainant went to the office of APMC Dhalli to enquire about the licence of accused persons but complainant was informed by APMC authorities that no licence has been issued in the names of accused persons. There is further recital in police report that accused persons have received the apple boxes with intention to cheat the complainant deliberately and by way of misrepresentation of facts that accused persons are registered commission agents with APMC Dhalli. There is also recital in police report that accused persons have cheated the complainant in furtherance of criminal conspiracy and received the sale price of apples by supplying the apple boxes to the various markets throughout India. There is further recital in police report that after registration of criminal case matter was investigated and during investigation it was observed that no licence was issued in the names of accused persons by APMC Dhalli as commission agents. There is further recital in police

report that accused persons have purchased the apples of villagers. There is further recital in police report that accused persons have purchased the apples from villagers without any licence of commission agents in consideration amount of Rs.50,00,000/- (Rupees fifty lacs only). There is further recital in police report that accused persons are liable to pay Rs.25,00,000/- (Rupees twenty five lacs only) to complainant namely Sukh Dev. There is further recital in police report that Suresh Kumar and Gulshan Kumar have been released on bail by Sessions Court Shimla. There is also recital in police report that in present case no recovery is to be effected from accused persons. There is further recital in police report that if applicant is released on bail then applicant will threat the prosecution witnesses and will also influence the investigation of case. Prayer for rejection of anticipatory bail application is sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the State and also perused the record.

5. Following points arise for determination in this bail application:-

Point No. 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?

Point No.2

Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent cannot be decided at this stage. Same facts will be decided when case shall be disposed of on merits after giving due opportunity to both parties to lead evidence in support of their case.

7. Submission of learned Advocate appearing on behalf of applicant that no recovery is to be effected from applicant and other co-accused persons namely Suresh Kumar and Gulshan Kumar have been released on bail and on this ground anticipatory bail application filed by applicant be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** 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. In view of the fact that no recovery is to be effected from accused as per police report and in view of the fact that other co-accused namely Suresh Kumar and Gulshan Kumar already released on bail by learned Sessions Judge Shimla Court is of the opinion that if anticipatory bail application is allowed then interest of State and general public will not be adversely effected.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if bail is granted to applicant then applicant will induce threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons

hereinafter mentioned. Court is of the opinion that condition will be imposed in the bail order to the effect that applicant will not induce and threat the prosecution witnesses and if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail 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 anticipatory bail application filed by applicant under Section 438 Cr.P.C. is allowed and applicant is ordered to be released on bail subject to furnishing personal bond to the tune of Rs. 25 lac with one surety in the like amount to the satisfaction of Investigating Officer on following terms and conditions. (i) That applicant will join the investigation of the case as and when required by police. (ii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address in written manner to the Investigating Officer. (vi) That applicant will participate in the proceedings of learned trial Court regularly. Applicant be released only if not required in any other criminal case. Anticipatory bail application filed under Section 438 Cr.P.C. stands disposed of. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973. Application stands disposed of. All pending application(s) if any also disposed of.

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