सत्यमेव जयते

THE
INDIAN LAW REPORTS
HIMACHAL SERIES, 2014

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

November-December, 2014

Vol. XLIV (VI)

Pages: HC 1 to 1339

Mode of Citation : I L R 2014 (VI) HP 1

Containing cases decided by the High Court of

Himachal Pradesh and by the Supreme Court of India

And
Acts, Rules and Notifications.

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

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INDIAN LAW REPORTS

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(November-December, 2014)

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SUBJECT INDEX

'A'

Arbitration and Conciliation Act, 1966- Section 11(6)- Petitioner contended that Chairman of the respondent, Company had not appointed an Arbitrator despite the demand raised by the petitioner- respondent stated that Arbitrator was appointed within stipulated period of 30 days from the date of issuance of the notice and the petition had become infructuous – record showed that an Arbitrator was appointed with the approval of the Chairman- merely because order of appointment was signed by Chief Engineer does not mean that Arbitrator was appointed by Chief Engineer- fairness and impartiality of arbitrator cannot be doubted at this stage and the petitioner will be at liberty to resort to the remedy in accordance with law- petition dismissed.
Title: M/s Ahluwalia Contracts (India) Ltd. Vs. HPSEB Limited & Another
Page-613

Arbitration and Conciliation Act, 1996- Section 34- Construction of underground work comprising of Head Race Tunnel and Desilting Chambers was awarded to the respondent-Contractor by the Executive Engineer- date of completion was fixed as 31.8.1991- Contractor failed to complete the work well within the time- Contract was rescinded on 23.03.1992 with the condition to get it completed by the Electricity Board at the cost of the Contractor- Work was completed in June, 1996 – A notice was served on 16.10.1998 for the appointment of the Arbitrator for adjudication of the dispute- the Arbitrator was appointed on 9.9.1999- Arbitrator announced the award on 7.9.2007- held, that delay in execution of the work granted a right to the Board to rescind the contract- Board was competent to get the work executed at the cost of the contractor - rescission of the contract and execution of the remaining work by Board at the risk and cost of the contractor did not fall within the definition of the dispute and could not have been referred to Arbitrator- cost of the remaining work should have been adjusted against the security deposit bill.
Title: Himachal Pradesh State Electricity Board Vs. Madan Lal Gulati
Page-1149

Arbitration and Conciliation Act, 1996- Section 34- Contract was rescinded by the Electricity Board on failure of the contractor to complete the contract within time on 23.3.1992- contractor claimed that he was not responsible for non-completion of the work within time and the non-completion was due to the acts of the board- held, that the dispute could have been raised within 30 days before the Arbitrator- contractor had not sought the appointment of the Arbitrator and had filed a counter-claim on 28.6.2008 when the appointment of the Arbitrator was sought by Electricity Board- the counter-claim preferred by contractor was barred by limitation.
Title: Himachal Pradesh State Electricity Board Vs. Madan Lal Gulati
Page-1149

'C'

Central Civil Services (Classification, Control and Appeals) Rules, 1965 - Disciplinary proceedings were initiated against the petitioner- Inquiry Officer submitted his findings that the charges were not proved- Disciplinary Authority disagreed with the findings of the Inquiry Officer and imposed penalty of stoppage of two increments for two years with cumulative effect- held, that the Disciplinary Authority has to record the reason for disagreeing with the findings

of the Inquiry Officer which reasons are required to be supplied to delinquent officer- since, the procedure was not followed, therefore, order was set aside.
Title: Amrit Lal Vs. Himachal Road Transport Corporation and others.
Page-347

Code of Civil Procedure, 1908- Section 10- Defendant contended that he had already instituted a civil suit for recovery of Rs. 27,14,302.60 along with interest @ 18% in the Court of learned Civil Judge (S.D.) at Vadodara- matter in issue in the suit pending before the High Court and the previous suit is substantially the same-record showed that suit filed at Vadodara relates to spare parts supplied by defendant to the plaintiff for which no sale consideration was paid- suit was filed before the High Court on the premises that the spare parts were not genuine- this shows that cause of action in the two suits is not identical- application dismissed.
Title: Italian Thai Development Public Company Ltd. Vs. Jala Ram, Engineering Enterprises Page-1000

Code of Civil Procedure, 1908 - Section 10 - One civil suit is pending before Civil Judge, Palampur, District Kangra - another suit is pending before Delhi High Court- third suit has been filed before the High Court – an application for staying the proceeding before the High Court filed- held, that Section 10 is applicable only if the first Court is competent to grant the relief claimed in the second suit- suit filed before the high Court is valued at Rs. 2 crores - Civil Judge, Palampur is not competent to grant the relief claimed in the second suit as his pecuniary jurisdiction is restricted to Rs. 10 lacs- therefore, proceedings before High Court cannot be stayed.
Title: Bahar Murtaza Ali and others Vs. Rohini Wahi alias Roohani
Page-639

Code of Civil Procedure, 1908- Section 11- Plaintiff filed a civil suit for permanent prohibitory injunction and recovery of use and occupation charges- an application under Order 7 Rule 11 of CPC was moved by the defendant- application was allowed by the Tribunal constituted under the Wakf Act- an appeal was preferred by plaintiff which was allowed and it was held that recovery of possession use and occupation charges is a dispute relating to the Wakf and Tribunal had jurisdiction- held, that in view of adjudication of the application filed by the defendant – question whether the Wakf Tribunal had jurisdiction or not cannot be raised subsequently in the suit.
Title: Maulana Mumtaz Ahmed Quasmi Vs. Himachal Pradesh Wakf Board
Page-1074

Code of Civil Procedure, 1908- Section 114 - Review petition was preferred on the ground that additional evidence taken by Inquiry Officer was in violation of Rule 14 (15) of CCS (CCA) Rules- Inquiry Officer was biased and there was violation of Rule 17 – held, that the points raised by the petitioner were also raised before the single judge and thereafter before division bench- there was no error apparent on the face of record- therefore, it is not permissible to set aside the decision- an erroneous decision can be corrected by higher forum in appeal and not by the same court in exercise of the judicial review.
Title: K. P. Singh Vs. High Court of H.P. and others Page-142

Code of Civil Procedure, 1908- Order 1 Rule 10- An application was moved for impleadment as defendants by the petitioners which was dismissed- held, that the application was filed belatedly and allowing the application for impleadment would amount to relegating the parties to 2004 position- presence of the petitioners is not necessary to adjudicate upon the real controversy between the parties.
Title: Amit Sood & ors. Vs. Sandala & ors. Page-200

Code of Civil Procedure, 1908- Order 1 Rule 13- A plea of misjoinder of necessary parties has to be taken at the earliest possible opportunity and in any case prior to the settlement of issues- where such plea was not taken or no issue was raised regarding non-joinder of necessary party, plea is deemed to have been waived.
Title: Rattan Chand (deceased) through his LRs Smt. Kunti Devi and others Vs. Pawan Kumar and others Page-1007

Code of Civil Procedure, 1908- Order 6- Pleading- plaintiffs claimed to be a lease-holders of the land - defendants claimed that the document set up by the plaintiffs was not lease but was only a concession – court recorded a finding that the plaintiffs were licensee- held, that it was not permissible for the Court to make out a different case by recording the finding that plaintiffs were licensee.
Title: Kuldip Singh and others vs. State of H.P. and others Page-46

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff claimed that the history and background of the title of the plaintiffs were not given in the plaint, though evidence was led to this effect and this was a technical defect - held, that application was filed when the respondents were confronted with the fact that evidence was not in accordance with pleading during the course of hearing of appeal - amendment has been filed with an intention to fit the pleadings with the evidence adduced already, which is not permissible- the opposite party cannot be placed in the same position as if the pleadings had been correct- therefore, application is liable to be dismissed.
Title: Smt .Rubi Sood and another Vs. Major (Retd.)Shri Vijay Kumar Sood and others Page-378

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff filed an application for seeking amendment to the effect that defendants were not entitled to compensation and for seeking to restrain the defendants from spending the award amount- held, that the award was passed on 12.6.2013- plaintiff was not a party before Land Acquisition Collector and did not know about the proceeding- therefore, plaintiff had filed the application after exercise of due diligence – amendment was necessary for adjudicating the controversy between the parties- amendment was allowed subject to payment of cost of Rs.1,000/-.
Title: Santosh Kumar and another Vs. Vijay Ram and others
Page-431

Code of Civil Procedure, 1908- Order 8 Rule 6(A) - Counter-claim- Counter claim, which is beyond pecuniary jurisdiction of the Court, cannot be filed before the Court.
Title: Bahar Murtaza Ali and others Vs. Rohini Wahi alias Roohani
Page-639

Code of Civil Procedure, 1908- Order 14 Rule 2- Court recorded finding only on issue No.1 and disposed of the remaining issues on the basis of this finding- held, that the matter ought to have been disposed of on all points and should not have been allowed to rest merely on consideration of a single point- Provisions of Order 20 requires the judgment to contain all the issues and findings or decisions thereon with reasons- the courts should not adopt a shortcut method of adjudicating upon a claim by resting its decision on one single point but should give a reasoned judgment of the dispute on all the issues.
Title: Tara Kaushal & ors. Vs. Bal Raj & ors. Page-1026

Code of Civil Procedure, 1908- Order 18 Rule 3-A- An application was filed for seeking permission to examine the plaintiff after the examination of other witnesses on the ground that most of the witnesses referred in the list of witnesses are witnesses of record and it is not possible to record the statement of the plaintiff without proving the document by the examination of official witnesses- held, that plaintiff is required to prove the relinquishment deed and the power of attorney- he is required to lead evidence regarding the manner of execution of these documents and the relationship between the parties- plaintiff may be required to prove the document from the witnesses- therefore, application allowed subject to the condition that plaintiff will step into witness box immediately after the examination of the witnesses of the record.
Title: Brig. S.C. Kuthiala Vs. Radha Krishan Kuthiala and another
Page- 505

Code of Civil Procedure, 1908- Order 22 Rule 4- One of the proforma defendants died on 9.12.2006 during the pendency of the appeal before district judge- this fact was not brought to the notice of the Court- when the notice of the appeal was issued by High Court, it was found that one of the defendants had already died- held, that question regarding the abatement can only be decided by the Court where the lis is pending at the time of death- judgment passed in favour or against the dead person is a nullity - matter remanded to the Trial Court with the direction to decide the question of the substitution or abatement.
Title: Seeta Ram and others Vs. Ashok Kumar and other. Page-929

Code of Civil Procedure, 1908- Order 22 Rule 4- proforma defendants No. 3 to 5 were proceeded exparte- no written statement was filed by them- suit was filed for the benefit of proforma defendants No. 3 to 5- held, that death of proforma defendant No. 3 would not result in the abatement of the suit or appeal.
Title: Ram Lok Vs. Nand Ram & others Page-126

Code of Civil Procedure, 1908- Order 23 Rule 1- Application filed to withdraw the suit with liberty to file a fresh suit on the same cause of action on the ground that pleadings are not in accordance with the evidence which has been led- held, that suit can be allowed to be withdrawn due to a formal defect which does not affect the merit of the case- permission cannot be granted mechanically when the suit is originally weak- a statement by the plaintiff that there is a formal defect is not sufficient and the plaintiff is required to satisfy the Court that defect is a formal defect - since, no such defect was shown, hence, application dismissed.
Title: Smt.Rubi Sood and another Vs. Major (Retd.)Shri Vijay Kumar Sood and others Page-378

Code of Civil Procedure, 1908- Order 26 Rule 9- An application for appointment of Local Commissioner was filed when the case was listed for arguments- it was specifically asserted in the Written Statement that the land was demarcated prior to the institution of the suit- it was not asserted that the defendant had encroached upon the suit land during the pendency of the suit- held, that the application was filed at the belated stage for collection of evidence which was not permissible- hence, application dismissed.
Title: Manmohan Kansal & ors. Vs. Hem Raj & ors. Page-480

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Applicant filed an application seeking mandatory injunction directing the respondents to remove the lock put on the gate- record showed that the applicant had constructed a house and a path adjoining the Kuhal to his house- respondent had put a gate on the path- applicant produced a certificate from Gram Panchayat showing that he had started construction work about 11 years ago and had carried material from the path through vehicle – this was the only path available to the applicant to go to his house – a compromise in another suit also showed that there was a path which was four meters wide and it was being used for going to the house of the applicant- held, that in these circumstances, the mandatory injunction was rightly granted.
Title: Ramesh Chand and others Vs. Trilok Chand Page-553

Code of Civil Procedure, 1908- Order 41- Appellate Court framed additional issues and remanded the case for trial - held, that Appellate Court should not have remanded whole matter for consideration on all issues but should have obtained the findings on additional issues so framed by it.
Title: Ramesh Chand Vs. Kamli Ram and others Page-548

Code of Civil Procedure, 1908- Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff - the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court.
Title: Pritam Chand (died) through LRs. Vs. Bilwamangal Page-528

Code of Civil Procedure, 1908- Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff and the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court.
Title: Madho (died) through LRs. Vs. Bilwamangal Page-515

Code of Civil Procedure, 1908- Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff and the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court.
Title: Hans Raj (died) through LRs. Vs. Bilwamangal and others
Page-508

Code of Civil Procedure, 1908- Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff and the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court.

Title: Partap Chand Vs. Bilwamangal and others Page- 521

Code of Civil Procedure, 1908- Order 41 Rule 27- There must be satisfactory reasons for non-production of the evidence in trial court- any party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court.

Title: Manohar Lal Vs. Joginder Singh and another Page-1100

Code of Civil Procedure, 1908- Order 43 Rule 1- An appeal against the order of wholesale remand would lie under Order 41 Rule 1(u) of CPC.

Title: Ramesh Chand Vs. Kamli Ram and others Page-548

Code of Civil Procedure, 1908- Order 43 Rule 1- Trial Court held that it had no jurisdiction to hear and entertain the matter and ordered the return of plaint for presentation before an appropriate Court- appeal was preferred under Order 43 Rule 1(a) of CPC which was treated as a Civil Appeal- held, that it was not permissible for the Court to treat an appeal under Order 43 Rule 1 (a) as a Civil Appeal - only an appeal under Order 43 Rule 1 (a) lies against the order returning the plaint - matter remanded with the direction to decide the same as appeal under Order 43 Rule 1(a).

Title: Sadhu Singh & Others Vs. Mohinder Singh & Others Page-219

Code of Civil Procedure, 1908- Order 43 Rule 1(i)- Appeal under Order 22 Rule 10 read with Order 1 Rule 10 and Section 151 of CPC was filed before the Learned District Judge, which was disposed of by him in the capacity of Sessions Judge- held, that Sessions Judge cannot pass any order in civil proceedings- order should have been passed in the capacity of a District Judge- Order set aside and the case remanded to District Judge with the direction to decide the matter afresh.

Title: Sanjay Prashar & others Vs. Subhash Chander & others. Page- 347

Code of Civil Procedure, 1908- Order 47 Rule 1- Petitioners claimed that they are entitled for appointment as Beldar on regular basis as per Recruitment and Promotion Rules- held, that Court had specifically held that prayer of the petitioners that they be appointed as DDT Beldars or Class IV employee was declined- Review petition is not maintainable in relation to an order wherein, relief sought has already been negated - Review petition dismissed.

Title: Jeet Ram son of Shri Mani Ram & another Vs. State of H.P. and others Page-250

Code of Civil Procedure, 1908- Order 47 Rule 1- Petitioners claimed that they are entitled for appointment as Beldar on regular basis as per Recruitment and Promotion Rules- held, that Court had specifically held that prayer of the petitioners that they be appointed as DDT Beldars or Class IV employee was

declined- Review petition is not maintainable in relation to an order wherein, relief sought has already been negated - Review petition dismissed.
Title: Jai Singh son of Shri Daya Ram Vs. State of H.P. and others
Page-249

Code of Criminal Procedure, 1973- Section 154- Investigating Officer sought information from the medical officer, whether the injured was in a position to make statement or not- Medical Officer certified that the injured was not fit to make the statement- Investigating Officer recorded the statement of PW-1 which was treated as FIR – held, that in these circumstances, there was no delay in recording the FIR.
Title: Nikhil Soni Vs. State of H.P. Page-974

Code of Criminal Procedure, 1973- Section 154- Petitioner had applied for the copy of FIR but the copy was not supplied to him- held that, FIR is a public document and the accused is entitled to a copy of the same- he can file an application himself or through his representatives for getting the certified copy on which copy shall be supplied to him within 24 hours - accused can also get copy of FIR from a Magistrate within two working days- police directed to upload the FIR on the website except where a decision not to upload is taken by Deputy Superintendent of Police by a speaking order - a person can file an appeal before Superintendent of Police which shall be decided within three working days by a Committee of three higher Officer.
Title: Rama Nand Rathore Vs. State of H.P. & Ors. Page-1171

Code of Criminal Procedure, 1973- Section 161- Extra judicial confession- As per prosecution case, accused stated before PW-3 and PW-6 that "*Aaj mene ise dil se mara hai*"- they had not disclosed this fact to the police - held, that in these circumstances, extra judicial confession could not be relied upon.
Title: Bhim Singh Vs. State of H.P. Page-468

Code of Criminal Procedure, 1973- Section 245- Complaint was filed by the complainant for the commission of offence punishable under Sections 379, 467, 471 read with Section 34 IPC and cognizance was taken- complainant did not step into witness-box while leading pre-charge evidence- the Court drew an adverse inference and discharged the accused- held, that petitioner was the best witness to depose about the entire case but he had not stepped into witness box- evidence led by the complainant at the time of taking cognizance cannot be used for framing of charge- therefore, discharge of the accused was justified.
Title: Harcharan Singh alias Charan Singh Vs. Krishan Chand and another
Page-264

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for commission of offences punishable under Sections 420 and 120-B 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 accused are regarding the embezzlement of Rs. 1 lac- hence, in these circumstances, custodial interrogation of the accused is necessary- bail rejected.
Title: Kunal Jaggi S/o Sh Ajay Jaggi Vs. State of Himachal Pradesh
Page-1239

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the applicant for the commission of offences punishable under Section 307 of IPC and Section 25 of Arms Act- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- the allegations against the applicant are grave and heinous in nature- it is alleged that applicant attempted to murder the injured- the injured is under medical treatment- investigation is at initial stage- custodial interrogation of the applicant is necessary- hence, bail application rejected.
Title: Rafiq Hussain son of Babu Khan Vs. State of H.P. Page-913

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the applicant for the commission of offences punishable under Section 307 of IPC and Section 25 of Arms Act- held, that while granting bail Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- the allegations against the applicant are grave and heinous in nature- it is alleged that applicant attempted to murder the injured- the injured is under medical treatment- investigation is at initial stage- custodial interrogation of the applicant is necessary- hence, bail application rejected.
Title: Safi Mohammed son of Babu Khan Vs. State of H.P. Page-921

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offence punishable under Section 306 read with Section 34 IPC - prima facie, the name of the applicant was mentioned in the suicide note of the deceased- custodial interrogation of the applicant is necessary keeping in view the gravity- grant of bail would affect the investigation adversely, therefore, application rejected.
Title: Tilak Raj Sharma, son of late Sh. Harish Chand Vs. State of H.P.
Page-565

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offence punishable under Section 306 read with Section 34 IPC - prima facie, the name of the applicant was mentioned in the suicide note of the deceased- custodial interrogation of the applicant is necessary keeping in view the gravity- grant of bail would affect the investigation adversely, therefore, application rejected.
Title: Dilbag Singh son of late Shri Bhoda Ram Vs. State Page-539

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 354A, 306, 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 during 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 heinous and grave in nature- applicant had abetted the deceased to commit suicide –

investigation is at initial stage, and allowing application will affect the investigation adversely- bail application dismissed.
Title: Ram Lal son of Sh Buaditta Vs. State of Himachal Pradesh
Page-1316

Code of Criminal Procedure, 1973- Section 438- An FIR for commission of offences punishable under Sections 420 and 120-B read with Section 34 IPC was registered against the petitioner- dispute was settled between the parties after the registration of the FIR- held, that while granting the bail, the Court has to keep in view nature and seriousness of offence, character of the evidence, circumstances which are peculiar to the accused, possibility of the presence of the accused at the trial or investigation, reasonable apprehension of witnesses being tampered with and the larger interests of the public or the State- Bail is rule and jail is the exception- bail could not be denied on the ground that cheque book, pass book and ATM Card are to be recovered from the applicant.

Title: Sanjay Sharma son of Om Parkash Vs. State of Himachal Pradesh Cr.MP(M) No.671 of 2014 Page-563

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 467, 468, 471 and 120B of IPC- held that Court has to see nature and seriousness of offence, the character of the evidence, circumstances which are peculiar to the accused, possibility of the presence of the accused at the trial or investigation, reasonable apprehension of witnesses being tampered with and the larger interests of the public or the State- allegations against the petitioner were regarding the embezzlement of Rs. 19,70,000/-- investigation was undergoing and specimen signatures were to be taken- since the investigation was not complete, therefore, bail rejected.
Title: Jai Parkash son of Sh. Krishan Chand Vs. State of Himachal Pradesh.
Page-139

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offence punishable under Section 15 of N.D.P.S. Act- held, that investigation is complete- challan has already been filed in the Court, therefore, no useful purpose would be served by detaining the applicant in prison - bail granted.
Title: Hari Om son of Shri Bhagat Ram Vs. State of H.P. Page-357

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 302, 341 and 120 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 – Applicant is facing grave criminal charges and releasing him on bail will adversely affecting the investigation- hence, bail application dismissed.
Title: Kamal Singh son of Shri Rattan Singh vs. State of H.P. Page-899

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Section 392 read with Section 34 of IPC and Section 25 of Arms Act- as per prosecution case,

petitioner is hardened criminal and many FIRs have been registered against him- held, that while granting the bail nature and seriousness of offence, the character of the evidence, circumstances which are peculiar to the accused, Possibility of the presence of the accused at the trial or investigation, reasonable apprehension of witnesses being tampered with and the larger interests of the public are to be seen- object of bail is to secure the appearance of the accused person at the trial- grant of bail is the rule and committal to jail is exception- challan has already been filed in the Court and, therefore, it would be futile to keep the applicant in jail-Mere pendency of criminal cases is no ground to decline the bail.

Title: Kulwinder Kumar alias Billa son of Shri Paramjit Pal Vs. State of H.P.
Page-365

Code of Criminal Procedure, 1973 - Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 147, 148, 149, 323, 353, 332, 506, 427 and 307 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- object of bail is to secure the presence of the accused during the trial- in the present case, investigation is complete and challan has already been filed in the Court- other accused have already been released on bail- mere pendency of criminal cases against the petitioner is not sufficient to decline the bail to the petitioner-considering that petitioner had joined the investigation, petitioner is ordered to be released on bail.

Title: Dinesh Kumar S/o Sh. Ratti Ram Sharma Vs. State of H.P.
Page-1217

Code of Criminal Procedure, 1973- Section 439 - An FIR was registered against the accused for the commission of offences punishable under Sections 279, 337, 338, 304-A, 489-B and 489-C read with Section 34 of IPC- applicant is facing trial before the Court- case is listed for recording the statement of the accused under Section 313 Cr.P.C. - 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- the applicant is facing trial for counterfeiting currency notes, which is an offence against the society and Nation- the fact that trial is at last stage is not sufficient to release the applicant on bail, however the court can be directed to conduct the trial expeditiously- hence, bail application rejected and trial Court directed to dispose of the case within the period of one month.

Title: Jaskaran Singh son of Shri Swaran Singh Vs. State of H.P.
Page- 910

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 307, 341, 323, 504 and 506 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–in the present case, investigation is complete- challan has

been filed in the Court- therefore, it would not to be appropriate to detain the applicant in custody- hence, the applicant is ordered to be released on bail.
Title: Mohit Kumar son of Shri Dalip Singh Vs. State of H.P. Page-907

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 307, 341, 323, 504 and 506 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 – State contended that FIR no. 57 of 2004 and FIR No. 60 of 2004 were registered against the applicant and he should not be released on bail- record showed that applicant was acquitted in both the criminal cases- considering the nature of offence, application is allowed and the applicant is ordered to be released on bail.
Title: Firoj Bhutto @ Happy son of Shri Z.A. Bhutto Vs. State of H.P.
Page- 896

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 307, 341, 323, 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 – State contended that FIR no. 47 of 2014 and FIR No. 87 of 2014 had been registered against the applicant and applicant should not be released on bail- record showed that applicant had been acquitted in FIR no. 47 of 2014 and the criminal case was pending against the applicant regarding the FIR no. 87 of 2014- further held that mere pendency of the criminal Case is not sufficient to decline the bail to the accused - considering that applicant had joined the investigation, applicant is ordered to be released on bail.
Title: Farooq Bhutto son of Shri Z.A. Bhutto Vs. State of H.P. Page-893

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 316, 498-A, 325 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- In the present case, investigation has been completed- challan has been filed- therefore, it would not be proper to keep applicant in custody- bail granted.
Title: Susheel Kumar son of Shri Chet Ram Vs. State of H.P. Page-924

Code of Criminal Procedure, 1973 - Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 363 and 366 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 during the trial and investigation, reasonable

apprehension of the witnesses being tampered with and larger interest of the public and State- In the present case, investigation was complete- challan has been filed- therefore, it would not be proper to keep applicant in custody- bail granted.
Title: Gulchen Singh son of Suram Singh Vs. State of H.P. Page-1220

Code of Criminal Procedure, 1973- Section 439 - An FIR was registered for the commission of offences punishable under Sections 363, 342, 376D, 323, 201 and 511 IPC and Sections 6 and 17 of the Protection of Children from Sexual Offences Act 2012- the allegations against the applicants are that they had committed gang rape upon minor prosecutrix- such offences are increasing in the society and should be viewed strictly- mere fact that statements under Section 164 Cr.P.C are contradictory is not sufficient to discard the prosecution case at the stage of bail- considering the gravity of the offence and the impact on society, bail application rejected.
Title: Sachin son of Partap Singh Vs. State of H.P. Page- 916

Code of Criminal Procedure, 1973- Section 482 - An FIR was registered for the commission of offences punishable under Sections 363, 366-A and 120-B of IPC at the instance of Respondent No. 4 who was proceeded ex-parte- petitioner No. 1/accused and petitioner No. 2/victim solemnized marriage subsequent to the registration of FIR – a child was born out of wedlock- parties approached the High court for quashing of the FIR- the fact that respondent No. 4 allowed himself to be proceeded ex-parte shows that he has no objection for quashing of the FIR- held, that since the parties had entered in to a compromise – therefore, proceeding with the case would be an exercise in futility – further, in order to preserve the institution of marriage and for maintaining peace between the parties who constitute one family, FIR ordered to be quashed.
Title: Samuel Masih & another Vs. State of Himachal Pradesh & others
Page-693

Code of Criminal Procedure, 1973- Section 482 - An FIR was registered for the commission of offences punishable under Sections 420 and 120B, IPC and 13(2) of the Prevention of Corruption Act – it was alleged that petitioner is not an agriculturist and had obtained an agriculturist certificate fraudulently- petitioner claimed to be a legatee under the Will of one Shri Surjeet Singh- however, mutation was attested in favour of legal heirs- petitioner filed a civil suit which was decreed- decree is stated to be collusive and not conferring any right upon the petitioner- held, that FIR can only be quashed if it does not disclose any offence or is perverse, fictitious or oppressive- on the death of the testator estate vested in the petitioner- H.P. Land Tenancy and Reforms (Amendment) Act, 1995 will not be retrospective and will not affect the completed transactions- decree merely confirmed the recital of the Will and did not confer any fresh title in favour of the petitioner- consequently, it cannot be said that agriculturist certificate issued in favour of the petitioner was fraudulent- hence, petition allowed and FIR quashed.
Title: Seema Luthra Vs. State of H.P. Page-822

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420 and 120-B IPC read with Section 34 IPC- applicant claimed that matter was settled between the parties- complainant had received amount of Rs. 1,35,000/- on 15.5.2014 and had compromised the matter - accordingly, a prayer was made for quashing the FIR- held, that the offence punishable under Section 120-B IPC

is non-compoundable offence- power to quash the FIR should be exercised sparingly and not to stifle the prosecution- offence of criminal conspiracy is against the society and to maintain public peace and tranquility, offence punishable under Section 120-B IPC cannot be allowed to be compounded even if the parties had compromised the same- petition rejected.
Title: Sanjay Sharma son of Om Parkash and others Vs. State of Himachal Pradesh and others (Cr.MMO No. 119 of 2014) Page-561

Code of Criminal Procedure, 1973- Section 482- Complaint was filed against the petitioners for the commission of offences punishable under Sections 451, 323, 506 and 141 read with Section 149 of IPC- Magistrate found sufficient grounds to summon the petitioners for the commission of offences punishable under Sections 451, 323, 506 and 141 read with Section 149 of IPC- it was contended that the order passed by the magistrate was bad as no reasons were given for summoning the accused- held, that there is no legal requirement to pass a detailed and speaking order while issuing the process- however, when the Investigating Agency had submitted a closure report, it was appropriate though not imperative for the Magistrate to record reasons but the order is not vitiated merely because of absence of reasons- petition dismissed.
Title: Kali Dass & ors. Vs. Shobha Ram & anr. Page-1225

Code of Criminal Procedure, 1973- Section 482- Petitioner claimed that she and her family members were meted out brutal treatment by the police and they were kept in illegal confinement for more than 36 hours in police Station- police had lodged an FIR against the petitioners to save their skin - FIR does not disclose the commission of any cognizable offence- police had already submitted charge-sheet under Section 173 of Cr.P.C to the Magistrate after the completion of the investigation- held, that when the Magistrate is seized of the matter, High Court should not quash the FIR in exercise of its inherent powers- further, investigation cannot be transferred to CBI without any material especially when the charge-sheet had already been filed.
Title: Sandhya Bansal Vs. State of H.P. & ors. Page-353

Code of Criminal Procedure, 1973- Section 482- Petitioners sought quashing of FIR registered against them for the commission of offences punishable under Sections 498-A and 406 read with Section 34 of IPC- held, that FIR can only be quashed if the allegations made in the same do not constitute an offence – where the allegations satisfy the ingredients of an offence, such power cannot be exercised- it was asserted in the FIR that the accused had harassed the deceased physically and mentally compelling her to commit suicide- she was turned out of home and she started living with her husband who threatened her- she went to her maternal home and she asked her husband to take her to his home but he had refused to do so- she was residing separately from 2009 to 2011- complaint was made on 10.4.2014- there was no explanation for delay - magnitude and enormity of the physical and mental cruelty were not specified – therefore, it could not be said that the accused intended to cause injury and the danger to her life, limb or health- hence, ingredients of Section 498-A were not satisfied- she stated that she had entrusted her jewellery to the petitioner and when she demanded it back, jewellery was not returned-however, the day on which jewellery was entrusted was not mentioned- allegations were vague and ambiguous- hence, FIR ordered to be quashed.
Title: Naveen Sood & Others Vs. State of Himachal Pradesh & another
Page-688

Code of Criminal Procedure, 1973- Section 482- There was a family dispute between two brothers- complaint was made before the Gram Panchayat, which was settled- in view of compromise, decision passed by Gram Panchayat as affirmed by Judicial Magistrate is set aside.
Title: Surinder Kumar Vs. Parkash Chand Page-254

Constitution of India, 1950- Article 14- Petitioner pleaded that he was asked to perform duty of Assistant Collector (Printing) w.e.f. 5.10.1992 till 21.2.1994 and no benefit of pay was granted to him- petitioner made a representation but no decision was conveyed to him- he applied under RTI and was informed that his case was rejected on the ground that no ex-post-facto sanction could be granted in case of promotion- however, such ex-post-facto sanction was granted to one 'S'- petitioner claimed the benefit of higher scale- respondent stated that 'S' had performed the duties of Assistant Collector till his retirement and no order was passed directing the petitioner to hold the charge of Assistant Controller- it was proved on record that the petitioner had performed the duties of Assistant Collector in addition to his work- held, that the petitioner is entitled to the salary of Assistant Controller on the principle of equal pay for equal work.
Title: Moti Ram Kainthla son of late Shri Rulda Ram Vs. State of H.P. and others Page-1241

Constitution of India, 1950- Article 226- A Writ Petition is not maintainable against a co-operative society.
Title: Satish Dadwal Vs. State of H.P. and others Page-954

Constitution of India, 1950- Article 226- An advertisement was issued for 25 posts of unskilled workers on contract basis- petitioner participated in the selection process- however, selection process was cancelled- held, that selection process once commenced cannot be stopped - no cogent reasons were given for cancelling the selection process- respondent directed to continue and conclude the selection process.
Title: Rajinder Singh and others Vs. State of H.P. and others Page-934

Constitution of India, 1950- Article 226- An FIR was registered against the petitioner for the commission of offences punishable under Sections 7 & 13 (2) of the Prevention of Corruption Act, 1988- Department initiated departmental proceedings against the petitioner- the petitioner approached the Administrative Tribunal which granted the interim stay- subsequently, petitioner was convicted by Special Judge, Kangra at Dharamshala- petitioner was removed from the service after his conviction and departmental enquiry was dropped due to severance of the relations of master and servant- conviction was set aside by Hon'ble Supreme Court of India- petitioner was reinstated and the disciplinary authority was directed to proceed further with departmental inquiry- petitioner contended that departmental inquiry had been closed and, therefore, it was not permissible to continue with the inquiry- held, that department had taken a decision on technical ground after the removal of the petitioner that Departmental inquiry will not continue since the master-servant relationship was severed after the removal of the petitioner- once petitioner has been reinstated, the employer has a right to continue the departmental proceedings and it cannot be said that mere acquittal in a criminal case is a ground to drop the departmental proceedings- hence, petition dismissed.
Title: Dr. Rakesh Kapoor Vs. State of H.P. & others. Page-797

Constitution of India, 1950 - Article 226- Appellants were directed by writ court to remove the anomaly in the pay scale by giving benefits of stepping up of the pay along with interest @ 7 % per annum- held, that the order passed by the Writ Court does not suffer from any infirmity- appeal dismissed.
Title: H.P. State Electricity Board Ltd. Vs. Sh. Jeet Ram Panwar and others Page-165

Constitution of India, 1950- Article 226- Brother of the petitioner was missing since 30.1.2013- FIR was registered for the commission of offences punishable under Sections 364 and 365 IPC at Police Station Sarkaghat, Distt. Mandi- I.O recorded the statements of 56 witnesses but could not find the brother of the complainant- held, that police had failed to trace out the brother of the petitioner- investigation should be conducted promptly – therefore, in these circumstances, CBI was directed to carry out the investigations within a period of three months and thereafter to put up the challan before the Court in accordance with law.
Title: Pooja Pathania Vs. State of H.P. & ors. Page-776

Constitution of India, 1950- Article 226- Central Civil Services (Leave) Rules 1972 - son of petitioners and husband of respondent No. 5 and father of respondents No. 6 and 7, who was serving as medical officer died in harness- Leave encashment amount was not paid by the State- held, that the Leave encashment amount after the death of employee who died during service is payable by State under Rule 39-C - Father and Mother fall in class (v) and (vi) while Widow falls in class (i) - First category will be preferred over class (v) and (vi)- therefore, the petitioners are not entitled for the payment of Leave encashment amount - leave rules will supersede the general law contained in Hindu Succession Act.
Title: .Sudesh Sood Vs. State of HP and others Page-113

Constitution of India, 1950- Article 226- Daughter of the petitioner was missing - petitioner lodged a missing report in Police Station, Bangana- petitioner suspected that respondent No. 7 had unlawfully detained his daughter with the help of respondents No. 8 to 15- direction was issued to the police to produce the daughter of the petitioner but the police failed to do so- police directed to hand over the complete record to CBI who will complete the investigation within the period of 15 days and will produce the daughter of the petitioner before the Court on 8.1.2015.
Title: Sanjeev Kumar Vs. State of H.P. & Ors. Page-1190

Constitution of India, 1950- Article 226- Predecessor of the petitioners died in harness- Petitioners claimed death-cum-retirement gratuity amount - held, that as per Central Civil Services (Leave) Rules 1972 widows has a preferential right of payment of death-cum-retirement gratuity amount- therefore, the petitioners being father and mother are not entitled to death-cum-retirement gratuity amount.
Title: .Sudesh Sood *Vs.* State of HP and others Page-113

Constitution of India, 1950- Article 226- Father of the petitioner died in harness on 25.4.2006- he filed an application for considering his case for appointment on compassionate basis – same was rejected on the ground that case of the petitioner does not meet the financial/income criteria fixed by the Government – held, that while computing income of the petitioner

pensionery/retiral benefits should not be taken into consideration and State had wrongly included pensionery/retiral benefits while computing annual income- petition allowed and the respondent directed to consider the case of the applicant by ignoring the family pension/retiral benefits.
Title: Prahalad Mishra Vs. State of Himachal Pradesh and another
Page-746

Constitution of India, 1950- Article 226- Gratuity of the petitioner was withheld on the ground that decision from the Court was awaited but record shows that case was disposed of- held, that gratuity is a property and not a bounty - State being a welfare state could not be oblivious to the decision of the case- State directed to release the amount with interest @ 8% per annum.
Title: Neeraja Marwaha Vs. State of H.P and others. Page-452

Constitution of India, 1950- Article 226- Husband of the petitioner was employed as Mali in a Private College- College informed the petitioner that she is entitled to leave encashment amount of Rs. 19,811/- and sum of Rs. 6,12,909/- towards gratuity- however, no amount was paid – State contended that husband of the petitioner was not Government servant- his case was not covered under the CCS (Pension) Rules, 1972- State only released financial assistance towards the part of salary component- held, that respondent No. 2 is establishment as per Section 1(3)(b) of the Payment of Gratuity Act, 1972- Government should make efforts to see that teachers and non-teaching staff of Government Aided Colleges/Schools are treated at par with teachers and non-teaching staff of Government Colleges/Schools- College directed to release the gratuity and state directed to pay the amount towards the leave encashment.
Title: Jamila Khan Vs. State of H.P. & others Page-1083

Constitution of India, 1950, Article 226- H.P. Co-operative Act- Section 94- A revision is not maintainable before the State Government against an administrative order passed by registrar.
Title: The Baghal Land Loosers Transport Co-operative Societies Ltd. and others Vs. State of H.P. and others Page-576

Constitution of India, 1950- Article 226- Income Tax Department had issued show cause notice to the petitioners- petitioners filed reply to the notice - an order was passed by the Department transferring the case to DCIT, Central Circle, Chandigarh- record showed that order was passed on the facts, which were not disclosed in the show cause notice- department was in possession of facts mentioned in the order of transfer- held, that petitioners were entitled to know the facts which were to be used against them- non disclosure of the facts amounts to violation of principle of natural justice.
Title: Anand Chauhan Vs. The Commissioner of Income Tax, Himachal Pradesh
Page-1119

Constitution of India, 1950- Article 226- Land was allotted to father of the writ petitioner- mutations were attested, which were questioned by the appellant by filing appeal- appeal was dismissed- appellant filed civil suit, which was decreed- appeal preferred by the father of the petitioner was dismissed by the Appellate Court - RSA was filed which was allowed and the decrees passed by the Civil Court and Appellate Court were set aside – SLP was filed which was dismissed by Supreme Court of India- Revision Petition was filed before the Financial Commissioner who allowed the same - writ petition was filed, which

was allowed on the ground that Financial Commissioner had set aside the order passed by the revenue authority and civil Court- held, that the appellant had lost the litigation before the revenue Court and the Civil Court- he had filed a revision petition which was barred by limitation and was meant to abuse the process of law- no reason was given for condonation of delay- revision power must be exercised within a reasonable time.
Title: Devinder Singh Jaswal vs. Nagender Singh & others Page-81

Constitution of India, 1950- Article 226- License qua unit No. 23 was issued by respondent in favour of petitioner – Petitioner deposited an amount of Rs. 7,50,879/- for renewal of the license on the expiry of original license-however, license was not renewed- a conscious decision was taken by the respondent to merge this unit with other units- unit No. 23 lost its identity- petitioner was advised to obtain license for Unit No. 25- petitioner insisted upon renewal of license for unit No. 23- held, that mere deposit of license fees, does not confer any right upon the petitioner to obtain the renewal of license of unit No. 23 when it had ceased to exist- Financial Commissioner had power to merge liquor units - petition dismissed.
Title: Hem Raj Vs. State of H.P. & Ors. Page-1141

Constitution of India, 1950- Article 226 - Loan/financial assistance was sanctioned in favour of the petitioner for the construction of agricultural go-down- 33.33% subsidy was to be given by the respondent under the scheme of Government of India- petitioner stated that he had spent Rs. 5 lacs for the construction of go-down but the respondent recalled the amount and the financial assistance after joint inspection - respondent contended that petitioner had not utilized the sanctioned amount - held, that the joint inspection report showed that the petitioner had constructed a house instead of a go-down- therefore, he was not entitled for the benefit of subsidy-petition dismissed.
Title: Dalip Singh Thakur Vs. The National Bank for Agriculture & Rural Development & Ors. Page-221

Constitution of India, 1950- Article 226- Petitioner and private respondent appeared for the post of water carrier- petitioner was denied the appointment as water carrier and the private respondent was appointed as water carrier- petitioner filed an original application before the Administrative Tribunal which was allowed and the petitioner was directed to be appointed - he was not given seniority and other service benefits- held, that petitioner was denied appointment illegally - had the private respondent not been appointed- respondent would have been in the employment right from that date when he was denied the appointment illegally- he is deemed to be appointed from the same day - hence, petitioner held entitled to seniority notionally from the date of appointment of private respondent.
Title: Balak Ram Vs. State of H.P. and Ors. Page-343

Constitution of India, 1950- Article 226- Petitioner and respondent No. 3 appeared in an interview for the post of trained Dai in which respondent No. 3 was selected - petitioner filed an application before Administrative Tribunal, which was transferred to the High Court- petitioner was permitted to make a representation which she did –however, representation was rejected by Medical Officer- respondent No. 3 had undergone one month's training and not six months' training - Principal Secretary (Health) passed an order holding that there was no requirement of training as per Recruitment and Promotion Rules-

held, that trained Dai would mean a Dai who had undergone training and got her name registered under Section 18(2) of H.P. Nurses Registration Act- since, respondent No. 3 had not undergone 6 months' training, therefore, appointment of respondent No. 3 is quashed- respondent No. 2 directed to consider the case of the petitioner and offer her appointment in case she is found eligible.
Title: Naresh Kumari Vs. State of H.P. & others Page-178

Constitution of India, 1950- Article 226- Petitioner appeared for the post of Junior Engineer (Electrical) in the sports quota- he was held ineligible on the ground that he had not participated three times in national championship and one time in senior national championship- held, that the mere fact that petitioner had appeared in screening test and had qualified the same would not entitle him for the appointment – he was required to fulfill the criteria and mere possession of merit certificate is not sufficient- petition dismissed.
Title: Arvind Bhardwaj Vs. Himachal Pradesh Subordinate Services Selection Board and others Page-135

Constitution of India, 1950- Article 226- Petitioner appeared for the post of Physiotherapist – she was not offered appointment on the ground that the veracity of her certificates was to be verified- petitioner had obtained the diploma in physiotherapy from Allahabad Agricultural Institute which was recognized till 2005- petitioner appeared in examination during the academic session 2005-2006 and 2006-2007- no document was placed on record to show that recognition was extended to sessions 2005-2006 and 2006-2007- course in Physiotherapy is technical one which cannot be undergone in a distant mode- held, that in these circumstances, petition was rightly dismissed.
Title: Jyoti Gautam Vs. State of Himachal Pradesh and others Page-1005

Constitution of India, 1950- Article 226- Petitioner appeared in the examination for the post of Assistant District Attorney, Class-I (Gazetted)- he contended that the answer of question No. 5(b) was not evaluated- examiner had given three marks to the petitioner for question 5 (a) and 3 marks to the petitioner for question 5 (c)- no marks were given for question 5 (b)- examiner explained that answer given by the candidate was too brief and the candidate had failed to mention basic sections in question No. 5 (b), therefore, he did not deserve any marks- reply of the respondent was not satisfactory, therefore, respondent directed to get the answer-sheet evaluated from an independent examiner.
Title: Ashok Kumar Vs. State of H.P. & ors. Page-238

Constitution of India, 1950- Article 226- Petitioner applied for the post of Constable under OBC category- respondent No. 4 and 5 applied for the post under the category of OBC reserved for Antyodya and IRDP categories- respondent No. 4 secured higher marks than the petitioner and he was considered against the IRDP (general) OBC category – respondent No. 4 was appointed against the OBC (IRDP) category- petitioner contended that respondent No. 5 could not have been considered against the post of OBC (IRDP) category because this post was already filled up by respondent No. 4- State contended that both respondents No. 4 and 5 belong to the OBC (IRDP) category and because the respondent No. 4 had secured higher marks, his case was considered against the OBC un-reserved post as per rules and instructions of the government- petitioner had secured less marks than respondent No. 4- therefore, he could not be selected against the OBC (unreserved) category- respondent No. 5 had secured less marks than the petitioner but he was

selected against the OBC (IRDP) category and not against OBC (unreserved) category – held, that reservation in favour of OBC is under Article 16 (4) of the Constitution and would be termed as vertical reservation, reservation thereafter in favour of other categories like Ex-serviceman, IRDP and Home Guard within the OBC category would be considered as horizontal reservation- horizontal reservations cut across the vertical reservations - therefore, even after providing for the horizontal reservations, the percentage of reservations in favour of OBC would still remain the same - proper course for the respondents was to fill up all the vacancies on the basis of merit and thereafter to fill up special reservations like Ex-serviceman, IRDP and Home Guard - if the quota fixed for horizontal reservation was already satisfied, no question would arise further but in case there was a shortfall, the number of special reservation candidates were required to be taken and adjusted/ accommodated against their respective categories- name of the respondent No. 4 could not have been considered against the OBC un-reserved category- the seat vacated by him could not have been offered to respondent No. 5- respondent No. 5 could not have been considered against the post of OBC (IRDP) - the seat vacated by respondent No. 4 was to be filled up from OBC (unreserved) category – since, petitioner was next in merit, therefore, he was required to be appointed in place of respondent No. 5.

Title: Vikas Kumar vs. State of H.P. & ors. Page-958

Constitution of India, 1950- Article 226- Petitioner applied for the post of Demonstrator and was appointed as such on tenure post for a period of three years –tenure period expired on 6.9.2014 – petitioner sought extension and the Head of Department recommended her case for extension for a period of six months – however, petitioner was relieved from the post vide order dated 6.9.2014- State contended that post of the Demonstrator was tenure post for a period of three years- policy has been amended and selection has to be made on the basis of walk in interview- Dr. 'J' had been appointed as Senior Resident and no post was available- held, that post is a tenure post and petitioner has no right to claim extension in a post, which was filled up as per policy in vogue at the relevant time - new incumbent had also joined- Writ Petition dismissed.

Title: Saruchi Sharma Vs. State of H.P. and others Page-856

Constitution of India, 1950- Article 226- Petitioner, a contractual employee, was granted 12 weeks (84 days) maternity leave, whereas female regular employee are entitled to 135 days of maternity leave - held, that there is no difference between female regular employee and contractual employee- there is no occasion for making discrimination between regular and contractual employee regarding grant of maternity leave - State directed to provide maternity leave at par with the regular employee.

Title: State of H.P. Vs. Sudesh Kumari Page-337

Constitution of India, 1950- Article 226-Petitioner belongs to OBC category- she married in forward/advance caste- her candidature was rejected on the ground that she could not produce latest OBC Certificate- State contended that in view of her marriage in advance caste, she is not entitled to OBC certificate- held, that a person born in OBC caste does not lose her status by marrying in forward caste- issuance of OBC Certificate was wrongly declined by the respondent- petitioner had qualified in the examination- her candidature was rejected merely for non-production of OBC Certificate- hence, respondent directed to appoint the petitioner as clerk from the due date.

Title: Anuradhika Vs. State of H.P. & ors. Page-234

Constitution of India, 1950- Article 226- Petitioner claimed that he was appointed as temporary employee- he is entitled for the pay and allowances at par with the temporary employees and his entire services should be counted for the purpose of pension, gratuity and other service benefits- petitioner was regularized on 14.2.1992 and he filed writ petition on 2.4.2913, after the gap of 21 years- no explanation was given for the delay- hence, petition is liable to be dismissed on this short ground alone.

Title: Krishan Chand son of late Sh. Ram Rakhu Vs. HPSEB Limited and another Page-1237

Constitution of India, 1950- Article 226- Petitioner claimed that she belongs to a BPL family – she is landless and has a preferential right to be appointed- interview committee had wrongly awarded 6 marks to respondent No. 4 and one mark to her (petitioner)- it was further claimed that respondent No. 4 is a member of joint family and is getting pension- family income of the respondent No. 4 is more than Rs. 12,000/- per month- respondent No. 4 claimed that she is widow and has five children- she is residing separately from her mother-in-law- held, that no allegations of favoritism or mala-fide were made in the petition- it was for the Selection Committee to award the marks- merely because less marks were awarded to the petitioner cannot lead to an inference that assessment is unfair- further, the petitioner had taken a chance and was not selected, hence, she cannot question the selection – petition dismissed.

Title: Anjna Kumari vs. State of H.P. and others Page-965

Constitution of India, 1950- Article 226- Petitioner claimed work charge status- his application before Administrative Tribunal was ordered to be treated as a representation- representation was rejected by the respondent- Learned Single Judge held that representation was wrongly rejected and directed the respondent to consider the case of the petitioner for conferring work charge status with all consequential benefits- held, that case of the petitioner was to be considered in accordance with judgment of Hon'ble Supreme Court of India in **Mool Raj Upadhyaya vs. State of H.P. and others, 1994 Supp. (2) SCC 316** the direction was rightly passed by Learned Judge- Appeal dismissed.

Title: H.P. State Electricity Board Limited and others Vs. Jagmohan Singh Page-349

Constitution of India, 1950- Article 226- Petitioner had applied for allotment in which he was awarded 10 marks- his grievance was that he was entitled to 25 marks as per criterion fixed by the respondent since he is an owner of land and has absolute title to it- held, that the revenue record produced by the petitioner shows that he is co-sharer and his mother and brother are also recorded as owners- brother does not fall within the definition of the family prescribed by the respondent, therefore, respondent had rightly awarded 10 marks to the petitioner.

Title: Sunil Kumar vs. Indian Oil Corporation Ltd. (IOC) & others Page-119

Constitution of India, 1950- Article 226- Petitioner had applied for the post of Lower Division Clerk as general category candidate - she applied for change of category from general to schedule caste on the ground that she could not submit her certificate earlier- application was allowed and it was decided that petitioner is entitled for the benefits of reservation from the date of joining but she shall

not consume the reserved point for initial appointment in the recruitment roster - held, that petitioner had not taken any benefit at the time of recruitment by not declaring herself to be a member of Scheduled Caste- she had joined as general category without availing the benefit of the relaxed standard - since, she is scheduled caste by birth, therefore, she is entitled to all the benefits of scheduled caste.

Title: Inder Jyoti Chauhan Vs. Union of India and Ors. Page-305

Constitution of India, 1950- Article 226- Petitioner had filed a writ petition against the Co-operative society registered under H.P. Cooperative Societies Act, 1968- held, that writ petition against the co-operative society is not maintainable- the Court cannot even relegate the petitioner to pursue the remedy under section 72 of H.P. Cooperative Societies Act.

Title: Ram Krishan Khagta Vs. The Kangra Central Cooperative Bank Ltd. & ors. Page-3

Constitution of India, 1950- Article 226- Petitioner joined as Assistant Engineer on the recommendations made by the H.P. Public Service Commission - Chief Engineer, Shah Nehar Project, Fatehpur sent a letter to the Superintending Engineer stating that there was no justification for providing any SE (Design) keeping in view the work load - IPH sent a letter to the Government of Himachal Pradesh stating that there was one post of SE Shahnehar Project and the work relating to Design in the Office of Chief Engineer, Shahnehar Project shall be attended to by the incumbent of the post of SE Shahnehar Project – petitioner was promoted to the post of SE (Civil) – Government amended recruitment and promotion rules for the post of Chief Engineer Class-I from 30.8.2008 stating that post of Chief Engineer would be filled up by promotion from amongst the SE (Civil) with minimum 25 years service including three years regular service or regular service combined with continuous ad-hoc service as Superintending Engineer (Civil), out of which 3 years essential service must be as Superintending Engineer (Design) - Petitioner was found ineligible as he had not served for 3 years as Executive/Superintending Engineer- petitioner contended that he was looking after the work of design in Shah Nehar Project, Fatehpur- held, that as per the letter, Superintending Engineer was to look after the work of SE (Design) in addition to his duty- petitioner had approved the design in his capacity as Superintending Engineer- therefore, service rendered by him should have been counted while considering his case for promotion- Writ Petition allowed and respondent No. 1 directed to convene a review DPC to consider the case of the petitioner.

Title: Ravender Kumar Jarhyan Vs. State of H.P. & anr. Page-853

Constitution of India, 1950- Article 226- Petitioner joined as a Manager with respondent No. 3, a Society- her pay was ordered to be reduced in view of the orders passed by the Deputy Registrar, Cooperative Societies- she filed a writ petition in which a statement was made that reduction will not be applicable to the petitioner- when new Director joined, he passed various resolutions reducing the salary of the petitioner-record showed that resolutions enhancing the salary were passed without seeking approval of the Registrar- it was stated in the writ petition that petitioner need not refund the enhanced salary received by her-no statement was made regarding the future salary- income of the society was Rs. 28,000/- and the petitioner claimed salary of Rs. 40,000/- held, that no fault can be found with the resolutions reducing the salary of the petitioner.

Title: Satish Dadwal Vs. State of H.P. and others Page-954

Constitution of India, 1950- Article 226- Petitioner sought regularization of her services- respondent contended that the services of the petitioner were not terminated and she had abandoned her job voluntarily- petitioner had not placed on record any termination letter- held that, the version of the respondent that the petitioner had abandoned her services is more probable, therefore, petitioner is not entitled for any relief.

Title: Miss Lata Sharma Vs. The H.P. State Electricity Board and others
Page-166

Constitution of India, 1950- Article 226- Petitioner was appointed as Anganwari Worker- her services were terminated on 14.12.2001- she filed a Writ Petition which was allowed and the order of the termination was quashed – written notices were to be served upon the petitioner in terms of the guidelines- respondent had not served notice, therefore, termination order was rightly quashed - however, the petitioner had not pleaded that she was not gainfully engaged when she was kept out of services, therefore, she is not entitled to back wages- order modified and it is directed that petitioner is not entitled to back-wages but is only entitled for other consequential benefits.

Title: Child Development Project Officer & others Vs. Tripta Devi
Page-1093

Constitution of India, 1950- Article 226- Petitioner was appointed as a Beldar- he was retrenched in the year 1998- he filed an application before Administrative Tribunal, which was allowed- petitioner was re-engaged and was conferred the status of work charge employee- he was again retrenched on 13.5.2005- he referred the matter to Industrial Tribunal Shimla, which held that retrenchment was in violation of the Industrial Disputes Act – writ petition filed by the respondent was dismissed and the petitioner was engaged on 12.11.2010 as a T-mate- petitioner claimed that he should have been conferred with work charge status with all the consequential benefits- held, that petitioner was conferred the work charge status w.e.f. 26.12.1993- he was not allowed to join the duty and was wrongly retrenched- retrenchment was set aside- therefore, he is entitled to be conferred the work charge status with all consequential benefits including promotion from the day his juniors were promoted to the higher post.

Title: Dharam Dass vs. HPSEB Ltd. & anr. Page-1

Constitution of India, 1950- Article 226- Petitioner was appointed as a clerk on contract basis- she claimed regularization before Administrative Tribunal- Tribunal directed the board to regularize the services of the petitioner as a clerk from the date of completion of 10 years of continuous services and to grant all the consequential benefits- Board regularized her services but did not take into consideration the services rendered by her on contract basis- held, that as per Central Civil Services (Pension) Rules, 1972, if a person engaged by Government on a contract basis for a specific period is appointed to the same or another post without interruption in duty , he may opt to retain the Government contribution or to refund the monetary benefit- Board should behave as model employer and cannot be permitted to exploit the situation by not regularizing the services rendered on contract basis.

Title: Veena Devi Vs. Himachal Pradesh State Electricity Board Ltd. and another
Page-460

Constitution of India, 1950- Article 226- Petitioner was appointed as a Constable in S.S.B. in the category of combatized cadre on 20.08.1974- he completed 24 years of regular service in the year 1998 - respondent issued an office memorandum introducing Assured Career Progression Scheme- petitioner was promoted as head constable - petitioner made a representation which was rejected on the ground that he was not entitled to grant of 2nd financial up-gradation benefits without fulfilling the normal promotion norm of qualifying mandatory pre-promotional course - held, that petitioner was entitled to the benefit of ACP scheme after the completion of 24 years as per Para-15 of the scheme and it was for the respondent to ensure that petitioner undergoes mandatory pre-promotional course- it was not asserted that petitioner had refused to undergo the course - the action of the respondents of not releasing the monetary benefits to the petitioners as per Assured Career Progression Scheme, 1999 is arbitrary and violative of Articles 14 and 16 of the Constitution of India.

Title: Govind Ram Vs. Union of India Page-447

Constitution of India, 1950- Article 226- Petitioner was appointed as a Medical Officer and he joined his duty on 4.6.1993- subsequently, an advertisement was issued on 31.10.1996 for the post of ex-serviceman scheduled caste- petitioner made a representation for considering him against the said post- his representation was rejected on the ground that rules do not provide for benefit of fixation of pay and seniority when Officer is not recruited against the reserved vacancy of ex-serviceman- held, that instructions of the Government providing that if any ex-serviceman belonging to scheduled caste or scheduled tribe is selected for appointment, his selection can be counted against the overall quota of reservation for scheduled caste or scheduled tribe and that he cannot claim any benefit of being an ex-serviceman shall be applicable when the vacancy is available on the date of recruitment of the candidate but will not apply when no vacancy was available and the petitioner had specifically indicated his preference for being considered against the post of ex-serviceman.

Title: Jai Ram Kaundal Vs. State of H.P. and another Page-450

Constitution of India, 1950- Article 226- Petitioner was appointed as a Gram Panchayat Vikas Adhikari – his name was sponsored by the Department for undergoing five years degree course in B.Sc. Agriculture - he was allowed study leave and he completed B.Sc. Agriculture by securing 70.1% marks- petitioner claimed that he is qualified to be appointed as Agricultural Development Officer by way of promotion under 5% quota- it was proved on record that no post was lying vacant- held that, petitioner cannot claim promotion.

Title: Than Singh son of Sh. Sobha Ram Vs. State of H.P. and others Page-1335

Constitution of India, 1950- Article 226- Petitioner was appointed as a Workman on temporary basis for a period of 6 months- his employment came to an end after expiry of 6 months- petitioner moved an application which was considered and he was directed to undergo training for a period of two years- when he was undergoing training, he was withdrawn on which he filed an application before the Labour Court- order of the Labour Court was questioned before the Writ Court which held that the appellant is not a workman – held, that the appellant was not workman- he had not sought any remedy after his engagement came to an end - he accepted his induction as a trainee- he was not

performing any job but was undergoing training as a trainee- therefore, he was rightly held not to be a workman.
Title: Pardeep Kumar Vs. Cipla Ltd. & others Page-851

Constitution of India, 1950- Article 226- Petitioner was appointed as TGT (Mathematics) for a period of two years- period of probation was extendable by another year at the discretion of the competent authority- period of probation was extended up to 2.4.2007 and thereafter it was extended for one year up to 31.3.2008- a show cause notice was served upon the petitioner- petitioner filed a reply to the notice but her services were terminated vide order dated 4.7.2008- it was contended that petitioner was allowed to continue after probation and, therefore, she is deemed to be confirmed – petitioner further contended that her probation period could be extended by only one year and further extension of probation after one year was not permissible- held, that the services of a person can be confirmed by an order in writing- mere continuation beyond the probation period will not amount to deemed confirmation- petition dismissed.
Title: Suman Sharma Vs. Union of India and others Page-1318

Constitution of India, 1950- Article 226- Petitioner was compulsorily retired – he filed an application before Administrative Tribunal, which was transferred to High Court and was allowed- petitioner was permitted to make a representation against the finding of the Inquiry Officer- petitioner made a representation, which was rejected – petitioner claimed that order passed by the Disciplinary Authority rejecting the representation was incorrect- held, that the petitioner was given an opportunity to appear as defence evidence but he had failed to do so- petitioner had signed the statements of the witnesses which means that he was present during the time of recording the statements - he had failed to join the duty despite issuance of notice- employer had legal right to transfer the petitioner- as the petitioner had not joined the place of posting after transfer- therefore, he was rightly held guilty.
Title: Sushil Kumar Dogra son of Sh. Balak Ram Vs. State of HP and another Page-601

Constitution of India, 1950- Article 226- Petitioner was engaged as daily wage Beldar- he worked as Assistant fitter and thereafter as daily wage beldar- his services were regularized as beldar- respondent stated that the private respondents had joined subsequently but they had forefeited their seniority for the period when they had worked as beldar and were appointed as fitter on the completion of 8 years of services on the said post - held, that respondent is a model employer and is under an obligation to conduct itself with high probity-it should not take advantage of the employees- respondent had exploited the petitioner as well as private respondents- when a person had rendered service in two or three capacities, an option was required to be obtained from him -petition allowed and the respondent directed to take appropriate action in accordance with law.
Title: Mohan Lal Vs. State of H.P. & ors. Page-110

Constitution of India, 1950- Article 226- Petitioner was enrolled in the Central Reserve Police Force as Constable- petitioner suffered from eye problem- he was found blind in left eye and partially blind in the right eye- he was found to be permanently incapacitated for further service and was invalidated from service - held that, petitioner had acquired disability during his service and he could not have been invalidated from the service on account of disability in view of the Persons with

Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

Title: Union of India through its Secretary (Home) to the Govt. of India and others Vs. Bali Ram Page-1205

Constitution of India, 1950- Article 226- Petitioner was initially appointed as Water Carrier in the Rajiv Gandhi Government Degree College Chaura Maidan Shimla- subsequently he was appointed as part time contingent paid Sweeper- petitioner had served for more than 21 years but was not conferred the status of whole time contingent paid worker – respondent pleaded that the petitioner was appointed purely on temporary basis as stop gap arrangement- petitioner was placed at seniority No. 584 and at present posts of part time employees up to seniority No. 466 had been converted to the post of whole time contingent paid employees- case of the petitioner would be considered for the next higher post as per his seniority on the availability of the posts- held, that the petitioner was appointed on temporary basis as stop gap arrangement- it was specifically stated in his appointment order that his services would stand terminated on joining of regular employee- petitioner had accepted the terms of the appointment order and he cannot be allowed to approbate and reprobate the conditional appointment order- further, employee cannot be appointed on public post contrary to Rules framed by Union or State under Article 309 of Constitution of India- there was no evidence to prove that the vacancy of the contingent worker was available in the department or that his claim was recommended by the Competent Authority for appointment.

Title: Sita Ram son of Shri Bihari Lal Vs. State of H.P. & Anr. Page-67

Constitution of India, 1950- Article 226- Petitioner was posted in Shimla and was transferred to Reckong Peo, a tribal area- he completed his tenure but was not transferred- respondents directed to consider the case of the petitioner for transfer within one week and to take disciplinary action against the transferred employee who have failed to join the duty within stipulated period.

Title: Karam Singh vs. Managing Director & another Page-154

Constitution of India 1950- Article 226- Petitioner sought promotion as JE as per Military Engineering Services (Superintendents (Electrical Mechanical) Grade I and Grade II) Recruitment Rules , 1983- petitioner had appeared in the diploma Course, the result of which was declared on 6.2.2001 after the cut-off date- however, examination was conducted in the month of December, 2000 prior to cut-off date- held, that petitioner was eligible to be considered for promotion and relevant date is the date of taking of the examination and not the date of pronouncement of the results.

Title: Union of India & Others Vs. Tej Ram Page-968

Constitution of India, 1950- Article 226- Petitioner was regularized as a conductor and was asked to discharge the duty as clerk/typist - petitioner sought change of designation for appointment as clerk with retrospective effect- respondent had not denied the fact that petitioner was discharging the duty as a typist- respondent asserted that there was no post of clerk but they had a discretion to take the work of any nature from the petitioner- held, that when the petitioner is discharging the duty of clerk, he is entitled for the wages and appointment as a clerk.

Title: Tara Chand Verma Vs. Himachal Pradesh State Transport Corporation & another Page-225

Constitution of India, 1950- Article 226- Petitioner was serving as Professor in the faculty of Pomolgy, now known as "the Department of Fruit Sciences"- he was selected and appointed as Director of Extension Education for a tenure of five years- he made representation for providing increment to him which was rejected- held, that post of Director of Extension Education carried higher responsibilities- the words "other than a tenure basis" in FR 22 (1) (a) will not be applicable when the person is appointed to a post involving assumption of duties and responsibilities of greater importance- therefore, petition allowed and the university directed to grant benefit of the increment in accordance with FR 22 (1) (a).
Title: Dr. N.K. Joolka Vs. Dr. Y.S. Parmar University of Horticulture and Forestry, Nauni Page-795

Constitution of India, 1950- Article 226- Petitioner was transferred from Pangi, a tribal area to GHS Tippar from where he was transferred to GMS Jhaniker and again to tribal area- transfer policy framed by the Government provides that employee who served in Tribal/ Hard/Difficult Areas as well as in Remote/Rural Areas are not to be transferred to the same area again- hence, respondents directed to examine the case of the petitioner afresh and to pass appropriate order.
Title: Suresh Kumar vs. State of H.P. & others Page-163

Constitution of India, 1950- Article 226- Petitioner was transferred on the basis of U.O. Note received from the office of Chief Minister- respondents claimed that they had received numerous complaints against the petitioner from public representatives of nearest Panchayat, which compelled the authorities to effect the transfer- petitioner has remained in and around his home district- held, that transfer is an incident of service and can be effected on the basis of administrative exigency and taking into consideration the public interest- government servant has no vested right to remain posted at one place - courts should not interfere with the orders of transfer- however, if the exercise of power is based on extraneous considerations or for achieving an alien purpose or an oblique motive, it would amount to colourable exercise of power- transfer has been made on the basis of UO Note, no proposal for transfer had originated from the administrative department- hence, order is not sustainable.
Title: Raj Kumar Vs. State of H.P. & ors. Page-1306

Constitution of India, 1950- Article 226- Petitioner was working as Senior Accountant in the office of the Accountant General – he applied for voluntary retirement on 30.9.2004 by giving three months notice- he was informed that his request for voluntary retirement had been accepted and the process of preparation of pension papers had been initiated- petitioner withdrew the notice for voluntary retirement but he was informed that his request for withdrawal was rejected and he would be treated as voluntarily retired- petitioner filed an application before Central Administrative Tribunal which allowed the application and directed the petitioner to return the retiral benefits received by him - the respondent was directed to treat the petitioner on service- however, the back-wages were not granted to the petitioner- held, that the benefit of back-wages was wrongly denied- when the order of retirement was held to be illegal, employee is entitled to the benefit of back-wages- Petition allowed with a direction to the respondent to pay the back-wages and other benefits to the petitioner.
Title: Om Parkash Murarka Vs. Controller and Auditor General of India and others Page-739

Constitution of India, 1950- Article 226- Petitioners claimed that they were appointed as temporary employees w.e.f. 1.11.1986 and 13.12.1985 respectively- petitioners were conferred the work charge status w.e.f. 3.1.1998- they claimed that services rendered by them till conferment of work charge status should be counted for the purpose of pay fixation, increments and other benefits as well as pensionary benefits- it was proved on record that petitioners were offered the post of T-mate on work charge status –work charge status would come to an end after the completion of the work- petitioners had not challenged the work charge status for 15 years- no explanation was given for the delay- petition dismissed on this short ground alone.
Title: Sukhdarshan Singh Vs. HPSEB Limited and another. Page-1256

Constitution of India, 1950- Article 226- Petitioners were appointed as Assistant Surgeon and Assistant Professor in the department of Health and Medical Education, Jammu and Kashmir – they had applied through proper channel for the post of Lecturer/ Assistant Professor at IGMC, Shimla- they made representation for counting the services rendered by them in Jammu and Kashmir for the purpose of pensionary benefits- Govt. refused to do so on the ground that there was no reciprocal arrangement with the State of Jammu and Kashmir- held, that as per CCS (Pension) Rules, 1972 and decision No. 5(2)(b) of Rule 14 liability is to be borne in full by the Central/ State department and no recovery is to be made from Central/State Government under whom employee had served, therefore, it was not open for the State Government to decline the claim of the petitioners on the ground that there was no reciprocal arrangement with the State of Jammu and Kashmir.
Title: State of H.P. & ors. Vs. Dr.(Mrs.) Man Mohini Sharma & anr.
Page-157

Constitution of India, 1950- Article 226- Petitioners were appointed as Junior Engineers in general open category - they belonged to ex-servicemen category and their case was not being considered in the category of ex-serviceman- respondent contended that the case of the petitioners could not be considered against the vacancy of ex-serviceman in view of direction of Hon'ble High Court in ***V.K. Behal vs. State of H.P & ors.*** reported in ***Latest HLJ 2009 (HP) 402*** - Rule 5(1) of the Demobilized Armed Forces Personnel (Reservation of vacancies in the Himachal Pradesh State Non- Technical Services) Rules, 1972 has two parts- first pertains to counting of services for fixation of the pay and second pertains to counting of service for the purpose of seniority- held, that in V.K. Behal case, Court had only considered the case for the seniority and not for fixation of the pay- therefore, respondents were not in position to say that petitioners are not entitled for the benefit of the military service for fixation of the pay.
Title: Avtar Singh Dyal Vs. H.P. State Electricity Board Ltd. Page-535

Constitution of India, 1950- Article 226- Petitioners with the qualification of matriculation were promoted to the post of Superintendent Grade-II- they were entitled to be promoted to the post of B.D.O.- Government changed the rules on 7.10.2003 and restricted the quota of matriculate Superintendent Grade-II to 10%- quota was changed to 15% on 6.4.2012 and the qualification was changed to graduate- held, that amendment has deprived the petitioner of their right of promotion- some of the matriculate Superintendent are holding the post of BDO, this aspect was not taken into consideration while amending the rules - writ petitioners had experience and they had legal and legitimate expectation to get

promotion- therefore, respondent directed to consider the case of petitioners for regularization.
Title: Raj Kumar-II and Ors. Vs. State of H.P. and Ors. Page-323

Constitution of India, 1950- Article 226- Petitioners were denied the appointment as JBT on the ground that they had not secured the qualifying marks for appointment- held, that the respondent will consider the case of the petitioner in accordance with law and in case decision goes against them, they will be at liberty to approach the Court again and in case decision is in their favour they would be entitled to seniority from the date of their appointment.
Title: Naresh Chand and others Vs. State of H.P. and others. Page-481

Constitution of India, 1950- Article 226- Petitioners were serving in H.P.T.D.C. – they were superannuated in the year 2006-2010 - H.P.T.D.C. adopted the government pattern regarding the release of retirement or gratuity to the employees- Government issued a notification revising the rate of gratuity payable to the employees- petitioners claimed the revision in the gratuity at par with Government employee- held, that even if, provisions of the Payment of Gratuity Act are applicable, employee can claim a higher/better benefit on the basis of the decision of the board of directors- petitioners held entitled to the revised rate of gratuity at par with the government employee.
Title: Sukh Ram Chandel Vs. State of H.P. & others Page-859

Constitution of India, 1950- Article 226- PCCF (Wildlife)-cum-Chief Wildlife Warden, H.P., Shimla had written a letter to Additional Director General (Wildlife), Government of India, Ministry of Environment and Forests, Paryavaran Bhavan, CGO Complex, New Delhi, to deal with the monkey menace, but no decision was taken- therefore, Union of India directed to file compliance report as well as report regarding the steps taken in terms of letter.
Title**:** People for Animals Kasauli and another vs. Union of India & others
Page-155

Constitution of India, 1950- Article 226- Public Interest Litigation- public interest litigation is not maintainable in service jurisprudence- Writ petitioners claimed that they have a right of consideration, which showed that they had an interest- hence, public interest litigation is not maintainable at their instance.
Title: Pankaj Kumar Vs. State of Himachal Pradesh & others Page-830

Constitution of India, 1950- Article 226- Respondent issued prospectus for the year 2014 for filling-up PG seats in IGMC, Shimla and DRPGMC, Tanda from in service General Duty Medical Officers, HPHS Contract Service Medical Officer Group and Direct Group for the different categories- petitioner contended that the respondent had not disclosed two Post Graduate seats in Preventive and Social Medicine and Pathology- they were told that only seats in Microbiology and Bio-chemistry were available, which were accepted by the petitioners- the seats were subsequently allotted to the private respondents- respondents admitted that two seats were filled up by contacting the candidates in the waiting list over their mobile phones- held, that admissions have to be made in a fair and transparent manner and no admissions can be made without disclosing the available vacancies and without publishing the same in the newspaper- respondents had failed to observe this requirement and had ignored the merit- however, keeping in view that the upsetting the admission would start a chain reaction and many candidates would come forward to occupy the seats,

therefore, the matter was left at rest- directions issued to the respondent to grant admission strictly in accordance with prospectus.
Title: Dr. Disha Sharma Vs. State of Himachal Pradesh & others
Page-22

Constitution of India, 1950- Article 226- Respondent No. 2 issued a notice inviting tenders on or before 18.6.2014- subsequently, the entire process was recalled and another advertisement was issued calling for tender on or before 12.8.2014- entire process was again recalled and fresh advertisement was issued calling for tender on or before 15.9.2014- petitioner submitted the tender document but the respondent No. 2 refused to accept them- respondent filed a reply stating that technical bid of the petitioner was rejected by the Competent Authority- held, that issuance of tender notice, opening of financial bids, technical bids and contracts cannot be subjected to judicial review unless it is malafide, illegal, unconstitutional and against the public interest.
Title: M/s Kausal Air Products vs. State of H.P. & others Page-85

Constitution of India, 1950- Article 226- Respondent No. 3 had issued an advertisement on 13.12.2011 for filling up the post of PGT (Informatics Practices) - petitioner was called for viva-voce - petitioner stated that he had answered question No. 155 correctly- respondent had changed the answer from A to C - dictionary showed that answer to question 155 was A- respondent directed to revise the list and to recommend the name of the petitioner in case he was found eligible.
Title: Deepak Verma vs. State of H.P. & ors. Page-204

Constitution of India, 1950- Article 226- Respondent No. 3 issued an advertisement inviting applications for filling up the post of Junior Engineers- petitioners, members of the scheduled castes, participated in the selection process - they qualified the test and were called for interviews - Petitioners were successful but the appointment letters were not issued to them on the basis of instructions dated 9.6.2014- held, that selection process had commenced on 20.5.2014- test was held on 10.1.2014- Interviews were held on 24.3.2014 and 25.3.2014 and the result was declared on 20.4.2014- selection process had commenced and the instructions would only apply prospectively- further held that the reservation of the ex-servicemen is horizontal in nature- the persons have to be first selected against the respective quotas in favour of Ex-servicemen, physically handicapped persons and thereafter depending upon the fact as to which of the reserved categories under Article 16(4) or the residuary general category, they belong to, they have to be adjusted against those categories- Writ petition allowed and respondent directed to fill up the posts of Junior Engineer from the category of scheduled caste ex-servicemen (unreserved) and if the candidates of ex-servicemen scheduled caste are not available, the posts are permitted to be filled up from the candidates belonging to scheduled caste category.
Title: Praveen Bharti and another Vs. State of H.P. and others.
Page-927

Constitution of India, 1950- Article 226- Respondent No. 3 submitted an application asserting that the land was recorded in the joint ownership of his mother and father of Respondent No. 4 in the jamabandi for the year 1954-55- mother of the respondent No. 3 was allotted the land to the extent of 4 kanals and 1 marla towards the western side and it was wrongly recorded in the map/tatima that the land was given towards eastern side- application was

allowed and the land was allotted to respondent No. 3- appeals were preferred which were dismissed- held, that respondents No. 4 and 5 had admitted the case of the respondent No. 3 and, therefore, it is not permissible for the petitioner to assail the same.
Title: Krishan Chand Vs. State of H.P. & Ors. Page-352

Constitution of India, 1950- Article 226- Respondent No. 7 was selected for the post of Aaganwari Worker- petitioner asserted that respondent no. 7 was ineligible as her income was more than Rs. 8,000/- per month specified in the rules-Tehsildar, Mandi had conducted an inquiry in which he found that income of petitioner and respondent No.7 was more than the prescribed limit- consequently, he quashed the income certificate - an appeal was filed before Sub Divisional Collector, Sadar, District Mandi, who accepted the appeal and held the certificate to be in order- further appeals were dismissed- no material was brought on record to show that any legal impropriety was committed or there was non-application of mind- appeal dismissed.
Title: Sita Devi Vs. State of H.P & others Page-637

Constitution of India, 1950- Article 226- Respondents admitted that the petitioner was wrongly denied the appointment and the appointment would be offered shortly - in view of this statement, respondents No.1 and 3 directed to offer appointment to the petitioner within a period of four weeks and to grant seniority from the date of wrongful denial of the appointment.
Title: Vijay Amrit Raj Vs. State of H.P. and others. Page-504

Constitution of India, 1950- Article 226- Road Users and Pedestrians (Public Safety and Convenience) Act, 2007- respondents were directed to furnish the list of permit holders but the list was not furnished in accordance with the direction- respondent directed to file a fresh list along with name of the officers who had issued the permits in violation of the provisions of the Act –respondent further directed to cancel permits which were issued in breach of the Act- respondents also directed to furnish the list of the names of the police officers and to mention the action taken by police officials for violation of the Act- further, direction issued to indicate the mechanism in place for managing the parking of vehicles.
Title: Dharam Pal Thakur vs. State of Himachal Pradesh & others
Page-123

Constitution of India, 1950- Article 226- Seniority was fixed on the basis of the date of joining and not on the basis of merit obtained in the selection process- petitioner claimed that the seniority list be issued on the basis of the merit obtained by the candidates in the selection process- held, that seniority list is to be drawn as per the merit obtained in the selection process and date of joining cannot determine the seniority- respondents directed to issue a fresh seniority list as per merit.
Title: Harish Kumar and another Vs. State of H.P and others
Page-1302

Constitution of India, 1950- Article 226- Settled seniority cannot be unsettled- when the petitioner had remained in deep slumber and had not taken any action, he is not entitled for any relief.
Title: Khub Chand Verma Vs. The State of Himachal Pradesh & others
Page-687

Constitution of India, 1950- Article 226 - State appointed Gram Vidya Upasak Assistant Teacher and Para teachers- services of gram Vidya Upasak and para teachers were subsequently regularized- Writ Petition was filed by one of the Primary Assistant Teachers and the Court held that appointment of teachers was not made in accordance with rule - State was directed to phase out those teachers in a phased manner- State preferred an appeal and contended that there was deficiency of the teachers due to which it had engaged primary assistant teachers –teachers had undergone the training subsequent to their appointment- held, that teachers were not appointed as a stop-gap arrangement- State had decided to regularize them- teachers were not parties before the Writ Court- teachers were appointed in the public interest to improve Pupil Teacher Ratio- large number of vacancies are still available- therefore, in these circumstances, decision to regularize them cannot be said to be bad.
Title: Pankaj Kumar vs. State of Himachal Pradesh & others Page-830

Constitution of India, 1950- Article 226- State Government amended rule 56 of fundamental rule providing an option to the Government servant to continue in service beyond the age of 58 years till 59 years, subject to fulfillment of certain conditions- matter was placed before the Board of Directors of HIMUDA who declined to give similar benefit to its employees - petitioner, an employee of HIMUDA gave option for extension of service – Board did not give any extension to the petitioner but gave extension to another employee on the ground that he was looking after the construction work of many projects -the petitioner was also looking after the projects as Executive Engineer- held, that the petitioner was treated in an unfair manner- petitioner had right to be considered for extension of service- he was discriminated against by denying him the benefit of extension and by granting the extension to another employee – Writ Petition allowed and the Board directed to consider the case of the petitioner and to extend the services of the petitioner by one year.
Title: D.K.Tandon Vs. State of H.P. & ors. Page-682

Constitution of India, 1950- Article 226- The act of drawing of the election program and the act of dividing the area of operation into zones cannot be termed to be an administrative act- they would be termed as quasi judicial function which are to be performed after hearing parties or making an inquiry- such decision would affect the rights and obligations of the parties.

Title: The Baghal Land Loosers Transport Co-operative Societies Ltd. and others Vs. State of H.P. and others Page-576

Constitution of India, 1950- Article 226- Writ Court allowed the petition of the petitioner and the respondents were directed to give the benefit of two increments- petitioner had filed a petition seeking relief that respondents be directed to give benefits of FR 22 (1) (a) (1) and to re-fix his pay with consequential benefits- held, that Writ Court had not granted the relief in accordance with relief prayed by the applicant- hence, order modified.
Title: The State of Himachal Pradesh & others Vs. Shri Kashmir Singh
Page-858

Constitution of India, 1950- Article 226- Writ Petition was disposed of on 6.9.2013 on the assurance made by State with liberty to the petitioner or any other affected person to take recourse to appropriate proceedings, including the revival of the writ petition – petitioner filed a public interest litigation for issuing the direction to the state to complete the construction of Theog-Rohru road and to submit the status report periodically- State contended that the Writ Petition is

not maintainable and the petitioner was a minister in the previous government who was opposing the petition- Writ petition was politically motivated- held, that the remedy of public interest litigation should not be misused - the Courts should, prima facie, be satisfied that writ petition is not the outcome of political or extraneous considerations or motivated one- petitioner was an ex-minister and, therefore, Writ petition cannot be treated as public interest litigation on his behalf- however, keeping in view the fact that the projected issue is of great importance and relates to public at large- hence, cognizance taken suo motu by High Court by appointing an Amicus Curiae to assist the Court - a Committee constituted to monitor the progress of the work and to submit report periodically.
Title: Devinder Chauhan JaitaVs. State of Himachal Pradesh and others.
Page-709

Constitution of India, 1950- Article 363- Jurisdiction of the Civil Court is barred for determining disputes arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which were entered into or executed before the commencement of Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any predecessor Governments was a party - this article will not cover the grants made by the Rulers in favour of individuals.
Title: Kuldip Singh and others vs. State of H.P. and others Page-46

'H'

Himachal Pradesh Court Fees Act, 1968- Article 13(vi)- Plaintiff filed a suit for partition of the land claiming that land is coparcenary property and that the plaintiff had acquired a right in it by birth- defendant claimed that suit was not properly valued and market value of the suit land is not less than Rs. 2,53,83,000/- held, that plaintiff would be deemed to be in constructive joint possession of the suit property- he is liable to pay the Court fees in accordance with Section 13(vi) and not in accordance with Section 7(iv)(b) or Section 7(v) of the Court Fees Act.
Title: Surjit Singh Vs. Sachin Raizada & ors. Page-1258

Himachal Pradesh Land Revenue Act, 1954 - Section 17- Section 17 can be pressed into service only when any case is pending and the matter was determined by the Revenue Court, Appellate Court and by the Civil Courts.
Title: Devinder Singh Jaswal vs. Nagender Singh & others Page-81

Himachal Pradesh Land Revenue Act, 1954- Section 38- B was owner of the suit land and S was recorded as a tenant- revenue entries were repeated in the subsequent jamabandies- R was recorded as a tenant for the first time in the jamabandi for the year 1973-74- held, that there was no record to show as to how R was recorded as a tenant- Patwari is required to notify in writing to the person or persons likely to be adversely affected by change of the entries and retain on record proof of the notifications - entries are required to be verified by the '*Lumberdar*' or '*Panch* and any entry made in violation of these instructions are void.
Title: Ram Lok Vs. Nand Ram & others Page-126

Himachal Pradesh Land Revenue Act, 1954- Section 107- Demarcation- demarcation was conducted on the basis of Aks Shazra- held, that demarcation

should be conducted on the basis of Aks Musabi and the demarcation conducted on the basis of Aks Shazra is not permissible.
Rattan Chand son of Lachho Ram Vs. Pushpa Devi widow of Shri Balwant Singh and others Page-169

Himachal Pradesh Land Revenue Act, 1954- Section 129 read with 171- Plaintiff had raised question of the title before the Revenue Officer- Revenue Officer observed that relief can be sought from an appropriate Civil Court- held, that Revenue Officer should have decided the question by converting himself into civil court or he should have relegated the parties to approach the civil court -he should not have proceeded with the matter, thus, order passed by Revenue Officer was not in accordance with law.
Title: Giano Devi and others Vs. Bishan Singh and ors. Page-205

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Copy of jamabandi for the year 1984-85 shows B to be the owner to the extent of 1/3rd share, and in possession as tenant of 2/3rd share- one L is shown to be the owner of remaining 2/3rd share- held, that entries are not based upon the order of any competent authority, therefore, it is void ab-initio- a person cannot acquire the status of ownership as well as status of tenancy simultaneously.
Title: Bakshi Ram son of Achharu Vs. Mandro Devi widow of Karam Chand Page-568

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 2(10)- Defendant claimed to be a tenant who had become the owner under the provision of H.P. Tenancy and Land Reforms Act- Jamabandi for the year 1987-88 showed the defendant to be a Gair Maurusi Tehat Murtan (tenant under the mortgagee) - held, that tenant inducted by mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act.
Title: Hans Raj (died) through LRs. Vs. Bilwamangal and others Page-508

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 2(10) - Defendant claimed to be a tenant who had become the owner under the provision of H.P. Tenancy and Land Reforms Act- Jamabandi for the year 1987-88 showed the defendant to be a Gair Maurusi Tehat Murtan (tenant under the mortgagee) - held, that a tenant inducted by mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act.
Title: Partap Chand Vs. Bilwamangal and others Page- 521

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 2(10) - Defendant claimed that tenant of mortgagee was a tenant for all intents and purpose- jamabandi for the year 1987-88 showed the defendant to be a tenant Gair Maurusi Tehat Murtan- held, that tenant inducted by mortgagee does not fall within the definition of a tenant and is not entitled to the benefit of the Act.
Title: Pritam Chand (died) through LRs. Vs. Bilwamangal Page-528

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 2(10) - Defendant claimed that tenant of mortgagee was a tenant for all intents and purpose- jamabandi for the year 1987-88 showed the defendant to be a tenant Gair Maurusi Tehat Murtan- held, that tenant inducted by mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act.
Title: Madho (died) through LRs. Vs. Bilwamangal Page-515

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 2 (10)- Plaintiff claimed that land was mortgaged – the mortgage was redeemed and the possession was delivered on 18.9.1992- defendants or their predecessor-in-interest were never inducted as tenants- defendants claimed that they were in possession prior to the mortgage- evidence showed that land was mortgaged by the predecessor-in-interest with Sardar of Shamirpur – it was proved that defendants were inducted as tenant by mortgagee and not by mortgagor- held, that tenant of a mortgagee does not acquire any right of ownership- tenants of the mortgagee do not become the tenants of the mortgagor.
Title: Deemanu Ram and others Vs. Bilwa Mangal Page-939

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 104- Widow has a right during her life time - vestment/conferment of the proprietary rights upon the tenant is automatic after the death of widow- proprietary rights cannot be conferred on the basis of Will.
Title: Sunil Singh vs. State of H.P. & others Page-616

H.P. Town and Country Planning Act, 1977- Section 16 (c)- Plaintiff filed a civil suit seeking specific performance of the contract entered into between the predecessor-in-interest of the plaintiffs and defendants regarding the land situated within the jurisdiction of Town and Country Planner – held that there is no blanket bar in the planning area to sell, gift, exchange, lease or mortgage with possession any land if its Sub-Division is duly approved by the Director – further, held that separate khasra no. can be alienated without seeking permission from Town and Country Planning Department.
Title: Rattan Chand (deceased) through his LRs Smt. Kunti Devi and others Vs. Pawan Kumar and others Page-1007

H.P. Urban Rent Control Act, 1987- Sections 2(e) and 12- tenant claimed that he had taken permission of the landlord to carry out commercial activities which was granted at the enhanced rent- parties had not taken the permission of the Rent Controller in writing for converting residential building into non-residential building- held that, landlord and tenant cannot convert a residential building into non-residential building by their mutual consent and landlord would be entitled to seek ejectment of the tenant.
Title: Manohar Lal Vs. Joginder Singh and another Page-1100

H.P. Urban Rent Control Act, 1987 - Section 14- Landlord filed an eviction petition seeking eviction on the ground that premises was required bonafide for reconstruction and rebuilding on old lines, which could not be carried out without vacating the same- building was in dilapidated condition and had outlived its life span – building had become unsafe and unfit for human habitation and the tenants were in arrears of rent- tenant pleaded that building is situated in core area where construction activities are banned by the government – building had not become unfit and unsafe for human habitation- the petitioner was not an actual landlord and was not entitled to get rent- held, that the version of the petitioner that the building was more than 100 years old, in dilapidated condition and had become unfit and unsafe for human habitation was duly proved by evidence of the landlord- landlord had deposed that he had sufficient funds and had got the map approved from M.C. Shimla- building cannot be reconstructed without being vacated- further, tenants were in arrears of rent- learned Appellate Court had wrongly held that executing Court will not execute the order of eviction unless duly sanctioned plan is produced by the

petitioner- this modification by Appellate Court was contrary to the Law- petition allowed.
Title: Janmejai Sood vs. Ram Gopal Sood & ors. Page-42

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Landlady filed an Eviction petition on the ground of arrears of rent- respondent denied that she was inducted as tenant or was in occupation of the premises- Rent Controller allowed the Petition- the Appellate Authority held in appeal that respondent was not a tenant but was a lessee- held, that once respondent had disputed the jural relationship of landlord and tenant, the Appellate Authority could not have conferred the status of lessee upon the respondent- respondent being in possession could not have denied the title of the landlady- Rent Controller should have simply recorded the statement of the respondent on oath and should have passed conditional order of eviction that in case respondent is found to be in possession, she would be evicted forthwith- when the Court had found respondent to be in possession, she is liable to be evicted and to pay the use and occupation charges.
Title: Sudha Bhargava Vs. Manju Sharma Page-725

Himachal Pradesh Urban Rent Control Act, 1984- Section 14- Landlord sought eviction of the tenant on the ground of personal bona-fide requirement of the shop- landlord had also instituted a case before Rent Controller-1 on the ground of subletting and personal bona fide requirement for the purposes of building and rebuilding- tenant filed an application for staying the proceedings- application was rejected by Rent Controller- held, that the subject matter in the two proceedings was not same and, therefore, there was no need to stay the proceedings- petition dismissed.
Title: Krishna Devi Vs. Amar Jeet Ahuja and others Page-679

Himachal Pradesh Village Common Lands Vesting and Utilization Scheme, 1975 - Clause 13 (1) to (4) Sub clause (4) of the scheme vests jurisdiction and authority in the commissioner to cancel the grant suo moto on an application made to him when the allottee was not entitled to or was ineligible for allotment- however, cancellation has to be made after proper inquiry.
Title: Madho Ram & Anr. vs. Makholi Ram Page-99

Hindu Marriage Act, 1956- Section13(1)(i)- Husband claimed divorce on the ground of cruelty and desertion – evidence showed that wife was forced to leave her matrimonial home after she gave birth to a female child - no person visited her in the Hospital at the time of delivery- no maintenance was paid to the child and wife-she had to file a petition for maintenance and the husband, instead of paying maintenance, filed a revision petition- held, that husband had created such an atmosphere that wife could not be expected to live in the matrimonial home- behaviour of the husband towards his wife was cruel and he could not be permitted to take advantage of his own wrong.
Title: Kulbhushan Sharma Vs. Neeraj Sharma Page-402

Hindu Marriage Act, 1955- Sections13(1)(i)- & 13(1) (i-a)- Husband filed a divorce petition against the wife on the ground of cruelty and adultery – evidence proved that husband called his wife characterless for which he was reprimanded by his mother- he had also misbehaved with the members of his family and his wife- he had made false allegations against the wife that she was living an adulterous life- he used to beat the wife on which she had to file a complaint

under Protection of Women from Domestic Violence Act, 2005- held, that in these circumstances, version of the petitioner regarding cruelty and adultery was not proved.
Title: Anurag Sharma Vs. Pratibha Sharma Page-657

Hindu Marriage Act, 1955- Section 24- Petitioner claimed that she is pursuing her studies of Ph.D. and is residing in girls hostel of Kurukshetra, University- she had no source of income- Court awarded maintenance @ Rs. 2,500/- per month and Rs. 5,000/- as litigation expenses- held, that the husband is bound to maintain his wife - husband had not declared his income and had not denied the averments of the wife that his income was Rs. 35,000/- per month- As per the pay scale uploaded on the official website of the school, the TGT was getting Rs. 35,000/- as salary- teachers and administrative staff are entitled to free food and accommodation, therefore, in these circumstances, the maintenance of Rs. 2,500/- per month and litigation expenses of Rs. 5,000/- cannot be said to be excessive, rather, wife held entitled for maintenance @ Rs.10,000/- per month.
Title: Poonam Vs. Virender Chauhan Page-375

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Income Tax Act, 1961- Section 80 (IB)2- Assessing Officer conducted a status inquiry and found that the assessee had employed 13 person who had worked for 3-4 months except for the two employees - he further found that most of the employees had left the job and only three workers were working with the assessee- he held that the requirement of 10 workers was not fulfilled and, therefore, deduction was not permissible to the assessee- held, that when the employees were not employed during the substantial part of the year, assessee is not entitled to the deduction.
Title: Commissioner of Income tax, Shimla Vs. M/s. Indus Cosmeceuticals Page-276

Income Tax Act, 1961- Section 80 (IB)iv- Assessee was converting henna leaves into herbal powder by the process of mixing and grinding - raw material was first collected, dried with the use of mixture of various acids and thereafter ground by putting the definite quantity (in percentage) and the end product was the result of many transformations carried out with the help of various materials, manpower and machines and was commercially a different item- henna leaves only constitute about 40% of the raw material, -held that the activity of the assessee would fall within the definition of manufacture and the assessee is entitled to the benefit of Section 80(IB)iv.
Title: Commissioner of Income tax, Shimla Vs. M/s. Indus Cosmeceuticals Page-276

Income Tax Act, 1961- Section 194 A (3) (f)- 'B' and 'H' wholly financed and controlled establishment of the Government, had made certain deposits with the assessee- the assessee had not deducted the income tax at the sources at the time of disbursement- penal action was taken by ITO- assessee filed an appeal and the decision of ITO was reversed- an appeal was preferred before Income Tax Appellate Tribunal Chandigarh, which was also dismissed- Government had issued a notification under Section 194(A) covering any undertaking or body including a Society registered under the Societies Registration Act wholly financed by the Government- held, that once the notification had been issued, it is not necessary for the assessee to seek exemption from the Authorities under

the Act or from the Central Government - therefore, the Appellate Authority had rightly allowed the Appeal and had set aside the order passed by ITO.

Title: Commissioner of Income tax (TDS), Chandigarh Vs. State Bank of Patiala Sectt. Shimla (ITA No.17 of 2014) Page-1290

Income Tax Act, 1961- Section 194 A (3) (f)- 'B' and 'H' wholly financed and controlled establishment of the Government, had made certain deposits with the assessee- the assessee had not deducted the income tax at the sources at the time of disbursement- penal action was taken by ITO- assessee filed an appeal and the decision of ITO was reversed- an appeal was preferred before Income Tax Appellate Tribunal Chandigarh, which was also dismissed- Government had issued a notification under Section 194(A) covering any undertaking or body including a Society registered under the Societies Registration Act wholly financed by the Government- held, that once the notification had been issued, it is not necessary for the assessee to seek exemption from the Authorities under the Act or from the Central Government - therefore, the Appellate Authority had rightly allowed the Appeal and had set aside the order passed by ITO.

Title: Commissioner of Income tax (TDS), Chandigarh Vs. State Bank of Patiala Sectt. Shimla Page-1292

Income Tax Act, 1961- Section 260-A- Assessee is entitled to depreciation on goodwill or other intangible assets.

Title: Commissioner of Income Tax Vs. RFCL Limited. Page-1283

Indian Evidence Act, 1872- Section 3- Appreciation of evidence- it was contended that testimony of PW-1 was not acceptable and he had reported the matter to the police after some days-PW-1 specifically stated that he was under extreme fear that he would also be killed by accused- held, that the testimony of eye witness was acceptable and accused can be convicted on his sole testimony.

Title: Rikhi Ram son of Shri Kedar Dutt Vs. State of Himachal Pradesh Page-807

Indian Evidence Act- 1872- Section 3- Interested witness would be the one who has some direct interest in having the accused somehow or the other convicted for some animus or for some other reason- merely because, witness had an interest cannot be a ground to discard his testimony.

Title: Tarsem Lal Vs. State of Himachal Pradesh Page-879

Indian Evidence Act- 1872- Section 3- Testimony of relative witness cannot be equated to interested witnesses- conviction can be based on the testimony of related witnesses, if the same is found to be reliable and trustworthy.

Title: Nikhil Soni Vs. State of H.P. Page-974

Indian Evidence Act, 1872- Section 65- An application was filed to permit the plaintiff to prove office note dated 31.3.2009 by leading secondary evidence- defendant denied the execution of the note and stated that no such office note is available in the record- the persons stated to have executed the note were not employees of the defendant and they had no power to make any financial commitment on behalf of defendant- held, that the denial of the defendant is not regarding the execution of the document but regarding the competency of the officer to execute any such note- question of leading the secondary evidence will

only arise during the stage of the evidence and not prior to the same- application dismissed.
Title: Ashok Chauhan Vs. M/s S.S.J.V Projects Pvt. Ltd., (a Body Cooperate) and others Page-1192

Indian Evidence Act, 1872- Section 91- When a piece of land is sold with definite boundaries- boundaries will prevail against the measurement.
Title: Daulat Ram Thakur Vs. State of Himachal Pradesh Page-621

Indian Evidence Act, 1872- Section 114- Magistrate relied upon Section 114 to draw an inference that the petitioner had caused disturbance in the proceedings of the Panchayat- he relied upon the facts that proceeding was conducted before Gram Panchayat, there was no allegation of ill-will against the respondent and the appellant had not led any evidence to prove that he had not caused any interruption- held, that the Court hearing an appeal has to record the findings duly supported by reason on all points and there has to be a conscious application of mind - support could not have been drawn from Section 114 of Indian Evidence Act.
Title: Surinder Kumar Vs. Parkash Chand Page-254

Indian Evidence Act- 1872- Section 134- No particular number of witnesses are required for proof of any fact- when the testimony of a witness is wholly reliable, there is no need for corroboration.
Title: Nikhil Soni Vs. State of H.P. Page-974

Indian Evidence Act- 1872- Section 134- When the prosecution has already led credible evidence- there was no necessity to multiply number of witnesses.
Title: Tarsem Lal Vs. State of Himachal Pradesh Page-879

Indian Penal Code, 1860- Section 34- Common intention means a pre oriented plan – it must exist prior to the commission of the act- no evidence was led to prove that the accused shared common intention hence accused could not be convicted with the aid of Section 34.
Title: Prem Chand Vs. State of H.P. Page-483

Indian Penal Code, 1860- Section 302- Accused caused death of 'K' in the sawmill of 'V' by hitting him with the shovel on the head – testimony of eye-witnesses clearly proved that accused gave beating with the shovel on the head of the deceased and thereafter dragged the deceased towards his house- medical evidence proved that the deceased had died due to head injury which was possible with the sharp edged shovel- the testimony of the eye- witness was corroborated by other prosecution witnesses- accused made a disclosure statement leading to the recovery of blood clotted stones, shirt and hair- body of deceased was also found in the house of the accused- all these circumstances clearly established the prosecution version – hence, conviction of the accused was justified.
Title: Rikhi Ram son of Shri Kedar Dutt Vs. State of Himachal Pradesh Page-807

Indian Penal Code, 1860- Section 302- Accused gave beating with the help of a wooden piece and inflicted injuries upon 'K'- children raised hue and cries on which PW-1 and PW-2 arrived at the spot – 'K' was beaten by the accused in their presence - PW-13, vice-president of Panchayat was called- 'K' was lying

unconscious on the floor – she was taken to hospital where an application was moved for ascertaining whether she was fit to make the statement or not- Medical Officer certified that she was not fit to make statement and referred her to PGI, Chandigarh- 'K' succumbed to injury at PGI, Chandigarh- PW-1 did not state in the Court that he had seen the accused giving beating to the deceased- accused was not arrested immediately- PW-13 also admitted that he had never summoned the accused in the Panchayat as no complaint was received against him- PW-1 and PW-2 had entered in the room simultaneously – therefore, PW-2 could not be called to be an eye-witness to the beating- children who had witnessed the incident were not examined- there were 40-50 houses in the village- no person was examined to corroborate the testimony of eye-witness- there are major contradictions in the testimonies of eye-witnesses- hence, in these circumstances, prosecution case is not proved beyond reasonable doubt.
Title: Vinod Kumar Khadia Vs. State of H.P. Page-1077

Indian Penal Code, 1860- Section 302- Accused murdered their parents- they burnt their bodies by setting the house on fire- one of the accused confessed to the murder of his parents- police was informed on which FIR was registered – Trial Court held that motive, namely disinheritance from property, extra judicial confession, disclosure statements, which led to recovery of incriminating articles, and recovery of remnants of bodies of the deceased were duly proved- held, that case is based upon circumstantial evidence -in case of circumstantial evidence, prosecution is under a legal obligation to prove the circumstances from which the conclusion of guilt is to be drawn- Court cannot substitute suspicion in place of proof- the extra judicial confession did not inspire confidence- disinheritance from the property was also not established as the accused was issueless and was residing in his own house at Derabassi- issue of inheritance of property was settled about 8 years back – testimonies of witnesses were contradictory- Investigating Officer had not associated any independent witness- Trial Court had disbelieved the prosecution case regarding the accused- testimony of one witness was accepted qua one accused and was rejected qua other which is not permissible- therefore, in these circumstances, accused cannot be held guilty- accused acquitted.
Title: Karamjit Singh @ Amarjit Singh Vs. State of Himachal Pradesh
Page-862

Indian Penal Code, 1860- Section 302- As per prosecution version, accused had given beating mercilessly to deceased and thereafter, he had tried to commit suicide by touching electric wires of transformer - he received severe injuries- he was taken to hospital where he died- PW-1, PW-2 and PW-8 resiled from their testimonies recorded by the police and categorically denied that they had seen the accused giving beating to the deceased- PW-6 had strained relation with the accused which makes it difficult to rely upon his version that deceased had visited his home- medical officer had not found any burn injury on his hand- PW-5 also admitted that it was not possible to touch the wires without using the staircase- held, that the testimonies of eye-witnesses do not prove the prosecution version- no witness from the vicinity had heard any cries- hence, in these circumstances, accused is acquitted.
Title: Bhim Singh Vs. State of H.P. Page-468

Indian Penal Code, 1860- Section 302 read with Section 30 of Indian Arms Act- hot exchange took place between the accused and his elder son on which accused brought his gun and shot his son at the abdomen - son died at the spot- the fact that deceased had died due to gunshot was proved by medical

evidence- the fact that accused possessed gun was not disputed by him- held, that the mere fact that accused had used a deadly weapon would not prove his criminal intent of murdering his own son- there was no prior hostility- the incident had taken place at the spur of the moment- hence, accused acquitted of the commission of offence punishable under Section 302 IPC and convicted of the commission of offence punishable under Section 304 (second part) of the Indian Penal Code.
Title: Ranvir Singh Vs. State of Himachal Pradesh Page-874

Indian Penal Code, 1860- Section 302 read with Section 34- As per prosecution case, accused caused the death of Rajesh Kumar in the shop at Sujanpur- PW-1 heard the cries and ran towards the place- she found that accused were beating Rajesh Kumar with kicks and fist blows and he was lying on the ground with face towards the sky- she raised hue and cries on which the accused ran away - deceased was taken for treatment to CHC, Sujanpur from where he was referred to Dr. Rajinder Prasad Medical College, Tanda- he died on the way to the Hospital- prosecution version was duly proved by the testimony of PW-1 and was corroborated by PW-3, PW-4 and PW-5 - PW-9, a medical officer proved that deceased was brought to the hospital in unconscious condition- PW-18 found ante mortem injuries on the person of the deceased near left side area of spleen and small intestines caused with fist blows- held that in these circumstances, prosecution case was proved beyond reasonable doubt.
Title: Nikhil Soni Vs. State of H.P. Page-974

Indian Penal Code, 1860- Sections 302 and 324 read with Section 34- PW-1 specifically stated that accused was in possession of dagger and had inflicted a dagger blow on the back side of the deceased- when PW-1 tried to rescue the deceased, accused inflicted a dagger blow on his abdomen- his testimony was corroborated by other prosecution witnesses- medical evidence also showed that the deceased had died due to rupture of the descending thoracic aorta- medical evidence also proved incised wound on the abdomen of PW-1- dagger was recovered at the instance of accused- held, that in these circumstances, prosecution version was duly proved.
Title: Prem Chand Vs. State of H.P. Page-483

Indian Penal Code, 1860- Sections 302, 201 and 120-B, read with Section 34 IPC- Dead body of the deceased was found in a sitting posture tied from the neck with one side of rope - other portion of the rope was tied with the branch of tree - on examination, wounds were found on the person of the deceased- as per prosecution, deceased was killed by his wife with the help of other person- wife made a disclosure statement under Section 27 of Indian Evidence Act-as per medical evidence, cause of the death was asphyxia leading to cardio-respiratory failure- no fractures of thyroid cartilages and hyoid bone were detected- the ligature was also high on the neck- the shirt did not bear any cut marks- disclosure statement was also not proved satisfactorily- house was already open prior to the arrival of the witnesses- held, that in these circumstances, prosecution version is not proved- accused acquitted.
Title: Sant Ram alias Nikku Vs. State of H.P. Page-714

Indian Penal Code, 1860- Sections 302 and 452- Accused armed with a dagger came to the house of PW-1 who was teaching her son in the verandah of her house- he inflicted a fist blow on the stomach of her son- PW-1 and deceased tried to intervene on which accused stabbed the deceased with dagger on her stomach – she was taken to Hospital at Hoshiarpur where she was declared

brought dead – prosecution version was duly proved by the testimony of PW-1, her son and by other witnesses- accused got weapon of offence recovered - bodily injury was proved by Medical Officer- held that in these circumstances, prosecution version was duly proved beyond all reasonable doubt.
Title: Tarsem Lal vs. State of Himachal Pradesh Page-879

Indian Penal Code, 1860- Sections 306 and 498-A read with Section 34 of IPC- As per prosecution case, accused had treated the deceased with cruelty due to which she had committed suicide- father of the deceased deposed that deceased had told him that her husband was demanding Rs. 50,000/- and motorcycle- brother of the deceased also deposed that deceased had disclosed that her in-laws harassed her and had called her handicapped and Paharan- medical evidence proved that death was due to suicide- deceased had written a suicide note - her husband had abused her on the day of commission of suicide- held, that in these circumstances, husband is guilty of the commission of offence punishable under Section 498-A of IPC.
Title: State of Himachal Pradesh vs. Susheel Kumar son of Shri Gurbachan and others Page-696

Indian Penal Code, 1860- Section 306 read with Section 34- Deceased was married to 'A'- 'A' remained in the matrimonial home for 1-2 months- she was dropped at her parent's home- thereafter efforts were made to call her but she did not come- accused raised demand of Rs. 5 lacs- PW-1 had not stated before investigating officer that demand of Rs. 5 lacs was made- PW-2 deposed that demand of Rs. 3.5 lacs was raised- deceased had committed suicide after 3 years of raising demand - held, that there was no proximity in the demand and the suicide- therefore, it cannot be said that demand was an instigatory factor for the deceased to commit suicide.
Title: State of H.P. Vs. Jai Ram and others Page-1252

Indian Penal Code, 1860- Sections 354 and 323 IPC – As per the prosecution case accused caught hold of the prosecutrix- she cried on which her parents came to the spot and rescued her from the accused- the testimony of the prosecutrix was contradictory to the version narrated by her in the FIR- the other eye-witnesses also made contradictory statements- held, that in these circumstances, prosecution version was not proved- hence, accused acquitted.
Title: State of H.P. Vs. Jeet Singh Page-827

Indian Penal Code, 1860- Sections 363, 366, 120-B and 506- Accused had taken the prosecutrix from her house on motorcycle with an intention to marry her with co-accused 'M' by telling her that her friend had called her - they served cold drink and 'Laddu' to her after which she started feeling giddiness -she was brought to the temple- there was no evidence to prove that some intoxicated substance was mixed in the cold drink and Laddu provided to the prosecutrix- there was no evidence that any arrangement was made for performing marriage ceremony in the temple and that the priest was engaged to perform the marriage ceremony – no complaint was made by the prosecutrix to PW-4 or PW-7- On the other hand prosecutrix specifically told the Investigating Officer that she had voluntarily come for strolling- held, that in these circumstances prosecution version was not proved and the acquittal of the accused was justified.
Title: State of H.P. vs. Ravinder Kumar s/o Sh Raghbir Dass Page-72

Indian Penal Code, 1860- Section 376- As per prosecution case, accused asked the prosecutrix for Pattals on which she replied that she had only 200 pattals and more pattals would be supplied by her Jethani- accused asked the prosecutrix to accompany him- prosecutrix was raped on the way- prosecutrix admitted that accused knew house of her Jethani- no hue and cry was raised by her- there were contradictions in the testimony of the prosecutrix – no injuries were found on her person- held, that in these circumstances, version of the prosecutrix was not reliable.
Title: State of Himachal Pradesh Vs. Krishan Lal Page- 393

Indian Penal Code, 1860- Section 376- Prosecutrix returned with her friends- she forgot her bag and returned to retrieve it-Accused met her with his friends on the way and told her that he had not seen any bag- Accused took prosecutrix on his scooter - he stopped the scooter on the way and raped the prosecutrix in the jungle- prosecutrix narrated the incident to her aunt and her parents- held that none of the friends of the prosecutrix was examined to corroborate her version- prosecution had also not examined the persons with whom accused was present- thus, genesis of the occurrence had become doubtful and leads to an inference that prosecutrix had met the accused alone for a specific purpose- testimony of the aunt was not satisfactory, which creates doubt that she had ever met prosecutrix or the prosecutrix had narrated any incident to her- prosecutrix admitted that she had fallen down the scooter which shows that prosecutrix had inculpated the accused when an inquiry was made from her by her parents-no injuries were found on the private parts of the prosecutrix which shows that she was a consenting party.
Title: Kehar Singh Vs. State of H.P. Page-1232

Indian Penal Code, 1860 – Section 376- Prosecutrix went to the house of one 'A' for getting her clothes stitched – she was not present but her brother was present who raped the prosecutrix- prosecutrix was proved to be below 18 years but above 16 years and of feeble mind- testimony of prosecutrix was duly supported by independent witness- testimony of the prosecutrix is sufficient to convict the accused- mere absence of DNA profiling is not sufficient to acquit the accused.
Title: Deep Raj @ Baddu vs. State of Himachal Pradesh Page-752

Indian Penal Code, 1860- Section 376(2)(f) – Accused took the prosecutrix to the back side of the temple and sexually assaulted her- PW-2 heard the cries of the prosecutrix and went to the spot- accused ran away on seeing PW-2- prosecutrix was minor- medical evidence proved that blood detected on vaginal swab was on account of micro haemorrhage, which could be caused by the sexual attempt- held, that mere absence of injury cannot be a ground to disbelieve the testimony of the prosecutrix- testimony of the prosecutrix was corroborated by PW-1, Pardhan who deposed that in the meeting of the Panchayat, accused had admitted his mistake- in these circumstances, conviction of the accused was justified.
Title: Susheel Kumar Vs. State of Himachal Pradesh Page-1268

Indian Penal Code,1860 - Sections 376 (2) (f) and 84- Prosecutrix aged four and half years was raped by the accused- Accused pleaded that he was suffering from schizophrenia- he was examined by the Doctor and was declared fit for trial- held, that crucial point of time at which the unsoundness of mind has to be established is when the offence was committed, the Court has to consider whether at the time of commission of the offence the accused, by reason of

unsoundness of mind, was incapable of knowing the nature of the act or that what have he was doing was contrary to the law-since there was no evidence that the accused was insane at the time of commission of offence therefore, accused is not entitled to the acquittal on the ground of unsoundness of mind.
Title: Gopal Singh Vs. State of H.P. Page-185

Indian Penal Code, 1860 - Sections 376 and 506 IPC- Accused committed rape upon the prosecutrix- she narrated this fact to her parents who lodged the FIR – incident had taken place on 31.3.2007- FIR was lodged on 4.4.2007- no satisfactory explanation was given for delay- medical evidence did not corroborate the prosecution version-it was stated that as per forensic report and examination of the victim, there was no sign of recent sexual intercourse-prosecutrix was minor and in case of forcible intercourse with her, there was every possibility of swelling of labia majora/labia minora- held, that in these circumstances, prosecution version was not proved beyond reasonable doubt-accused acquitted.
Title: Dharam Sain Vs. State of H.P. Page-1013

Indian Penal Code, 1860- Sections 382, 341, 506 and 323 read with Section 34 IPC- Accused had committed theft of Rs. 6,700/- after having made preparation for causing hurt- testimony of eye-witness was contradictory in examination-in-chief and cross-examination- recovery witness also denied the recovery- FIR was not lodged immediately on the date of incident- held, that in these circumstances, prosecution version was not proved and the acquittal of the accused was justified.
Title: State of Himachal Pradesh Vs. Ajay Shakti and another
Page-1244

Indian Penal Code, 1860- Sections 498-A and 306- deceased was married to the accused- a daughter aged 3 years old and son aged 9 months were born out of wedlock- accused started beating the deceased and denied maintenance to her- matter was reported to Panchayat- the deceased committed suicide- held, that prosecution witnesses had made improvements in their testimonies -no specific instance was given when the beatings were given to the deceased- father of the deceased had never made any complaint regarding the beating given to his daughter - no application for maintenance was made by the deceased-hence, version of the prosecution that deceased was forced to commit suicide by accused was not reliable- in order to prove cruelty, there has to be series of events which were not proved- accused acquitted.
Title: State of Himachal Pradesh Vs. Soni Kumar and another Page-181

Indian Penal Code, 1860- Sections 498-A and 306 read with Section 34 of IPC-Deceased had committed suicide by consuming poison- father of the deceased filed a complaint that deceased was not being treated properly in her matrimonial home- he made inquiry on which accused apologized-subsequently, deceased committed suicide- father of the deceased admitted in his cross-examination that no dowry was demanded by the accused at the time of marriage- PW-3 told that deceased was fed up due to her illness- accused had never harassed the deceased-PW-5 also admitted in cross-examination that no dowry was demanded at the time of marriage- PW-9 admitted that she had not told about the non-fulfillment of the demand of dowry to anyone and was deposing about this fact for the first time- held, that the testimonies of the eye-witnesses suffer from improvements- there has to be a series of facts/events to cause harassment - there was no demand of dowry and no evidence that

deceased was forced to commit suicide or that accused had insisted or provoked the deceased to commit suicide.
Title: State of Himachal Pradesh Vs. Sunil Kumar and another Page- 17

Indian Succession Act, 1925- Section 63- Defendant No.1 claimed that deceased had executed a Will in his favour- he was looking after the deceased during his life time- the trial Court and the Appellate Court held that the Will was shrouded in suspicious circumstances – it was proved on record that defendant No. 2 was looking after the deceased during his life time- deceased was residing alone and defendant No. 2 was married at a walk-able distance of 5 minutes from the house of the deceased- version of the witnesses regarding the visit to Sub Registrar by deceased was also contradictory- scribe stated that the Will was earlier written in favour of all real brothers- 3-4 persons came who quarreled with the deceased on which the deceased tore the earlier Will and executed a fresh Will in the name of the defendant No. 1 – the fact that deceased had got the Will executed in favour of all brothers showed that she never executed the Will in favour of the defendant No. 1- defendant No. 1 is the client of DW-1- DW-3 is his clerk, therefore, their testimonies cannot be relied upon- in these circumstances, Will was rightly held to be not proved.
Title: Gilja Ram Vs. Barfi Devi & Others Page-949

Indian Succession Act, 1925- Section 63- Plaintiff claimed that she being daughter of the deceased is entitled to succeed to his share along with defendants 1 a, b and 2- defendant No. 2 had forged a fictitious document stated to be a "will" of the deceased – defendant No. 2 claimed that Will was executed by the deceased in his favour in the presence of respectable persons- held, that as per evidence, will was duly executed by the deceased – plaintiff was born in the house of her maternal grand-mother and had no inimical relations with the witnesses– defendant No. 2 was looking after the deceased and had performed his last rites – the mere fact that mutation was attested after few years will not render the Will suspicious.
Title: Tek Ram Vs. Bali and others Page-748

Indian Succession Act, 1925- Section 63- Will was witnessed by one marginal witness- the other person had put his signature above the words "***Shinakhat Karta***, (identifier) - held, that even if it is believed that Lambardar was only an Identifier, one of the marginal witnesses had stepped into witness box and had deposed about the execution and attestation of the Will- execution and attestation of the Will was duly proved.
Title: Dashoda alias Yashoda Devi & another Vs. Ramesh and others Page-1210

Industrial Disputes Act, 1947- Section 25-B (2) read with Section 25-F- Workman was appointed in the year 1980 and his services were dispensed with in the year 1990- he had worked for 240 days in calendar years 1980, 1981, 1982 and 1986 to 1989 and he had not completed 240 days of services in the year of his retrenchment - held, that workman is entitled to the benefit of Section 25-B(1) if he had worked continuously or uninterruptedly for a period of 12 consecutive months and it is not necessary that he should have worked continuously or uninterruptedly from January to December in a particular year - if a workman has worked for more than 240 days during the period of 10 months prior to his retrenchment, he would be deemed to be in continuous service for a year.
Title: Mohd. Ali Vs. The State of Himachal Pradesh and others Page-311

Industrial Dispute Act, 1947- Section 25- Delay- State contended that claimant had made a reference before the Industrial Tribunal which was barred by limitation- held, that question of limitation is to be decided by an appropriate Govt. - once a reference was not questioned on the ground of delay, award passed on such reference cannot be questioned on the ground of delay.
Title: State of H.P. and ors. Vs. Inder Singh Page-210

Industrial Dispute Act, 1947- Section 25(f)- petitioner was engaged as a daily wage workman - he was retrenched and made a reference to Labour Court-cum-Industrial Tribunal, which held that the retrenchment was bad and was liable to be set aside- held, that if workman had completed 240 days of service with or without interruptions, it constitutes completion of 240 days of service and the employer is under an obligation to comply with Section 25(f) of Industrial Dispute Act.
Title: State of H.P. and ors. Vs. Inder Singh Page-210

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Land Acquisition Act, 1894- Section 18 - Appellants claimed that an award announced by District Judge should have been taken into consideration while assessing the compensation payable to them- held, that award pronounced by the District Judge could have been taken into consideration only when the lands are proximate to each other – oral testimonies of the claimants in absence of Khaka Dasti prepared by revenue officials cannot lead to an inference that the lands were proximate to each other-District Judge was justified in rejecting the previous award.
Title: Prakash Kaur & Others Vs. L.A.C & others Page-1112

Land Acquisition Act, 1894- Section 18- Compensation should be fair and reasonable- compensation should be determined on the basis of comparable sale-exemplars of small plots can be taken into consideration especially when other relevant or material evidence is not available- however, Court has to make suitable deduction.
Title: Collector, Land Acquisition, National Hydro Electric Power Corporation Vs. BhagwanDass and others Page-668

Land Acquisition Act, 1894- Section 18- District Judge had assessed different rates of compensation for different categories of land- land was acquired for construction of the road- held, that it is not permissible for the Court to apply the different rates and the Court has to assess uniform rates of compensation for different pieces of land.
Title: State of H.P. & others Vs. Hukmi Ram and ors. Page-331

Land Acquisition Act, 1894- Section 18- Land of the claimant was acquired for the construction of road- he relied upon the sale deed for determination of the market value of the land- held, that sale deed relied upon by the claimants was for the construction of the colonies for housing people which had a profit motive - the land of the claimants was acquired for constructing the road which had no profit motive - asking the State to pay higher compensation would defeat the purpose of acquisition - given the distinction in the purpose of acquisition of the land, sale deed could not be relied upon to determine the compensation.
Title: Hari Chand & Ors. Vs. Land Acquisition Collector, Hamirpur Page-300

Land Acquisition Act, 1894- Section 18- Land of the claimant was acquired for construction of Parbati Hydro Electric Project- claimant dis-satisfied with the award, filed a reference petition claiming that land was situated near bazaar and had potential of raising orchards, growing vegetables, construction of commercial buildings and hotels- reference petition was allowed- appellants contended that land was not situated near bazaar and was not marketing centre of the area- no commercial activities were expected and excessive compensation was paid- held, that no evidence was led by the appellants to show that sale deed produced by them pertained to the land having similar potentiality, utility, similarity and advantages as the acquired land- therefore, sale deeds were rightly rejected.
Title: Collector, Land Acquisition, National Hydro Electric Power Corporation Vs. Bhagwan Dass and others Page-668

Land Acquisition Act, 1894- Section 18- Land of the claimant was acquired for construction of Parbati Hydro Electric Project – some of the land was already the subject matter of the award- acquired land is in the proximity of the headquarters of Sub-Tehsil, Sainj- there is great potentiality for the land to be used for commercial business- held, that the reference Court had rightly granted the parity to the acquired land.
Title: Collector, Land Acquisition, National Hydro Electric Power Corporation Vs. Bhagwan Dass and others Page-668

Land Acquisition Act, 1894- Section 18- Land of the petitioner was acquired for construction of the Kayartu-Thaila road**-** A.D.J. relied upon the sale deed to determine the market value as on January, 2000 and thereafter provided a hike of 10% per annum to determine the market value- held, that in view of judgment of Hon'ble Supreme Court of India in **Ahsanul Hoda vs. State of Bihar, (2013)14 SCC 59-** it is permissible for land acquisition collector or court of law to provide a hike per year.
Title: State of H.P. & others Vs. Hukmi Ram and ors. Page-331

Land Acquisition Act, 1894- Section 18- Land of the petitioner was acquired for the construction of the road- Petitioner claimed that his Gharat was damaged in the year 1985 along with water channel and remaining wall was damaged in the year 1993- he claimed that he was earning Rs. 5,000/- and had incurred total loss of Rs. 1 lac due to damage to Gharat- held, that there was no satisfactory evidence to show that Gharat and its three walls were damaged in the year 1985- Land Acquisition Collector had awarded amount of Rs. 2,157/- amount was enhanced to Rs. 25,000/- for the damage to one wall.
Title: Sant Ram Vs. Land Acquisition Collector & anr. Page-1117

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of Nangal-Talwara Rail Line- notification under Section 4 was issued on 21.4.1998- reference Court had taken into consideration the sale deed dated 22.8.1998- held, that sale deed was proximate to the notification and was rightly taken into consideration- subsequent transaction can be relied upon when there were no fluctuations in the prices since the preliminary notification and the date of subsequent transaction.
Title: General Manager, Northern Railway Vs. Gian Chand & others Page-645

Land Acquisition Act, 1894- Section 18- Possession of the land was taken in the year 1964 whereas the land was acquired in the year 1998- held, that when the possession has been taken prior to the acquisition of the land- land owners are not entitled to compensation from the date of possession but from the date of acquisition- claimants are entitled to file a civil suit for damages.
Title: Hari Chand & Ors. Vs. Land Acquisition Collector, Hamirpur
Page-300

Land Acquisition Act, 1894 - Section 31- Claim of the person entitled to share in compensation if not adjudicated upon in land acquisition proceedings is not barred before the Civil Court.
Title: Santosh Kumar and another Vs. Vijay Ram and others Page-431

Letters Patent Appeal- Clause 10- An order was passed by the Writ Court directing the re-instatement of the Workmen- an appeal was preferred against the order contending that Writ Court had granted the main relief sought in the petition, which was not permissible- held, that an appeal is competent from the decision of a Single Bench provided that such decision falls within the ambit of judgment- order must decide question in controversy in ancillary proceedings, in the petition itself or in the part of the proceedings and such adjudication must also decide and affect the rights of parties – further intermediary or interlocutory order cannot be regarded as judgment - only such order which decides or affects the rights of the parties and put to an end or terminate the proceedings can be treated as judgment- Workmen were ordered to be re-instated subject to the condition and order had not determined the rights or liabilities of the parties - hence, order cannot be termed to be a judgment.
Title: Federal Mogul Bearing India Ltd. Vs. Prit Pal Page-1293

Limitation Act, 1965- Section 5 – An appeal was filed before the Deputy Commissioner, Kangra which was accompanied by an application under Section 5 of Limitation Act for condonation of delay- application was allowed and the delay was condoned- held, that the period of 15 days has been prescribed for the filing of an appeal before the trial Court against the selection and appointment of a person from the date of issuance of appointment letter- an appeal preferred beyond the prescribed period is not maintainable- Section 5 empowers only the Court and not the administrative authority to condone delay- order passed by the Deputy Commissioner, Kangra condoning delay set aside.
Title: Minakshi Vs. State of H.P and others Page-805

Limitation Act, 1963- Article 54- where the purchasers had stated that they were ready to perform their part of the contract and had kept the money for registration expenses- seller admitted that sale consideration was received by him and contract did not provide that time was the essence of the contract, suit cannot be said to be barred by limitation.
Title: Rattan Chand (deceased) through his LRs Smt. Kunti Devi and others Vs. Pawan Kumar and others Page-1007

Limitation Act, 1963- Article 65- Plaintiff filed a civil suit stating that he is owner in possession of suit land and the defendants have no concern with the same- entries in favour of defendants were wrong and illegal- defendants claimed that they are in open, peaceful and continuous possession of the suit land since time immemorial- they have become owners by way of adverse possession- jamabandi showed that suit land was recorded in possession of

defendant since 1987-1988- entries were repeated in the subsequent jamabandies – land was earlier cultivated by the father of the defendant and the house was constructed over a portion of the land- there is no entry of payment of rent by the predecessor-in-interest of the defendants to the plaintiff – held, that in these circumstances the plea of the adverse possession is duly proved.
Title: Bias Dev Vs. Munshi Ram and others Page- 932

Limitation Act, 1965- Article 112 - Plaintiff filed a civil suit for the recovery on the ground of loss suffered by him due to breach of contract- suit was instituted on 10.12.2004, whereas, agreement was entered between the parties on 28.6.1997- plaintiff claimed that his case was covered under Article 112 of Limitation Act and the suit was within limitation- held that, Article 112 covers the suit filed by State Government or the Central Government- any authority/corporation which falls within definition of state under Article 12 will not become entitled to be treated as Central Government or State Government within the meaning of Article 12- suit was to be filed within the period of three years and the suit having not been filed within period of three years is barred by limitation.
Title: Badri Nath Vs. H.P. State Forest Corporation Ltd. Page-1137

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Motor Vehicle Act, 1988- Section 149- A cover note was issued which was valid from 16.9.2005 till 15.9.2005- insurer pleaded that cover note was issued without the payment of premium and the cover note was cancelled – held, that there is no evidence that cancellation of the policy was conveyed to the insured in absence of which the Insurance Company will be liable to satisfy the award.
Title: United India Insurance Company Ltd. Vs. Sh. Mohan Lal & others
Page-388

Motor Vehicle Act, 1988- Section 149- Accident was caused by Tata Bolero, whose gross vehicle weight is 2750 kg - it falls within the definition of light motor vehicle- driver possessed a license to drive light motor vehicle- held, that there was no requirement of having endorsement of PSV and the Tribunal had wrongly granted the right to recovery to the Insurance Company.
Title: Raj Kumar & another Vs. Sukh Dev & others Page-593

Motor Vehicle Act, 1988- Section 149- As per the testimony of Junior Assistant from the Office of R.T.O., Driving Licence was issued from Dehradun and was renewed from the Office of R.T.O. Kullu- held, that in these circumstances, the plea of the Insurance Company that driver did not have a valid driving license to drive the vehicle was not acceptable.
Title: Oriental Insurance Company Ltd. Vs. Mokshri Devi & others
Page-590

Motor Vehicle Act, 1988—Section 149- Claimants pleaded that deceased was travelling in the vehicle as an employee of the owner to deliver the goods- the vehicle met with an accident when he was returning after delivering the goods- driver also admitted that deceased was travelling in the vehicle as an employee of the owner- held, that when a person had hired the vehicle for transporting his goods and was returning in the same vehicle, then he cannot be held to be an unauthorized passenger.
Title: Oriental Insurance Company Ltd. Vs. Rikta alias Kritka & others
Page-1163

Motor Vehicle Act, 1988- Section 149- Deceased and two labourers sustained injuries in an accident of the tractor- Tribunal held the insurance company liable to pay compensation with the right of recovery- held, that as per registration certificate and the insurance policy tractor was meant for agricultural purposes of the insured and not for any other purposes- deceased and two labourers were employees and had loaded bricks in the tractor- they were travelling in the vehicle as labourers and had sustained injury-therefore, it was duly proved that insured had violated the terms and conditions of the insurance policy- appeal dismissed.
Title: Jaswant Singh Vs. Sh. Jagat Ram and others Page-362

Motor Vehicle Act, 1988—Section 149- Driver had a driving licence to drive light motor vehicle- he was driving Mahindra Jeep, which falls within the definition of light motor vehicle- held that Insurance Company is liable to indemnify the insured.
Title: Oriental Insurance Company Ltd. Vs. Rikta alias Kritka & others
Page-1163

Motor Vehicle Act, 1988- Section 149- Driver possessed a license to drive the light motor vehicle – he was driving a Taxi at the time of accident- held, that driver having a valid light motor vehicle licence is not required to have endorsement of PSV i.e. public service vehicle- therefore, it cannot be said that driver did not possess a valid driving licence at the time of accident.
Title: Oriental Insurance Company Ltd. Vs. Asha Devi Gosain and Ors.
Page-773

Motor Vehicle Act, 1988- Section 149- Driving License of the driver was fake but it was renewed from time to time- held, that the insured is not supposed to take any steps to verify the license from the licensing authority to determine the validity- hence, insurer cannot be absolved from the liability on the ground that driving license was fake.
Title: United India Insurance Co. Ltd. Vs. Akash Babu and others
Page-257

Motor Vehicle Act, 1988- Section 149- Driving license was renewed at Nalagarh at least six times- insurer had examined the witness of the licencing authority who proved the renewal of licence - held, that it is for the insurer to plead and prove that insured had committed willful breach of the terms and conditions of the Insurance policy- insured is not supposed to verify the licence- in these circumstances, insurer was rightly held liable.
Title: Salim Vs. Shashi Kala & another Page-223

Motor Vehicle Act, 1988- Section 149- Injured was travelling in the vehicle at the time of accident – Insured contended that injured was travelling in the capacity of conductor/cleaner- he was covered under insurance policy- Insurer argued that deceased was travelling as a gratuitous passenger – copy of the application filed by injured before Commissioner under Workmen Compensation Act and copy of the judgment of the Workman Compensation Commissioner showed that the injured had contended that he was a workman which plea was turned down by Commissioner- an application was preferred which was disposed of with liberty to approach the Motor Accident Claimant Tribunal- the findings recorded by Workmen Compensation Commissioner had attained

finality- therefore, it was not permissible for the claimant to say that he was travelling as cleaner/conductor- MACT had also held that no goods were found near the place of the accident- therefore, insured was rightly held liable.
Title: Ramesh Chand Khurana Vs. Oriental Insurance Company & another
Page-789

Motor Vehicle Act, 1988- Section 149- Insurance Company claimed that driver did not have valid driving licence to drive the vehicle and that insured had committed willful breach of the terms and conditions of the insurance policy- however, no evidence was led to prove this fact- held, that insurer had to plead and prove that the owner of the vehicle has committed willful breach of the terms and conditions of the insurance policy and mere plea is not sufficient to seek exoneration.
Title: United India Insurance Company Limited Vs. Poonam Sharma & others
Page-604

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that deceased was travelling as a gratuitous passenger- claimants led the evidence to prove that deceased was travelling as owner of timber- no evidence was led by the Insurance Company to prove that the deceased was travelling as a gratuitous passenger- held, that in these circumstances the plea of the Insurance Company that deceased was travelling as a gratuitous passenger could not be relied upon and the Insurance Company was rightly held liable to pay the compensation.
Title: Oriental Insurance Company Ltd. Vs. Mokshri Devi & others
Page-590

Motor Vehicle Act, 1988- Section 149- Insurer pleaded that driver did not have a valid driving license to drive transport vehicle – he was driving a vehicle whose unladen weight was 1690 kgs. and gross vehicle weight was 2820 kgs- held, that there was no necessity to have the endorsement of transport vehicle on the license in such a situation- further, insurer had not pleaded and proved that owner had committed any willful breach of the terms and conditions of the policy- appeal dismissed.
Title: Smt. Bhowmick Arti and anr. Vs. Smt. Shiksha Rani and others
Page-240

Motor Vehicle Act, 1988- Section 149- Insurer pleaded that the driver of the vehicle did not have effective and valid driving licence- Driving licence disclosed that it was issued by Registration and Licencing Authority, Nadaun- no evidence was led to prove that the licence was not valid, therefore, the plea of the insurer that licence was not valid is not acceptable.
Title: The New India Assurance Company Vs. Smt. Ato Devi & others
Page-457

Motor Vehicle Act, 1988, Section 149- It is for the insurer to plead and prove that the deceased was travelling in the vehicle as a gratuitous passenger and the owner had committed willful default but when no evidence was led by the insurer to prove this fact, Insurance Company cannot be absolved of its liability to pay the compensation.
Title: Oriental Insurance Company Ltd. Vs. Indira Devi and others
Page-586

Motor Vehicle Act, 1988- Section 149- MACT had held after placing reliance on the FIR that driver was charge-sheeted for the commission of offence punishable under Section 185 of M.V. Act and the insured had committed the breach of the terms and conditions of the insurance policy- however, driver was acquitted of the commission punishable under Section 185 after the trial- held, that the insured had not committed any breach of the terms and conditions of the policy and the Insurance Company was wrongly granted the right of recovery.
Title: Dhiraj Sharma alias Vipin Kumar Vs. Bhagat Ram and others
Page-247

Motor Vehicle Act, 1988- Section 149- MACT held that respondent No. 2 was driving the vehicle- Insurance Company had failed to prove that driver did not possess a valid and effective driving license- copy of driving license showed that driver possessed the licence to drive the vehicle – therefore, insured had not committed any breach- Insurer was rightly held liable.
Title: National Insurance Company Ltd. Vs. Nirmala Devi and Ors.
Page-769

Motor Vehicle Act, 1988- Section 149- Owner claimed that he had engaged one 'R' as driver and 'A' on his own had started vehicle and had caused accident- A did not have a valid driving licence at the time of accident- held, that if 'R' was engaged as driver, it was not explained as to how 'A' could have opened the door of the vehicle and could have started the same- no police report was filed before the Tribunal- held, that in these circumstances, Tribunal had rightly held the owner to be liable.
Title: Kesari Devi Vs. Anil Kumar Mastana & others Page-1060

Motor Vehicle Act, 1988- Section 149- Passengers carrying capacity of the vehicle was '4+1' which means that risk of 4 passengers and one driver was covered- deceased was travelling in the vehicle at the time of accident- insurer had not proved the terms and conditions of the policy- it cannot be said to be an 'Act Policy'- held, that the insurer was rightly held liable.
Title: Oriental Insurance Company Vs. Anil Kumar & others
Page-1063

Motor Vehicle Act, 1988- Section 149- Tribunal had directed the insurer to satisfy the award and to recover the amount from the owner- held that the claimants fall within the purview of third party and the insurer is liable to satisfy the award with the right of the recovery.
Title: Oriental Insurance Company Ltd. vs. Sardaru & ors. Page-253

Motor Vehicle Act, 1988- Section 149- Tribunal had held that driver did not have a valid driving licence - Driver had a valid driving licence to drive light motor vehicle- he was driving a Canter at the time of accident- unladen weight of Canter is less than 4000 kg and gross weight of the same is 10005 kg- held, that canter falls within the definition of "Light Motor Vehicle" as given in Sections 2 (21) and 2 (28) of the Motor Vehicles Act —licence was valid and the Tribunal had fallen in error in holding that driver did not possess a valid driving licence.
Title: Joginder Singh @ Pamma Vs. Vikram @ Vicky and others
Page-1052

Motor Vehicle Act, 1988- Section 149- Tribunal held that driver/insured was not having a driving licence- record showed that insured/driver possessed a learner's licence- RW-1 deposed that he was travelling in the scooter as an instructor and was sitting behind the insured in the scooter- held, that driver was having a valid driving licence and was competent to drive the vehicle - he was accompanied by an instructor, and it cannot be said that driver was not competent to drive the vehicle.
Title: Anuj Sirkek vs. Neelma Devi & Ors. Page-1145

Motor Vehicle Act, 1988- Sections 149 and 157- Unless and until the transfer is effected in the registration certificate and the other documents, registration certificate continues to be in the name of the owner and the transferee in whose name the vehicle has been transferred cannot be said to be the registered owner.
Title: Vipan Kumar Vs. Naushad Ahmed and another Page-607

Motor Vehicle Act, 1988- Section 166- Age of the deceased was 42 years at the time of accident- Tribunal had applied the multiplier of 15- held, that multiplier of 13 would be applicable.
Title: Oriental Insurance Company Ltd. Vs. Asha Devi Gosain and Ors. Page-773

Motor Vehicle Act, 1988- Section 166- Age of the deceased was 50 years at the time of accident- Tribunal had applied the multiplier of 11- held, that multiplier of 9 should have been applied.
Title: National Insurance Company Ltd. Vs. Nirmala Devi and Ors. Page-769

Motor Vehicle Act, 1988- Section 166- Claimant had filed a petition before Workmen Compensation Commissioner which was dismissed on the ground that deceased was not a workman- held, that the claimants are not debarred from filing the claim petition on the ground that deceased was travelling in the vehicle as owner of the goods.
Title: Oriental Insurance Company Ltd. Vs. Indira Devi and others Page-586

Motor Vehicle Act, 1988—Section 166- Claimant sustained injury in the collision between the bus and Swaraj Mazada- his claim petition was dismissed on the ground that bus was not involved in the accident but the accident was caused by the Driver of Swaraj Mazada- it was established that the driver of Swaraj Majda had died in the accident- a closure report was filed before the Court- held, that it was the duty of the Presiding Officer of the Claim Tribunal to provide an opportunity to claimant to array the owner and insurer of the vehicle as respondent in the claim petition- hence, matter remanded with the direction to afford an opportunity to the claimant to array the owner and insurer in the claim petition.
Title: Kaula Ram Vs. Kusum Sood & others Page-1158

Motor Vehicle Act, 1988- Section 166- Deceased, riding a motorcycle, was hit by a bus due to which he died on the spot- Tribunal considered the income of the deceased as Rs. 4,000/- per month and determined the loss of dependency as Rs. 2,200/- per month- held, that claimant had specifically pleaded that deceased was pursuing agriculture/horticulture vocation and this evidence was not rebutted- therefore, income of the deceased could not have been less than

Rs. 6,000/- per month – 50% of the income was deducted towards the personal expenses- thus, loss of the dependency would be Rs. 3,000/- per month- age of the claimant was to be taken into consideration to determine the multiplier- therefore, multiplier of 12 was proper- Tribunal had held that deceased had contributed to the negligence and had deducted 30% amount, which was not correct- therefore, amount of Rs. 4,32,000/- was awarded along with interest at the rate of 7.5% per annum.

Title: Kamla Sharma Vs. M/s Bharat Tour & Travels Pvt. Ltd. and others Page-765

Motor Vehicle Act, 1988- Section 166- Deceased sustained injuries when he was debarking from the bus, which was started by the driver suddenly- claimant claimed that the income of the deceased was Rs. 12,000/- per month- however, no evidence was led to prove this fact- hence, by guess-work income of the deceased can be taken as Rs. 6,000/- per month- claimant had lost source of dependency to the extent of 50%, thus, loss of dependency was Rs. 3,000/- per month- the multiplier of '6' is applicable- claimant is entitled to the compensation of Rs. 2,16,000/- with interest at the rate of 7.5% per annum.

Title: Tejwanti Vs. Ibrahim Bharti & others Page-792

Motor Vehicle Act, 1988- Section 166- Deceased was bachelor and a government employee drawing gross salary of Rs. 7604/- -claimants were three in number, therefore, 1/3rd of the amount was to be deducted towards the personal expenses -applying multiplier of 13, claimants are entitled to the sum of Rs.7,80,000/- as loss of earning- Rs. 2,000/- under the head 'funeral expenses' and Rs. 2,500/- under the head 'loss of estate'.

Title: The New India Assurance Company Vs. Smt. Ato Devi & others Page-457

Motor Vehicle Act, 1988- Section 166- Deceased was driving a scooter and was hit by a Tractor which was suddenly stopped by the driver at the place of the accident- held, that evidence of the claimant duly proved that driver of the tractor was driving the tractor rashly and negligently- there was no evidence regarding the negligence of the driver of the scooter- hence, driver and owner of the tractor were rightly held liable to pay the compensation.

Title: National Insurance Company Ltd. vs. Maya Devi & ors. Page-252

Motor Vehicle Act, 1988- Section 166- Deceased was employed in electricity board and her monthly salary was Rs.12,800/- - Tribunal held the loss of dependency to be Rs. 75,000/- per annum and applied multiplier of 7- held, that the compensation was rightly determined.

Title: Janku Devi & Ors. Vs. Managing Director, Himachal Road Transport Corporation Page-360

Motor Vehicle Act, 1988- Section 166- Deceased was returning to his home in a Tractor- he requested the driver to stop the tractor- driver stopped the tractor on which the deceased got down the tractor- Driver started the tractor but could not control it- tractor rolled down- deceased was crushed and succumbed to the injury- insurer had failed to prove that driver did not have a valid driving licence – insurer had not pleaded and proved that owner had committed willful breach of the terms and conditions of the policy- held that deceased was not in the

tractor and was present on the road side, and the insurance company was rightly held liable to pay compensation.
Title: Oriental Insurance Company Ltd. Vs. Leela Devi and others
Page-1066

Motor Vehicle Act, 1988- Section 166- FIR was lodged against the driver of the vehicle – investigation was conducted and challan was filed before the Court- Investigating Officer specifically stated that accident was the result of rashness and negligence of the driver- this statement could not be demolished by the State or the Driver- therefore, it was duly proved that accident was the result of rashness and negligence of the driver- driver had also not challenged the findings recorded by the Tribunal- hence, plea that accident had taken place due to contributory negligence could not be accepted- appeal dismissed.
Title: State of Himachal Pradesh & another Vs. Suresh Sharma & others
Page-685

Motor Vehicle Act, 1988- Section 166- High Court had decided one of appeal bearing number FAO No. 278 of 2007, titled as United India Insurance Company Ltd. versus Shri Tulsi Ram and others, on 31.10.2014 in which the insurer was saddled with liability- the insurer had not questioned the same and the order had attained the finality- held that the insurer was liable to pay the compensation in view of the earlier judgment.
Title: United India Insurance Company Ltd. Vs. Salima Devi & others
Page-1072

Motor Vehicle Act, 1988- Section 166- Insurer claimed that accident was result of contributory negligence – however, no evidence was led by the insurer to prove this fact- evidence of the claimants showed that driver was driving the vehicle in a rash and negligent manner- driver had not questioned this finding, hence, plea of the insurer was not acceptable.
Title: United India Insurance Co. Nangal Vs. Sh. Gaurav Sharma and others
Page-386

Motor Vehicle Act, 1988- Section 166- Son of the claimants had died in a motor vehicle accident- MACT awarded amount of Rs. 2,10,000/-- claimants had pleaded that deceased was earning Rs. 5,000/- per month, however, MACT had assessed income as Rs. 2,500/- per month- held, that even if, he was working as labourer his wages cannot be less than Rs. 200/- per day- he would not have earned less than Rs. 4,500/- and the loss of dependency would not be less than Rs. 3,000/- per month- multiplier of 10 would be applicable- thus, the tribunal had assessed the compensation on the lower side.
Title: M/S Oriental Insurance Company Vs. Smt. Manu Devi & others
Page-372

Motor Vehicle Act, 1988- Section 166- Tribunal held that accident was not the result of contributory negligence of the drivers of the bus and truck and was due to the rash and negligent driving of the driver of the bus- tribunal saddled the owner of the bus with liability and directed the insurer to indemnify the insured- held, that no appeal was preferred by the owner/driver of the bus and, therefore, it was not permissible for insurer to claim that the accident was not the outcome of rash and negligent driving of the bus driver.
Title: New India Assurance Company Ltd. Vs. Randeep Singh Rana and others.
Page-369

Motor Vehicle Act, 1988- Section 166- When the injured is seeking compensation for the injury sustained by him, no amount is to be deducted towards his personal expenses.
Title: United India Insurance Company Ltd. Vs. Lalit Chauhan and another.
Page-226

Motor Vehicle Act, 1988—Section 171- Tribunal had granted interest on compensation at the rate of 9% per annum- held, that the rate of interest has to be granted at the rate of 7.5% per annum- accordingly, rate of interest reduced to 7.5% per annum.
Title: Oriental Insurance Company Vs. Tanu Chauhan & others
Page-1169

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N.D.P.S. Act, 1985- Section 20- PW-1 deposed that the bag was sealed with seal impression 'C'- PW-2 deposed that bag was sealed with seal impression 'T' – PW-5 stated that parcel sealed with seal 'E' was handed over to him- NCB forms showed the seal impression 'C'- held, that in view of NCB form, testimony of PW-2 that seal impression was T and that of PW-5 that seal impression was 'E' were of no consequences.
Title: Hem Raj vs. State of H.P. Page-396

N.D.P.S. Act, 1985- Section 20- Accused was driving a Tata Sumo- accused S was occupying front seat while other accused were occupying the rear seats- search of the vehicle and the persons of the accused were conducted leading to the recovery of the charas- held, that the testimonies of the prosecution contradicted each other regarding the time of their arrival at the place of incident- regarding the manner of taking the accused to the police station- no independent witness was associated- link evidence was not established, therefore, in these circumstances, acquittal of the accused was justified.
Title: State of H.P. Vs. Rajesh Kumar & Ors. Page-270

N.D.P.S. Act, 1985- Section 20- Petitioner was found in possession of 150 grams of charas- independent witness did not support the prosecution version- there was contradiction between site plan and the seizure memo regarding the place of recovery- original seal was not produced before the Court for comparison- there was difference in weight of sample mentioned in the seizure memo and the sample received in the laboratory- there was contradiction regarding the re-seal impression, therefore, in these circumstances, acquittal of the accused was justified.
Title: State of Himachal Pradesh Vs. Mustkeen son of Mr.Karimulla
Page-1194

NDPS Act, 1985- Section 20- Accused was found in possession of 400 grams of charas- independent witness had turned hostile - I.O admitted in his cross-examination that school, shop, panchyat ghar and houses of independent persons were situated near the place of incident- no person was called from the shop or school, but independent witnesses were called from a far off place- held, that in these circumstances, prosecution version could not be relied upon- acquittal of the accused was justified.
Title: State of Himachal Pradesh Vs. Siri Ram Page-197

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3.5 kg of charas- according to prosecution witnesses, there were 5-7 shops on the roadside and about 15/20 residential houses in the village- it was admitted that no person from locality was associated nor any vehicle was stopped to associate its occupant as a witness while carrying out search- person carrying the ruqqa left to police station but never returned- held, that the police had not made any serious effort to associate independent witnesses-accused acquitted.
Title: Om Prakash Vs. State of Himachal Pradesh Page-1023

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3.5 kg of charas in the vehicle- independent witness had not supported the prosecution version- there are material contradictions, improvement, embellishment and falsehood in the testimonies of the police officials- there is contradiction regarding the handing over of the case property to MHC- held, that in these circumstances, prosecution version cannot be relied upon- accused acquitted.
Title: Manoj Kumar Vs. State of Himachal Pradesh Page-1276

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3 kg 800 grams charas concealed in a bag under his left arm pit- no independent witness was associated during the search, seizure and sampling process- prosecution witnesses admitted that police party had checked 20-25 vehicles and the place where the accused was apprehended was a national highway- they further admitted that there were 4-5 hotel and restaurants between the police Station and the place of incident, therefore, place of the incident was not an isolated place where no independent witness was available- police had not made any efforts to associate independent witness- there were contradictions in the testimonies of eye-witnesses regarding the time of sending ruqqa and the time spent in taking photographs- held that in these circumstances, prosecution case was doubtful- accused acquitted.
Title: Dalbir Singh Vs. State of Himachal Pradesh Page-259

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 4.5 kg. of charas- place of incident was situated on National Highway having heavy flow of traffic- police could not give the registration number of any of the vehicles, which were stopped by them for traffic checking- version of the police that police party tried to stop vehicles but no one stopped was not believable –a tea shop was located at a short distance but no one was called from the tea shop- this shows that sincere efforts were not made to associate independent witness- in these circumstances, prosecution version not reliable-accused acquitted.
Title: Duni Chand Vs. State of H.P. Page-889

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 5.600 kg of charas-PW-1 deposed that he was asked to call independent witness but could not find any independent witness- PW-2 also deposed that he had sent PW-1 to search for independent witness but PW-1 could not find any independent witness- held, that in these circumstances, prosecution version cannot be doubted due to non-association of independent witnesses.
Title: Sushil Kumar alias Shilu Vs. State of Himachal Pradesh
Page-413

N.D.P.S. Act- Section 20- Accused was found in possession of 6.250 k.gs of charas- police made efforts to search for independent witnesses but could not find any independent witness - PW-3 and PW-4 were declared hostile but they

admitted their signature on the seizure memo- FSL report showed that the contraband was found to be charas on analysis- held, that accused was rightly convicted.
Title: Prakash Chand vs. State of Himachal Pradesh Page- 62

N.P.P.S. Act, 1985- Section 20- Accused was found in possession of 7 kg 100 grams of charas- prosecution version regarding sending of rukka was contradictory- testimony of the independent witness also contradicted the prosecution version-No seal impression was put on the NCB form making it difficult for the laboratory to compare the sample seal- held, that in these circumstances, prosecution had not proved its case beyond reasonable doubt.
Title: Inder Singh Vs. State of H.P. Page-758

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 11 kgs 730 gms of charas- police officials specifically deposed that accused was found at a secluded place, where no witness was available and there was no habitation nearby- testimonies of the police officials were reliable and could not be doubted simply because of non-association of independent witnesses.
Title: Hem Raj Vs. State of H.P. Page-396

N.D.P.S. Act, 1985- Section 20- As per prosecution case, accused was found in possession of 4.85 kg. of charas- police officials carrying out the search were posted at different places- according to them, they had stayed in hotel- however, prosecution had not placed on record the registers of hotel located at Sunder Nagar or Karsog, which shows that prosecution version regarding this fact could not be relied upon- further, police officials had arrived in the private vehicle of Head Constable 'L' – in the absence of hotel record the whole version that police had stayed in the hotel and had arrived in the vehicle became doubtful which makes the genesis of the incident suspicious.
Title: Karam Singh Vs. State of H.P. Page-541

N.D.P.S. Act, 1985- Section 20- As per prosecution case, accused was found in possession of 1.930 kg. of charas- independent witness had not supported the prosecution version- it was proved that police Station Anni was surrounded by many residential houses and shops and there were houses in the vicinity- however, no person was associated from those houses- police officials stated that efforts were made to associate independent witness but no person was available- held, that it is unbelievable that no one was available in the house- ordinarily houses are occupied in the villages- therefore, testimony of the prosecution witnesses that they tried to associate independent witness cannot be relied upon- hence, accused acquitted.
Title: Mohan Singh Vs. State of H.P. Page-902

N.D.P.S. Act, 1985- Section 20- Petitioner was occupying seat no. 36 in a bus- search of bus was conducted on which the accused was found in possession of 5.5 k.g of charas - there were contradictions in the testimonies of the prosecution witnesses regarding the location of the bag and the number of police officials who had boarded the bus- police officials had straight away gone to Seat No. 36 which showed that they had prior knowledge that the person occupying seat No. 36 had contraband- held, that in these circumstances, the compliance of Section 42 of N.D.P.S. Act was mandatory- since, there was non-compliance of Section 42, hence, accused acquitted.
Title: Raju Vs. State of Himachal Pradesh Page-784

N.D.P.S. Act, 1985- Section 50- Accused was found in possession of 7 kg of charas concealed under the clothes- an option was given to him whether he wanted to be searched by police on the spot, magistrate or gazetted officer prior to the search- held, that accused has to be given an option to be searched before gazetted officer or magistrate- option given to the accused to be searched before the Magistrate, gazetted officer or the police is against the letter and spirit of Section 50 of the ND & PS Act- the entire trial is vitiated due to non-compliance of the provisions of Section 50-accused acquitted.
Title: Sagar Chaudhary Vs. State of H.P. Page-1068

N.D.P. S. Act, 1985- Section 55- Column No. 1 to 8 of NCB Form were filled up by I.O. – column No. 9 to 12 were filled by ASI Mohan Lal- however, he was not posted as SHO- therefore, he was not competent to sign the column No. 9 to 12- no Roznamcha was produced to prove that he was discharging duty of SHO or that SHO was absent from the police Station, which leads to an inference that the case property was not brought to the police station and the exercise was completed at a place other than Police Station.
Title: Karam Singh Vs. State of H.P. Page-541

Negotiable Instruments Act, 1881- Section 138- Complainant had advanced an amount of Rs. 2 lacs to the accused- accused issued a cheque which was dishonoured due to insufficient fund on presentation- it has come in evidence that agreement was entered between the complainant and the husband of the accused- agreement was subsequently cancelled- cross-examination of the complainant showed that he did not know the accused- therefore, he had no occasion to advance the loan of Rs. 2 lacs to unknown person- held, that complainant had failed to prove that cheque was issued in discharge of any lawful authority- accused acquitted.
Title: Ses Ram Vs. Reeta Bhardwaj Page-723

'P'

Practice and Procedure- Court should be conscious in entertaining the writ petitions which are aimed at preventing the eligible candidate to reap the fruits of selection.
Title: Sunil Kumar vs. Indian Oil Corporation Ltd. (IOC) & others Page-119

'S'

Specific Relief Act, 1963- Section 12- Defendant had entered into an agreement to sell the land with the plaintiff in which he had undertaken to get the consent of his brother for selling his share- held, that share of the defendant was severable and identifiable- therefore, plaintiff is entitled for the execution of the sale deed regarding the share of the defendant.
Title: Hari Krishan Karol Vs. Surinder Kumar Page-417

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit seeking specific performance of the agreement- defendant admitted the execution of the agreement and the receipt of the claim- he claimed that he had written letters to the plaintiff to get the sale deed executed but the plaintiff had failed to get the sale deed executed- however, letters were not placed on record- held, that plea of the defendant cannot be accepted.
Title: Hari Krishan Karol Vs. Surinder Kumar Page-417

Specific Relief Act, 1963- Section 34- Plaintiff claimed that he and defendants No. 4 and 8 are owners in possession of suit land- order passed by Settlement Officer, Dharamshala and consequent mutation attested in favour of defendants No. 1 and 3 are wrong- defendants claimed that suit land was the subject matter of consolidation – the predecessor-in-interest of the plaintiff and defendants No. 4 and 5 and others had filed a revision petition before the State Government- Khasra Nos. 221 and 222 were re-allotted- order is binding upon the plaintiff- record showed that only Khasra Nos. 221, 222 and 223 were re-allotted- thus the order would not apply to other Khasra numbers- plaintiff claimed that order was passed by settlement Officer without hearing him- trial Court held that in absence of the file, the version of the plaintiff could not be relied upon- held, that in absence of file, version of the plaintiff that he was not heard prior to passing of the order cannot be brushed aside – further, the fact that suit land was allotted to defendants No. 1 to 3 beyond entitlement would show that plaintiff was not heard, otherwise, plaintiff would have pointed out this fact to the Settlement Officer.
Title: Pawan Kumar Vs. Rajinder Lal and others Page-996

Specific Relief Act, 1963- Section 34- Plaintiffs claimed that they are joint owners in possession of the suit land with defendant No. 1 to the extent of half share and that the land was never partitioned – predecessor-in-interest of the defendants had sold the suit land exceeding his share vide sale deed dated 1.3.1983- defendant claimed that land was mortgaged prior to the sale- plaintiff had no right, title or interest over the suit land- according to recital in the sale deed, vendor had half share over the suit land, however, he had sold the entire suit land- held, that only half share could have been sold and not the whole.
Title: Kanahya Lal & ors. Vs. Kirpa Ram & ors. Page-947

Specific Relief Act, 1963- Section 34- Plaintiffs claimed to be the co-owners in possession of the suit land and the defendant to be a stranger- defendant claimed that suit land was allotted to him by Government under H.P. Village Common Land and Utilization Scheme- copy of revenue record showed that suit land was recorded in ownership of Shamlat Deh Hasab Rasad Malguzari- the name of the defendant was recorded to be in possession of suit land- remarks column showed that ownership was transferred in the name of the Government and that the govt. had allotted the land in favour of the defendant- mutation was attested-Settlement collector reviewed and cancelled it - held, that certificate of allotment of land is a substantial piece of evidence- allotment made by Settlement Collector could not be challenged before the Civil Court but could only be challenged by filing an appeal.
Title: Jarmej Singh son of Shri Rasila Singh and others Vs. Hazauro son of Shri Mangtu Page-1040

Specific Relief Act, 1963- Section 34- Plaintiffs claimed to be the co-owners in possession of the suit land and the defendant to be a stranger- defendant claimed that suit land was allotted to him by Government under H.P. Village Common Land and Utilization Scheme- copy of revenue record showed that suit land was recorded in ownership of Shamlat Deh Hasab Rasad Malguzari- the name of the defendant was recorded to be in possession of suit land- remarks column showed that ownership was transferred in the name of the Government and that the govt. had allotted the land in favour of the defendant- mutation was attested-Settlement collector reviewed and cancelled it - held, that certificate of allotment of land is a substantial piece of evidence- allotment made by

Settlement Collector could not be challenged before the Civil Court but could only be challenged by filing an appeal.
Title: Jarmej Singh son of Shri Rasila Singh and others Vs. Raghubir Singh S/o Mangtu Page-1046

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit for declaration that they are permanent lessees of the grass land known as "Ghas Godam Mundkhar" and the land was allotted to their father by ruler of Bilaspur State- State Government decided to put the forest grass grown on the land to auction- notice was issued by the plaintiff on which Law Department gave an opinion that lease was perpetual and heritable- one of the plaintiffs filed an application before Collector for recording the factum of lease in the revenue record which was allowed- an appeal was preferred before the Commissioner who directed that matter be settled before the Civil Court- defendants pleaded that document was not a lease, but it was a concession granted by the Ruler to the father of the plaintiffs and no rent was paid by the plaintiffs- suit was initially decreed- appeal preferred before Additional District Judge, Bilaspur and High Court were dismissed- matter was taken to Supreme Court of India and the case was remanded with liberty to the parties to adduce fresh evidence- however, no evidence was led and application filed to lead additional evidence was dismissed- suit was ultimately dismissed- appeal preferred before the Appellate Court was also dismissed- held that documents show that grant was made by Raja Bilaspur- there was no time frame rather the same was granted in perpetuity subject to the payment of Rs. 5/- as rent- Raja of Bilaspur was a sovereign enjoying the full powers of the State- there was no restriction or obstruction on his power- further, Conservator of Forest, Bilaspur had also acknowledged the right of the plaintiff- in these circumstances, decree passed by the Trial Court as affirmed by the Appellate Court is not sustainable- appeal allowed.
Title: Kuldip Singh and others vs. State of H.P. and others Page-46

Specific Relief Act,1963- Section 34- Plaintiff claimed to be a co-owner in possession of the suit land to the extent of 1/4th share- he further claimed that revenue entries were wrongly changed and the plaintiff was being dispossessed on the basis of wrong entries- defendants claimed that they were in possession since the time of their ancestors as tenants in the Will without the payment of any rent- they further set up an exchange or arrangement between the predecessor-in-interest of the parties – jamabandi for the year 1953-54 recorded the joint ownership of the parties- subsequent jamabandi shows the suit land to be in possession of G and K and the defendant to be in exclusive possession under them – held, that there was no valid order for change of revenue entries- hence, subsequent entries would have no legal effect.
Title: Banka Ram Vs. Des Raj & others Page-462

Specific Relief Act, 1963- Section 34- Suit land was recorded in the name of respondents No. 7 to 11- A sale deed was executed by respondents No. 7 to 9 in favour of defendants No. 3 to 5- plaintiffs claimed that earlier a suit was filed by defendants No. 7 to 9 against them regarding the cultivation of the land- a compromise was arrived in the appeal and as per compromise, plaintiff and defendants No. 1 and 2 had paid money to the previous owner and had become owners of their share in the suit land- defendants became the owners to the extent of half share, whereas plaintiffs became owners of remaining half share – entries in favour of defendants are wrong- defendants denied the possession as well as the compromise- held, that once it was determined that plaintiffs are

entitled to half share and defendants no. 1 & 2 are entitled to half share, the same question cannot be re-agitated.
Title: Bakshi Ram and others Vs. Julfi Ram since deceased through his LR's and others Page-970

Specific Relief Act, 1963- Section 34- 'T' had gifted the land in favour of 'J'- subsequently, she filed a suit for recovery of gift- 'J' agreed to pay maintenance @ Rs. 50/- per month to 'T' and arrears of maintenance @ Rs. 200/- per month before 11.5.1965- 'T' could recover the possession on breach of undertaking given by 'J'- 'J' exchanged the land with 'B' and 'D'- 'B' transferred the portion of the suit land in favour of defendants No. 14 and 15- 'J' transferred the portion of the land in favour of defendants No. 8 to 13- 'T' filed an Execution Petition without impleading the transferee - warrant of possession was issued on 6.7.1971 – plaintiffs, successors of the transferee, sought declaration that they are owners in possession of the suit land- held, that copy of the report filed by Field Kanungo and copy of Raznamcha do not show as to who was evicted from the suit land- these documents further do not show that 'T' was put in possession of the suit land- exchange made by predecessor-in-interest of the plaintiffs was valid and they could not be deprived of the land given to them.
Title: Kunj Lal & ors. Vs. Kekh Ram & ors. Page-1094

Specific Relief Act, 1963- Section 38- Plaintiff claimed that suit land had fallen to the share of the plaintiff in a family partition and was bifurcated into two parts after the construction of Oddi-Bithal horticultural link road- settlement official carved out a new khasra number out of two khasra numbers and made the land compact, which was not permissible - plaintiff relied upon mutation in support of this submission- plaintiff had not examined the revenue official who had prepared field map of old khasra shown in mutation- held, that mutation entries do not confer any title- plaintiff had also not produced the report of the demarcation- hence, an adverse inference has to be drawn against him.
Title: Man Mohan Singh (deceased) through his LRs Smt. Asha Devi and others Vs. Gopi Chand (deceased) through his LRs Sh. Daneshwar Singh and other Page-1159

Specific Relief Act, 1963- Section 38- Plaintiff claimed to be a tenant –she further alleged that the defendant had broken the lock and had removed the articles- defendant was threatening to dispossess the plaintiff forcibly from the premises- hence, injunction was sought- defendant asserted that plaintiff had vacated the shop after six months of the death of her husband and a false suit was filed – held, that evidence of the defendant did not prove the date, month and year when the possession was handed over by the plaintiff to the landlord- even, the name of the landlord to whom the possession was handed over was not mentioned- name of the husband of the plaintiff was recorded in the jamabandi- no efforts were made by the defendant to seek the deletion of his name- therefore, in these circumstances, the version of the defendant that the plaintiff had handed over the possession to the landlord was not acceptable and the version of the plaintiff that she was forcibly dispossessed was to be accepted as correct on the balance of probability.
Title: Suresh Kumar Vs. Sarla Vaidya Page-499

'T'

Transfer of Property Act, 1882-Section 122- Plaintiff claimed that she was an illiterate lady with rural background- defendant, being the son of her brother residing with her, persuaded her to execute a 'Will' in his favour- instead the

defendant got executed a gift deed in his favour- defendant never intended to execute a gift deed- hence, she prayed that gift deed be set aside- the gift deed was executed on 18.7.1994- an Ikrarnama was also executed vide which defendant agreed to pay maintenance @ Rs. 100/- per month- no explanation was given for executing Ikrarnama- no receipt was produced to show that defendant was paying Rs. 100/- per month- defendant failed to prove that gift deed was a result of fraud, mis-representation and undue influence- when the deed was executed by illiterate lady, the burden of proving that transaction was free and fair would be upon the beneficiaries.
Title: Hari Ram Vs. Tarlok Chand Page-729

'W'

Wakf Act, 1995- Section 7- Defendant was removed by Himachal Pradesh Wakf Board from the post of Imam of the mosque - he was caught red handed taking bribe from the Muslim community for sending them to Haz- he was in possession of the residential accommodation free of cost- he was using two storeyed building attached to the mosque as guest house- he was asked to vacate the premises but he refused to do so- held, that defendant had not assailed his termination order as Imam of the mosque- status of the defendant after termination was of a mere tress passer- he had no vested right to reside in the accommodation after his removal as Imam- therefore, defendant was liable to vacate the premises and to pay use and occupation charges.
Title: Maulana Mumtaz Ahmed Quasmi Vs. Himachal Pradesh Wakf Board Page-1074

Wealth Tax Act,1957- Section 17- Assessee contended that his land was agricultural land and did not fall within the definition of the urban land - there are trees standing on the land and it was not possible to raise any construction without seeking permission from the Competent Authority- held, that as per the definition of the urban land any land classified as agricultural land or the land in which the construction of the building is not possible would not fall within the definition of the urban land- as the land of the assessee is agricultural land and no construction is possible without the permission of Municipal Corporation, it is not liable for the assessment.
Title: Amin Chand Mehta Vs. Commissioner of Wealth Tax Page-442

Wealth Tax Act, 1952- Section 17- Assessee contended that his land was agricultural land and does not fall within the definition of the urban land - there are trees standing on the land and it was not possible to raise any construction without seeking permission from the Competent Authority- held, that as per the definition of the urban land any land classified as agricultural land or the land in which the construction of the building is not possible would not fall within the definition of the urban land- as the land of the assessee is agricultural land and no construction is possible without the permission of Municipal Corporation, it is not liable for the assessment.
Title: Amin Chand Mehta Vs. Commissioner of Wealth Tax Page-445

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

Dharam Dass .....Petitioner.
Versus
HPSEB Ltd. & anr. .....Respondents.

CWP No. 5639 of 2014.
Reserved on: 30.10.2014
Decided on: 3.11.2014.

Constitution of India, 1950- Article 226- Petitioner was appointed as a Beldar- he was retrenched in the year 1998- he filed an application before Administrative Tribunal, which was allowed- petitioner was re-engaged and was conferred the status of work charge employee- he was again retrenched on 13.5.2005- he referred the matter to Industrial Tribunal Shimla, which held that retrenchment was in violation of the Industrial Disputes Act – writ petition filed by the respondent was dismissed and the petitioner was engaged on 12.11.2010 as a T-mate- petitioner claimed that he should have been conferred with work charge status with all the consequential benefits- held, that petitioner was conferred the work charge status w.e.f. 26.12.1993- he was not allowed to join the duty and was wrongly retrenched- retrenchment was set aside- therefore, he is entitled to be conferred the work charge status with all consequential benefits including promotion from the day his juniors were promoted to the higher post. (Para- 4 and 5)

For the petitioner: Mr. Hamender Singh Chandel, Advocate.
For the respondents: Ms. Sharmila Patial, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner was engaged as Beldar on 26.12.1993. He was retrenched in the year 1998. He approached the erstwhile H.P. State Administrative Tribunal, by filing OA No. 1587 of 1998. The erstwhile H.P. State Administrative Tribunal ordered the re-engagement of the petitioner vide order dated 6.11.1998. The petitioner was re-engaged as per the orders of the erstwhile H.P. State Administrative Tribunal. He was conferred with work charge status, as per Annexure P-2 dated 6.11.2002 at Sr. No. 42. However, the fact of the matter is that the petitioner was not allowed to join his duties as work charge employee.

2. The petitioner was again retrenched on 13.5.2005. The petitioner raised the industrial dispute. The matter was referred to the Industrial Tribunal-cum-Labour Court, Shimla, vide reference No. 59 of

2007. The learned Presiding Officer, Industrial Tribunal-cum-Labour Court, Shimla, held the retrenchment of the petitioner in violation to provisions of Sections 25F,25G &H of the Industrial Disputes Act, 1947. The petitioner was ordered to be re-instated with seniority and continuity of service, but without back wages.

3. The respondents-Board, feeling aggrieved by the order dated 1.6.2010, filed CWP No. 6089 of 2010 before this Court. The same was dismissed by this Court with analogous writ petitions on 28.9.2010. The petitioner was re-engaged as Beldar on 12.11.2010 vide Annexure P-6. He was appointed as T/Mate vide order dated 5.11.2011 (Annexure P-7).

4. The case of the petitioner, in a nut shell, is that on the basis of Annexure P-2, order dated 6.11.2002, he should have been conferred work charge status with all consequential benefits. Mrs. Sharmila Patial, Advocate, appearing for the Board has vehemently argued that since there is break in service, the petitioner could not be conferred with work charge status w.e.f. 6.11.2002, as he was re-engaged pursuant to the award dated 1.6.2010, as Beldar on 12.11.2010.

5. It is evident from Annexure P-2, letter dated 6.11.2002 that taking into consideration the seniority of the petitioner w.e.f. 26.12.1993, he was conferred with work charge status. He was not permitted to join his duties as work charge employee for the reasons best known to the respondents. The subsequent retrenchment of the petitioner dated 13.5.2005 was set aside by the learned Industrial Tribunal-cum-Labour Court, Shimla, vide order dated 1.6.2010. The learned Tribunal has awarded re-instatement of the petitioner with continuity in service but without back wages. The writ petition preferred against the award dated 1.6.2010 has been dismissed by this Court on 28.9.2010. The action of the respondents to re-engage the petitioner merely as Beldar on 12.11.2010 was wholly illegal, though he has been made T/Mate on 5.11.2011. However, the fact of the matter is that the petitioner should have been granted the work charge status w.e.f. 6.11.2002, vide letter Annexure P-2, with all consequential benefits by counting his previous seniority.

6. Accordingly, the Writ Petition is allowed. The petitioner would be deemed to have been appointed on work charge basis w.e.f. 6.11.2002 with all consequential benefits including promotion etc. from the date the persons junior to him have been promoted to the higher post. The consequential benefits be released to the petitioner by treating him work charge employee w.e.f. 6.11.2002, within a period of six weeks from today.

7. Pending applications, if any, shall stand disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE.

Ram Krishan Khagta ..... Petitioner
Vs.
The Kangra Central Cooperative
Bank Ltd. & ors. ..... Respondents

CWP No. 3874 of 2014.
Date of decision: 3.11.2014.

Constitution of India, 1950- Article 226- Petitioner had filed a writ petition against the Co-operative society registered under H.P. Cooperative Societies Act, 1968- held, that writ petition against the co-operative society is not maintainable- the Court cannot even relegate the petitioner to pursue the remedy under section 72 of H.P. Cooperative Societies Act. (Para- 3 to 6)

Cases referred:
Chandresh Kumar Malhotra vs. H.P.State Coop. Bank and others 1993 (2) Sim.L.C. 243
S.S.Rana vs. Registrar, Co-operative Societies and another (2006) 11 SCC 634
Vikram Chauhan vs. The Managing Director and ors. Latest HLJ 2013 (HP) 742 (FB)

For the petitioner : Mrs. Jyotsna Rewal Dua and Ms. Shalini Thakur, Advocates.

For the respondents Mr. Umesh Kanwar, Advocate, for respondents No. 1 and 2.
Mr. Virender Kumar Verma and Ms. Meenakshi Sharma, Addl. Advocate Generals with Ms. Parul Negi, Dy. Advocate General, for respondent No. 3.
Mrs. Ranjana Parmar, Advocate, for respondents No. 4, 6 and 7.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner has approached this court for grant of following substantive reliefs:-

(i) For directing the respondents to hold review DPC within a time bound schedule by ensuring that no Grade 1 officer is superseded in his promotion to the post of Assistant

General Manager by another officer where the difference of length of promotion between the two officers in feeder category is more than 2 years.

(ii) For holding that supercession by respondents No. 4-6 over the petitioner for promotion to the post of Assistant General Manager is bad in eyes of law considering the difference between their length of promotion in feeder category of Grade 1 is more than 2 years vis-à-vis the petitioner.

(iii) For directing the respondents to promote the petitioner to the post of Assistant General Manager w.e.f. the date his juniors have been promoted i.e. 7.2.2014 along with all consequential including monetary benefits.

(iv) For directing the respondents to read the over all entry of ACR of the petitioner for the year 2008-09 & 2011-12 as 'Very Good' or alternatively the entries in these ACRs be directed to be communicated to the petitioner and thereafter action in accordance with law may be directed to be taken on the un-communicated ACRs.

(v) For issuing a writ of Certiorari or any other appropriate writ for quashing the proceedings of DPC as convened on 31.1.2014 vide annexure P-4 and all consequential actions thereupon vis-à-vis parties to the litigation.

2. From the perusal of the reliefs sought for by the petitioner, it is clear that the relief has been sought primarily against respondent No.1, which is a Cooperative Society registered under the H.P. Cooperative Societies Act, 1968 (for short, the Act).

3. The parties are not at variance that in view of decisions of learned Division Bench of this court in **Chandresh Kumar Malhotra** vs. **H.P.State Coop. Bank and others 1993 (2) Sim.L.C. 243, Sanjeev Kumar & ors.** Vs. **State of H.P. and ors. CWP No. 6709 of 2013-A dated 4.8.2014, LPA No. 236 of 2011 titled Laxmi Narain & ors.** Vs. **Kuldeep Singh & ors alongwith connected matters decided on 17.9.2014,** the decision of Hon'ble Supreme Court in **S.S.Rana** vs. **Registrar, Co-operative Societies and another (2006) 11 SCC 634** and the decision of Hon'ble Full Bench of this court in **Vikram Chauhan** vs. **The Managing Director and ors. Latest HLJ 2013 (HP) 742 (FB),** the writ petition itself is not maintainable.

4. However, the learned counsel for the petitioner has made a request for relegating the petitioner to the Registrar so as to enable him to file a petition under section 72 of the Act. The petitioner has made this request taking cue from para-9 of preliminary objection raised by respondents No. 1 and 2 to the following effect:-

> "*The petitioner has an effective alternative remedy under Section 72 of the H.P. Cooperative Societies Act, 1968. Being a matter touching the business of the society, the grievance, if any,*

has got to be vindicated by having recourse to the said provisions only."

5. I am afraid that this court cannot relegate the petitioner to pursue the remedy under section 72 of the Act, which is in fact not available to him under the law. This aspect of the matter has been succinctly dealt with by the learned Division Bench of this court in **Sanjeev Kumar's** case (supra), wherein it was held as follows:-

> *"9. "Faced with such situation, the petitioners would then contend that the orders passed by the Registrar and thereafter by the State government were statutory and therefore, a writ against an order passed by the statutory authority was maintainable.*
>
> *10. There would have been no dispute in case the orders impugned herein could be termed to have been passed by the statutory authority in exercise of powers conferred upon it by the Act and Rules, because in that event undisputedly the writ petition would be maintainable before this court. However, the moot question again herein is as to whether the orders passed by the respondents i.e. Registrar and the State Government can be termed to be statutory orders.*
>
> *11. Admittedly, the dispute raised by the petitioners pertained to a service matter and therefore, even if this court had relegated the petitioners to the Registrar/ State government, could the orders be termed to be in exercise of the statutory powers? The obvious answer is no, for more than one reasons. Firstly, the dispute of an employee and employer relationship is not a dispute, which touches the constitution, management or business of the cooperative societies and therefore, is not amenable to the jurisdiction of the Registrar under section 72 of the Act [Re:* ***Morinda Coop. Sugar Mills Ltd.*** *Vs.* ***Morinda Coop.Sugar Mills Workers' Union (2006) 6 SCC 80****]. Secondly even if this court had relegated the petitioners before the Registrar/ State government, the orders passed by them would not clothe the orders so passed with statutory colour, as the same are not in exercise of statutory powers conferred upon them under the provisions of the Act and Rules as held in* ***Chandresh Kumar Malhotra*** *(supra). "*

6. In view of the aforesaid exposition of law, even this prayer of the petitioner cannot be acceded to. Consequently, there is no merit in this petition and the same is dismissed. All interim orders are vacated. Pending application, if any also stands disposed of.

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

State of Himachal Pradesh ...Appellant.
Versus
Sunil Kumar and another ...Respondents.

Cr.A.No. 344 of 2008
Reserved on : 31.10.2014
Decided on: 3.11.2014

For the Appellant: Mr. Ramesh Thakur, Asstt. A.G.
For the Respondents: Mr. T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 29.2.2008 rendered by the Additional Sessions Judge, Ghumarwin, District Bilaspur in Sessions Trial No. 58/7 of 2004, whereby the respondents-accused (hereinafter referred to as the "accused" for convenience sake), who were charged with and tried for offence punishable under sections 498-A and 306 read with section 34 of the Indian Penal Code, have been acquitted.

2. Case of the prosecution, in a nutshell, is that a telephonic message was received at Police Station, Ghumarwin on 25.2.2004 at 5.45 P.M. from Dr. Anil at Civil Hospital, Ghumarwin that a case of poisoning has come which needs action. Rapat No.20 dated 25.2.2004 Ex.PW-4/A was recorded. S.I. Balwant Singh proceeded to Civil Hospital, Ghumarwin. The Medical Officer on duty informed that a lady named Asha Devi was not fit to make statement. He came back to Police Station and got recorded rapat No.26 dated 25.2.2004 vide Ex.PW-4/B. On 26.2.2004 at 10.10 A.M. Rattan Singh from P.G.I. Chandigarh informed telephonically Police Station, Ghumarwin that in the poisoning case of Jol Palakhi village which was referred to P.G.I. from Ghumarwin, the lady has died at PG.I. Chandigarh. Head Constable Chotta Ram alongwith Constable Balbir were sent to P.G.I. Chandigarh vide rapat No. 6 dated 26.2.2004 Ext. PW-4/C. Chotta Ram came back from P.G.I. Chandigarh to Police Station Ghumarwin on 27.2.2004 and rapat No.22 dated 27.2.2004 Ext. PW-4/D was incorporated. The post- mortem of the deceased was got conducted at Chandigarh and the dead body was handed over to deceased's father in law, Rattan Lal. It came during the course of investigation by Head Constable Chotta Ram that on 25.2.2004 at 5.15 P.M., Asha Devi had gone to bring grass from the fields. She felt giddy and accused Ram Dass and Krishni Devi brought her home. However, she started vomiting. She was taken to Civil Hospital, Ghumarwin from where she was referred to Bilaspur. From Bilaspur she

was further referred to P.G.I. Chandigarh on 25.2.2004 at 4.00 A.M. Asha Devi died at P.G.I. Chandigarh on 26.2.2004 at 5.00 P.M. Statement of the mother of the deceased Brahmi Devi was recorded by H.C. Chotta Ram vide Ext. DW-2/A. PW-1 Chandu Ram on 28.2.2004 made statement under Section 154 of the Criminal Procedure Code vide Ext. PA. According to him, he was resident of Dosarka, Police Station, District Hamirpur. He has retired as Captain from the Army. His elder brother has expired 7 years back, who was having 8 daughters. He was looking after the daughters. He married Asha Devi on 8.7.2003 with accused Sunil Kumar, resident of village Jol Palakhi. Whenever Asha Devi used to visit her house, she used to say that she was not comfortable at her in-laws house. Her husband, mother-in-law, grandfather-in-law and Sister-in-law used to taunt her. He went to Asha Devi's house and asked accused as to why they were harassing Asha Devi. They apologized. On 25.2.2004, Sunil Kumar informed him telephonically at 8.30 P.M. that Asha Devi has consumed poison. She was brought to Ghumarwin hospital. Thereafter, he and his wife Santosh went to Ghumarwin hospital. They found that Asha Devi was taken to Bilaspur. They proceeded to Bilaspur. They were told that Asha Devi has been taken to P.G.I. Chandigarh. He got telephonic information about Asha Devi having expired at P.G.I. Chandigarh. Accused were subjecting Asha Devi to ill-treatment, which led her to consume poison. The matter was investigated. An empty tube of Aluminum Phosphide Sulphas was recovered. It was seized vide seizure memo Ext. PW-11/A in presence of Lekh Ram and Joginder Singh witnesses. PW-11 Chint Ram recorded statements of the witnesses. Post-mortem of the dead body was got conducted vide Mark 'C'. Police investigated the case and the challan was put up in the court after completing all the codal formalities.

3. Prosecution examined as many as 12 witnesses in all to prove its case against the accused. Statements of accused under Section 313 Cr.P.C. were recorded. They have denied the case of the prosecution in entirety. According to them, they have not harassed or tortured Asha Devi and no dowry was demanded. She was kept nicely. Learned trial Court acquitted the accused. Hence the present appeal.

4. Mr. Ramesh Thakur, learned Assistant Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. T.S. Chauhan has supported the judgment passed by the trial Court.

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

7. PW-1 Chandu Ram has deposed that he has performed marriage of Asha Devi in the month of July 2003 with accused Sunil Kumar resident of Jol Palakhi. Asha Devi visited his house only once after the marriage. She told them that her mother-in-law, grandfather-in-law, husband and sister-in-law were harassing her on account of dowry. He visited the house of accused and advised them to stop

harassing Asha Devi. On 25.2.2004, at 8.30 P.M. he received telephonic message from accused Sunil Kumar that Asha Devi has consumed something. She was admitted to hospital at Ghumarwin. He and his wife Santosh Kumar went to Ghumarwin. After reaching Ghumarwin, he was told that Asha Devi was sent to Bilaspur Hospital. They rushed to Bilaspur Hospital. When they reached Bilaspur they were told that Asha Devi has already been sent to P.G.I. Chandigarh. They stayed in hospital at Bilaspur and next morning they went back to their home at Hamirpur. They were informed that Asha Devi has expired in P.G.I. Chandigarh. In his cross- examination, he has categorically admitted that at the time of marriage, no dowry was demanded by the accused. However, according to him, they had given dowry according to their status. Accused never demanded dowry from him. He has also admitted that accused knew that Brahmi Devi was a poor lady. Asha Devi had told him about her harassment for dowry in the month of September –October, 2003 when she visited his house at Dosarka. He told this fact to his neighbourer Dalip Singh, retired Subedar. Except that he has not told this fact to anyone. He told this fact for the first time in the Court. He has informed the Police that accused were demanding dowry from Asha Devi (whereas it is not so recorded in Ext.PA.). He has also stated to the police that thereafter he visited the house of accused and told them to stop harassing Asha Devi due to fulfillment of demand of dowry (whereas the words 'her harassment due to demand of dowry' is not written in Ext. PA)

8. PW-2 Dr. Anil Kumar has examined Asha Devi. He has issued MLC to this effect.

9. PW-3 Asha Devi has deposed that on 25.2.2004, at about 4.30 PM, she was going to bring grass. When she reached near Bowali, Asha Devi (deceased) consumed something from a tube. She threw away the tube and told her that she was fed up and thereafter she went away. She also told her that she was fed up due to her illness as she was operated upon for her illness. She was cross-examined by the learned Public Prosecutor. In her cross-examination by the learned defence counsel she has testified that accused never harassed deceased Asha Devi nor deceased Asha Devi told her about alleged harassment by the accused persons.

10. Statement of PW-4 Bharat Bhushan is formal in nature.

11. PW-5 Brahmi Devi is the mother of deceased. She has deposed that deceased Asha Devi told her that she was harassed by accused Sunil Kumar. Asha Devi used to tell her that her husband used to come late night. He was demanding a motor cycle from them. Asha Devi also used to tell her that whenever she used to watch T.V., her sister-in-law Nishu used to tell her that she should bring T.V. from her parents. In her cross-examination she has admitted that no dowry was demanded by the accused nor agreed to be given. She has also admitted that she went with Asha Devi from Ghumarwin upto Chandigarh and Sunil and his Taya were also with them upto Chandigarh.

12. PW-6 Naresh Kumar has partly investigated the case. He has recorded statements of witnesses Santosh Kumari, Brahmi Devi, Madhu Bala, Chandu Ram, Anjana Devi and Vinod Kumar. In his cross-examination, he has deposed that Brahmi Devi has also made statement earlier to the police at Chandigarh.

13. PW-7 Chotta Ram has got the post mortem conducted at P.G.I. Chandigarh. He obtained post mortem report Mark 'C'. In his cross-examination, he has deposed that Brahmi Devi made statement to him at Chandigarh that her daughter Asha Devi was not being harassed by accused. Brahmi Devi has also made statement that Asha Devi has not made any complaint about her harassment by the accused.

14. PW-8 Shiv Chaudhary has recorded statement of PW-1 Chandu Ram under Section 154 of the Criminal Procedure Code.

15. PW-9 Anjana Kumari has deposed deceased Asha Devi was daughter of her Taya (uncle). She was her friend. Whenever Asha Devi used to visit her mother's house, she used to tell her that she was being harassed and tortured by her in-laws. She also used to tell that her husband used to come late during night and he also used to beat her. Her husband demanded dowry and asked to bring money from her parents. In her cross-examination, she has admitted that she has not told the fact of torturing to anyone. About harassment of Asha Devi and demand of dowry, she was telling for the first time in the Court.

16. PW-10 Madhuwala is the sister of deceased. She has deposed that deceased used to meet her and also used to talk to her on telephone. She used to tell her that she was being harassed by her in-laws for dowry and her husband used to come home at late during night. Asha Devi died by consuming poison. In her cross-examination, she has deposed that she has told about demand of motor-cycle and T.V. to police (whereas it was not so recorded in mark 'X'. She has made statement to police that she used to meet her after marriage (whereas it was not so recorded in mark 'X').

17. PW-11 Chint Ram has partly investigated the matter. He has taken into possession empty tube with mark Sulphase vide memo Ex.PW-11/A. He recorded the statements of witnesses under section 161 of the Code of Criminal Procedure.

18. What emerges from the facts enumerated hereinabove is that marriage of deceased was solemnized with accused Sunil Kumar in the month of July, 2003. It was performed by PW-1 Chandu Ram. Statement of PW-1 Chandu Ram was recorded vide Ex.PA on the basis of which FIR was registered. According to PW-1 Chandu Ram, deceased has told them that her mother-in-law, grand father-in-law, husband and sister-in-law were harassing her on account of dowry. In his cross-examination, he has admitted that at the time of marriage, no dowry was demanded by the accused. He has not stated in Ex.PA about the demand of dowry raised by the accused. PW-3 Asha Devi has deposed that she was going to bring grass on 25.2.2004 at about 4.30 P.M. Asha

Devi consumed something from tube. She threw away that tube and told that she was fed up due to her illness. She was operated for her illness. In her cross-examination, she has specifically deposed that accused never harassed deceased Asha Devi nor Asha Devi ever told her about harassment by the accused. PW-5 Brahmi Devi, mother of deceased has deposed that deceased was harassed by Sunil Kumar as he was demanding a motorcycle from them and also threatening to kill in case motorcycle is not given to him. In her cross-examination, she has admitted that no dowry was demanded by the accused nor agreed to be given. She has also admitted that she went with Asha from Ghumarwin to P.G.I. Chandigarh. Accused Sunil and his Taya also went with them upto Chandigarh. Statement of PW-5 Brahmi Devi was also recorded vide Ex.DW-2/A. We have also gone through Ex.DW-2/A. There is no reference about the demand of dowry being raised by the accused. Statement of PW-5 Brahmi Devi was recorded by PW-7 Chotta Ram at P.G.I. Chandigarh. PW-6 Head Constable Naresh Kumar has also deposed in his cross-examination that no witness has stated about the demand of dowry before him. PW-7 ASI Chotta Ram has admitted that Brahmi Devi has made statement before him at Chandigarh vide Ex.DW-2/A. In case the dowry has ever been demanded by the accused, it should have been mentioned in Ex.DW-2/A. PW-1 Chandu Ram, PW-5 Brahmi Devi and PW-6 Naresh Kumar have categorically deposed that there was no demand of dowry. In view of these statements, statement of PW-9 Anjana Kumari and PW-10 Madhuwala cannot be believed. Moreover, PW-9 Anjana Kumari has specifically admitted that she has not told the non-fulfillment of demand of dowry to anyone. She has stated about the harassment of Asha Devi and demand of dowry in the Court for the first time.

19. Now, as far as statement of PW-10 Madhuwala is concerned, she has also not told about harassment of Asha Devi and demand of dowry to anyone. She has narrated these facts to police after the death of deceased Asha Devi. According to her, she has told about the demand of motorcycle and T.V. to police. However, it is not so recorded in mark 'X'. It is true that deceased has died by consuming poison. She has also been operated for breast cancer. She could be in depression due to her serious ailment. She was operated upon for her ailment. It has also come on record that accused are well off. They have never demanded any dowry from the deceased. PW-5 Brahmi Devi has made major improvements in her statement vis-à-vis Ex.DW-2/A. There has to be series of facts/events to cause harassment. There was no demand of dowry. The evidence produced by the prosecution does not prove the case against the accused for offence under section 498-A of the Indian Penal Code. There is no evidence brought on record to establish that deceased was forced to commit suicide. There is no evidence also whatsoever to establish that accused have incited or provoked the deceased to commit suicide.

20. So far as presumption under section 113 of the Indian Evidence is concerned, it could be raised, if it was proved that deceased was subjected to cruelty. No cruelty was ever meted out to the deceased.

Thus, section 113 of the Indian Evidence is not applicable in the present case.

21. The prosecution has failed to prove that accused ever demanded dowry from the deceased or compelled the deceased to commit suicide. We need not interfere with the well reasoned judgment rendered by the trial court.

22. Accordingly, in view of the analysis and discussion made hereinabove, the prosecution has failed to prove its case against the accused beyond reasonable doubt for offence under sections 498-A and 306 read with section 34 of the Indian Penal Code.

20. Consequently, the appeal is dismissed.

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

Dharam Dass .....Petitioner.
Versus
HPSEB Ltd. & anr. .....Respondents.

CWP No. 5639 of 2014.
Reserved on: 30.10.2014
Decided on: 3.11.2014.

Constitution of India, 1950- Article 226- petitioner was appointed as a Beldar- he was retrenched in the year 1998- he filed an application before Administrative Tribunal which was allowed- petitioner was re-engaged and was conferred the status of work charge employee- he was again retrenched on 13.5.2005- he referred the matter to Industrial Tribunal Shimla, which held that retrenchment was in violation of the Industrial Disputes Act – writ petition was filed by the respondent was dismissed and the petitioner was engaged on 12.11.2010 as a T-mate- petitioner claimed that he should have been conferred with work charge status with all the consequential benefits- held, that petitioner was conferred the work charge status w.e.f. 26.12.1993- he was not allowed to join the duty and was wrongly retrenched- retrenchment was set aside- therefore, he is entitled to be conferred the work charge status with all consequential benefit including promotion from the date- his juniors were promoted to the higher post. (Para- 4 and 5)

For the petitioner: Mr. Hamender Singh Chandel, Advocate.
For the respondents: Ms. Sharmila Patial, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner was engaged as Beldar on 26.12.1993. He was retrenched in the year 1998. He approached the erstwhile H.P. State Administrative Tribunal, by filing OA No. 1587 of 1998. The erstwhile H.P. State Administrative Tribunal ordered the re-engagement of the petitioner vide order dated 6.11.1998. The petitioner was re-engaged as per the orders of the erstwhile H.P. State Administrative Tribunal. He was conferred with work charge status, as per Annexure P-2 dated 6.11.2002 at Sr. No. 42. However, the fact of the matter is that the petitioner was not allowed to join his duties as work charge employee.

2. The petitioner was again retrenched on 13.5.2005. The petitioner raised the industrial dispute. The matter was referred to the Industrial Tribunal-cum-Labour Court, Shimla, vide reference No. 59 of 2007. The learned Presiding Officer, Industrial Tribunal-cum-Labour Court, Shimla, held the retrenchment of the petitioner in violation to provisions of Sections 25F,25G &H of the Industrial Disputes Act, 1947. The petitioner was ordered to be re-instated with seniority and continuity of service, but without back wages.

3. The respondents-Board, feeling aggrieved by the order dated 1.6.2010, filed CWP No. 6089 of 2010 before this Court. The same was dismissed by this Court with analogous writ petitions on 28.9.2010. The petitioner was re-engaged as Beldar on 12.11.2010 vide Annexure P-6. He was appointed as T/Mate vide order dated 5.11.2011 (Annexure P-7).

4. The case of the petitioner, in a nut shell, is that on the basis of Annexure P-2, order dated 6.11.2002, he should have been conferred work charge status with all consequential benefits. Mrs. Sharmila Patial, Advocate, appearing for the Board has vehemently argued that since there is break in service, the petitioner could not be conferred with work charge status w.e.f. 6.11.2002, as he was re-engaged pursuant to the award dated 1.6.2010, as Beldar on 12.11.2010.

5. It is evident from Annexure P-2, letter dated 6.11.2002 that taking into consideration the seniority of the petitioner w.e.f. 26.12.1993, he was conferred with work charge status. He was not permitted to join his duties as work charge employee for the reasons best known to the respondents. The subsequent retrenchment of the petitioner dated 13.5.2005 was set aside by the learned Industrial Tribunal-cum-Labour Court, Shimla, vide order dated 1.6.2010. The learned Tribunal has awarded re-instatement of the petitioner with continuity in service but without back wages. The writ petition preferred against the award dated 1.6.2010 has been dismissed by this Court on 28.9.2010. The action of the respondents to re-engage the petitioner merely as Beldar on 12.11.2010 was wholly illegal, though he has been made T/Mate on 5.11.2011. However, the fact of the matter is that the petitioner should

have been granted the work charge status w.e.f. 6.11.2002, vide letter Annexure P-2, with all consequential benefits by counting his previous seniority.

6. Accordingly, the Writ Petition is allowed. The petitioner would be deemed to have been appointed on work charge basis w.e.f. 6.11.2002 with all consequential benefits including promotion etc. from the date the persons junior to him have been promoted to the higher post. The consequential benefits be released to the petitioner by treating him work charge employee w.e.f. 6.11.2002, within a period of six weeks from today.

7. Pending applications, if any, shall stand disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE.

Ram Krishan Khagta ..... Petitioner
Vs.
The Kangra Central Cooperative
Bank Ltd. & ors. ..... Respondents

CWP No. 3874 of 2014.
Date of decision: 3.11.2014.

Constitution of India, 1950- Article 226- *P*etitioner had filed a writ petition against the Co-operative society registered under H.P. Cooperative Societies Act, 1968- held, that writ petition against the co-operative society is not maintainable, even the Court cannot relegate the petitioner to pursue the remedy under section 72 of H.P. Cooperative Societies Act. (Para- 3 to 6)

Cases referred:
Chandresh Kumar Malhotra vs. H.P.State Coop. Bank and others 1993 (2) Sim.L.C. 243
S.S.Rana vs. Registrar, Co-operative Societies and another (2006) 11 SCC 634
Vikram Chauhan vs. The Managing Director and ors. Latest HLJ 2013 (HP) 742 (FB)

For the petitioner : Mrs. Jyotsna Rewal Dua and Ms. Shalini Thakur, Advocates.

For the respondents Mr. Umesh Kanwar, Advocate, for respondents No. 1 and 2.
Mr. Virender Kumar Verma and Ms. Meenakshi Sharma, Addl. Advocate Generals with Ms. Parul Negi, Dy. Advocate General, for respondent No. 3.
Mrs. Ranjana Parmar, Advocate, for respondents No. 4, 6 and 7.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner has approached this court for grant of following substantive reliefs:-

(i) For directing the respondents to hold review DPC within a time bound schedule by ensuring that no Grade 1 officer is superseded in his promotion to the post of Assistant

General Manager by another officer where the difference of length of promotion between the two officers in feeder category is more than 2 years.

(ii) For holding that supercession by respondents No. 4-6 over the petitioner for promotion to the post of Assistant General Manager is bad in eyes of law considering the difference between their length of promotion in feeder category of Grade 1 is more than 2 years vis-à-vis the petitioner.

(vi) For directing the respondents to promote the petitioner to the post of Assistant General Manager w.e.f. the date his juniors have been promoted i.e. 7.2.2014 along with all consequential including monetary benefits.

(vii) For directing the respondents to read the over all entry of ACR of the petitioner for the year 2008-09 & 2011-12 as 'Very Good' or alternatively the entries in these ACRs be directed to be communicated to the petitioner and thereafter action in accordance with law may be directed to be taken on the un-communicated ACRs.

(viii) For issuing a writ of Certiorari or any other appropriate writ for quashing the proceedings of DPC as convened on 31.1.2014 vide annexure P-4 and all consequential actions thereupon vis-à-vis parties to the litigation.

7. From the perusal of the reliefs sought for by the petitioner, it is clear that the relief has been sought primarily against respondent No.1, which is a Cooperative Society registered under the H.P. Cooperative Societies Act, 1968 (for short, the Act).

8. The parties are not at variance that in view of decisions of learned Division Bench of this court in **Chandresh Kumar Malhotra** vs. **H.P.State Coop. Bank and others 1993 (2) Sim.L.C. 243, Sanjeev Kumar & ors.** Vs. **State of H.P. and ors. CWP No. 6709 of 2013-A dated 4.8.2014, LPA No. 236 of 2011 titled Laxmi Narain & ors.** Vs. **Kuldeep Singh & ors alongwith connected matters decided on 17.9.2014,** the decision of Hon'ble Supreme Court in **S.S.Rana** vs. **Registrar, Co-operative Societies and another (2006) 11 SCC 634** and the decision of Hon'ble Full Bench of this court in **Vikram Chauhan** vs. **The Managing Director and ors. Latest HLJ 2013 (HP) 742 (FB),** the writ petition itself is not maintainable.

9. However, the learned counsel for the petitioner has made a request for relegating the petitioner to the Registrar so as to enable him to file a petition under section 72 of the Act. The petitioner has made this request taking cue from para-9 of preliminary objection raised by respondents No. 1 and 2 to the following effect:-

> "*The petitioner has an effective alternative remedy under Section 72 of the H.P. Cooperative Societies Act, 1968. Being a matter touching the business of the society, the grievance, if any,*

has got to be vindicated by having recourse to the said provisions only."

10. I am afraid that this court cannot relegate the petitioner to pursue the remedy under section 72 of the Act, which is in fact not available to him under the law. This aspect of the matter has been succinctly dealt with by the learned Division Bench of this court in **Sanjeev Kumar's** case (supra), wherein it was held as follows:-

> *"9. "Faced with such situation, the petitioners would then contend that the orders passed by the Registrar and thereafter by the State government were statutory and therefore, a writ against an order passed by the statutory authority was maintainable.*
>
> *10. There would have been no dispute in case the orders impugned herein could be termed to have been passed by the statutory authority in exercise of powers conferred upon it by the Act and Rules, because in that event undisputedly the writ petition would be maintainable before this court. However, the moot question again herein is as to whether the orders passed by the respondents i.e. Registrar and the State Government can be termed to be statutory orders.*
>
> *11. Admittedly, the dispute raised by the petitioners pertained to a service matter and therefore, even if this court had relegated the petitioners to the Registrar/ State government, could the orders be termed to be in exercise of the statutory powers? The obvious answer is no, for more than one reasons. Firstly, the dispute of an employee and employer relationship is not a dispute, which touches the constitution, management or business of the cooperative societies and therefore, is not amenable to the jurisdiction of the Registrar under section 72 of the Act [Re:* ***Morinda Coop. Sugar Mills Ltd.*** *Vs.* ***Morinda Coop.Sugar Mills Workers' Union (2006) 6 SCC 80****]. Secondly even if this court had relegated the petitioners before the Registrar/ State government, the orders passed by them would not clothe the orders so passed with statutory colour, as the same are not in exercise of statutory powers conferred upon them under the provisions of the Act and Rules as held in* ***Chandresh Kumar Malhotra*** *(supra). "*

11. In view of the aforesaid exposition of law, even this prayer of the petitioner cannot be acceded to. Consequently, there is no merit in this petition and the same is dismissed. All interim orders are vacated. Pending application, if any also stands disposed of.

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

State of Himachal Pradesh ...Appellant.
Versus
Sunil Kumar and another ...Respondents.

Cr.A.No. 344 of 2008
Reserved on : 31.10.2014
Decided on: 3.11.2014

Indian Penal Code, 1860- Sections 498-A and 306 read with Section 34 of IPC- Deceased had committed suicide by consuming poison- father of the deceased filed a complaint that deceased was not being treated properly in her matrimonial home- he made inquiry on which accused apologized-subsequently, deceased committed suicide- father of the deceased admitted in his cross-examination that no dowry was demanded by the accused at the time of marriage- PW-3 told that deceased was fed up due to her illness- accused had never harassed the deceased-PW-5 also admitted in cross-examination that no dowry was demanded at the time of marriage- PW-9 admitted that she had not told about the non-fulfillment of the demand of dowry to anyone and was deposing about this fact for the first time- held, that the testimonies of the eye-witnesses suffer from improvements- there has to be a series of facts/events to cause harassment - there was no demand of dowry and no evidence that deceased was forced to commit suicide or that accused had insisted or provoked the deceased to commit suicide.

(Para-19)

For the Appellant: Mr. Ramesh Thakur, Asstt. A.G.
For the Respondents: Mr. T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 29.2.2008 rendered by the Additional Sessions Judge, Ghumarwin, District Bilaspur in Sessions Trial No. 58/7 of 2004, whereby the respondents-accused (hereinafter referred to as the "accused" for convenience sake), who were charged with and tried for offence punishable under sections 498-A and 306 read with section 34 of the Indian Penal Code, have been acquitted.

2. Case of the prosecution, in a nutshell, is that a telephonic message was received at Police Station, Ghumarwin on 25.2.2004 at 5.45 P.M. from Dr. Anil at Civil Hospital, Ghumarwin that a case of poisoning has come which needs action. Rapat No.20 dated 25.2.2004 Ex.PW-4/A

was recorded. S.I. Balwant Singh proceeded to Civil Hospital, Ghumarwin. The Medical Officer on duty informed that a lady named Asha Devi was not fit to make statement. He came back to Police Station and got recorded rapat No.26 dated 25.2.2004 vide Ex.PW-4/B. On 26.2.2004 at 10.10 A.M. Rattan Singh from P.G.I. Chandigarh informed telephonically Police Station, Ghumarwin that in the poisoning case of Jol Palakhi village which was referred to P.G.I. from Ghumarwin, the lady has died at PG.I. Chandigarh. Head Constable Chotta Ram alongwith Constable Balbir were sent to P.G.I. Chandigarh vide rapat No. 6 dated 26.2.2004 Ext. PW-4/C. Chotta Ram came back from P.G.I. Chandigarh to Police Station Ghumarwin on 27.2.2004 and rapat No.22 dated 27.2.2004 Ext. PW-4/D was incorporated. The post- mortem of the deceased was got conducted at Chandigarh and the dead body was handed over to deceased's father in law, Rattan Lal. It came during the course of investigation by Head Constable Chotta Ram that on 25.2.2004 at 5.15 P.M., Asha Devi had gone to bring grass from the fields. She felt giddy and accused Ram Dass and Krishni Devi brought her home. However, she started vomiting. She was taken to Civil Hospital, Ghumarwin from where she was referred to Bilaspur. From Bilaspur she was further referred to P.G.I. Chandigarh on 25.2.2004 at 4.00 A.M. Asha Devi died at P.G.I. Chandigarh on 26.2.2004 at 5.00 P.M. Statement of the mother of the deceased Brahmi Devi was recorded by H.C. Chotta Ram vide Ext. DW-2/A. PW-1 Chandu Ram on 28.2.2004 made statement under Section 154 of the Criminal Procedure Code vide Ext. PA. According to him, he was resident of Dosarka, Police Station, District Hamirpur. He has retired as Captain from the Army. His elder brother has expired 7 years back, who was having 8 daughters. He was looking after the daughters. He married Asha Devi on 8.7.2003 with accused Sunil Kumar, resident of village Jol Palakhi. Whenever Asha Devi used to visit her house, she used to say that she was not comfortable at her in-laws house. Her husband, mother-in-law, grandfather-in-law and Sister-in-law used to taunt her. He went to Asha Devi's house and asked accused as to why they were harassing Asha Devi. They apologized. On 25.2.2004, Sunil Kumar informed him telephonically at 8.30 P.M. that Asha Devi has consumed poison. She was brought to Ghumarwin hospital. Thereafter, he and his wife Santosh went to Ghumarwin hospital. They found that Asha Devi was taken to Bilaspur. They proceeded to Bilaspur. They were told that Asha Devi has been taken to P.G.I. Chandigarh. He got telephonic information about Asha Devi having expired at P.G.I. Chandigarh. Accused were subjecting Asha Devi to ill-treatment, which led her to consume poison. The matter was investigated. An empty tube of Aluminum Phosphide Sulphas was recovered. It was seized vide seizure memo Ext. PW-11/A in presence of Lekh Ram and Joginder Singh witnesses. PW-11 Chint Ram recorded statements of the witnesses. Post-mortem of the dead body was got conducted vide Mark 'C'. Police investigated the case and the challan was put up in the court after completing all the codal formalities.

3. Prosecution examined as many as 12 witnesses in all to prove its case against the accused. Statements of accused under Section

313 Cr.P.C. were recorded. They have denied the case of the prosecution in entirety. According to them, they have not harassed or tortured Asha Devi and no dowry was demanded. She was kept nicely. Learned trial Court acquitted the accused. Hence the present appeal.

4. Mr. Ramesh Thakur, learned Assistant Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. T.S. Chauhan has supported the judgment passed by the trial Court.

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

7. PW-1 Chandu Ram has deposed that he has performed marriage of Asha Devi in the month of July 2003 with accused Sunil Kumar resident of Jol Palakhi. Asha Devi visited his house only once after the marriage. She told them that her mother-in-law, grandfather-in-law, husband and sister-in-law were harassing her on account of dowry. He visited the house of accused and advised them to stop harassing Asha Devi. On 25.2.2004, at 8.30 P.M. he received telephonic message from accused Sunil Kumar that Asha Devi has consumed something. She was admitted to hospital at Ghumarwin. He and his wife Santosh Kumar went to Ghumarwin. After reaching Ghumarwin, he was told that Asha Devi was sent to Bilaspur Hospital. They rushed to Bilaspur Hospital. When they reached Bilaspur they were told that Asha Devi has already been sent to P.G.I. Chandigarh. They stayed in hospital at Bilaspur and next morning they went back to their home at Hamirpur. They were informed that Asha Devi has expired in P.G.I. Chandigarh. In his cross- examination, he has categorically admitted that at the time of marriage, no dowry was demanded by the accused. However, according to him, they had given dowry according to their status. Accused never demanded dowry from him. He has also admitted that accused knew that Brahmi Devi was a poor lady. Asha Devi had told him about her harassment for dowry in the month of September –October, 2003 when she visited his house at Dosarka. He told this fact to his neighbourer Dalip Singh, retired Subedar. Except that he has not told this fact to anyone. He told this fact for the first time in the Court. He has informed the Police that accused were demanding dowry from Asha Devi (whereas it is not so recorded in Ext.PA.). He has also stated to the police that thereafter he visited the house of accused and told them to stop harassing Asha Devi due to fulfillment of demand of dowry (whereas the words 'her harassment due to demand of dowry' is not written in Ext. PA)

8. PW-2 Dr. Anil Kumar has examined Asha Devi. He has issued MLC to this effect.

9. PW-3 Asha Devi has deposed that on 25.2.2004, at about 4.30 PM, she was going to bring grass. When she reached near Bowali, Asha Devi (deceased) consumed something from a tube. She threw away the tube and told her that she was fed up and thereafter she went away.

She also told her that she was fed up due to her illness as she was operated upon for her illness. She was cross-examined by the learned Public Prosecutor. In her cross-examination by the learned defence counsel she has testified that accused never harassed deceased Asha Devi nor deceased Asha Devi told her about alleged harassment by the accused persons.

10. Statement of PW-4 Bharat Bhushan is formal in nature.

11. PW-5 Brahmi Devi is the mother of deceased. She has deposed that deceased Asha Devi told her that she was harassed by accused Sunil Kumar. Asha Devi used to tell her that her husband used to come late night. He was demanding a motor cycle from them. Asha Devi also used to tell her that whenever she used to watch T.V., her sister-in-law Nishu used to tell her that she should bring T.V. from her parents. In her cross-examination she has admitted that no dowry was demanded by the accused nor agreed to be given. She has also admitted that she went with Asha Devi from Ghumarwin upto Chandigarh and Sunil and his Taya were also with them upto Chandigarh.

12. PW-6 Naresh Kumar has partly investigated the case. He has recorded statements of witnesses Santosh Kumari, Brahmi Devi, Madhu Bala, Chandu Ram, Anjana Devi and Vinod Kumar. In his cross-examination, he has deposed that Brahmi Devi has also made statement earlier to the police at Chandigarh.

13. PW-7 Chotta Ram has got the post mortem conducted at P.G.I. Chandigarh. He obtained post mortem report Mark 'C'. In his cross-examination, he has deposed that Brahmi Devi made statement to him at Chandigarh that her daughter Asha Devi was not being harassed by accused. Brahmi Devi has also made statement that Asha Devi has not made any complaint about her harassment by the accused.

14. PW-8 Shiv Chaudhary has recorded statement of PW-1 Chandu Ram under Section 154 of the Criminal Procedure Code.

15. PW-9 Anjana Kumari has deposed deceased Asha Devi was daughter of her Taya (uncle). She was her friend. Whenever Asha Devi used to visit her mother's house, she used to tell her that she was being harassed and tortured by her in-laws. She also used to tell that her husband used to come late during night and he also used to beat her. Her husband demanded dowry and asked to bring money from her parents. In her cross-examination, she has admitted that she has not told the fact of torturing to anyone. About harassment of Asha Devi and demand of dowry, she was telling for the first time in the Court.

16. PW-10 Madhuwala is the sister of deceased. She has deposed that deceased used to meet her and also used to talk to her on telephone. She used to tell her that she was being harassed by her in-laws for dowry and her husband used to come home at late during night. Asha Devi died by consuming poison. In her cross-examination, she has deposed that she has told about demand of motor-cycle and T.V. to police (whereas it was not so recorded in mark 'X'. She has made

statement to police that she used to meet her after marriage (whereas it was not so recorded in mark 'X').

17. PW-11 Chint Ram has partly investigated the matter. He has taken into possession empty tube with mark Sulphase vide memo Ex.PW-11/A. He recorded the statements of witnesses under section 161 of the Code of Criminal Procedure.

18. What emerges from the facts enumerated hereinabove is that marriage of deceased was solemnized with accused Sunil Kumar in the month of July, 2003. It was performed by PW-1 Chandu Ram. Statement of PW-1 Chandu Ram was recorded vide Ex.PA on the basis of which FIR was registered. According to PW-1 Chandu Ram, deceased has told them that her mother-in-law, grand father-in-law, husband and sister-in-law were harassing her on account of dowry. In his cross-examination, he has admitted that at the time of marriage, no dowry was demanded by the accused. He has not stated in Ex.PA about the demand of dowry raised by the accused. PW-3 Asha Devi has deposed that she was going to bring grass on 25.2.2004 at about 4.30 P.M. Asha Devi consumed something from tube. She threw away that tube and told that she was fed up due to her illness. She was operated for her illness. In her cross-examination, she has specifically deposed that accused never harassed deceased Asha Devi nor Asha Devi ever told her about harassment by the accused. PW-5 Brahmi Devi, mother of deceased has deposed that deceased was harassed by Sunil Kumar as he was demanding a motorcycle from them and also threatening to kill in case motorcycle is not given to him. In her cross-examination, she has admitted that no dowry was demanded by the accused nor agreed to be given. She has also admitted that she went with Asha from Ghumarwin to P.G.I. Chandigarh. Accused Sunil and his Taya also went with them upto Chandigarh. Statement of PW-5 Brahmi Devi was also recorded vide Ex.DW-2/A. We have also gone through Ex.DW-2/A. There is no reference about the demand of dowry being raised by the accused. Statement of PW-5 Brahmi Devi was recorded by PW-7 Chotta Ram at P.G.I. Chandigarh. PW-6 Head Constable Naresh Kumar has also deposed in his cross-examination that no witness has stated about the demand of dowry before him. PW-7 ASI Chotta Ram has admitted that Brahmi Devi has made statement before him at Chandigarh vide Ex.DW-2/A. In case the dowry has ever been demanded by the accused, it should have been mentioned in Ex.DW-2/A. PW-1 Chandu Ram, PW-5 Brahmi Devi and PW-6 Naresh Kumar have categorically deposed that there was no demand of dowry. In view of these statements, statement of PW-9 Anjana Kumari and PW-10 Madhuwala cannot be believed. Moreover, PW-9 Anjana Kumari has specifically admitted that she has not told the non-fulfillment of demand of dowry to anyone. She has stated about the harassment of Asha Devi and demand of dowry in the Court for the first time.

19. Now, as far as statement of PW-10 Madhuwala is concerned, she has also not told about harassment of Asha Devi and demand of dowry to anyone. She has narrated these facts to police after

the death of deceased Asha Devi. According to her, she has told about the demand of motorcycle and T.V. to police. However, it is not so recorded in mark 'X'. It is true that deceased has died by consuming poison. She has also been operated for breast cancer. She could be in depression due to her serious ailment. She was operated upon for her ailment. It has also come on record that accused are well off. They have never demanded any dowry from the deceased. PW-5 Brahmi Devi has made major improvements in her statement vis-à-vis Ex.DW-2/A. There has to be series of facts/events to cause harassment. There was no demand of dowry. The evidence produced by the prosecution does not prove the case against the accused for offence under section 498-A of the Indian Penal Code. There is no evidence brought on record to establish that deceased was forced to commit suicide. There is no evidence also whatsoever to establish that accused have incited or provoked the deceased to commit suicide.

20. So far as presumption under section 113 of the Indian Evidence is concerned, it could be raised, if it was proved that deceased was subjected to cruelty. No cruelty was ever meted out to the deceased. Thus, section 113 of the Indian Evidence is not applicable in the present case.

21. The prosecution has failed to prove that accused ever demanded dowry from the deceased or compelled the deceased to commit suicide. We need not interfere with the well reasoned judgment rendered by the trial court.

22. Accordingly, in view of the analysis and discussion made hereinabove, the prosecution has failed to prove its case against the accused beyond reasonable doubt for offence under sections 498-A and 306 read with section 34 of the Indian Penal Code.

20. Consequently, the appeal is dismissed.

****

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

CWP No.5419 of 2014 alongwith
CWP No.4872 of 2014.
Judgment reserved on : 14.10.2014.
Date of decision: 4th November, 2014.

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1. <u>CWP No.5419 of 2014.</u>

Dr. Disha Sharma .....Petitioner.

Versus

State of Himachal Pradesh & others .....Respondents.

For the Petitioner : Mr. Ashwani Sharma, Advocate.

For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr.Romesh Verma and Mr. V.S.Chauhan, Additional Advocate Generals, Mr.J.K.Verma, Deputy Advocate General, for respondents No.1 to 4.
Nemo for respondent No.5.
Ms.Anjali Soni Verma, Advocate, for respondent No.6.

2. <u>CWP No.4872 of 2014.</u>

Dr.Pankaj Katoch .....Petitioner.
Versus
State of Himachal Pradesh & others .....Respondents.

For the Petitioner : Mr. Ashwani Sharma, Advocate.
For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr.Romesh Verma and Mr. V.S.Chauhan, Additional Advocate Generals, Mr.J.K.Verma, Deputy Advocate General, for respondents No.1 to 5.
Respondent No.6 ex parte.
Respondent No.7 deleted.

Constitution of India, 1950- Article 226- Respondent issued prospectus for the year 2014 for filling-up PG seats in IGMC, Shimla and DRPGMC, Tanda from in service General Duty Medical Officers, HPHS Contract Service Medical Officer Group and Direct Group for the different categories- petitioner contended that the respondent had not disclosed two Post Graduate seats in Preventive and Social Medicine and Pathology- they were told that only seats in Microbiology and Bio-chemistry were available, which were accepted by the petitioners- the seats were subsequently allotted to the private respondents- respondents admitted that two seats were filled up by contacting the candidates in the waiting list over their mobile phones- held, that admissions have to be made in a fair and transparent manner and no admissions can be made without disclosing the available vacancies and without publishing the same in the newspaper- respondents had failed to observe this requirement and had ignored the merit- however, keeping in view that the upsetting the admission would start a chain reaction and many candidates would come forward to occupy the seats, therefore, the matter was left at rest- directions issued to the respondent to grant admission strictly in accordance with prospectus.

(Para-14, 15 and 33)

Cases referred:

Priya Gupta versus State of Chhattisgarh and others (2012) 7 SCC 433

Asha versus Pt. B.D.Sharma University of Health Sciences and others (2012) 7 SCC 389

Punjab Engineer College, Chandigarh through its Principal versus Sanjay Gulati and others (1983) 3 SCC 517

State of Punjab and others versus Renuka Singla and others (1994) 1 SCC 175

Rajiv Mittal versus Maharshi Dayanand University and others (1998) 2 SCC 402

Aneesh D.Lawande and others versus State of Goa and others 2013 AIR SCW 6217,

Chandigarh Administration & Another versus Jasmine Kaur and others JT 2014 (10) SC 319

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common question of law and facts arise for determination, therefore, both these petitions are taken up together for decision.

2. The petitioner(s) by way of these writ petitions have approached this Court making grievance therein that the respondents had not disclosed two seats of PSM (Preventive and Social Medicine) and Pathology in the open counselling held on 08.07.2014 for GDO in service candidates and had further illegally ted these seats to respondents No. 6 and 7, who were lower in merit to the petitioner(s).

3. The respondents in February, 2014, issued prospectus for the year 2014 for filling-up PG seats in IGMC, Shimla and DRPGMC, Tanda from amongst the candidates from HPHS (in service General Duty Medical Officers) and HPHS Contract Service Medical Officer Group and Direct Group. The seats for Post Graduate (MD and MS) Degree Course have been categorized under Group-A (All India Quota Seats), Group-B (State Quota Seats). Under Group-B, the seats are further sub-classified as HPHS (in service General Duty Medical Officers) and HPHS Contract Service Medical Officer Group under HPHS (in service GDO). The petitioner (s) and the private respondents applied for PG seats under HPHS (in service General Duty Medical Officers) after qualifying All India NEET PG Competitive Entrance Examination. The petitioner(s) were ranked 63 and 79 respectively while the private respondents were ranked 91 and 93 respectively in the merit list.

4. The grievance of the petitioner (s) is that when they were called for second counselling on 08.07.2014 for filling-up the vacant PG seats, the respondents concealed and did not disclose two Post Graduate seats in Preventive and Social Medicine (in short hereinafter referred to 'PSM') and Pathology and were informed that only seats in Microbiology and Biochemistry were vacant and were asked to give their options qua these two seats. Left with no other option, the petitioner(s) accepted these

seats by depositing the fees. The petitioner(s) were shocked and surprised when they came to know that the official respondents had infact offered the aforesaid two Post Graduate seats in 'PSM' and Pathology to the respondents No.6 and 7 on 10.07.2014 without offering these seats first to the petitioner(s), who had a preferential right qua the same on account of their being better placed in merit.

5. The officials respondents initially filed short reply and there appeared to be some contradictions in Paras 3 and 7 thereof and accordingly this Court vide order dated 22.09.2014 directed the official respondents to file supplementary affidavit. In compliance to the aforesaid orders, the respondents filed supplementary affidavit wherein they categorically stated that in the 3rd round of counselling held on 08.07.2014, the following PG (MD/MS) seats were offered to the petitioner(s):-

> *1 PG seat of MD Community Medicine (Preventive and Social Medicine),*
>
> *1 PG seat of Microbiology and*
>
> *1 PG seat of Bio-chemistry for GDO (General) group and category.*

6. It is further alleged that contrary to the claim set up by the petitioner(s), none of them opted for PG seats in 'PSM' and infact exercised their options and accepted the seats of Microbiology and Bio-chemistry, respectively. Insofar as the allegation of the petitioner(s) that two seats of 'PSM' and Pathology had been filled-up on 10.07.2014 in a surreptitious manner by offering the same to respondents No.6 and 7 without first offering the same to the petitioner(s), who were higher in merit, the respondents have repelled this claim in the following manner:-

> *"10. That it is submitted that after completion of 3rd round of Counselling, while compilation/finalization of the record on 10.7.2014, it was found that two seats remained vacant (One seat of MD Community Medicine GDO General (regular) and one seat of MD Pathology GDO (contract).*
>
> *It is worthwhile to submit here that the MD Pathology GDO General (Contract) seat which was allotted to one Dr.Puneet Singh during 2nd round of Counselling held on 29.4.2014 remained vacant due to the non-submission of fees by the candidate as verified from the records, which did not come in the notice of Counselling Committee on 8.7.2014 and the same was brought to the knowledge of authorities by the concerned Dealing Assistant on 9.7.2014. The Principal, Indira Gandhi Medical College, Shimla called for the emergency meeting of Counselling Committee on 10.7.2014 in the chamber of Director Medical Education and Research, Himachal Pradesh. Copy of relevant Noting Sheet is annexed and marked herewith as Annexure R-4 for the kind perusal of this Hon'ble Court.*
>
> *It is pertinent to submit here that no written information has been submitted by the candidate i.e. Dr.Puneet Singh regarding*

surrendering of MD Pathology seat, ***it is a known fact that surrendering of seats is total responsibility of candidate for which Director, Medical Education has also published a Notice in leading News Paper on 4.7.2014****, inspite of this, we have not received any written information from the concerned Doctor for non-joining/ surrendering of seats i.e. MD Pathology,*

Further, during the emergent meeting held on 10.7.2014, after detailed deliberation on this issue, it was unanimously decided by the Committee that in order to avoid the sheer wastage of precious Post Graduate Degree seats and in compliance to the direction passed by the Hon'ble Apex Court in Writ Petition (C) No.433/2013 titled as Dr.Fraz Naseem V/S Union of India and others to fill the vacant seats arisen ***out of any reason may be filled up out of waiting list*** *of 3rd round of Counselling . Accordingly, the candidates ranked at 91 and 93 were offered these seats* ***in order of merit from the waiting list of 3rd round of Counselling .*** *Xerox copies are annexed and marked as Annexure R-5 for the kind perusal of this Hon'ble Court."*

7. Thus, what appears from the defence of the State is that the admissions in question have been made by offering the same only to the waiting list candidates in compliance to the directions passed by the Hon'ble Supreme Court in ***Dr.Fraz Naseem & others*** *versus* ***Union of India & others, Writ Petition (Civil) No. 433 of 2013***.

8. Now, in case the order passed by the Hon'ble Supreme Court on 14.03.2014 is perused, it would be clear that the Hon'ble Supreme Court infact did not pass any effective order, but infact fixed the following schedule for the admissions to the Post Graduate Courses for the academic session 2014-15:-

"Upon hearing counsel the Court made the following

O R D E R

We have heard learned counsel for the parties. For the timer being we fix the following schedule for the admissions to the Post Graduate Medical Courses for the academic session 2014-2015:-

SCHEDULE FOR ADMISSION POST GRADUATE COURSES

[BROAD SPECIALITY]

STATE QUOTA

ALL INDIA QUOTA

1st round of Counselling	*To be over by 30th March*	*Between 4th April and 16th April*
Last date for joining the allotted College and course	*7th April*	*26th April*

2nd round of Counselling for allotment of seats from waiting list	*27th April to 3rd May*	*9th May to 13th May*
Last date for joining for candidates allotted seats in 2nd round of counselling	*10th May*	*24th May*
3rd round of counselling (Round for filling up seats reverted from AIQ/ other vacant State Quota Seats)	*20th June to 25th June*	*25th May to 9th June*
Last date for joining for candidates Allotted seats in 3rd round of Counselling	*30th June*	*19th June*
Commencement of academic Session	*30th June*	*30th June*
Last date up to which students can be admitted against vacancies arising due to any reason from the waiting list	*10th July*	*Not applicable.*

The Medical Council of India will notify the aforesaid schedule. List the matters in the month of April, 2014.

This order has been passed in modification of order dated 28th February, 2014."

9. In this background, the only question required to be determined in these petitions is as to whether the vacant seats of PG Courses were first required to be filled-up purely on merit from amongst the candidates desiring change of course/specialty or the same were required to be filled-up only out of the waiting list.

10. From the material placed on record and what has been stated above, it is clear that the respondents had not denied the fact that two seats of 'PSM' and Pathology filled-up on 10.07.2014 had not been filled-up after due publicity and had been filled-up by contacting the candidates in the waiting list over their mobile telephones and after seeking their options, these seats were offered to respondents No.6 and 7.

11. True import of the terms "cut off date" and "rule of merit" came up for consideration in ***Priya Gupta*** *versus* ***State of Chhattisgarh and others (2012) 7 SCC 433*** wherein after deprecating the practice of Universities not complying with the prescribed schedule and procedure, the Hon'ble Supreme Court held as follows:-

"45. The maxim Boni judicis est causas litium dirimere places an obligation upon the Court to ensure that it resolves the causes of litigation in the country. Thus, the need of the hour is that binding dicta be prescribed and statutory regulations be enforced, so that all concerned are mandatorily required to implement the time schedule in its true spirit and substance. It is difficult and not even advisable to keep some windows open to meet a particular situation of exception, as it may pose impediments to the smooth implementation of laws and defeat the very object of the scheme. These schedules have been prescribed upon serious consideration by all concerned. They are to be applied stricto sensu and cannot be moulded to suit the convenience of some economic or other interest of any institution, especially, in a manner that is bound to result in compromise of the above- stated principles.

46. Keeping in view the contemptuous conduct of the relevant stakeholders, their cannonade on the rule of merit compels us to state, with precision and esemplastically, the action that is necessary to ameliorate the process of selection. Thus, we issue the following directions in rem for their strict compliance, without demur and default, by all concerned:

46.6. All admissions through any of the stated selection processes have to be effected only after due publicity and in consonance with the directions issued by this Court. We vehemently deprecate the practice of giving admissions on 30th September of the academic year. In fact, that is the date by which, in exceptional circumstances, a candidate duly selected as per the prescribed selection process is to join the academic course of MBBS/BDS. Under the directions of this Court, second Counselling should be the final Counselling, as this Court has already held in the case of Ms. Neelu Arora & Anr. v. UOI & Ors. (2003) 3 SCC 366 and third Counselling is not contemplated or permitted under the entire process of selection/grant of admission to these professional courses.

46.7. If any seats remain vacant or are surrendered from All India Quota, they should positively be allotted and admission granted strictly as per the merit by 15th September of the relevant year and not by holding an extended Counselling. The remaining time will be limited to the filling up of the vacant seats resulting from exceptional circumstances or surrender of seats. All candidates should join the academic courses by 30th September of the academic year.

46.8. No college may grant admissions without duly advertising the vacancies available and by publicizing the same through the internet, newspaper, on the notice board of the respective feeder schools and colleges, etc. Every effort has to be made by all concerned to ensure that the admissions are given on merit and after due publicity and not in a manner which is ex-facie arbitrary and casts the shadow of favouritism.

46.9. The admissions to all government colleges have to be on merit obtained in the entrance examination conducted by the nominated authority, while in the case of private colleges, the colleges should choose their option by 30th April of the relevant year, as to whether they wish to grant admission on the basis of the merit obtained in the test conducted by the nominated State authority or they wish to follow the merit list/rank obtained by the candidates in the competitive examination collectively held by the nominated agency for the private colleges. The option exercised by 30th April shall not be subject to change. This choice should also be given by the colleges which are anticipating grant of recognition, in compliance with the date specified in these directions."

12. ***Priya Gupta's*** case (supra) subsequently came up for consideration before the Hon'ble Supreme in ***Asha*** *versus* ***Pt. B.D.Sharma University of Health Sciences and others (2012) 7 SCC 389*** wherein it was observed as follows:-

"23. Adherence to the schedule is the obligation of the authorities and the students both. The prescribed schedule is to be maintained stricto sensu by all the stakeholders because if one party adheres to the schedule and others do not or there is some kind of lack of communication or omission to make proper announcements and maintain proper records for such counselling, disastrous results can follow, of which the present case is an apt example.

24. The Court cannot ignore the fact that these admissions relate to professional courses and the entire life of a student depends upon his admission to a particular course. Every candidate of higher merit would always aspire admission to the course which is more promising. Undoubtedly, any candidate would prefer course of MBBS over BDS given the high-competitiveness in the present times, where on a fraction of a mark, the admission to course could vary. Higher the competition, greater is the duty on the part of the concerned authorities to act with utmost caution to ensure transparency and fairness. It is one of their primary obligations to see that a candidate of higher merit is not denied seat to the appropriate course and college, as per his preference. We are not oblivious of the fact that the process of admissions is a cumbersome task for the authorities but that per se cannot be a ground for compromising merit. The concerned authorities are expected to perform certain functions, which must be performed in a fair and proper manner i.e. strictly in consonance with the relevant rules and regulations."

"40.2. The essence of all the judgments dealing with this issue is to nurture discipline, fairness and transparency in the selection and admission process and avoid prejudice to any of the stake-holders. Thus, while we expect the authorities to be perfect, fair and transparent in the discharge of their duties, we make it clear that the students who adopt malpractices in collusion with the authorities or otherwise for seeking admissions and if their

admissions are found to be irregular or faulty in law by the courts, they shall normally be held responsible for paying compensation to such other candidates who have been denied admission as a result of admission of the wrong candidates.

40.3. The law requires adherence to a settled protocol in the process of selection and grant of admission. None should be able to circumvent or trounce this process, with or without an ulterior motive. The courts are duty bound to ensure that litigation relating to academic courses, particularly, professional courses should not be generated for want of will on the part of the stake holders to follow the process of selection and admission fairly, transparently and without exploitation."

13. Undoubtedly, the judgments of the Hon'ble Supreme Court referred hereinabove in ***Priya Gupta's*** case (supra) and ***Asha's*** case (supra) relate to MBBS and BDS Courses, however, nonetheless the broader guidelines and principles laid down therein can be applied to the facts of the present case as has been held by a co-ordinate Bench of this Court in ***CWP No.5587 of 2012, Richa Kaushik versus State of Himachal Pradesh and others.***

14. The aforesaid exposition of law by the Hon'ble Supreme Court makes it absolutely clear that admissions have to be made in a fair and transparent manner and, therefore, no admissions can be made without disclosing the vacancies available and by publishing the same through the newspaper and displaying the same on the notice board. Every effort has to be made by all concerned to ensure that the admissions are made on merit after due publicity and in no manner which is *ex-facie* arbitrary and casts the shadow of favouritism. The admissions have to be made on merit and merit alone. Infact, merit, fairness and transparency are the ethos of the process of admissions to such courses and it will be a travesty of justice if the rule of justice is defeated by inefficient or improper methods of admissions.

15. From the facts of this case, it is evident that "merit" has been a casualty because the respondents have failed to observe and oversee that the procedure adopted is fair and transparent which has been the consistent view of the Hon'ble Supreme Court that merit alone is the criteria for such admissions and circumvention of merit is not only impermissible but it is also an abuse of process of Court.

16. At this stage, we may now refer to the prospectus issued by the respondents themselves setting out in detail the mode and manner of filling-up the seats in question. Clause-4 of the prospectus deals with the procedure to be followed for counsellling which reads thus:-

"4.1 The Counselling will be held on dates mentioned in the prospectus as per the time schedule fixed by MCI/GOI based on the judgment of Hon'ble Supreme Court of India. The allotment of available seats to the eligible candidates will be made in order of merit on the basis of State merit drawn (group-wise as well as category-wise) by the ***Principal Indira Gandhi Medical***

College, Shimla-cum-Member Secretary Counselling Committee *on the basis of score of Himachal Pradesh State AIPGMEE-2014 result supplied by the Assistant Director (Medical), NBE (Ministry of Health & Family Welfare Govt. of India) New Delhi vide letter No. NBE/AIPGMEE (2014)/ Result/ 14038 dated 4.2.2014 of those candidates who have applied on the prescribed application form within stipulated date as mentioned in the prospectus for admission to PG(MD/MS) degree course in Indira Gandhi Medical College & Hospital Shimla and Dr.Rajindera Prasad Govt. Medical College & Hospital Tanda against 50% State quota seats for the academic session 2014-17 on the day of Counselling. All the eligible candidates or their authorized representatives will have to bring their original documents alongwith required documents at the time of Counselling. NO SEPARATE COMMUNICATION WILL BE ISSUED TO THE CANDIDATES FOR ATTENDING THE COUNSELLING. The candidate not reporting for Counselling as per schedule will forfeit their claim for admission without any further notice. No further opportunity will be given.* ***Hence, appearance in the 1st round of Counselling is mandatory for consideration of candidature for further Counselling.*** *Joining time is as per schedule prescribed in the prospectus. The selected candidates will be required to join latest by* ***26.5.2014*** *failing which their candidature will be cancelled. The academic session will start from* ***31.5.2014****. In case of any vacancy arising on or after* ***26.5.2014*** *for any reason, the vacancy position will be displayed on the college notice board and uploaded on the College website on* ***30.5.2013*** *(afternoon). The available vacancies will be filled-up purely on merit from amongst the candidates desiring the change of course/speciality and thereafter from the waiting list. The interested candidates will report to the Principal Indira Gandhi Govt. Medical College, Shimla on 10.00 AM on* ***31.5.2014*** *along with original documents and requisite fees. No admission will be made after* ***31.5.2014*** *(including change of course) and seats still remaining vacant will not be filled-up in compliance of directions of MCI/GOI as per the Judgment of the Hon'ble Supreme Court of India.*

Note: *The candidate who brings incomplete certificates/documents including service certificate-cum-No objection certificate (NOC) as per provisions of the Prospectus will be rejected without any notice there and then by the Counselling Committee."*

(Underlining supplied by us)

A perusal of the underlined portion makes it abundantly clear that the available vacancies in all subsequent counselling after the first counselling are required to be filled-up purely on merit from amongst the candidates desiring change of course/specialty and only thereafter the same can be offered to the candidates from the waiting list.

17. The terms and conditions of the prospectus are binding even on those who have issued it. (***See: Punjab Engineer College,***

Chandigarh through its Principal versus Sanjay Gulati and others (1983) 3 SCC 517). A prospectus issued with regard to admissions to educational courses is a declaration to the candidates that a field for development of educational technicalities is available for exploration and that there could be a chance of success. It is a piece of information. The rules and norms contained in the prospectus are binding on the Selection Committee and the authorities and, therefore, have to be strictly followed. The binding nature of the prospectus both on the Selection Committee and the candidates applying for admission is on the basis that it is a piece of information containing the summary essence of norms and rules that guide both the Selection Committee and the candidates. After setting out the various conditions and methods of selection, if anyone of the parties is permitted to travel beyond the prescribed procedure, that would adversely affect the right of the other party. Therefore, it is necessary that the Selection Committee is to follow the procedure enumerated in various clauses of the prospectus and cannot be permitted or allowed to introduce any new element or procedure for admission to those as are contained in the prospectus.

18. Now, in case the arguments of the learned Advocate General are taken to its logical end whereby it has been canvassed that the seats had to be offered to the waiting list candidates in preference to the meritorious candidates, who wanted to change their options/courses, it would essentially mean that what the respondents are virtually seeking is a direction to violate their own statutory rules and regulations in respect of admissions which admittedly will be contrary to what has been envisaged and provided under Clause-4 of the prospectus. We are afraid that no such direction can be issued by this Court in the teeth of the observations of the Hon'ble Supreme Court in ***State of Punjab and others*** *versus* ***Renuka Singla and others (1994) 1 SCC 175*** wherein it was held that the High Court and the Supreme Court cannot be generous or liberal in issuing such directions which in substance amount to directing the authorities concerned to violate their own statutory rules and regulations, in respect of admissions of students.

19. Further, in case the order passed by the Hon'ble Supreme Court in ***Dr.Fraz Naseem's*** case (supra) is minutely analyzed, it would be seen that the word "waiting list" has not been used in its literal sense. Even at the stage of second round of counselling, it has been provided as under:-

> *"2nd round of counselling for allotment of seats from waiting list , STATE QUOTA, 27th April to 3rd May."*

In case the term "waiting list" is interpreted in the manner as suggested by the learned Advocate General, then it would essentially mean that a candidate, who has exercised his option in the first counselling held on 7th of April, is debarred for all times to come to change his option of course irrespective of subsequent counselling held thereafter at three stages and the course of choice being available. This clearly is not the intent of the order passed by the Hon'ble Supreme

Court. We, therefore, have no manner of doubt that the respondents have failed to carry out counselling in terms of Clause-4 of the prospectus and have completely misconstrued and misinterpreted the order passed by the Hon'ble Supreme Court in ***Dr.Fraz Naseem's*** case (supra).

20. The present lis relates to admissions to the post of Graduate Medical Degree Courses which is a technical/academic course of super-specialty, where emphases are always on merit. In ***Dr.Dinesh Kumar and others*** *versus* ***Moti Lal Nehru Medical College, Allahabad and others (1986) 3 SCC 727***, it was observed that if we want to introduce doctors, who are MD/MS particularly Surgeon, who were going to operate, on human beings, it is of utmost importance that the selection should be made on merits.

21. Indisputably, "counselling" has been prescribed in the prospectus as the medium on the basis of which admissions are required to be made. The system of Counselling for the purpose of granting admissions is now regarded as the most equitable one where options are given of various seats to the students in accordance with their overall merit position in the combined competitive examination. If as a result of first counselling, all the seats which are available are filled, then no further counselling takes place. Where, however, some seats become available, then the need for holding second, third or fourth counselling may arise. This was so held by the Hon'ble Supreme Court in ***Rajiv Mittal*** *versus* ***Maharshi Dayanand University and others (1998) 2 SCC 402*** in the following terms:-

> *"10.....The system of counselling for the purpose of granting admission to the various medical colleges in the State is now regarded as most equitable one where options are given of various seats to the students in accordance with their overall merit position in the combined entrance examination, which examination is competitive in nature.*
>
> *11. If as a result of first counselling, all the seats, which are available, are filled then no further counselling takes place. Where however some seats become available, then it appears that second, third or if the need arise, fourth counselling does take place but in such a manner that normally there should be no delay in the commencement of the course of study. Further more unless and until counselling takes place, no candidate who has been granted admission on the basis of the counselling, is allowed to change his college merely because a seat in another college has fallen vacant. The seats, if any, which fall vacant, can only be filled if and when counselling takes place where the candidates who have already been selected may have an option of shifting to another college. An appropriate analogy of this system is that of a booking chart for a dramatic performance which has to take place in the future. The people standing in the queue reserve or book their seats out of those which are available according to their preference. Once the chart fills up the booking closes. Only sometimes, if tickets are returned they*

may be reissued. But once the dramatic performance starts no one is allowed to enter. Just as counselling for seats to medical colleges must stop once the courses of study commence."

The centralized and integrated procedure for competitive examination and counselling optimizes chances of not only the students in securing the course available for admission on the one hand but it also maximizes educational institution chances of filling-up its seats. Once, therefore, the Hon'ble Supreme Court itself has held the counselling system to be one of the most equitable methods of filling-up of seats of different disciplines and further when a clear-cut provision was set out in Clause-4 of the prospectus prescribing therein the mode and manner in which the seats would be filled-in, it was imperative and mandatory for the respondents to have adhered to the provisions of the prospectus.

22. The allegations of the respondents that they only came to know about the seats of MD Pathology GDO General (Contract) only on 09.07.2014 when the same was brought to the notice of the authorities by the concerned dealing hand is more than what meets the eye. We say so because the second round of counselling was held wayback on 29.04.2014 and the seat admittedly had become vacant on the said date itself since the selected candidate Dr.Puneet Singh had not deposited the fees. The third round of counselling was held after a gap of more than two months on 08.07.2014 and yet the respondents would have this Court believe that the dealing hand had not informed the authorities regarding this vacancy. After-all, the purpose of counselling is to offer to the eligible candidates the option and choice of seats which are available in the Institution. The respondents cannot be permitted to give admissions to the students in an arbitrary and nepotistic manner. The methodology adopted by the respondents and the manner in which the admissions were given to the private respondents, leaves no doubt in the mind of this Court that this process was neither fair nor transparent. It was incumbent upon the official respondents to have ensured that arbitrariness and discrimination do not creep into the process of admissions and the same are carried out in a just and fair manner.

23. Earlier also, while making admissions for the academic sessions 2012-13, the matter had reached this Court in ***Richa Kaushik's*** case (supra) wherein this Court in its majority decision after placing reliance on ***Priya Gupta's*** and ***Asha's*** cases (supra) had directed the seat in Periodontics to be offered to the candidate in the merit list after quashing the action of the respondents whereby they had offered this seat to the waiting list candidate.

24. More than three decades back, a three Judges Bench of the Hon'ble Supreme Court in ***Sanjay Gulati's*** case (supra) had expressed their anguish regarding the insensitivity of the educational authorities while granting admissions in the following terms:-

"4. Cases like these in which admissions granted to students in educational institutions are quashed raise a sensitive human issue. It is unquestionably true that the authorities who are charged with

the duty of admitting students to educational institutions must act fairly and objectively. If admissions to these institutions are made on extraneous considerations and the authorities violate the norms set down by the rules and regulations, a sense of resentment and frustration is bound to be generated in the minds of those unfortunate young students who are wrongly or purposefully left out. Indiscipline in educational institutions is not wholly unconnected with a lack of sense of moral values on the part of the administrators and teachers alike. But, the problem which the courts are faced with in these cases is, that it is not until a period of six months or a year elapses after the admissions are made that the intervention of the court comes into play. Writ petitions involving a challenge to such admissions are generally taken up by the High Court as promptly as possible but even then, students who are wrongly admitted finish one or two semesters of the course by the time the decision of the High Court is pronounced. A further appeal to this Court consumes still more time, which creates further difficulties in adjusting equities between students who are wrongly admitted and those who are unjustly excluded. Inevitably, the Court has to rest content with and academic pronouncement of the true legal position. Students who are wrongly admitted do not suffer the consequences of the manipulations, if any, made on their behalf by interested persons. This has virtually come to mean that one must get into an educational institution by means, fair or foul: Once you are in, no one will put you out. Law's delays work their wonders in such diverse fashions.

5. We find that this situation has emboldened the erring authorities of educational institutions of various States to indulge in violating the norms of admission with impunity. They seem to feel that the Courts will leave the admissions intact, even if the admissions are granted contrary to the rules and regulations. This is a most unsatisfactory state of affairs. Laws are meant to be obeyed, not flouted. Some day, not distant, if admissions are quashed for the reason that they were made wrongly, it will have to be directed that the names of students who are wrongly admitted should be removed from the rolls of the institution. We might have been justified in adopting this course in this case itself, but we thought that we may utter a clear warning before taking that precipitate step. We have decided, regretfully, to allow the aforesaid sixteen students to continue their studies, despite the careful and weighty finding of the High Court that at least eight of them, namely, the seven wards of employees and Ashok Kumar Kaushik, were admitted to the Engineering Course in violation of the relevant rules and regulations.

6. It is strange that in all such cases, the authorities who make admissions by ignoring the rules of admissions contend that the seats cannot correspondingly be increased, since the State Government cannot meet the additional expenditure which will be caused, by increasing the number of seats or that the institution will

not be able to cope up with the additional influx of students. An additional plea available in regard to Medical Colleges is that the Indian Medical Council will not sanction additional seats. We cannot entertain this submission. Those who infringe the rules must pay for their lapse and the wrong done to the deserving students who ought to have been admitted has to be rectified. The best solution under the circumstances is to ensure that the strength of seats is increased in proportion to the wrong admissions made."

25. Three decades later, the Hon'ble Supreme Court in ***Aneesh D.Lawande and others*** *versus* ***State of Goa and others 2013 AIR SCW 6217***, expressed its despair in the following terms:-

" The present litigation exposits a sad sad scenario. It is sad because a chaos has crept in the lives of some students and it is further sad as the State of Goa and its functionaries have allowed ingress of systemic anarchy throwing propriety to the winds possibly harbouring the attitude of utter indifference and nurturing an incurable propensity to pave the path of deviancy. The context is admission to Post Graduate courses in a single Government medical college at Goa. The insensitivity of the authorities administering medical college admissions was seriously decried by a three-Judge Bench in Convenor, MBBS/BDS Selection Board and others v. Chandan Mishra and others 1995 Supp (3) SCC 77 and further echoed in Medical Council of India v. Madhu Singh and others (2002) 7 SCC 258. The Court in Chandan Mishra (supra) had approvingly reproduced a sentence from the decision of the High Court that proclaimed in sheer anguish: "Shakespeare in Othello has written "Chaos is come again".

2. The saga of anguish continues with constant consistency. In Asha v. Pt. B.D. Sharma University of Health Sciences and others (2012) 7 SCC 389 a two-Judge Bench commenced the judgment thus: -

"Admission to the medical courses (MBBS and BDS) has consistently been a subject of judicial scrutiny and review for more than three decades. While this Court has enunciated the law and put to rest the controversy arising in relation to one facet of the admission and selection process to the medical courses, because of the ingenuity of the authorities involved in this process, even more complex and sophisticated sets of questions have come up for consideration of the Court with the passage of time. One can hardly find any infirmities, inaccuracies or impracticalities in the prescribed scheme and notifications in regard to the process of selection and grant of admission. It is the arbitrary and colourable use of power and manipulation in implementation of the schedule as well as the apparently perverse handling of the process by the persons concerned or the authorities involved, in collusion with the students or otherwise, that have rendered the entire admission process

faulty and questionable before the courts. It is the admissions granted arbitrarily, discriminately or in a manner repugnant to the regulations dealing with the subject that have invited judicial catechism. With the passage of time, the quantum of this litigation has increased manifold."

3. We have begun with such a prefatory note and referred to the aforesaid pronouncements as the facts, as have been uncurtained, would shock one's conscience. A deliberate labyrinth which not only assaults the majesty, sanctity and purity of law, but also simultaneously creates a complex situation requiring this Court to intervene in a different manner to redeem the situation as far as possible so that there is some sanguine cathartic effect."

26. The respondents would then contend that it will not only be difficult but an impossible task to contact all the candidates as per the merit list. This plea is equally fallacious and cannot be countenanced because the seats in question relate to in service candidates, meaning thereby candidates, who are already in the service of respondents, therefore, contacting them would not at all be difficult.

27. This is an age of communication and if waiting list candidates could be contacted, so could the candidates in order of merit be contacted. This is not a case of individual hardship because what we are examining is the generality of the situation and such matters have been repeatedly coming up before this Court. More meritorious candidates cannot be compelled to be pinned down to their choice given under compulsion in view of the limited seats available at the earlier counselling by refusing them a course of their choice which may have subsequently fallen vacant. This is not only contrary to the provisions of the prospectus issued by the respondents themselves but also in conflict with the very concept of "counselling".

28. The upshot of the aforesaid discussion is that the action of the respondents is, undoubtedly, illegal and arbitrary when they have filled-up vacant seats from the waiting list candidates instead of filling-up the same purely on the basis of merit from amongst the candidates desiring change of course/specialty and thereafter filling-up the same from the waiting list candidates. But, then there would be many other candidates, who would be even more meritorious than the petitioner(s), who may also want to opt for the same seats. In case the seats at this stage are offered merit wise, this will start a chain reaction and the effect of putting the seat back for counselling for all candidates would, therefore, be to upset the entire counselling which has taken place. Therefore, there is no alternative apart from leaving this aspect of the matter to rest.

29. There is yet another reason why the petitioner(s) cannot be granted any relief at this stage. Undisputedly, the Hon'ble Supreme Court in ***Dr.Fraz Naseem's*** case (supra) has fixed the schedule for admission to the Post Graduate Courses for the academic sessions 2014-15 which

time schedule as held by the Hon'ble Supreme Court in ***Asha's*** case (supra) has to be strictly adhered to:-

> *"25. Strict adherence to the time schedule has again been a matter of controversy before the courts. The courts have consistently taken the view that the schedule is sacrosanct like the rule of merit and all the stakeholders including the authorities concerned should adhere to it and should in no circumstances permit its violation. This, in our opinion, gives rise to dual problem. Firstly, it jeopardizes the interest and future of the students. Secondly, which is more serious, is that such action would be ex facie in violation of the orders of the court, and therefore, invite wrath of the courts under the provisions of the Contempt of Courts Act, 1971. In this regard, we may appropriately refer to the judgments of this Court in Priya Gupta v. State of Chhattisgarh (2012) 7 SCC 433, State of Bihar v. Sanjay Kumar Sinha (1990) 4 SCC 624, Medical Council of India v. Madhu Singh (2002) 7 SCC 258, GSF Medical and Paramedical Assn. v. Assn. of Self Financing Technical Institutes (2003) 12 SCC 414 and Christian Medical College v. State of Punjab (2010) 12 SCC 167."*

30. Adherence to the time schedule in professional courses was recently a subject-matter before the Hon'ble Supreme Court in ***Chandigarh Administration & Another*** *versus* ***Jasmine Kaur and others JT 2014 (10) SC 319*** and after taking into consideration the relevant principles contained in its previous decisions, the following principles were culled out:-

> *"30. Having noted the various decisions relied upon by the Appellant in SLP (C) No.18099 of 2014 and the contesting Respondent, we are able to discern the following principles:*
>
> > *(1) The schedule relating to admissions to the professional colleges should be strictly and scrupulously adhered to and shall not be deviated under any circumstance either by the courts or the Board and midstream admission should not be permitted.*
> >
> > *(2) Under exceptional circumstances, if the court finds that there is no fault attributable to the candidate i.e., the candidate has pursued his or her legal right expeditiously without any delay and that there is fault only on the part of the authorities or there is an apparent breach of rules and regulations as well as related principles in the process of grant of admission which would violate the right to equality and equal treatment to the competing candidates and the relief of admission can be directed within the time schedule prescribed, it would be completely just and fair to provide exceptional reliefs to the candidate under such circumstance alone.*
> >
> > *(3) If a candidate is not selected during a particular academic year due to the fault of the Institutions/Authorities*

and in this process if the seats are filled up and the scope for granting admission is lost due to eclipse of time schedule, then under such circumstances, the candidate should not be victimised for no fault of his/her and the Court may consider grant of appropriate compensation to offset the loss caused, if any.

(4) When a candidate does not exercise or pursue his/her rights or legal remedies against his/her non-selection expeditiously and promptly, then the Courts cannot grant any relief to the candidate in the form of securing an admission.

(5) If the candidate takes a calculated risk/chance by subjecting himself/herself to the selection process and after knowing his/her non- selection, he/she cannot subsequently turn around and contend that the process of selection was unfair.

(6) If it is found that the candidate acquiesces or waives his/her right to claim relief before the Court promptly, then in such cases, the legal maxim vigilantibus non dormientibus aequitas subvenit , which means that equity aids only the vigilant and not the ones who sleep over their rights, will be highly appropriate.

(7) No relief can be granted even though the prospectus is declared illegal or invalid if the same is not challenged promptly. Once the candidate is aware that he/she does not fulfil the criteria of the prospectus he/she cannot be heard to state that, he/she chose to challenge the same only after preferring the application and after the same is refused on the ground of eligibility.

(8) There cannot be telescoping of unfilled seats of one year with permitted seats of the subsequent year i.e., carry forward of seats cannot be permitted how much ever meritorious a candidate is and deserved admission. In such circumstances, the Courts cannot grant any relief to the candidate but it is up to the candidate to re-apply next academic year.

(9) There cannot be at any point of time a direction given either by the Court or the Board to increase the number of seats which is exclusively in the realm of the Medical Council of India.

(10) Each of these above mentioned principles should be applied based on the unique and distinguishable facts and circumstances of each case and no two cases can be held to be identical."

As observed earlier, there would be more meritorious candidates than the petitioner(s) herein, therefore, the case of the petitioner(s) do not fall in any of the exceptions specified hereinabove.

31. Moreover, the time gap between 10th July, 2014 till date is certainly a long period and in similar situation, the Hon'ble Supreme Court in ***Jasmine Kaur's*** case (supra) held as follows:-

> *"36. The time gap between April, 2013 and July, 2013 nearly three months is certainly a long period as the process of admission to professional courses are regulated by the Selection Authorities such as the Medical Council of India, All India Council for Technical Education, National Council for Teacher Education, State Government Authorities as well as the concerned affiliated universities each one of whom have got to play their corresponding roles in regulating the admissions and also monitoring the subsequent course of study for the purpose of ultimately granting the degrees of successful candidates after the completion of the course. As the process being a continuous one, any delay in working out the remedies promptly will have to be viewed very seriously or otherwise the same would impinge upon the rights of other candidates apart from causing unnecessary administrative hardship to the regulatory bodies. When the said factors are kept in mind while analyzing the case on hand, it will have to be stated that even though the contesting Respondent was successful in her challenge to the concerned provision relating to the NRI quota in the prospectus of 2013-14, on that sole ground it cannot be held that every other factor should be kept aside and her claim for admission to M.B.B.S. course should be ensured by issuing directions unmindful of the infringement of rights of other candidates and the other statutory bodies. We are, therefore, of the view that the conduct of the contesting Respondent in having fixed her own time limit in making the challenge, namely, after three months of the issuance of the prospectus and thereafter, in filing the Letters Patent Appeal which process resulted in the Division Bench in deciding the appeal only in the month of January, 2014 by which time the substantial part of the academic year had been crossed, the question remained as to whether the Division Bench was justified in directing the admission of the contesting Respondent to the M.B.B.S. course in the academic year 2014-15 by merely stating that she was already undergoing the B.D.S. course and that the course content of the first six months of B.D.S and M.B.B.S. are more or less identical. Beyond that we do not find any other good grounds which weighed with the Division Bench in issuing the direction for creating an additional seat."*
>
> *"38. As time and again such instances of claiming admission into such professional courses are brought before the Court, and on every such occasion, reliance is placed upon the various decisions of this Court for issuing necessary directions for accommodating the students to various courses claiming parity, we feel it appropriate to state that unless such claims of exceptional nature are brought before the Court within the time schedule fixed by this Court, Court or Board should not pass orders for granting admission into any particular course out of time. In this context, it will have to be stated*

that in whatever earlier decisions of this Court such out of time admissions were granted, the same cannot be quoted as a precedent in any other case, as such directions were issued after due consideration of the peculiar facts involved in those cases. No two cases can be held to be similar in all respects. Therefore, in such of those cases where the Court or Board is not in a position to grant the relief within the time schedule due to the fault attributable to the candidate concerned, like the case on hand, there should be no hesitation to deny the relief as was done by the learned Single Judge. If for any reason, such grant of relief is not possible within the time schedule, due to reasons attributable to other parties, and such reasons are found to be deliberate or mala fide the Court should only consider any other relief other than direction for admission, such as compensation, etc. In such situations, the Court should ensure that those who were at fault are appropriately proceeded against and punished in order to ensure that such deliberate or malicious acts do not recur."

32. Though no relief can be granted to the petitioner(s) for the reasons stated above, yet this Court cannot ignore the lapses on the part of the official respondents, who have acted in the most callous and negligent manner in carrying out the admissions little realizing that the career of more meritorious students has been jeopardized without adhereing to the rule of merit that too in violation of its own sacred prospectus. It was on account of the corrective measures and adherence to rule being thwarted by motivated action on the part of the authorities concerned which had led to manifold increase in arbitrary admissions whereby the repeated defaults had resulted in generating more and more litigation with the passage of time and the desire to curb these incidents of disobedience that the Hon'ble Supreme Court while dealing with cases relating to admissions had issued directions *in rem* for their strict compliance without demur and default by all concerned in ***Priya Gupta's*** case (supra). Therefore, the respondent No.1 is directed to hold an inquiry and fix responsibility against the erring official(s) and submit its report to this Court by 31st December, 2014.

33. Taking into account all these facts and circumstances, it has become imperative for this Court to issue directions that henceforth respondents shall make admissions to PG (MD/MS) Courses strictly in consonance with the procedure as prescribed in the prospectus, more particularly Clause-4, after adhering to the schedule as prescribed in ***Dr.Fraz Naseem's*** case (supra) by the Hon'ble Supreme Court. The schedule for admissions shall be religiously followed and vacant seats falling to the respective courses and quotas shall be notified at least a week earlier to the next counselling by displaying and publishing the same on the College notice board, uploading the same on the college website. Apart therefrom, the desirability of informing the eligible candidates through e-mail and text message over the mobile phones can also be considered. In short, the respondents would ensure that the

admissions are carried out on the basis of merit and merit alone in a fair and transparent manner and in no event would merit be compromised.

34. Ex-consequenti, the writ petitions are disposed of in the aforesaid terms accordingly, so also the pending application (s), if any. A copy of this judgment be placed on the connected file.

35. List the case on **1st January, 2015** for consideration of the report to be submitted by the respondent No.1.

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

Janmejai Sood .....Petitioner.
Versus
Ram Gopal Sood & ors. .....Respondents.

Civil Revision No. 62 of 2013.
Decided on: 4.11.2014.

H.P. Urban Rent Control Act, 1987 - Section 14- Landlord filed an eviction petition seeking eviction on the ground that premises was required bonafide for reconstruction and rebuilding on old lines, which could not be carried out without vacating the same- building was in dilapidated condition and had outlived its life span – building had become unsafe and unfit for human habitation and the tenants were in arrears of rent- tenant pleaded that building is situated in core area where construction activities are banned by the government – building had not become unfit and unsafe for human habitation- the petitioner was not an actual landlord and was not entitled to get rent- held, that the version of the petitioner that the building was more than 100 years old, in dilapidated condition and had become unfit and unsafe for human habitation was duly proved by evidence of the landlord- landlord had deposed that he had sufficient funds and had got the map approved from M.C. Shimla- building cannot be reconstructed without being vacated- further, tenants were in arrears of rent- learned Appellate Court had wrongly held that executing Court will not execute the order of eviction unless duly sanctioned plan is produced by the petitioner- this modification by Appellate Court was contrary to the Law- petition allowed. (Para- 8 to 14)

Cases referred:

Hari Dass Sharma vrs. Vikas Sood and others, reported in (2013) 5 SCC 243

Syed Jameel Abbas and others Vs. Mohd. Yamin alias Kallu Khan, reported in (2004) 4 SCC 781

For the petitioner: Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashista, Advocate.

For the respondents: Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Ajit Jaswal, Advocate for respondents No. 1 to 6.
None for respondents No. 7 to 13.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J. (oral)

This revision petition is instituted against the judgment rendered by the learned Appellate Authority (II), Shimla in Civil Appeal No. 19-S/13 (b) of 2007, dated 26.11.2012.

2. Key facts necessary for the adjudication of this revision petition are that the respondents (hereinafter referred to as the landlords) have filed a rent application No. 1-2 of 2002 in the Court of learned Rent Controller (5), Shimla under Section 14 of the H.P. Urban Rent Control Act, against the petitioner and proforma respondents (hereinafter referred to as the tenants). The premises were previously owned and possessed by one Sh. Shanti Swaroop son of Sh. Wadhwa Mal. From the original owner the demised premises was purchased vide registered sale deed dated 14.8.1989 by late Sh. Rama Nand and Sh. Ram Gopal Sood, sons of late Sh. Jai Karan Dass; and their respective sons namely, Chander Harsh, Vijay Kumar and Sanjay Karol (sons of Rama Nand) and Sh. Rakesh Sood, Raman Sood and Ashwani Sood (sons of Ram Gopal Sood). The premises fell exclusively to the share of the landlords in the family settlement vide arbitration award dated 1.10.2001 registered on 2.10.2001. The eviction petition was filed on the following grounds:

A) That the premises were bonafide required by the landlords for re-construction and rebuilding on old lines, which could not be carried out, unless the tenants vacates the same.

B) The building in question is more than 100 years old. It is in dilapidated condition. It has outlived its life span. The entire building stood constructed in old stone work i.e. "*surkhi*" and *lim masonry*. They have carried out addition and alteration resulting in putting additional load on entire load bearing structure and walls of the building. The walls are out of plumb and have bulged out due to weight. Damage has been caused to the building. The stone walls had started crumbling down.

C) The building has become unsafe and unfit for human habitation. The condition of the building was dangerous to the life and property of the occupants and other residents of the locality.

D) The rent has not been paid w.e.f. 1.3.1985 till 30.11.2001.

3. The tenants contested the petition. According to them, the building was situated in core area wherein any construction activity has been banned by the government. There was no bonafide requirement. No additions and alterations have been undertaken. The building has not become unsafe and unfit for human habitation. The tenants were

not liable to pay rent to the landlord as they were not the landlords of the demised premises.

4. Rejoinder was filed. The Rent Controller framed issues on 26.10.2002. He ordered the eviction of the tenants vide order dated 1.10.2007 on the ground of bonafide requirement of the landlord for the purpose of rebuilding/reconstruction that the demise premises has become unfit and unsafe for human habitation and that the respondent is in arrears of rent to the tune of Rs. 6305/-. The tenants were directed to hand over the vacant possession of the demise premises to the applicants within a period of 60 days from the date of the order.

5. The tenants feeling aggrieved by order dated 1.10.2007

preferred appeal before the learned Appellate Authority. The learned Appellate Authority, partly set aside and modified the order on 26.11.2012, hence this petition.

6. Mr. Ajay Kumar, Sr. Advocate, has vehemently argued that the premises in question were not bonafide required by the landlord for the purpose of re-building and reconstruction. He also contended that the building has not become unsafe and unfit for human habitation. The tenants were not bound to pay the rent to the landlords. On the other hand, Mr. Bhupinder Gupta, Sr. Advocate, has supported the order and judgment dated 1.10.2007.

7. I have heard the learned Advocates and gone through the pleadings and record very carefully.

8. The copy of the sale deed Ext. PW-3/A has been duly proved on record by registration Clerk. The arbitration award Ext. PW-9/A was duly proved. It was a duly registered document. On the basis of the sale deed Ext. PW-3/A, arbitration award Ext. PW-9/A and from the revenue record Ext. PW-1/A, it has rightly been held by the Courts' below that Sh. Ram Gopal Sood, Sudesh Sood, Rakesh Sood, Raman Karol, Ashwani Sood and Manu Karol have become landlords of the demise premises.

9. One of the landlords has appeared as PW-11. According to him, the premises were 100 years old. These were in dilapidated condition and have outlived its life. The building has been damaged by the tenants. The load bearing walls have bulged out. The foundation of the building has also settled down. The portion of the wall had fallen. The M.C. Shimla has issued notice vide letter Ext. PW-11/C wherein the building in question was declared unsafe. The photographs of the building have been produced by Sh. Harinder Singh vide Ext. PW-10/A to Ext. PW-10/C and its negatives Ext. PW-10/D to Ext. PW-10/F. Sh. Vivek Karol has appeared as PW-6. He is a graduate in Civil Engineering. He has inspected the building on 6.12.2001. He prepared report Ext. PW-6/A. According to his inspection report, the building was in bad condition. Its walls have bulged out. The stone work was falling. The building was more than 100 years old.

10. The tenants have examined one expert witness H.S.Bist. He appeared as RW-2 and stated that he is a retired Ex. Engineer from the department of HP PWD. He inspected the demise premises on two occasions i.e. firstly in December, 2001 and thereafter in June, 2002. He prepared his report Ext. RW-2/A and copy of map Ext. RW-2/B. According to him the building was in good condition and is very much habitable. RW-1 Kulbhushan Sood, RW-3 Sanjeev Kuthiala and RW-4 Ashutosh Aggarwal deposed that the building was in good condition. On the basis of the statement of the landlord read in conjunction with the statement of PW-6 Vivek Karol, the Courts below have rightly concluded that the building was 100 years old. It was in dilapidated condition. It has become unsafe and unfit for human habitation.

11. Now, as far as the issue of construction of the building on old lines is concerned, one of the landlord has appeared as PW-1. It is evident from Ext. PW-7/A, PW-7/A-1 to Ext. PW-7/A-8 that the landlords possesses sufficient funds. They have also got their plan sanctioned in this regard from the M.C. Shimla vide Ext. PW-2/A and the map as Ext. PW-11/A. Sh. Vivek Karol has deposed that if the landlords wanted to re-construct the building the same could not be carried out without the same being vacated by the tenants. Though, RW-2 has deposed that the building can be re-constructed/rebuild without being vacated, however, in view of the overwhelming evidence led by the landlords, it can be safely concluded that the building can not be built or re-built without the same being vacated by the tenants. The tenants are found to be in arrears of rent w.e.f. 1.3.1985 up to February, 2007.

12. The learned Appellate Authority has wrongly set aside and modified partly the order passed by the learned Rent Controller by observing that the executing Court would not execute the order of eviction on the ground of rebuilding and reconstruction unless duly sanctioned plan is produced by the petitioner therein. This issue is no more *res integra* in view of the decision of the Hon'ble Supreme Court in the case of ***Hari Dass Sharma vrs. Vikas Sood and others,*** reported in (***2013) 5 SCC 243.***

13. Now, it is not the requirement of the law that for the purpose of re-building the landlord should obtain building permission from the Municipal Authorities. Accordingly, the operative portion of the judgment whereby the appeal has been partly allowed and the order has been modified is set aside.

14. Accordingly, the Civil Revision is disposed of as under:

> "The tenant is directed to hand over the vacant possession of the premises to the landlords within a period of three months. Thereafter the landlords shall commence the construction within a period of six months and complete the same within a further period of one year. The tenants should be re-inducted in the same place, location and area should be equivalent to the area which was in occupation of the tenants before the orders passed by the learned Rent Controller. The rate of rent after the induction of the

tenants by the landlords would be determined as per the law laid down by their lordships of the Hon'ble Supreme Court in the case of ***Syed Jameel Abbas and others*** *Vs.* ***Mohd. Yamin alias Kallu Khan***, reported in ***(2004) 4 SCC 781.***"

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE.

Kuldip Singh and others ...Appellants/Plaintiffs
Versus
State of H.P. and others ..Respondents/Defendants

R.S.A. No. 53 of 2012
Judgment reserved on: 16.10.2014.
Date of decision: 04.11.2014

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit for declaration that they are permanent lessees of the grass land known as "Ghas Godam Mundkhar" and the land was allotted to their father by ruler of Bilaspur State- State Government decided to put the forest grass grown on the land to auction- notice was issued by the plaintiff on which Law Department gave an opinion that lease was perpetual and heritable- one of the plaintiffs filed an application before Collector for recording the factum of lease in the revenue record which was allowed- an appeal was preferred before the Commissioner who directed that matter be settled before the Civil Court- defendants pleaded that document was not a lease, but it was a concession granted by the Ruler to the father of the plaintiffs and no rent was paid by the plaintiffs- suit was initially decreed- appeal preferred before Additional District Judge, Bilaspur and High Court were dismissed- matter was taken to Supreme Court of India and the case was remanded with liberty to the parties to adduce fresh evidence- however, no evidence was led and application filed to lead additional evidence was dismissed- suit was ultimately dismissed- appeal preferred before the Appellate Court was also dismissed- held that documents show that grant was made by Raja Bilaspur- there was no time frame rather the same was granted in perpetuity subject to the payment of Rs. 5/- as rent- Raja of Bilaspur was a sovereign enjoying the full powers of the State- there was no restriction or obstruction on his power- further, Conservator of Forest, Bilaspur had also acknowledged the right of the plaintiff- in these circumstances, decree passed by the Trial Court as affirmed by the Appellate Court is not sustainable- appeal allowed. (Para- 25 to 30)

Code of Civil Procedure, 1908- Order 6- Pleading- plaintiffs claimed to be a lease-holders of the land - defendants claimed that the document set up by the plaintiffs was not lease but was only a concession – court recorded a finding that the plaintiffs were licensee- held, that it was not

permissible for the Court to make out a different case by recording the finding that plaintiffs were licensee. (Para-19)

Constitution of India, 1950- Article 363- Jurisdiction of the Civil Court is barred for determining disputes arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which were entered into or executed before the commencement of Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any predecessor Governments was a party - this article will not cover the grants made by the Rulers in favour of individuals. (Para-12)

Cases referred:

Union of India vs. E.I.D. Parry (India) Ltd. AIR 2000 SC 831

Pradeep Oil Corporation vs. Municipal Corporation of Delhi and another (2011) 5 SCC 270

For the Appellants :	Mr. B.P.Sharma, Senior Advocate with Mr. Arun Kumar and Mr. G.K.Nadda, Advocates.
For the Respondents :	Mr. P.M.Negi and Ms. Parul Negi, Deputy Advocate Generals, for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The appellants/plaintiffs filed a suit for declaration and consequential relief of injunction to the effect that they are permanent lessees of the grass land known as "Ghas Godam Mundkhar" comprised in Khasra Nos. 3 and 4 of the revenue estate No. 252/1, Jangal Jhanjiar Tehsil Ghumarwin and that the defendants be restrained from interfering with the possession of the plaintiffs over the said land and from auctioning the grass of the said land.

2. The case of the plaintiffs is that their father late Mian Lekh Ram was granted the aforesaid land by the then ruler of Bilaspur State, Sir Raja Vijay Chand Sahib Bahadur. The grant was made on 19 Sawan 1977 BK and a document known as "Satha" was issued on 23 Sawan, 1977 BK. This "Satha" was duly signed by the then ruler Sh. Vijay Chand. It was conveyed through the said "Satha" that Sh. Lekh Ram aforesaid would be entitled to the grass of the aforesaid forest against an annual rent of Rs.5/-. Mian Lekh Ram continued enjoying the aforesaid right of cutting the grass till his death in the year 1953 and thereafter the plaintiffs are enjoying the said right and are in possession of the land, in question. Mian Lekh Ram had been paying rent of Rs. 5/- per annum regularly to the State Government. Similarly, the plaintiffs continued paying the said rent after the death of their father. However,

subsequently, the said rent was enhanced from Rs. 5/- to Rs. 7/- per annum. It is further mentioned that the land is about 100 acres. Previously, this land used to be a demarcated forest under the ownership and possession of late Ruler of Bilaspur, but, subsequently when it was allotted to the father of the plaintiffs, it was taken out of the list of the demarcated forest and was declared as Ghas Godam. Thereafter, Khasra Nos. 3 and 4 was allotted to Mian Lekh Ram and thereafter the plaintiffs continued enjoying the right aforesaid till 1970. It was in 1970 that the State Government decided to put the forest into auction in respect of the grass which is grown in the said land. Having come to know the intention of the Government, the plaintiffs served a notice upon the State Government under Section 80 CPC. Consequently, the auction was stayed and the Government referred the matter for legal opinion of the Law Department. The main question for interpretation and opinion was the "Satha" aforesaid. The Law Department opined that "Satha" in question, was a perpetual and heritable lease and that the plaintiffs had right over the land in dispute. Subsequently, Kuldip Singh Patyal one of the plaintiffs preferred an application on 13.11.1973 to the Collector Ghumarwin for recording the factum of aforesaid lease in the revenue record. The said Collector passed an order on 26.3.1974 and ordered that an entry be made in the revenue record in respect of the said right of the plaintiffs. However, the defendants preferred an appeal against the said order of the Collector. The Commissioner directed the plaintiffs to get the matter settled through the Civil Court. The plaintiffs brought the present suit and also availed of the opportunity of filing an appeal against the order of the Divisional Commissioner. The appeal was pending before the Financial Commissioner, who had granted stay order against the defendants thereby restraining the defendants from interfering with the possession of the plaintiffs over the suit land. Thereafter, the defendants have been fixing various dates for putting the grass of the forest, in question, to auctioned. The defendant No.4,Shiv Ram Arya, DFO, Bilaspur had fixed the auction of the said land for 4.8.1976 and 28.8.1976 despite the stay order of the Financial Commissioner and it was with the intervention of the Collector concerned that the said auction was not held. It is stated that the defendants have admitted the right of the plaintiffs over the suit land and the defendants are estopped from disputing the right of the plaintiffs over the suit land. As such, a declaratory decree has been sought thereby declaring the plaintiffs as perpetual lease holders of the land, in question, and also prayed that the defendants be restrained permanently from auctioning the grass land or interfering with the possession of the plaintiffs over the suit land.

3. The defendants contested the claim of the plaintiffs and they have denied that the plaintiffs are permanent lease holders of the land in dispute. It has been pleaded that "Satha" in question, was not a lease, but it was a concession granted by the then Ruler to Sh. Lekh Ram, father of the plaintiffs. It is further stated that father of the plaintiffs and plaintiffs have never been in possession of the land in dispute and that no rent was paid by them to the Government. It has

also been mentioned that Khasra Nos. 3 and 4 still continue to be demarcated protected forest and are recorded as such in the revenue record. It has emphatically been denied that the Government had admitted "Satha" to be the perpetual and heritable one. It has also been averred that the Divisional Commissioner had rejected the claim of the plaintiffs in respect of making of the entries regarding the factum of lease. As regards the admission made by the defendants, it is stated that the same is not binding on the Government and the defendants are not estopped from raising the objections aforesaid. It has further been stated that the auctions were fixed by the defendants because the Financial Commissioner had vacated the stay on 26.8.1976. Apart from this, certain preliminary objections like maintainability of the suit etc. have been raised. However, these averments were denied by the plaintiffs in their replication which they were allowed to file.

4. On the pleadings of the parties, the following issues were framed by the learned trial Court:

1. *Whether the plaintiffs are permanent lease holders of the land known as Ghas Godam Mundkhar Khasra Nos. 3 and 4 of Village Jangal Jhanjiar, Tehsil Ghumarwin, District Bilaspur, H.P. under the Government? OPP*

1-A. *Whether the suit land is comprised in Khasra No. 4 only as alleged? OPD*

2. *Whether the defendants are estopped from denying the rights of the plaintiffs in the land in dispute by their conduct and admission as alleged? OPP*

3. *Whether the defendants are interfering with the rights of the plaintiffs in the land in dispute as alleged? OPP*

4. *Whether the plaintiffs are entitled to the relief of injunction and declaration as prayed for? OPP*

5. *Whether the suit is not legally maintainable? OPD*

5-A. *Whether the plaintiffs have no locus standi to file the present suit? OPD*

6. *Whether the suit is without limitation? OPD*

7. *Whether this court has no jurisdiction to try the suit? OPD*

8. *Whether no valid and legal notice U/s 80 CPC has been served upon the defendants? OPD*

9. *Whether the suit has been properly valued for the purpose of court fee and jurisdiction? OPP*

10. *Whether the plaintiffs are in continuous possession of the land in dispute for more than 30 years as alleged in the alternative, if so, its effect? OPP*

10-A. *Whether the plaintiffs are in adverse possession of the land in dispute for more than 30 years as alleged, if so, its effect? OPP*

11. Whether the Satha in dispute is not at all a lease and had terminated at the death of the father of the plaintiffs? OPD

12. Whether the land in dispute falls in demarcated forest and the plaintiffs are not permanent lease holders of the land in dispute known as Ghas Godam Mundkhar? OPD

12-A. Whether the suit land ceased to be a demarcated forest after its grant to the father of the plaintiffs, as alleged, if so, its effect? OPP

13. Relief.

5. The suit was initially decreed by the learned Senior Sub Judge, Bilaspur vide judgment and decree dated 7.12.1981 in case No. 141/1 of 1976. The State preferred an appeal which was dismissed by the learned Additional District Judge, Bilaspur and the second appeal preferred before this Court was also dismissed.

6. The respondents then filed an appeal before the Hon'ble Supreme Court of India and the same was allowed and the case was remanded to the learned trial Court in the following terms:

"Learned counsel appearing for the appellant urged that the courts below have committed a serious error in holding that what was given to the plaintiff-respondents was lease and not licence and moreover such a right stood extinguished once the area for which licence was given vested and became part of the protected and demarcated forest. Learned counsel has relied upon relevant notifications, survey map and judgment of this Court in support of his argument. After we heard the matter we find many documents which are sought to be relied upon were not filed in the Courts below. Learned counsel for the parties are agreed that the case may be remanded to the trial court with liberty to file documents.

In view of above, we set aside the judgment of the Courts below and send the case back to the trial Court to decide the matter afresh. It will be open to the parties to adduce fresh evidence.

The appeal is allowed. There shall be no order as to costs.

Sd/-
(V.N.Khare)

New Delhi,
February 01, 2001.
(K.G.Balakrishan)"

7. Learned trial Court after receipt of the file, fixed the case on 20.3.2010 a date for final arguments. However, when the case was listed on the said date, the parties sought time for arguments and the case was thereafter fixed for final arguments on 17.4.2010. On 17.4.2010, the respondents filed an application under Section 151 CPC for filing the documents i.e. Survey Map etc. However, this application was dismissed

on the ground that the case had been remanded by the Hon'ble Supreme Court by affording opportunities to the State to place on record the documents relating to the property but it had failed to exercise its right. The matter was then heard in part and fixed for arguments on 30.4.2010 on which date the suit of the plaintiffs came to be dismissed.

8. The plaintiffs preferred an appeal before the learned lower Appellate Court which also came to be dismissed and yet aggrieved, the plaintiffs/appellants have approached this Court by way of filing the present appeal.

9. When the appeal came up for consideration on 17.2.2012 this Court admitted the same on the following substantial questions of law:

1. *Whether Sanad Ex.PW-2/A is beyond the jurisdiction of the Civil Courts and cannot be set aside in any civil proceedings?*
2. *Whether Article 363 of the Constitution of India ousts the jurisdiction on the Civil Courts to adjudicate, set aside the grant in the Sanad Ex. PW-2/A or to pass any other order annulling the grant so made?*
3. *Whether the Sanad Ex.PW-2/A is not subject to the limitation imposed by other laws including the laws relating to forest settlement?*
4. *Whether the Courts below have ignored/glossed over/ misinterpreted the evidence of Raja Anand Chand son of Raja Bijai Chand, Ex Ruler of Bilaspur, who granted the Sanad Ex.PW-2/A?*
5. *Whether the Courts below have erred in interpreting the terms of the grant of the Sanad Ex.PW-2/A?*
6. *Whether the Courts below were in grave error in ignoring Ex.PZ, letter dated 18.06.1973, issued by the respondent-State acknowledging the possession of the plaintiff-appellant, if so its effect?*
7. *Whether the Courts below have misread and misinterpreted the evidence and pleadings of the parties on record?*
8. *Whether the judgment of the Courts below is against law and facts on record?*

10. Thereafter, vide order dated 15.7.2014 in CMP No. 9274 of 2014, the following additional substantial question of law was framed:

> *Whether the respondents have played fraud on the Hon'ble Supreme Court by filing and persuading the Hon'ble Supreme Court to remand the case on false plea and on wrong translation of Urdu word 'Doam' and if so, the judgment passed by the then Ld. Trial Court and both the Ld. Appellate Courts are to be revived by this Hon'ble Court*

by a judgment as per law laid down by the Hon'ble Apex Court.

Substantial questions of law Nos. 1 and 2:

Since both these questions of law are interconnected and interrelated, therefore, these are taken up together for consideration.

11. Article 363 of the Constitution of India reads thus:

> *"363.* ***Bar to interference by Courts in disputes arising out of certain treaties, agreements, etc.****- (1) Notwithstanding anything in this Constitution but subject to the provisions of article 143, neither the Supreme Court nor any other Court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument.*
> *(2) In this article –*
> *(a) "Indian State" means any territory recognized before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and*
> *(b) "Ruler" includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State."*

12. Till the Indian Independence Act, 1947, the Indian States were not subject to the administration of the Government of British India. The Indian States were under the suzerainty of the British Crown and were subject to control of the suzerain in certain matters. This suzerainty elapsed with the coming into force of the Indian Independence Act, 1947. With the passing of the Constitution, India became sovereign republic and Article 363(1) has barred the jurisdiction of the Civil Court arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party. To my mind, the provisions of this Article are not at all attracted to this case because sine qua non with respect to the documents like treaty, agreement etc. for coming within the ambit of Article 363 of the Constitution of India is that the same must have been entered into or executed before the commencement of the Constitution by any Ruler of an Indian State and thereafter importantly the Government of the Dominion of India or any of its predecessor Governments must be a party thereto. Resultantly, this

would not cover the grants made like in the present case by the erstwhile Rulers in favour of individuals to which the Government of the Dominion of India or any of its predecessor is not a party thereto. Accordingly, it is held that Article 363 of the Constitution is not applicable to the facts of the present case and the Civil Court had jurisdiction to entertain the suit. These substantial questions of law are answered accordingly.

Substantial questions of law Nos. 3, 4, 5, 6, 7, 8 & 9:

Since these questions of law are somewhat inter-connected and inter-related, therefore, these are collectively taken up together for consideration.

13. At the outset, it may be pointed out that granting of "Satha" Ex.PW-2/A has not been disputed by the respondents. The claim of the appellants is that the "Satha" was a perpetual lease while on the other hand, the claim of the respondents is that it was simply a concession granted on the application of Lekh Ram, which had terminated automatically on the death of Lekh Ram, father of the plaintiffs. The translation of "Satha" has been placed on record by the appellants, which reads as under:

> ***"Before Captain Sir Raja Vijay Chand Sahib Bahadur K.C.I.C.C.S. Bilaspur State (Kehloor)***
>
> ***No. of case Corresponding Date Register file.***
> ***133 23 Savan 1977 Sambad Sd/-***
> ***(Vijay Chand)***
> ***Signature in English.***
>
> ***Addressed Mian Lekh Ram S/o Malagar Singh by Caste Rajput, resident of Village Mundkhar, Pargana Sunhani.***
>
> ***Whereas according to your petition for the contract (THEKA) of Grass Godown (Grass area) in Village Mundkhar, Pargana Sunhani on payment of `5/- per year is granted on perpetual basis on 19th Savan 1977 Sambat. This will be deemed effective from the 1977 Sambat. The contract amount shall be deposited with the Forest Department every year. This contract is thus granted by way of Sanad (certificate) and you are directed to retain it with you.***
>
> ***Sd/- inder Singh Sd/- Hari Singh Sd/- Shiv Singh***
> ***(Signature in English) Nazirn Forest Forester Forest***
> ***(Signature in English) (Signature in Urdu)."***

14. The respondents on the other hand have placed on record the translation of "Satha" which reads as under:

> ***"Before Captain Sir Raja Vijay Chand Sahib Bahadur K.C.I.E.C.S. Riyasat, Bilaspur.***
>
> ***Case No. Date of Registration***
> ***133 23 Savan Sambat 1977 B.K.***
> ***Sd/-***

Raja Vijay Chand (in English).
Versus Mian Lekh Raj, son of Malagar Singh, Caste Rajput, R/o Mundkhar, Pargana Sunhani.

As per your written request, the contract of the grass godown Mundkhar, Pargana Sunhani on payment of Rs. 5/- yearly, has been accepted in public hearing, by order of the Raja dated 19 Savan 1977 and is granted to you, which shall be operative from 1977. The agreed contract amount shall be deposited every year with Forest Department. Hence, this Sanad is granted which be kept with you. Promulgated 23rd Savan, Sambat 1977.

Scribe Shiv Singh, Forester, Forest Department.
Sd/- Hari Singh Nazirn of Forest Department.
Sd/-
Inder Singh.
The Hindi translation of the above document has been transcribed by the trial Court in its judgment dated 7.12.1981 in English alphabets. Copy of the above judgment is endorsed as Annexure A-1. The admissions if any, made by the official of the Government are not binding on the State being against the official record."

15. It is argued by learned counsel for the appellants that the respondents have played mischief and have even misled the Hon'ble Supreme Court to remand the case on account of wrong translation of the Urdu word "doam" by terming it to be "public hearing", which in fact otherwise means "perpetual". The appellants in support of his contention with regard to meaning of "doam" has placed on record an extract of Advance Urdu-Hindi-English Dictionary by V.V.Sahani wherein the "doam" means perpetual, continual, eternal. The respondents on the other hand have not been able to show that "doam" in fact means "public hearing". The translation submitted by the respondents in fact changes the entire complexion of the case and, therefore, it is established that the translation of "Satha" made by the respondents is incorrect while the translation made by the appellants is correct. However, this does not mean that only on account of the wrong translation, the judgments passed previously by the learned trial Court and learned Appellate Court would automatically revive.

16. Undisputedly, Raja Vijay Chand was the Ruler of erstwhile State of Bilaspur and had granted the "Satha" in favour of late Sh. Lekh Ram. PW-2 Anand Chand Sahib, who is the son of Raja Vijai Chand while deposing in this case, has stated that he was Ex-Ruler of Bilaspur and "Satha" Ex.PW-2/A bore the signatures of his father. It was also signed by administering the same. He identified the signatures of both the aforesaid persons. It cannot be disputed that being a complete sovereign, he had made the "Satha" and the only question which arises for consideration as to whether the "Satha" was a perpetual lease granted

in favour of the plaintiffs or was it only a concession granted in favour of the predecessors in interest of the plaintiffs.

17. The learned courts below while rejecting the claim of the plaintiff/appellants have held that the plaintiffs were only licensee whose predecessor-in-interest had been given concession of licence merely to cut the grass from the suit land. While the claim of the plaintiffs/appellants was that they were permanent lessee of the suit land. At this stage, this Court is required to see as to what were the precise pleadings of the respective parties.

18. The plaintiffs in paras No. 1 and 2 of the plaint had alleged as under:

> *"1. That the plaintiffs are permanent lease holders of the land in dispute known as Ghas Godam Mundkhar comprising of Khasra No. 3 and 4 of Village Jangal Jhanjiar Hadbast No. 252/1, Tehsil Ghumarwin, District Bilaspur, H.P. measuring about 100 acres (489-11-0 bighas) since it was granted to their worthy father.*
> *2. That the land in dispute was granted to their worthy father of the plaintiffs late Mian Lekh Ram, Jagirdar by the then Ruler of Bilaspur State Siri Raja Bijai Chand Sahib Bahadur K.e.i.C.s. vide his order dated 19 Sawan 1977 BK and Satha dated 23 Sawan 1977 BK, signed by the then Ruler of the State Siri Bijai Chand, his minister late Shri Inder Singh, Forest Nazam Late Shri Hari Singh and Forester late Sh. Shiv Singh, as perpetual lease in lieu of rupees five annual rent to deposited with the forest department. The attested copy of the original Satha is enclosed herewith.""*

While corresponding paras 1 and 2 of the written statement reads as under:

> *"1. That the contents of para No.1 are wrong, hence not admitted. The plaintiffs are not permanent lease holders of the land in dispute known as grass Godam Mundkhar, comprised in Kh. No. 4 and not in Khasra No.3 of Village Jangale Jhanjiar hadbast No. 258/1, Jhanjiar Forest hadbast No. 258/1 has been notified as demarcated protected Forest, under Chapter IV of Indian Forest Act.*
> *2. That the contents of para No.2 of the plaint are wrong and hence denied. The so called Satha which the plaintiffs claim as permanent lease, is not at all lease and was simply a concession granted on the application of late Sh. Lekh Ram, which had terminated automatically on the death of Shri Lekh Ram, the father of plaintiffs."*

19. Thus, what would be seen from the pleadings is that the plaintiffs had claimed themselves to be a lease-holders of the land comprised in Khasra Nos. 3 and 4, while the defendants on the other hand had alleged that the plaintiffs were not permanent lessee but only a simple concession had been granted on the application of late Sh. Lekh Ram, which had terminated with his death. The defendants did not even set up a plea that the predecessor-in-interest of the plaintiffs was only a licensee. I wonder from where and how the learned Courts below

assumed the status of the predecessor-in-interest of the plaintiffs to be that of a licensee when this was not even the plea set up by the defendants. The learned Courts below could not have carved out an entirely a new case in favour of the defendants to dis-lodge the claim of the plaintiffs. There were no pleadings on behalf of the defendants that the plaintiffs were licensees. In absence of pleadings to this effect, the trial Court did not frame any issue on that question. However, still the learned Courts below have concluded that the plaintiffs were mere licensees. This view is contrary to the settled law that a question, which did not form part of the pleadings or in respect of which the parties were not at variance and which was not the subject matter of any issue, could not have been decided. Reliance can conveniently be placed upon the judgment of the Hon'ble Supreme Court in ***Union of India vs. E.I.D. Parry (India) Ltd. AIR 2000 SC 831*** wherein it was held as follows:

> *"The suit was filed for the recovery of excess demurrage allegedly charged by the appellant from the respondent. The claim depended upon Goods Tariff Rules, specially the Rule quoted above, which authorizes the respondent to claim damages in respect of the entire block of wagons supplied to a party who does not empty those wagons at the siding within the time permitted for that purpose. There was no pleading that the Rule upon which the reliance was placed by the respondent was ultra vires the Railways Act, 1890. In the absence of the pleading to that effect, the trial Court did not frame any issue on that question. The High Court of its own proceeded to consider the validity of the Rule and ultimately held that it was not in consonance with the relevant provisions of the Railways Act, 1890 and consequently held that it was ultra vires. This view is contrary to the settled law that a question, which did not form part of the pleadings or in respect of which the parties were not at variance and which was not the subject matter of any issue, could not be decided by the Court. The scope of the suit was limited. The pleadings comprising of the averments set out in the plaint and the defence put up by the present appellant in their written statement did not relate to the validity of the Rule struck down by the High Court. The High Court, therefore, travelled beyond the pleadings in declaring the Rule to be ultra vires. The judgment of the High Court, therefore, on this question cannot be sustained."*

20. What is a lease, licence and what is the difference between the two, has been succinctly summed up by the Hon'ble Supreme Court in ***Pradeep Oil Corporation vs. Municipal Corporation of Delhi and another (2011) 5 SCC 270,*** which reads as follows:

> *"12. It would be useful to examine at this stage the definition of "lease" and "licence" as envisaged under Section 105 of the Transfer of Property Act, 1882 and section 52 of the Indian Easements Act, 1882 respectively. Section 105 of the Transfer of Property Act, 1882 reads: -*

> *"105. **Lease defined**.--A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."*

On the other hand, Section 52 of the Indian Easements Act, 1882 reads as:

> *"52**. 'Licence' defined**.--Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called, a licence."*

13. A licence may be created on deal or parole and it would be revocable. However, when it is accompanied with grant it becomes irrevocable. A mere licence does not create interest in the property to which it relates. License may be personal or contractual. A licensee without the grant creates a right in the licensor to enter into a land and enjoy it.

14. In Halsbury's Laws of England, 4th Edition, Vol. 27 at page 21 it is stated: -

> *"12. **Licence coupled with grant of interest.** - A license coupled with a grant of an interest in property is not revocable. Such a license is capable of assignment, and covenants may be made to run with it. A right to enter on land and enjoy a profit a prendre or other incorporeal hereditament is a license coupled with an interest and is irrevocable. Formerly it was necessary that the grant of the interest should be valid; thus, if the interest was an incorporeal hereditament, such as a right to make and use a watercourse, the grant was not valid unless tinder seal, and the license, unless so made, was therefore a mere license and was revocable but since 1873 the Court has been bound to give effect to equitable doctrines and it will restrain the revocation of a license coupled with a grant which should be, but is not, under seal."*

A lease on the other hand, would amount to transfer of property.

15. In Associated Hotels of India Ltd. v. R.N. Kapoor, AIR 1959 SC 1262, the following well established proposition were laid down by a Constitution Bench for ascertaining whether a transaction amounts to a lease or a licence: (AIR p. 1269, para 27)

> *"27. There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy*

such property made for a certain time in consideration for a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called the leasehold interest. The Lesser parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the Lessor. Whereas Section 52 of the Indian Easement Act defines a licence thus:

* * *

Under the aforesaid section, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a license. The legal possession, thereforee, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission his occupation would be unlawful. It does not create in his favor any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is dear through sometimes it becomes very thin or even blurred. Alone time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial option is reflected in Errington v. Errington 1952 (1) All ER 149, wherein Lord Denning reviewing the case law on the subject summarises the result of his discussion thus at p. 155:

> *"The result of all these cases is that, although a person who is let into exclusive possession is, prima facie to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."*

16. It is quite clear that the distinction between lease and license is marked by the last clause of Section 52 of the Easement Act as by reason of a license, no estate or interest in the property is created.

17. In the case of Qudrat Ullah v. Municipal Board, Bareilly, (1974) 1 SCC 202 it was observed at p. 398 thus: -

> *"... If an interest in immovable property, entitling the transferors to enjoyment is created, it is a lease; if permission to use land without right to exclusive possession is alone granted, a license is the legal result."*

(emphasis underlined)

18. A licence, inter alia, (a) is not assignable; (b) does not entitle the licensee to sue the stranger in his own name; (c) it is revocable and (d) it is determined when the grantor makes subsequent

assignment. The rights and obligations of the lessor as contained in the Transfer of Property Act, 1882 are also subject to the contract to the contrary. Even the right of assignment of leasehold property may be curtailed by an agreement."

21. On the touch-stone of the aforesaid exposition of law, I proceed to examine the oral and documentary evidence available on record. "Satha" Ex.PW-2/A in itself does not mention specifically the total area and khasra numbers which is only ascertainable from the entries made during the Bandobast of the Mundkhar forest wherein this area was denoted in Khasra Nos. 3 and 4. There is no contrary evidence on record so as to suggest that any other area save and except the aforesaid khasra numbers were also known as "Mundkhar". The area shown under Khasra No. 3 is 344-12 bighas while under Khasra No. 4, it is 141-19 bighas and in this manner the total area works out to be 486-11 bighas.

22. Now, in case the wording of the document Ex.PW-2/A is seen, the same reads as under:

"Before Captain Sir Raja Vijay Chand Sahib Bahadur
K.C.I.C.C.S. Bilaspur State (Kehloor)

No. of case	***Corresponding Date***	***Register file.***
133	***23 Savan 1977 Sambad***	***Sd/-***
		(Vijay Chand)
		Signature in English.

Addressed Mian Lekh Ram S/o Malagar Singh by Caste Rajput, resident of Village Mundkhar, Pargana Sunhani.

Whereas according to your petition for the contract (THEKA) of Grass Godown (Grass area) in Village Mundkhar, Pargana Sunhani on payment of Rs.5/- per year is granted on perpetual basis on 19th Savan 1977 Sambat. This will be deemed effective from the 1977 Sambat. The contract amount shall be deposited with the Forest Department every year. This contract is thus granted by way of Sanad (certificate) and you are directed to retain it with you.

Sd/- inder Singh	***Sd/- Hari Singh***	***Sd/- Shiv Singh***
(Signature in English)	***Nazirn Forest***	***Forester Forest***
	(Signature in English)	***(Signature in Urdu)."***

23. There is specific reference of a grant having been made by Raja of Bilaspur and the same is not restricted and there is no time frame rather the same has been granted in perpetuity subject to the payment of Rs. 5/- as rent (later increased to Rs. 7/-). It is not disputed that at the time of making the grant, the Raja of Bilaspur was a sovereign enjoying the full powers of the State and his Will was the law with no restriction or obstruction on his power and he in exercise of his prerogative right had made the grant.

24. I wonder how the learned Courts below have assumed that this land was given for cutting grass alone. The purpose of lease is no where mentioned in the "Satha". The mere mentioning of grass Godam (Grass area) in itself may only suggest that it had something to do with grass but it cannot inferred that this was the right for which it was given. The Courts cannot of its own introduce those words which otherwise have not been mentioned in the document.

25. At this stage, it would be relevant to make note of copy of memorandum dated 18.6.1973 issued by the Conservator of Forest, Bilaspur, which has been duly proved on record and reads as under:-

"No. 4081
Himachal Pradesh Forest Department.
Dated Bilaspur, the 18.6.73
From: C.F. Bilaspur.
Subject: Lease of Mundkhar Grass Godown in Bilaspur Forest Division.
Memorandum,

There is an area named Mundkhar Grass Godown, included in Palasla DPF of Bilaspur Forest Division, which was with lease for grass cutting with late Mian Lekh Ram of village Mundkhar for an annual payment of Rs. 5/- as lease money. This area was granted for grass cutting by His Highness Raja Sir Vijai Chand, the then ruler of Bilaspur State on 19th Savan 1977 vide 'Satha' dated 23rd Sawan, 1977 (attested copy enclosed). After the death of Mian Lekh Ram, his heirs have asserted their claim that the lease of grass cutting originally entered into with Mian Lekh Ram may be continued in their name as well. In support of their assertion they have stated that the lease was granted in perpetuity in the name of original grassee, therefore, the lease is to be continued to the succeeding generations as well. Since the transfer of lease to the heirs involves legal interpretation of the contents of 'Satha', therefore, the case is referred to you for kindly getting necessary clarification from the law department as to whether the lease can be transferred to the heirs of Mian Lekh Ram or not. It may however, be mentioned that the grass godown is at present under the possession of the heirs of Mian Lekh Ram and they are prepared to pay the arrears of lease amount of the grass godown which has not been accepted by the Department for the last few years. An early clarification in the matter is requested as the heirs of the original lease holder are keen to get the matter decided at the earliest.

2. The copy of 'Satha' enclosed with this letter may kindly be returned after it is no longer required in your office.

Sd/-
C.F. Bilaspur."

In the aforesaid memorandum, the Conservator of Forest had not only acknowledged the appellants to be in possession, but had also acknowledged the receipt of rent.

26. The learned Advocate General would contend that the appellants at best can agitate their claim over Khasra No.4 and not over Khasra No.3 since this khasra number had been notified as demarcated

protected forest under Chapter IV of the Indian Forest Act. There is a fallacy in this argument because the demarcated protected forest was declared only in the year 1952 while the grant in this case admittedly had been made in the year 1977 BK corresponding to the English Calendar 1920. Any unilateral act of the defendants that too subsequent to the grant of "Satha", would not be binding upon the plaintiffs.

27. The learned Advocate General would thereafter argue that the revenue records do not record and recognize right as claimed by the plaintiffs. I am afraid that even this contention does not appeal to this Court. It is settled law that no presumption of truth is attached to the revenue entries, particularly jamabandi, the entries whereof are primarily for fiscal purpose and moreover, the rights of the parties would be governed by the "Satha" and this Court need not fall back or rather look at any other document.

28. The learned Courts below have not only gone astray but these findings are perverse when they place reliance on the entries of revenue records in the teeth of this "Satha" Ex.PW-2/A. Equally misplaced is the reliance placed by the learned Courts below to the forest settlement report compiled by Mian Durga Singh under the authority of H.H. Raja Bije Chand Sahib as it does not even make a reference to the land in question. The further reliance placed by the learned Courts below upon the judgments of the Rajasthan High Court and Orrisa High Court, respectively, to hold that the plaintiff was only a licencee and not lessee to say least are misplaced for the simple reason that the "Satha" did not reflect the usage of the land mentioned therein much less the same being granted only for the purpose of cutting grass. Even the word "Doam" has been totally misconstrued by the learned Courts below as the word 'Doam" was with respect to the grant being made in perpetuity, how the learned Courts below have held the "Satha" to be a grant and how it amounts to Theka or contract year after year is neither discernable or forthcoming. A bare perusal of the "Satha" would clearly show that the grant had been made in perpetuity on the payment fixed therein and in no manner was a licensee as held by the learned Courts below.

29. Thus, in view of the aforesaid discussion, it can be safely concluded that while granting the "Satha" no subordinate tenure or an interest was created in anybody else and the same was a proprietary sovereign grant, granting all kinds of rights on these lands while making no reservation whatsoever in that connection. A perusal of the Sanad in indubitably and unequivocally indicates that the intention of the Ruler was to grant a right in perpetuity to the predecessor-in-interest of the plaintiffs. No doubt, ordinarily the rule is that the grant made by the sovereignty are to be construed most favourably for the sovereign but if the intention is obvious a fair and liberal interpretation may be given to the grant to enable it to take effect; and the operative part if plainly express may take effect notwithstanding qualifications, if any, in the recitals.

30. Lastly, it may be observed that the Hon'ble Supreme Court had remanded the case so as to enable the respondents to file documents so that the matter could be decided afresh, which is clear from the following observations of the order:

> ***"Learned counsel appearing for the appellant urged that the courts below have committed a serious error in holding that what was given to the plaintiff-respondents was lease and not licence and moreover such a right stood extinguished once the area for which licence was given vested and became part of the protected and demarcated forest. Learned counsel has relied upon relevant notifications, survey map and judgment of this Court in support of his argument. After we heard the matter we find many documents which are sought to be relied upon were not filed in the Courts below. Learned counsel for the parties are agreed that the case may be remanded to the trial court with liberty to file documents....."***

Admittedly no additional documents were filed by either of the parties, more particularly by the respondents. This being the factual position then whether the learned trial or even the appellate Court could have given findings different and contrary to ones rendered earlier by them once the pleadings and evidence available on the record remained same. The substantial questions of law are answered accordingly.

31. In view of the above, there is merit in this appeal and accordingly, the judgment and decree dated 19.11.2011 passed by learned Additional District Judge, Ghumarwin, District Bilaspur, H.P. (Camp at Bilaspur) in Civil Appeal No. 26/13 of 2011/10 are set-aside and the suit of the plaintiffs is decreed as prayed for. Pending application(s), if any, stands disposed of.

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

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

Cr. Appeal No. 119 of 2011.
Reserved on: November 3, 2014.
Decided on: November 4, 2014.

N.D.P.S. Act- Section 20- Accused was found in possession of 6.250 k.gs of charas- police made efforts to search for independent witnesses but could not find any independent witness - PW-3 and PW-4 were declared hostile but they admitted their signature on the seizure memo- FSL

report showed that the contraband was found to be charas on analysis-held, that accused was rightly convicted. (Para- 18 to 21)

For the appellant: Mr. Manoj Pathak, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG with Mr. Anup Rattan Addl. AG and Mr. Vivek Singh Attri, Dy. AG and Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 26.3.2011, rendered by the learned Special Judge(II), Kinnaur at Rampur, H.P. in RBT No. 20-AR/3 of 2010, whereby the appellant-accused (hereinafter referred to as the accused) who was charged with and tried for offence under Section 20/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, was convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs. 1,00,000/- and in default of payment of fine to undergo simple imprisonment for two years. Tara Chand was acquitted, hence this appeal.

2. The case of the prosecution, in a nut shell, is that on 13.12.2008, S.I Gurbachan Singh, P.S.Anni alongwith ASI Ludar Singh, Constable Hari Singh and Constable Bhoop Singh left Police Station Anni in connection with investigation of case FIR No. 119/08 dated 12.12.2008 and also for detection of cases under Excise Act, NDPS Act and Forest Act and for checking of traffic towards Swad, Kanda Aran side. At about 2 pm accused Prakash Chand came from Swad side holding a bag on his back. He stopped at a distance of 25 meters. He turned back and tried to escape. He was apprehended. S.I. Gurbachan Singh informed the accused that he intended to conduct his search and also apprised him of his right of being searched in the presence of the Magistrate or a gazetted officer. The accused opted to be searched by the police on the spot. S.I. Gurbachan Singh alongwith ASI Ludar Singh and Constable Bhoop singh were joined by him as witnesses. They gave their personal search to the accused. The bag was checked. It contained 6 kgs 250 gms charas. The sampling and seizure procedure was completed and NCB forms in triplicate were filled in. The 'rukka' was sent to PS Anni through Constable Hari Singh on the basis of which FIR No. 121/2008 was registered. The accused was arrested the case property was deposited in the *malkhana*. The case 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 persons were also examined under Section 313 Cr.P.C to which they pleaded not guilty. Accused also examined two witnesses in defence. The learned Trial Court convicted accused Prakash Chand, as stated hereinabove.

4. Mr. Manoj Pathak, Advocate, for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. According to him, no independent witness was associated by the prosecution, though available. On the other hand, Mr. M.A.Khan, learned Addl. Advocate General, has supported the judgment dated 26.3.2011, of the learned trial Court.

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

6. PW-1, ASI Luder Singh, deposed that on 13.12.2008, he accompanied S.I. Gurbachan Singh along with Constable Hari Singh and Bhoop Singh to Nagan. One person was apprehended who was carrying one Pithu and coming from Swad side towards Nagan. The accused was given option to be searched either before Magistrate or gazetted officer. Accused opted to be searched by the police vide memorandum Ext. PW-1/A. Constable Hari Singh was deputed to procure some independent witnesses but Constable Hari Singh came after some time as no independent witness was found to be associated. S.I. Gurbachan Singh after associating the official witnesses offered his search to accused Prakash Chand vide memorandum Ext. PW-1/B. The search of *Pithu* was carried out. It contained 6 kg 250 gms charas. Out of this contraband, two samples of 25 gms each were drawn separately and the remaining charas was put into the same polythene packet and *pithu* bag which was put into a separate sealed packet as P1 duly sealed with seal 'C' in the separate packet. NCB forms were filled in. The sample charas and remaining charas was taken into possession vide seizure memo Ext. PW-1/C. Constable Bhoop Singh and accused Prakash Chand also signed the same. In his cross-examination, he deposed that the distance from Police Station to Kanda Aran is about 20 kms., approximately. They remained there for about 2 hours. He did not remember the house or shop owner adjoining to the Nagan bridge. The electronic scale was used to weigh the contraband. All the proceedings including preparation of papers were completed on the spot.

7. PW-2 Chunni Devi is the wife of the accused. She did not know what had happened to her husband. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination, she deposed that her husband returned at about 4:30 PM after converting the timber. She denied the suggestion that her husband returned and he received a telephonic call from co-accused Tara Chand.

8. PW-3 Rajinder Kumar and PW-4 Amar Chand have deposed that nothing has taken place in their presence. They were also declared hostile. However, they have admitted their signatures on the memorandum Mark 'X'.

9. PW-5 M.L.Sharma, deposed that he has supplied the call details of Mobile No. 98171 49093 vide Ext. PW-5/A.

10. PW-6 Devinder Verma, has supplied the call details of Mobile No. 91166 43520 vide Ext. PW-6/A.

11. PW-7 HC Anup Kumar deposed that on 13.12.2008, Constable Hari Singh brought the *'rukka'* on the basis of which, he registered FIR Ext. PW-7/A. Thereafter, the file was handed over to Constable Hari Singh. On 13.12.2008, S.I. Gurbachan Singh deposited case property 3 sealed parcel, NCB forms in triplicate alongwith specimen impression of seal in the *malkhana* and entry was incorporated in the register vide PW-7/E. On 14.12.2008, vide RC No. 92/2008 he handed over to HHC Roshan Lal one sealed parcel sample alongwith the specimen impression of seal and NCB forms to be delivered at State Forensic Science Laboratory who brought the receipt over the RC itself after depositing the same. The copy of RC was Ext. PW-7/F.

12. PW-8 ASI Sohan Lal has deposed that on 14.12.2008, Dy. SP. Bhajan Singh Negi handed over to him special report, the copy of which was Ext. PW-8/A.

13. PW-9 HC Pushp Dev deposed that on 6.3.2010, he was working as MHC, Police Station Anni. He handed over two sealed parcels containing charas and sample of charas duly sealed alongwith the NCB form and specimen impression of seal vide RC No. 124/09-10 to HHC Roshan Lal to be delivered at SFSL who brought the receipt over the RC itself, the copy of which is Ext. PW-9/A.

14. PW-10 HHC Roshan Lal, deposed that firstly on 14.12.2008, MHC Anup Ram handed over to him one sealed parcel duly sealed with seal 'C' alongwith specimen impression of seal and NCB form vide RC No. 92/2008 and after depositing the same he brought the receipt over the RC itself and handed over the same to MHC. The copy of RC is Ext. PW-7/F. Thereafter on 6.3.2010 MHC Pushp Dev handed over to him two sealed parcels duly sealed alongwith the specimen impression of seal and NCB form vide RC No. 124/00, the copy of which is Ext. PW-9/A to be deposited in SFSL and after depositing the same, he brought the receipt over the RC itself and handed over to the MHC. No interference was caused to the samples.

15. PW-11 Hem Bharti is a formal witness.

16. PW-12 Constable Hari Singh deposed the manner in which the accused was apprehended and seizure and sampling process was completed on the spot. S.I. Gurbachan Singh scribed 'rukka' Ext. PW-12/A and handed over to him. He delivered the same to MHC Anup Kumar in the Police Station Anni, on the basis of which FIR Ext. PW-7/A was registered. In his cross-examination, he has specifically deposed that the I.O. had sent him to procure independent witnesses but no independent witness was available. He had gone towards Swad side as well as towards Nagan chowk to look for independent witnesses. He had gone towards Nagan side first and thereafter he had gone towards Swad side. He denied the suggestion that at that time a large number of people were present at the Nagan chowk. He denied that there was a tea stall at Nagan chowk and residential houses were also situated besides the shop. He made search for the independent witnesses for about 20/25 minutes on both sides.

17. PW-13 S.I. Gurbachan Singh also deposed the manner in which the accused was apprehended and the search and seizure process was completed and '*rukka'* was handed over to PW-12 Hari Singh, to be deposited at the Police Station, Anni. He deposited the case property with MHC with specimen seal and NCB forms. In his cross-examination, he deposed that they had visited Kanda in connection with investigation of a case FIR No. 119/08. He made an attempt to join independent witnesses by sending Constable Hari Singh to look for independent witnesses but he could not find any independent witness.

18. It has come in the statement of PW-1 ASI Ludar Singh that Constable Hari Singh (PW-12) was deputed to bring independent witnesses by S.I. Gurbachan Singh. PW-12 Constable Hari Singh came back as no independent witness was found. PW-12 Constable Hari Singh has deposed in his cross examination that I.O. had sent him to procure independent witnesses; however, no independent witness was available. He had gone towards Swad side as well as towards Nagan chowk side to look for independent witnesses. He had gone towards Nagan side first and thereafter he had gone towards Swad side. He made search for the independent witnesses for about 20/25 minutes on both sides. PW-13 SI Gurbachan Singh has also deposed that he had deputed Constable PW-12 Hari Singh to find out independent witnesses, however, no independent witness was available on the spot. PW-13 SI Gurbachan Singh has tried to associate independent witnesses by sending PW-12 Constable Hari Singh but no independent witness was available. The statement of official witnesses PW-1 ASI Ludar Singh, PW-12 Constable Hari Singh and PW-13 SI Gurbachan Singh inspire confidence. The statement of these official witnesses have rightly been relied upon by the learned trial Court.

19. Mr. Manoj Pathak, Advocate, for the accused has vehemently argued that PW-13 S.I. Gurbachan Singh was not carrying the file of case No. 119 of 2008 when the accused was apprehended. Merely that PW-13 S.I. Gurbachan Singh was not carrying the file of FIR No. 119 of 2008 has not caused any prejudice to the accused.

20 Now, as far as statements of PW-3 Rajinder Kumar and PW-4 Amar Chand are concerned, they were declared hostile but they have categorically admitted their signatures on the memorandum 'X'. The chain of circumstances is complete.

21. The prosecution has sent the samples as well as the bulk through special messenger. The FSL reports are Ext. PW-9/B and Ext. PW-13/J. The contraband was found to be charas. The case property was not tampered with during its transition from the *malkhana* to the State Forensic Science Laboratory. The seals were found intact as per Ext. PW-9/B and Ext. PW-13/J. The prosecution has fully proved the case against the accused. The charas was recovered from the exclusive and conscious possession of the accused. The statements of DW-1 Beli Ram and DW-2 Parmod Kumar do not inspire any confidence. Since the charas was recovered from the bag of the accused, neither Section 42 nor Section 50 is applicable in this case. It was a case of chance recovery.

The police had no prior information that the accused was carrying charas. Since the charas was recovered from the bag, Section 50 of the Act was not required to be followed. The contradictions pointed out by the learned counsel for the accused are only minor in nature.

22. Accordingly, there is no merit in this appeal, the same is dismissed.

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

Sita Ram son of Shri Bihari Lal ....Petitioner
Versus
State of H.P. and another ....Respondents

CWP No. 2872 of 2012
Order Reserved on 30th October,2014
Date of Order 4th November,2014

Constitution of India, 1950- Article 226- Petitioner was initially appointed as Water Carrier in the Rajiv Gandhi Government Degree College Chaura Maidan Shimla- subsequently he was appointed as part time contingent paid Sweeper- petitioner had served for more than 21 years but was not conferred the status of whole time contingent paid worker – respondent pleaded that the petitioner was appointed purely on temporary basis as stop gap arrangement- petitioner was placed at seniority No. 584 and at present posts of part time employees up to seniority No. 466 had been converted to the post of whole time contingent paid employees- case of the petitioner would be considered for the next higher post as per his seniority on the availability of the posts- held, that the petitioner was appointed on temporary basis as stop gap arrangement- it was specifically stated in his appointment order that his services would stand terminated on joining of regular employee- petitioner had accepted the terms of the appointment order and he cannot be allowed to approbate and reprobate the conditional appointment order- further, employee cannot be appointed on public post contrary to Rules framed by Union or State under Article 309 of Constitution of India- there was no evidence to prove that the vacancy of the contingent worker was available in the department or that his claim was recommended by the Competent Authority for appointment.
(Para-6)

Cases referred:

Haribans Misra and others vs. Railway Board and others AIR 1989 SC 696

Director Institute of Management Development UP vs. Smt. Pushpa Srivastava AIR 1992 SC 2070

For the Petitioner: Mr. P.D. Nanda, Advocate.

For the Respondents: Mr. M.L. Chauhan, Additional Advocate General, and Mr. Pushpinder Singh Jaswal, Deputy Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India pleaded therein that petitioner was initially appointed as Water Carrier in the Rajiv Gandhi Government Degree College Chaura Maidan Shimla on daily wages basis vide order dated 21.7.1997 out of the Amalgamated Fund. It is pleaded that copy of appointment order dated 21.7.1997 is Annexure P1 and subsequently petitioner was appointed as a part time contingent paid Sweeper through Employment Exchange vide order dated 29.9.1997 vide Annexure P-2. It is further pleaded that for the purpose of conferment of whole time contingent paid status and subsequently regular status all part time Water Carriers and Sweepers are considered jointly based on their date of initial appointments in either of the categories. It is further pleaded that petitioner has rendered more than 21 years of service but he has not been conferred the status of whole time contingent paid worker. It is pleaded that case of the petitioner is not considered for the conferment of whole time contingent worker. It is pleaded that service rendered by the petitioner on daily wage basis w.e.f. 21.7.1997 to 29.9.1997 is ignored on the plea that petitioner was paid out of the Amalgamated Fund of the College. It is further pleaded that action of respondents is highly illegal and arbitrary in view of judgments of the Hon'ble High Court of H.P. announced in CWP No. 859 of 2010 titled Rishi Pal vs. State of H.P. and others decided on dated 24.5.2010 and CWP No. 5444 of 2010 titled Jeet Ram vs. State of H.P. and others decided on dated 28.9.2011. It is further pleaded that copy of judgments are Annexures P3 and P4. It is also pleaded that petitioner be conferred the status of whole time contingent paid worker and thereafter he should be regularized. Prayer for acceptance of civil writ petition sought.

2. Per contra reply filed on behalf of respondents pleaded therein that category of part time Water Carrier/part time sweeper is covered on the basis of combined seniority in the District Cadre for the purpose of granting whole time contingent paid status and thereafter regularized as Class IV employee. It is pleaded that grant of such status is dependant upon availability of posts. It is also pleaded that conferment of whole time contingent paid worker is not automatic in nature. It is pleaded that Government has framed a committee consisting of President of part time Water Carrier association, President NGO federation and representative of Law, Finance, Personal departments both Directors Higher and Elementary Education and further pleaded that committee would submit the recommendation. It is pleaded that petitioner was appointed purely on temporary basis as stop gap arrangement against leave vacancy on dated 21.7.1997 with the condition that services of the

petitioner will stand terminated on the joining of regular employee. It is further pleaded that thereafter through interview held on dated 21.9.1997 petitioner was appointed as part time Sweeper by the Principal RGGCC Shimla on dated 29.9.1997 for two and a half hours daily pursuant to the recruitment scheme notified on dated 6.7.1996 and copy of appointment order is Annexure R1. It is further pleaded that petitioner could be considered for further promotion/regularization benefits w.e.f. 29.9.1997 instead on 21.7.1997. It is further pleaded that w.e.f. 21.7.1997 to 29.9.1997 petitioner could not be treated for consequential benefits as during this period petitioner was engaged purely on temporary basis as a stop gap arrangement out of amalgamated fund for smooth functioning of the college on the demand of the students. It is also pleaded that petitioner was placed at seniority No. 584 and at present part time employees up to seniority No. 466 have been converted to the post of whole time contingent paid employees. It is pleaded that petitioner will also be considered for the next higher post as per his seniority on the availability of vacancies. Prayer for dismissal of petition sought.

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

4. Following points arise for determination in this civil writ petition:-

1. Whether conditional services of petitioner as water carrier on daily wages w.e.f. 21.7.1997 to 29.9.1997 would be considered for appointment as whole time contingent paid worker and thereafter for seniority and regularization as alleged?
2. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing on behalf of the petitioner that service of the petitioner as water carrier on daily wages w.e.f. 21.7.1997 to 29.9.1997 be considered for the purpose of seniority and whole time contingent paid worker in view of rulings of Hon'ble High Court of H.P. announced in CWP No. 859 of 2010 titled Rishi Pal vs. State of H.P. and others decided on dated 24.5.2010 and in view of CWP No. 5444 of 2010 titled Jeet Ram vs. State of H.P. and others decided on dated 28.9.2011 is rejected being devoid of any force for the reasons mentioned hereinafter. Court has carefully perused the above said orders passed by Hon'ble High Court of H.P. in aforesaid CWPs carefully. In both CWPs, Hon'ble High Court of H.P. did not announce that if a person is appointed on daily wages purely on temporary basis as stop gap arrangement against the leave vacancy even then benefit of stop gap arrangement service would be given to the employee for the purpose of seniority and regularization. Court has carefully perused the office order passed by the Principal Government Collage Chaura Maidan Shimla dated 21.7.1997 wherein the petitioner was appointed on daily wages purely on temporary basis as stop gap arrangement. There is recital in

office order that service of petitioner would stand terminated on joining of regular employee who had proceeded on long leave due to her illness. Office order dated 21.7.1997 is quoted in toto:-

"No. EDN-GCCM-Funds (AF)/97-98-314
Govt. College Chauramaidan
Shimla-171004

Dated Shimla-171004 the 21st July 1997.

O F F I C E O R D E R

The following candidates are hereby appointed on daily wages purely on temporary basis (Stop-gap arrangement) with immediate effect against vacancy/Leave vacancy and their services will stand terminated on joining of regular hand/joining of duties by a regular Sweeper who has been proceeded on long leave due to her illness taking into consideration the demands of the students and will be paid out of College Amalgamated Fund according to approved rates of the H.P. Government:-

1. Shri Shavi Pal — Sweeper
   Purana Raj Bhawan,
   Shimla-171004

2. Sh. Sita Ram — Water Carrier
   Village Bagrath,
   P.O. and Teh. Suni,
   Distt.Shimla (HP)

2. In case above terms and conditions are acceptable to them they will report for duty forthwith failing which the offer will be treated as cancelled.

Sd/-
(J.S.Chauhan)
Principal
Govt. College Chaura Maidan
Shimla-171004

Endst.No.Edn.GCCM-Fund(AF)/97-98- Dt.Shimla-4the

Copy of above for information and necessary action.

1. Pursar, G.C. Chauramaidan, Shimla-171004
2. Individual concerned.

Sd/-
Principal
Govt. College Chaura Maidan
Shimla-171004"

6. It is proved on record that appointment of the petitioner as water carrier was (1) Purely on temporary basis. (2) The appointment of

petitioner was as stop gap arrangement. There is recital in office order that service of the petitioner would stand terminated automatically on joining of regular employee. There is further recital in office order that amount would be paid to the petitioner from the College Amalgamated Fund according to rates approved by H.P. Government. Copy of office order was supplied to the petitioner. After receiving the office order the petitioner has himself voluntarily accepted the condition of office order dated 21.7.1997. Petitioner has voluntarily accepted that he would work (1) Purely on temporary basis as stop gap arrangement. (2) Petitioner has admitted that his service would be terminated automatically on joining of regular employee. Court is of the opinion that petitioner has voluntarily accepted the terms and conditions of the conditional appointment order. It is held that petitioner cannot be allowed to approbate and reprobate the conditional appointment order dated 21.7.1997. Petitioner has himself admitted that he would work purely on temporary basis as stop gap arrangement and petitioner has himself admitted that his service would automatically terminate after joining the regular employee who was proceeded on leave. It was held in case reported in ***AIR 1989 SC 696 titled Haribans Misra and others vs. Railway Board and others*** that person appointed on ad-hoc basis cannot claim lien on post to which he was so appointed. It was hled in case reported in ***AIR 1992 SC 2070 titled Director Institute of Management Development UP vs. Smt. Pushpa Srivastava*** that appointment on contractual basis is only for a limited period and after expiry of period of contract post comes to an end automatically. It is well settled law that when there is conflict between judgments of Hon'ble Apex Court of India and Hon'ble High Court then judgment announced by Hon'ble Apex Court of India always prevails as per Constitution of India. It is well settled law that employee is appointed in particular cadre of post only upon the availability of vacancy and after recommendation of Selection Committee constituted by competent authority in accordance with law. As per Article 309 of Constitution of India recruitment and conditions of public service of Union or State are governed by Rules framed by competent authority of law and Rules so framed shall have effect subject to the provision of any Act. It is also well settled law that employee cannot be appointed on public post contrary to Rules framed by Union or State as per Article 309 of Constitution of India. It is well settled law that Constitution of India is supreme and all public authorities are under legal obligation to strictly comply the provision of Constitution of India. Petitioner did not place on record any evidence in order to prove that as of today vacancy of whole time contingent worker is available in the department. Petitioner also did not place on record any evidence on record in order to prove that his name has been recommended by competent authority of law for appointment as whole time contingent worker. In view of above facts point No. 1 is answered in negative.

Final Order

7. In view of above said findings (1) It is held that conditional service of petitioner upon leave vacancy w.e.f. 21.7.1997 to 29.9.1997 will not be considered for whole time contingent worker because as per

Anenxure P-1 the petitioner was appointed purely on temporary basis as stop gap arrangement from College Amalgamated Fund with condition that service of petitioner would stand terminated automatically after joining of regular employee and petitioner has voluntarily accepted terms and conditions of service of Water Carrier. Petitioner is not permitted to approbate and reprobate. (2) It is held that status of whole time contingent worker will be given to the petitioner strictly as per his seniority and strictly as per recommendation of Selection Committee subject to availability of post. Civil writ petition stands disposed of. Parties are left to bear their own costs. Pending miscellaneous application(s) if any also stands disposed of.

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

State of H.P. ...Appellant.
Vs.
Ravinder Kumar son of Sh Raghbir Dass
and others. .....Respondents.

Cr. Appeal No. 307 of 2008.
Judgment reserved on:19.8.2014
Date of Decision: November 4, 2014.

Indian Penal Code, 1860- Sections 363, 366, 120-B and 506- Accused had taken the prosecutrix from her house on motorcycle with an intention to marry her with co-accused 'M' by telling her that her friend had called her - they served cold drink and 'Laddu' to her after which she started feeling giddiness -she was brought to the temple- there was no evidence to prove that some intoxicated substance was mixed in the cold drink and Laddu provided to the prosecutrix- there was no evidence that any arrangement was made for performing marriage ceremony in the temple and that the priest was engaged to perform the marriage ceremony – no complaint was made by the prosecutrix to PW-4 or PW-7- On the other hand prosecutrix specifically told the Investigating Officer that she had voluntarily come for strolling- held, that in these circumstances prosecution version was not proved and the acquittal of the accused was justified. (Para-10 to 17)

For the appellant: Mr.Ashok Chaudhary, Addl. Advocate General with Mr.Vikram Thakur and Mr.Puneet Rajta Dy. Advocate General.
For respondents: Mr. Anuj Nag, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment of acquittal passed by learned Additional Sessions Judge Fast Track Court Kangra at Dharamshala in Sessions Trial No. 27-M/VII/2007 titled State of HP Vs. Ravinder Kumar and others decided on 31.12.2007.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 31.5.2005 at about 5.00 PM accused persons in furtherence of common object to marry prosecutrix with co-accused Manoj Kumar @ Palu against her will as well as against the will of her natural guardian and managed to take prosecutrix from her house on motor cycle by way of telling prosecutrix that her friend Ms Rita resident of village Jaunta had called her. It is further alleged by prosecution that accused persons took prosecutrix upon a motor cycle with the intention to marry her with co-accused Manoj Kumar @ Palu. It is further alleged by prosecution that since mother of prosecutrix came in search of her daughter accused persons could not succeed in performing the marriage of prosecutrix. It is further alleged by prosecution that prosecutrix daughter of Sh Bishan Dass was studying in 10th class in the year 2005 and was under the custody and care of her parents at village Kotla. It is further alleged by prosecution that accused persons served cold drink and 'Laddu' (Sweets) to prosecutrix and on consumption of cold drink and 'Laddu' (Sweets) prosecutrix started feeling giddiness. It is further alleged by prosecution that prosecutrix was brought to temple for marriage purpose. It is further alleged by prosecution that father of prosecutrix reported the matter to District Magistrate Ext PW1/A and thereafter FIR Ext PW9/A was registered. It is further alleged by prosecution that car and its documents were took into possession vide seizure memo Ext PW8/A. It is further alleged by prosecution that motor cycle was also took into possession vide seizure memo Ext PW12/B and site plan Ext PW12/C was prepared. It is further alleged by prosecution that certificate Ext PW5/A was collected by the Investigating Officer from Secretary Gram Panchayat Mehella District Chamba. Charge was framed against accused persons under Sections 363, 366, 120-B and 506 of the Indian Penal Code. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined as many as eleven witnesses in support of its case:

Sr.No.	Name of Witness
PW1	Sh Bishan Dass
PW2	Ms Shikha

PW3	Smt. Tara Devi
PW4	Sh Kanshi Ram
PW5	Sh Hem lal
PW6	Ms Rita
PW7	Sh Rajinder Kumar
PW8	Sh Dev Raj
PW9	ASI Kailash Chand
PW10	SHO Mohinder Singh
PW11	SI Hans Raj

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description:*
Ext PW1/A	*Complaint*
Ext PW5A	*Certificate*
Ext PW8/A	*Memo*
Ext. PW9/A	*FIR*
Ext PW9/B	*Endorsement*
Ext PW12/A	*Endorsement*
Ext PW12/B	*Seizure memo*
Ext PW12/C	*Site plan*
Ext PW12/D	*Statement of Rajinder Kumar*
Ext PW12/E	*Statement of Kanshi Ram*
Ext PW12/F	*Statement of Kanshi Ram*
Ext DA-1	*Statement of prosecutrix*
Ext DA	*Extract of family register*
Ext.DB	*Copy of order dated 16.7.2005*

5. Statements of accused persons were also recorded under Section 313 Cr.P.C. Accused persons did not examine any defence witness. Learned trial Court acquitted the accused.

6. Feeling aggrieved against the judgment passed by learned trial Court State of HP filed the present appeal.

7. We have heard learned Additional Advocate General appearing on behalf of the State and learned Advocate appearing on behalf of accused persons and also gone through the entire record carefully.

8. Question that arises for determination before us is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9. PW1 Bishan Dass has stated that his family consists of his wife Tara Devi, two daughters and son. He has stated that his wife was posted as Senior Assistant in Senior Secondary School Bhadawar. He has stated that on dated 31.5.2005 he received a telephone call from his wife at his place of posting at village Mhow in Madhya Pradesh informing him that prosecutrix had been kidnapped by accused persons with intent to marry her. He has stated that prosecutrix was traced at about 8.30 PM in the same day. He has stated that he sent a complaint through Army authorities to District Magistrate Kangra with a copy to soldier board Kangra. He has stated that complaint Ext PW1/A bears his signature. He has stated that his daughter and wife both have telephoned him. He has sated that on the basis of conversation with both of them he had filed a complaint. He has denied suggestion that he was provided wrong information.

9.1 PW2 prosecutrix has stated that in the year 2005 she was studying in 10th class in Senior Secondary School Kotla. She has stated that on dated 31.5.2005 her mother was working as Senior Assistant in Senior Secondary School Bhadawar. She has stated that at about 11.00 AM when she was ready to go to school to take admission in plus one class, mother of the prosecutrix refused to take admission on that day and informed prosecutrix that admission would be taken after 2/3 days. She has stated that she was in school dress. She has stated that Mohit came to her house and told prosecutrix that her girl friend Reeta was calling her. She has stated that Mohit took her on his motor cycle to his house at village Jaunta and accused persons Subhash, Ravinder, Sarita, Manoj Kumar @ Palu and Remeshwari were present there. She has stated that Madhu served cold drink and 'Laddu' (Sweets) etc. to her. She has stated that on consumption cold drink and 'Laddu' (Sweets) she started feeling giddiness. She has stated that accused persons told her that she would be married with Manoj Kumar @ Palu and thereafter she started weeping. She has stated that thereafter accused persons took her to Kakaro temple. She has stated that she told Mohit and co-accused

Manoj Kumar @ Palu to allow her to contact her parents on telephone but they did not permit her to do so. She has stated that she was sent with one Kaka on his scooter by Kanshi Ram up to village Jaunta. She has stated that thereafter co-accused Subhash Chand and his wife came in a car and after stopping the scooter of Kaka took her in the car and left to their house. She has stated that she was instructed by one Geeta Devi that she would not reveal anything to anyone. She has stated that she informed her father telephonically. She has denied suggestion that she had intimacy with co-accused Manoj Kumar @ Palu. She denied suggestion that in order to save the honour of her family she levelled false allegation against accused persons.

9.2 PW3 Tara Devi has stated that prosecutrix was born on 10th December 1990. She has stated that on dated 31.5.2005 her daughter asked her to get her admission in plus one class but she told her daughter that she would be admitted in school after two days and thereafter she left for duty. She has stated that she returned at home at about 5.30 PM. She has stated that she was told by her another daughter that prosecutrix was not at home. She has stated that her another daughter told her that Mohit came at about 5 PM and handed over keys of house. She has stated that thereafter she inquired about prosecutrix from Madhu telephonically and thereafter she went to the house of co-accused Ravinder and inquired about prosecutrix. She has stated that she along with her nephew Pankaj went in search of prosecutrix and in the meantime she was told by Madhu telephonically that prosecutrix would come and she should not be worried. She has stated that thereafter she along with Pankaj proceeded to the house of Madhu at village Jaunta but nobody was found there. She has stated that thereafter she proceeded towards old village Jaunta where some marriage was going on but her prosecutrix was not there. She has stated that she again proceeded to the house of Madhu at village Jaunta where she was informed that prosecutrix was sent to village Kotla. She has stated that co-accused Subhash Chand requested her that she should not report the matter to police. She has stated that police officials already recorded the statement of prosecutrix. She has stated that thereafter she returned to village Kotla and found prosecutrix at home. She has stated that thereafter she intimated the matter to her husband telephonically. She has stated that prosecutrix told her that she was took by accused persons under criminal conspiracy.

9.3. PW4 Kanshi Ram has stated that he is agriculturist and running a shop at village Kakroh. He has stated that he along with his wife was sitting in the shop. He has stated that Sawarna Devi told him that a boy and girl who were strangers were sitting in the temple. He has stated that in the meanwhile girl and boy came on motor cycle to his shop. He has stated that he stopped the motor cycle and on inquiry rider of the motor cycle told him that he is resident of village Indora and girl told that she is resident of village Shahpur. The witness was declared hostile. Witness was cross examined at length but no incriminating statement came against accused persons.

9.4 PW5 Hem Lal has stated that since January 2007 he was posted as Secretary in gram panchayat Mehla and brought family register. He has stated that he supplied copy of family register Ext PW5/A to the investigating agency. He has stated that the date of birth of the prosecutrix is 10.12.1990.

9.5 PW6 Ritta has stated that prosecutrix is her friend and was her class fellow in 10th class in the year 2005. She has stated that she did not call prosecutrix to her house. She has stated that she does not know Mohit.

9.6 PW7 Ravinder Kumar has stated that he had a scooter bearing No HP-38A-6127 in the year 2005. He has stated that marriage of his cousin was fixed for 31.5.2005 at village Kuppar adjoining to village Jaunta and there was also wrestling fair. He has stated that he had gone there to participate in the wrestling on dated 31.5.2005. He has stated that on his return his scooter was stopped by Pandit Kanshi Ram and he asked him as to why he knew prosecutrix who was standing there. He has stated that he knows prosecutrix and thereafter he took prosecutrix on his scooter up to village Jaunta. The witness was declared hostile. Witness was cross examined but no incriminating statement came against accused persons.

9.7 PW8 Dev Raj has stated that on dated 28.7.2005 police took into possession car and its documents and driving license of co-accused Subhash Chand and memo Ext PW8/A was prepared.

9.8 PW9 Kailash Chand has stated that in the year 2005 he was posted as Investigating Officer in police station Shahpur. He has stated that on receipt of Ext PW1/A FIR Ext PW9/A was registered which bears his signature. He has stated that he made endorsement Ext PW1/B on the receipt Ext PW1/A. He has stated that thereafter FIR was sent to Investigating Officer through HHG Jagdish Chand.

9.9 PW10 Mohinder Singh has stated that in the year 2005 he was posted as Station House Officer in Police Station Shahpur and he prepared challan and presented the same in Court.

9.10 PW11 Hans Raj has stated that in the year 2005 he was posted as Incharge Police Post Kotla. He has stated that on dated 2.7.2005 complaint Ext PW1/A was received in police station. He has stated that he was directed by Superintendent of Police to investigate the matter. He has stated that he visited at village Kotla and Jaunta and thereafter he submitted a report to Superintendent of Police. He has stated that Superintendent of Police directed him to register a criminal case and thereafter FIR Ext PW9/A was registered. He has stated that statements of prosecutrix witness were recorded as per their versions. He has stated that he also visited the temple at village Sakroh. He has stated that prosecutrix and co-accused Manoj Kumar @ Palu and one Mohit who is facing trial in Juvenile Board at Una were found sitting in the complex of the temple. He has stated that he recorded their statements according to their versions. He has stated that a car bearing No. HP-38-A

3583 and motor cycle LML were took into possession along with documents vide seizure memo Ext PW12/B and Ext PW8/A in the presence of witness. He has stated that motor cycle was identified by prosecutrix. He has stated that site plan Ext PW12/C was prepared. He has stated he also obtained Middle Standard Certificate and birth certificate of prosecutrix. He has stated that as per his investigation prosecutrix was deceitfully carried by accused persons. He has stated that on conclusion of the investigation case file was handed over to Station House Officer who prepared challan. He has admitted that on inquiry prosecutrix and co-accused Manoj Kumar @ Palu told him that they came for strolling. He has denied suggestion that he has recorded the statement of the prosecutrix Ext DA at his own. He has denied suggestion that false case was planted against accused persons.

(A) Testimony of PW1 Bishan Dass is not helpful to the prosecution in the present case.

10. In the present case testimony of PW1 Bishan Dass is not helpful to the prosecution case because PW1 is not eye witness of the incident because at the time of alleged incident he was posted in Army at Madhya Pradesh and testimony of PW1 is only hearsay evidence and it is well settled law that under Indian Evidence Act hearsay evidence is not admissible.

(B) Testimony of prosecutrix is also fatal to the prosecution case.

11. In the present case testimony of prosecutrix is also fatal to the prosecution case. Prosecutrix has specifically stated when she appeared in witness box that some cold drink and sweets were given to her and on consumption of cold drink and sweets she started feeling giddiness. There is no medical evidence on record in order to prove that some intoxicate cold drinks and 'Laddu' (Sweets) were given to the prosecutrix in order to convert the prosecutrix into the stage of intoxication. There is no positive, cogent and reliable evidence on record in order to prove that some intoxicated substance was mixed in the cold drink and 'Laddu' (Sweets) provided to the prosecutrix. No arrangement of marriage ceremony in the temple proved on record in the present case. There is no evidence on record to prove that priest was engaged to perform the marriage ceremony by the accused persons. There is no evidence on record in order to prove that articles of marriage ceremony were brought by the accused persons in temple. Hence it is held that testimony of prosecutrix is not sufficient to convict accused persons.

(C) Testimony of PW3 Smt Tara Devi is also fatal to the prosecution case in the present case.

12. PW3 Tara Devi mother of the prosecutrix is not eye witness of the incident. PW3 has specifically stated in positive manner that she was told by co-accused Sarita Devi that they would come with prosecutrix and PW3 Tara Devi should not worry about it. PW3 has stated that when she reached at home she found prosecutrix was already present there.

(D) Testimony of PW4 Kanshi Ram is also fatal to the prosecution case.

13. PW4 Sh Kanshi Ram has specifically stated when he appeared in witness box that prosecutrix told him that rider of the vehicle was her maternal uncle. Prosecutrix did not complaint against the accused persons when she met PW 4 Kanshi Ram. No reason has been assigned as to why the prosecutrix did not complaint against the accused persons when she met PW4 Kanshi Ram.

(E) Testimonies of PW5 Hem Lal and PW6 Ms Ritta Devi are not helpful to the prosecution case.

14. PW5 Hem Lal is not eye witness of the incident and he has simply proved the date of birth certificate of the prosecutrix. Even testimony of PW6 Ritta Devi is not helpful to the prosecution because PW6 has simply stated that prosecutrix is her friend and class fellow. PW6 has stated that she does not know about accused persons.

(F) Testimony of PW7 Rajinder Kumar is also not helpful to the prosecution.

15. PW7 Rajinder Kumar has specifically stated that he provided lift to the prosecutrix and when he provided lift to the prosecutrix she did not complaint against accused persons. No reason has been assigned by the prosecution as to why the prosecutrix did not complaint against the accused persons when she was given lift in the vehicle by PW7 Rajinder Kumar.

(G) Testimonies of PW8 Dev Raj, PW9 ASI Kailash Chand and PW10 SHO Mohinder Singh are also not helpful to the prosecution in the present case.

16. PW8 Dev Raj is only a corroborative witness and he has stated that only car key, RC, insurance and driving license of co-accused Subhash Chand were took into possession vide memo Ext PW8/A. PW9 ASI Kailash Chand has simply stated that he registered FIR after receipt of rukka. Even testimony of PW10 Mohinder Singh is not helpful to the prosecution because testimony of PW10 is only corroborative in nature and he has simply stated that he has prepared challan in the present case.

(H) Testimony of PW11 Hans Raj is also fatal to the prosecution case.

17. PW11 Hans Raj Investigating Officer has specifically stated that on inquiry from prosecutrix and co-accused Manoj Kumar @ Palu they informed to investigating officer that they voluntarily came for strolling. Prosecutrix had voluntarily stated before investigating officer that she voluntarily came for strolling. It was held in case reported in AIR 1965 SC 942 titled S Veradarajan Vs. State of Madras that where the girl left her father protection knowing and having capacity to know the full import of what she was doing and voluntarily joins the accused person the offence of kidnapping could not be said to have been proved. Similarly in the present case it is proved beyond reasonable doubt that girl had left her parental house voluntarily with co-accused Manoj Kumar

@ Palu. It was held in case reported in AIR 1997 SC 3483 titled Bilal Ahmed Kaloo Vs. State of Andhra Pradesh that mensrea is a necessary condition for the proof of criminal offence. It was held in case reported in (2010) 14 SCC 129 titled Johan Pandian Vs. State of Tamil Nadu that in order to punish the accused under criminal conspiracy there should be meeting of minds between the conspirators for the intended object of committing an illegal act. It was held in case reported in AIR 1999 SC 782 titled Sanjiv Kumar Vs. State of Himachal Pradesh that simply association is not sufficient to establish criminal conspiracy under Section 120 B of the Indian Penal Code. In the present case although it is proved on record that prosecutrix had accompanied one of the co-accused Manoj Kumar @ Palu upto temple but no over-act has been established on the part of accused persons. In the present case prosecutrix met several persons but she did not complaint to any of the persons to whom she met against the accused persons. It is well settled principle of law that vested right accrued in favour of the accused with the judgment of acquittal by learned trial Court. (See (2013) 2 SCC 89 titled Mookkiah and another Vs. State. See 2011 (11) SCC 666 titled State of Rajashthan Vs. Talevar and another. See AIR 2012 SC (Supp) 78 titled Surendra Vs. State of Rajasthan. See 2012 (1) SCC 602 titled State of Rajasthan Vs. Shera Ram @ Vishnu Dutt). It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible. (ii) That while dealing with a judgment of acquittal the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned trial Court failed to take into consideration any admissible fact (iv) That learned trial court took into consideration in admissible evidence. (See AIR 1974 SC 2165 titled Balak Ram and another Vs. State of UP, See (2002) 3 SCC 57 titled Allarakha K. Mansuri Vs. State of Gujarat, See (2003) 1 SCC 398 titled Raghunath Vs. State of Haryana, See AIR 2007 SC 3075 State of U.P Vs. Ram Veer Singh and others, See AIR 2008 SC 2066, (2008) 11 SCC 186 S.Rama Krishna Vs. S.Rami Raddy (D) by his LRs. & others. Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, See (2009) 10 SCC 206 titled Arulvelu and another Vs. State, See (2009) 16 SCC 98 titled Perla Somasekhara Reddy and others Vs. State of A.P, See:(2010) 2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh). It was held in case reported in 1998 (2) SLJ 1408 Shashi Pal and others Vs. State of HP that if two versions appear in prosecution evidence then version beneficial to the accused should be adopted. Also see 1993(1) SLJ 405 titled State of HP 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 HP Vs. Diwana and others. Also see 2005 (5) JT 553 titled State of UP Vs. Gambhir Singh and others. It was held in case reported (2005) 9 SCC 765 titled Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in (2010) 11 SCC 423 titled Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it

cannot derive any strength from the weakness of the defense. Also See: (1984) 4 SCC 116 Sharad Birdhichand Sarda Vs. State of Maharashtra. It is well settled law that conjecture or suspicion cannot take place of legal proof. See: AIR 1967 SC 520 Charan Singh Vs. The State of Uttar Pradesh**.** Also See*:* AIR 1971 SC 1898 Gian Mahtani Vs. State of Maharashtra. It was held in case reported in AIR 1979 SC 1382 State (Delhi Administration) Vs. Gulzarilal Tandon that even where the circumstances raise a serious suspicion against the accused it cannot take the place of legal proof. See: AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. The State of Gujarat See: AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others. There are following stages for commission of criminal offence i.e. (1) Criminal intention (2) Criminal preparation for commission of criminal offence (3) Criminal over-act for commission of criminal offence (4) Completion of criminal offence finally. It is well settled law that courts are under legal obligation to take grain from chaff and courts should not take chaff from gain.

18. In view of the above stated facts and case law cited supra it is held that learned trial Court has properly appreciated oral as well as documentary evidence placed on record and it is held that learned trial Court has rightly given benefit of doubt to the accused persons in the present case. Judgment passed by learned trial Court is affirmed and appeal filed by appellant-State is dismissed. All pending application(s) if any are also disposed of. Record of learned trial Court along with certify copy of judgment be transmitted forthwith.

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

Shri Devinder Singh Jaswal ...Appellant.
Versus
Shri Nagender Singh & others ...Respondents.

LPA No. 713 of 2011
Reserved on: 28.10.2014
Decided on: 05.11.2014

Constitution of India, 1950- Article 226- Land was allotted to father of the writ petitioner- mutations were attested, which were questioned by the appellant by filing appeal- appeal was dismissed- appellant filed civil suit, which was decreed- appeal preferred by the father of the petitioner was dismissed by the Appellate Court - RSA was filed which was allowed and the decrees passed by the Civil Court and Appellate Court were set aside – SLP was filed which was dismissed by Supreme Court of India- Revision Petition was filed before the Financial Commissioner who allowed the same - writ petition was filed, which was allowed on the ground that Financial Commissioner had set aside the order passed by

the revenue authority and civil Court- held, that the appellant had lost the litigation before the revenue Court and the Civil Court- he had filed a revision petition which was barred by limitation and was meant to abuse the process of law- no reason was given for condonation of delay- revision power must be exercised within a reasonable time.

(Para, 3 to 7, 9 and 11)

H.P. Land Revenue Act, 1954 - Section 17- Section 17 can be pressed into service only when any case is pending and the matter was determined by the Revenue Court, Appellate Court and by the Civil Courts. (Para-9)

Case referred:

State of Gujarat versus P. Raghav, AIR 1969 SC 1297

For the appellant:	Mr. Neeraj Gupta, Advocate.
For the respondents:	Mr. K.D. Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate, for respondent No. 1. Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 2 to 4. Respondent No. 5 stands deleted. Mr. Pawan Gautam, Advocate, for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This Letters Patent Appeal is directed against the judgment and order, dated 6th July, 2010, made by the learned Single Judge in CWP No. 472 of 2007, titled as Nagender Singh versus The Financial Commissioner (Appeals), H.P. Shimla and others, whereby writ petition filed by the writ petitioner-respondent No. 1 herein came to be allowed and the order passed by the Financial Commissioner (Appeals), Shimla, H.P., dated 23rd January, 2007 (Annexure P-11 to the writ petition) came to be quashed (hereinafter referred to as "the impugned judgment").

2. This case has a chequered history and depicts how the appellant has invoked the jurisdiction of the Revenue Courts, Civil Courts and again the Revenue Courts in order to deprive the writ petitioner-respondent No. 1 herein to enjoy/reap the fruits of the entire litigation, which he has completed with success.

3. It appears that the Collector had made an order on 9th September, 1975 (Annexure P-2 to the writ petition), whereby land was to

be allotted to Shri Chain Singh, father of the writ petitioner-respondent No. 1 herein, and the said order was given effect to by the Revenue Authority by effecting mutation Nos. 4437, 4438, 4439, 4440 and 4441, dated 21st September, 1987. The appellant had questioned those mutations by the medium of appeal, which was dismissed by the Appellate Authority on 29th August, 1995 (Annexure P-4 to the writ petition). The said order of the Appellate Authority was not questioned and had attained finality. However, the appellant had filed a Civil Suit before Senior Sub Judge, Una, which was decreed on 26th December, 1984. The appeal was filed by the father of the writ petitioner, i.e. Shri Chain Singh, which was dismissed on 1st September, 1988; was questioned by the writ petitioner and his father, Shri Chain Singh, by the medium of RSA No. 351 of 1988; was allowed vide judgment and order, dated 30th December, 1999 (Annexure P-5 to the writ petition), whereby the judgments made by the Civil Court and the Appellate Court were set aside and it was held that the suit was not maintainable. The appellant had questioned the same by the medium of SLP, which was dismissed by the Apex Court vide judgment and order, dated 9th February, 2001 (Annexure P-6 to the writ petition). Thus, the orders made by the Revenue Authorities in terms of order, dated 9th September, 1975, made by the Collector and the orders passed by the Civil Courts dismissing the suit of the plaintiff-appellant herein had attained finality.

4. Thereafter, the appellant filed a revision petition before the Financial Commissioner (Appeals), Himachal Pradesh, on 16th July, 2005, which was diarized as Revision Petition No. 120/05 and was allowed on 23rd January, 2007 (Annexure P-11), whereby the Authorities were directed to exercise the review powers and virtually has set aside the mutations.

5. Feeling aggrieved, the writ petitioner, i.e. son of Shri Chain Singh, filed writ petition questioning the said order, Annexure P-11, and also arrayed his brother and mother as proforma respondents No. 6 and 7, respectively. The Writ Court allowed the writ petition in terms of the impugned judgment and quashed the said order on the ground that the revisional Court has virtually set aside the orders made by the Revenue Authorities and the Civil Courts by passing this order, which is unknown to law and also held that after lapse of twenty one years, the revisional jurisdiction was invoked, which is patently barred.

6. Being dissatisfied by the impugned judgment, the appellant-respondent No. 1 in the writ petition has questioned the same.

7. It is undisputed that the appellant has lost the entire litigation before the Revenue Courts as well as before the Civil Court. Despite that, invoked the jurisdiction under Section 17 of the Himachal Pradesh Land Revenue Act (hereinafter referred to as “the Act”) by the medium of revision petition, which, on the face of it, was time barred and abuse of process of law.

8. It is also a moot question- whether the remedy provided in terms of Section 17 of the Act was available to the appellant?

9. Section 17 of the Act can be pressed into service only when any case is pending before any Revenue Court or disposed of. Admittedly, no case was pending and the matter was determined by the Revenue Courts, including the Appellate Courts and by all the Civil Courts.

10. The revisional Court has not taken into consideration the aspect that the revision petition was time barred and has not spelled out any reasons for condoning the delay. It has also not recorded the reasons for exercising the revisional power.

11. The Apex Court in a case titled as **State of Gujarat versus P. Raghav,** reported in **AIR 1969 SC 1297,** held that the revisional powers must be exercised in a reasonable time. It is apt to reproduce para 11 of the judgment herein:

> *"11. The question arises whether the Commissioner can revise an order made under Section 65 at any time. It is true that there is no period of limitation prescribed under Section 211, but it seems to us plain that this power must be exercised in reasonable time and the length of the reasonable time must be determined by the facts of the case and the nature of the order which is being revised."*

12. The order of revisional Court is without jurisdiction, power and competence. The said order is abuse of process of law.

13. The Writ Court has marshalled and thrashed out all the facts and has made the conclusions rightly.

14. The revisional Court cannot exercise power in a revision petition, that too, belatedly, to prevent the successful party from its legitimate rights and reaping the fruits of the litigation. Such power is to be exercised only in the interest of justice, that too, promptly and within reasonable time. The said power cannot be exercised in order to take away the settings of law.

15. Having said so, the Writ Court has passed a well reasoned judgment, needs no interference. Accordingly, the appeal merits to be dismissed and the impugned judgment merits to be upheld. The appeal is dismissed and the impugned judgment is upheld. Pending applications, if any, are also disposed of.

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

M/s Kausal Air Products ...Petitioner.
Versus
State of H.P. & others ...Respondents.

CWP No. 6953 of 2014-F
Reserved on: 28.10.2014
Decided on: 05.11.2014

Constitution of India, 1950- Article 226- Respondent No. 2 issued a notice inviting tenders on or before 18.6.2014- subsequently, the entire process was recalled and another advertisement was issued calling for tender on or before 12.8.2014- entire process was again recalled and fresh advertisement was issued calling for tender on or before 15.9.2014- petitioner submitted the tender document but the respondent No. 2 refused to accept them- respondent filed a reply stating that technical bid of the petitioner was rejected by the Competent Authority- held, that issuance of tender notice, opening of financial bids, technical bids and contracts cannot be subjected to judicial review unless it is malafide, illegal, unconstitutional and against the public interest. (Para-7)

Cases referred:

Tata Cellular versus Union of India, reported in (1994) 6 Supreme Court Cases 651

Association of Registration Plates versus Union of India and others, reported in (2005) 1 Supreme Court cases 679

Michigan Rubber (India) Limited versus State of Karnataka and others, reported in (2012) 8 Supreme Court Cases 216

Tejas Constructions and Infrastructure Private Limited versus Municipal Council, Sendhwa and another, reported in (2012) 6 Supreme Court Cases 464

Aruna Rodrigues & Ors. versus Union of India & Ors., reported in 2012 AIR SCW 3340

Pathan Mohammed Suleman Rehmatkhan versus State of Gujarat and others, reported in (2014) 4 Supreme Court Cases 156

M/s. Siemens Aktiengeselischaft & S. Ltd. versus DMRC Ltd. & Ors., reported in 2014 AIR SCW 1249

For the petitioner: Mr. Sanjeev Bhushan, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 1 and 2.

Nemo for respondents No. 3 to 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Petitioner has sought writ of mandamus commanding respondent No. 2 to open the technical bid of the petitioner and also to allow the petitioner to participate in the financial bid on the grounds taken in the writ petition, which can be aptly and precisely enumerated as under:

2. Respondent No. 2 issued notice inviting tenders, which was published in various newspapers and all the eligible contractors/persons had to submit tenders by or before 18th June, 2014 upto 2.00 p.m. Many persons applied, but the entire process was recalled, fresh advertisement notice was issued and the last date for submission of tender documents was fixed as 12th August, 2014. The entire process was again recalled and fresh advertisement notice was issued, in terms of which the tender documents were to be submitted by or before 15th September, 2014. Tenders were submitted. The petitioner also submitted the tender documents, but respondent No. 2 refused to accept the same, constraining the writ petitioner to make a correspondence with respondent No. 1 and the Hon'ble Minister concerned through e-mail on 16th September, 2014. Respondents have not opened the tender documents of the writ petitioner, constraining him to file the writ petition. It is averred in the writ petition that respondent No. 2 is bent upon to oust the writ petitioner from participation for extraneous reasons.

3. The writ petitioner had not arrayed respondents No. 4 and 5 in the array of respondents, were arrayed, on the application filed by the writ petitioner, as respondents No. 4 and 5 in the array of respondents.

4. Respondents No. 1 and 2 have filed reply. It has specifically been averred by respondents No. 1 and 2 that the technical bid of the writ petitioner was rejected by the Competent Authority as per the terms and conditions of the tender. Respondents No. 1 and 2 have also specifically stated what were the reasons for issuing tenders thrice. It is apt to reproduce paras 1 and 2 of the preliminary submissions herein:

> *"1. That the petitioner i.e. representative of M/s Kaushal Air Product, who was present on 15-09-2014 in the Directorate of Animal Husbandry, did not drop his tender in the sealed tender box despite verbal insistence by the committee members. The petitioner rather went on saying that he will drop the tender in sealed tender box only, if the department assures him to approve his tender for the supply of liquid nitrogen gas. Since, the petitioner deliberately did not drop the tender document before the prescribed time in sealed tender box and rather started creating nuisance.*

Hence, his tender was taken at 2.30 PM to start the proceeding in a cordial way and is still lying in sealed cover with the Department. It is pertinent to mention here that as per terms & condition of tender and also as per notice inviting tender, it was clearly mentioned that tender should be dropped in tender box up to 2.00 PM on 15-09-2014 and thereafter tender box will be sealed. Keeping in view this condition the tender of M/s Kaushal Air Product Una was rejected by the competent authority as per the terms & condition of the tender.

2. That Liquid Nitrogen is very essential item for preservation, transportation of Deep-frozen Semen Straws and Artificial Insemination of cattle & Buffaloes at the door step of the farmers. In the absence of supply of Liquid Nitrogen semen straws are likely to be destroyed thus may bring breeding programme in the entire State to stand still. Since the Notice Inviting Tender (NIT) has been called for third time so that the process has to be finalized before 30th October, 2014 i.e. before the expiry of extended validity of previous tender, so that farmers are not put to inconvenience and loss. It is pertinent to mention here that as per the report received from Director, Animal Husbandry Punjab M/s Kaushal Air Product, Una also participated in their tender for Liquid Nitrogen Gas which was opened on 05-08-2014 and was declared as L-1 but the said firm has failed to deposit the security money and sign the agreement with Punjab Livestock Development Board till date despite repeated reminders, instead he tried to impose new condition which were not in the notice inviting tender. It has been further intimated that because of this the said firm has put Punjab Livestock Development Board in lot of in-convenience wastage of time and energy and his record has been reported to be extremely poor and un-satisfactory."

5. Learned counsel for the writ petitioner was asked to show whether the writ petition is maintainable in view of the rejection of his technical bid, as averred in the reply filed by respondents No. 1 and 2.

6. It is also apt to record herein that respondents No. 1 and 2 have filed reply on 24th September, 2014 and copy was furnished to the learned counsel for the petitioner on the same day, has not taken any steps to seek appropriate relief.

7. The writ petition is also not maintainable for the reason that it is beaten law of land that issuance of tender notice, opening of financial bids, technical bids and contracts made cannot be subjected to

judicial review unless it is mala fide, illegal, unconstitutional and against the public interest.

8. This Court in **CWP No. 9337 of 2013-D,** titled as **Shri Ashok Thakur versus State of Himachal Pradesh & others,** decided on **6th May, 2014,** held that tenders cannot be questioned unless case for judicial review is carved out. It is apt to reproduce para 8 of the judgment herein:

> *"8. At the outset, it may be stated that this Court would interfere in tender or contractual matters in exercise of power of judicial review only in case the process adopted or decision made by the authority is malafide or intended to favour someone or the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached and lastly in case the public interest is affected. If the answers to these questions are in the negative, then there should be no interference by this Court in exercise of its powers under Article 226 of the Constitution of India."*

9. The Apex Court in the first case reported in **Tata Cellular versus Union of India,** reported in **(1994) 6 Supreme Court Cases 651,** has held that in tender matters, the judicial review is not permissible unless there is arbitrariness or mala fide writ large on the face of it and has also laid down guidelines. It is apt to reproduce para 94 of the judgment herein:

> *"94. The principles deducible from the above are:*
>
> *(1) The modern trend points to judicial restraint in administrative action.*
>
> *(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
>
> *(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not,*

such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administrative and lead to increased and unbudgeted expenditures.

……."

10. The Apex Court in a series of cases from the year 1994 till 2005 has also discussed the ambit of the powers of the writ Court, the writ jurisdiction and in which circumstances the tender documents, tender process and the decision-making process can be questioned. It is apt to reproduce paras 38 to 40, 43 and 44 of the judgment rendered by the Apex Court in **Association of Registration Plates versus Union of India and others,** reported in **(2005) 1 Supreme Court cases 679,** herein:

"38. In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep indigenous manufacturers out of the field. It is explained that on the date of formulation of scheme in Rule 50 and issuance of guidelines thereunder by the Central Government, there

were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long-term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.

39. The notice inviting tender is open to response by all and even if one single manufacturer is ultimately selected for a region or State, it cannot be said that the State has created monopoly of business in favour of a private party. Rule 50 permits the RTOs concerned themselves to implement the policy or to get it implemented through a selected approved manufacturer.

40. Selecting one manufacturer through a process of open competition is not creation of any monopoly, as contended, in violation of Article 19(1)(g) of the Constitution read with clause (6) of the said article. As is sought to be pointed out, the implementation involves large network of operations of highly sophisticated materials. The manufacturer has to have embossing stations within the premises of the RTO. He has to maintain the data of each plate which he would be getting from his main unit. It has to be cross-checked by the RTO data. There has to be a server in the RTO's office which is linked with all RTOs in each State and thereon linked to the whole nation. Maintenance of the record by one and supervision over its activity would be simpler for the State if there is one manufacturer instead of multi-manufacturers as suppliers. The actual operation of the scheme through the RTOs in their premises would get complicated and confused if multi-manufacturers are involved. That would also seriously impair the high security concept in affixation of new plates on the vehicles. If there is a single manufacturer he can be forced to go and serve rural areas with thin vehicular population and less volume of business. Multi-manufacturers might concentrate only on urban areas with higher vehicular population.

41. .....

42. .....

43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same

time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.

44. The grievance that the terms of notice inviting tenders in the present case virtually create a monopoly in favour of parties having foreign collaborations, is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners.

What has been argued is that the terms of the notices inviting tenders deliberately exclude domestic manufacturers and new entreprenneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for."

11. The Apex Court in **Michigan Rubber (India) Limited versus State of Karnataka and others,** reported in **(2012) 8 Supreme Court Cases 216,** has laid down some principles and has held that it is the prerogative of the department to fix any criterion and that cannot be made subject matter of a writ petition unless it is arbitrary or mala fide, which too appears on the face of it. It is apt to reproduce paras 23 and 35 of the judgment herein:

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim fundamental right to carry on business with the Government.

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35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or

> *unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide."*

12. In this judgment, the Apex Court, in paras 11 to 15, has also discussed and made reference to all the judgments of the Apex Court on the issue. In these judgments, the same ratio has been laid down and after taking note of all these judgments, the Apex Court has culled out the principles, reference of which has been made in para 23 (supra).

13. The Apex Court, in another case titled as **Tejas Constructions and Infrastructure Private Limited versus Municipal Council, Sendhwa and another,** reported in **(2012) 6 Supreme Court Cases 464,** has discussed what is judicial review, how it is to be exercised in economic cases and other cases related to business. It is apt to reproduce paras 27 and 31 of the judgment herein:

> *"27. That leaves us with the second ground on which the appellant questioned the eligibility of Respondent 2 to offer a bid, namely, the non-execution by Respondent 2 of a single integrated water supply scheme for the requisite value. The appellant's case, in this connection, is twofold. Firstly, it is contended that the works executed by Respondent 2 for Vyare and Songadh were distinct and different works which did not constitute a single integrated water supply scheme hence could not be pressed into service to show satisfaction of the*

condition of eligibility stipulated under the tender notice. The alternative submission made by the learned counsel appearing for the appellant in connection with this ground is that the work executed by Respondent 2 for Upleta also did not satisfy the requirement of the tender notice inasmuch as the said work did not involve the construction of intake wells, which was an essential item of work for any integrated water supply scheme.

28. .....

29. .....

30. .....

31. It is also noteworthy that in the matter of evaluation of the bids and determination of the eligibility of the bidders the Municipal Council had the advantage of the aid and advice of an empanelled consultant, a technical hand, who could well appreciate the significance of the tender condition regarding the bidder executing the single integrated water supply scheme and fulfilling that condition of tender by reference to the work undertaken by them. We, therefore, see no reason to interfere with the view taken by the High Court of the allotment of work made in favour of Respondent 2."

14. Applying these tests to the instant case, as discussed hereinabove, we are of the considered view that it is the prerogative and domain of the official respondents to determine the eligibility.

15. The Courts have no expertise to determine the issue whether the conditions imposed are relevant or otherwise and cannot interfere unless the petitioner carves out a case for interference, as discussed hereinabove.

16. The Apex Court in **Aruna Rodrigues & Ors. versus Union of India & Ors.,** reported in **2012 AIR SCW 3340,** has laid down the same principle. It is apt to reproduce para 2 of the judgment herein:

"2. This Court, vide its order dated 1st May, 2006, directed that till further orders, field trials of GMOs shall be conducted only with the approval of the Genetic Engineering Approval Committee (for short 'GEAC'). I.A. No.4 was filed, in which the prayer was for issuance of directions to stop all field trials for all genetically modified products anywhere and everywhere. The Court, however, declined to direct stoppage of field trials and instead, vide order dated 22nd September, 2009 directed the GEAC to withhold approvals till further directions are issued by this Court, after hearing all parties. Except permitting field trials in certain specific cases, the orders dated 1st May, 2006 and 22nd

> *September, 2009 were not substantially modified by the Court. As of 2007, nearly 91 varieties of plants, i.e., GMOs, were being subjected to open field tests, though in terms of the orders of this Court, no further open field tests were permitted nor had the GEAC granted any such approval except with the authorization of this Court. This has given rise to serious controversies before this Court as to whether or not the field tests of GMOs should be banned, wholly or partially, in the entire country. It is obvious that such technical matters can hardly be the subject matter of judicial review. The Court has no expertise to determine such an issue, which, besides being a scientific question, would have very serious and far-reaching consequences.*
>
> *(Emphasis added)"*

17. The Apex Court in a latest judgment in the case titled as **Pathan Mohammed Suleman Rehmatkhan versus State of Gujarat and others,** reported in **(2014) 4 Supreme Court Cases 156,** has also laid down the principles. It is apt to reproduce paras 11 and 14 of the judgment herein:

> *" 11. We have extensively referred to these principles in Arun Kumar Agrawal case, (2013) 7 SCC 1, where we have held as follows: (SCC p. 17, para 41)*
>
> > *"41. .....This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or taken for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve complex economic factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be wrong, that itself is not a ground to hold that the decision was mala fide or taken with ulterior motives."*
>
> *12. .....*
>
> *13. .....*

> *14. We are of the view that these are purely policy decisions taken by the State Government and, while so, it has examined the benefits the project would bring into the State and to the people of the State. It is well settled that non-floating of tenders or absence of public auction or invitation alone is not a sufficient reason to characterize the action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise of power. The courts have always held that it is open to the State and the authorities to take economic and management decisions depending upon the exigencies of a situation guided by appropriate financial policy notified in public interest. We are of the view that is what has been done in the instant case and the High Court has rightly held so. We, therefore, find no reason to entertain this special leave petition and the same is dismissed."*

18. The Apex Court in **M/s. Siemens Aktiengeselischaft & S. Ltd. versus DMRC Ltd. & Ors.,** reported in **2014 AIR SCW 1249,** has taken note of all the judgments right from the year 1949 and has culled out the principles. It is apt to reproduce paras 17, 18 and 22 of the judgment herein:

> *"17. Principles governing judicial review of administrative decisions are now fairly well-settled by a long line of decisions rendered by this Court, since the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India and Ors. (1979) 3 SCC 489 : (AIR 1979 SC 1628) which is one of the earliest cases in which this Court judicially reviewed the process of allotment of contracts by an instrumentality of the State and declared that such process was amenable to judicial review. Several subsequent decisions followed and applied the law to varied situations but among the latter decisions one that reviewed the law on the subject comprehensively was delivered by this Court in Tata Cellular's case (AIR 1996 SC 11) (supra) where this Court once again reiterated that judicial review would apply even to exercise of contractual powers by the Government and Government instrumentalities in order to prevent arbitrariness or favouritism. Having said that this Court noted the inherent limitations in the exercise of that power and declared that the State was free to protect its interest as the guardian of its finances. This Court held that there could be no infringement of Article 14 if the Government tried to get the best person or the best quotation for the right to choose cannot be considered to be an arbitrary power unless the power is exercised for any collateral purpose. The scope*

of judicial review, observed this Court, was confined to the following three distinct aspects:

> *(i) Whether there was any illegality in the decision which would imply whether the decision making authority has understood correctly the law that regulates his decision making power and whether it has given effect to it;*
>
> *(ii) Whether there was any irrationality in the decision taken by the authority implying thereby whether the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at the same; and*
>
> *(iii) whether there was any procedural impropriety committed by the decision making authority while arriving at the decision.*

18. The principles governing judicial review were then formulated in the following words:

> *(i) The modern trend points to judicial restraint in administrative action.*
>
> *(ii) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(iii) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
>
> *(iv) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
>
> *(v) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but*

must be free from arbitrariness not affected by bias or actuated by mala fides.

(vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

19. .....

20. .....

21. .....

22. There is no gainsaying that in any challenge to the award of contact before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bona fide with no perceptible injury to public interest"

19. This Court in **CWP No. 9337 of 2013-D (supra), CWP No. 765 of 2014,** titled as **Namit Gupta versus State of H.P. and others,** decided on 27th March, 2014, **CWP No. 4112 of 2014,** titled as **Minil Laboratories Pvt. Ltd. versus State of Himachal Pradesh and another,** decided on 15th July, 2014, and **CWP No. 4897 of 2014,** titled as **Mahalakshmi Oxyplants Pvt. Ltd. versus State of Himachal Pradesh and another,** decided on 10th September, 2014, has laid down the same principle.

20. The writ petition has been filed in order to delay the supply of Liquid Nitrogen Gas which is very essential for preservation, transportation of Deep-frozen Semen Straws and Artificial Insemination of cattle and Buffaloes at the door steps of the farmers and is to frustrate the scheme/breeding programme launched by the Government in the entire State, which is against the public interest.

21. While applying the test to the instant case, the writ petition is not maintainable.

22. The writ petitioner has also not arrayed respondent No. 2 in personal capacity and no specific allegation of mala fide is made.

23. The writ petitioner has not questioned the act of the official respondents whereby the technical bid stands rejected.

24. Having said so, the writ petition merits to be dismissed and is dismissed accordingly alongwith all pending applications. Interim directions, if any, shall stand vacated.

****

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

RSA No. 454 of 2003 with
RSA No.510 of 2003.
Reserved on: 29.10.2014
Decided on: 05/11/2014.

1. RSA No. 454 of 2003:

Madho Ram & Anr. ...Appellants.

VERSUS

Makholi Ram (since deceased) through LRs. ...Respondents.

2. RSA No. 510 of 2003:

State of H.P. ...Appellant.

VERSUS

Makholi Ram (since deceased) through LRs. ...Respondents.

H.P. Village Common Lands Vesting and Utilization Scheme, 1975 - Clause 13 (1) to (4) Sub clause (4) of the scheme vests jurisdiction and authority in the commissioner to cancel the grant suo moto on an application made to him when the allottee was not entitled to or was ineligible for allotment- however, cancellation has to be made after proper inquiry. (Para- 11 to 12)

Appearing Counsel:

In RSA No. 454 of 2003:

For the Appellants: Mr.Sanjeev Kuthiala, Advocate.

For the Respondents: Mr.Ajay Sharma, Advocate, for respondents No. 1(a) and 1(b).
Mr.Vivek Singh Attri, Dy. A.G. for respondent No.2.

In RSA No.510 of 2003:

For the Appellants: Mr.Vivek Singh Attry, Dy. A.G.

For the respondents: Mr.Ajay Sharma, Advocate, for respondents No. 1 (a) to 1(f).
Mr.Sanjeev Kuthiala, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Both the above noted appeals are directed against the judgment and decree, rendered on 1st September, 2003, in Civil appeals No.19-D/XIII-02 and 20-D/XIII-02, by the learned District Judge, Kangra at Dharamshala, whereby the learned First Appellate Court dismissed

the appeals, preferred by the appellants/defendants and affirmed the judgment, rendered on 29.12.2001 by the learned Sub Judge 1st Class(II), Dharamshala, District Kangra, H.P. These appeals are being disposed of by a single judgment as they arise out of a common judgment.

2. Brief facts of the case are that the plaintiff had instituted a suit for declaration to the effect that the plaintiff is owner in possession of suit land comprising Khewat No.88, Khatauni No.125 and Khasra No.764/362, measuring 0-10-11 Hectares of Jamabandi 1994-95 of Mohal Thamba, Mauza Ghiana Kalan, Tehsil Dharamshala and the defendants have no right, title or interest to interfere in the suit land in any manner whatsoever in the ownership and possession of plaintiff with consequential relief of permanent injunction.

3. The plaintiff has alleged that the suit land is owned and possessed by the plaintiff as per Jamabandi for the years 1994-95. The plaintiff is in cultivating possession of the suit land and the defendant No.1 has initiated some proceedings against the plaintiff and threatening to dispossess the plaintiff from the suit land. The proceedings have been initiated at the instance of defendants No.2 to 4 who are very influential persons. It is also stated that the plaintiff has applied for the allotment of the suit land to defendant No.3 and after due inquiries by the official of the defendant No.1 the plaintiff was finally allotted the suit land measuring 0-10-11 Hectares comprising Khasra No.362/2 by defendant No.1 on 14.11.1981 and a certificate of allotment was issued on 14.11.1981. The plaintiff deposited the amount of Rs.24/- qua the allotment on 1.12.1981. The plaintiff occupied the suit land on 14.11.1981 as the possession was given to the plaintiff by defendant No.1 without any interference from anybody. It has come in the notice of the plaintiff that vide order dated 26.5.1997, the Additional District Magistrate,Kangra, at Dharamshala, exercising the powers of Commissioner under the Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 has cancelled the allotment of the suit land. The said order is illegal, without authority, null and void and is liable to be set aside. It is stated that there are no 'Kuhals' in the suit land and there is no play ground of the school in the suit land and the local people of the area also did not use the suit land. The mango fruit trees were planted by the plaintiff in the year 1981. There are no 'Sare-Am-Rasta' in the suit land and there is no drinking water/spring in the suit land. The plaintiff was never summoned by the Commissioner under the aforesaid act. The plaintiff falls within the definition of landless person. Hence, the order passed by the Additional District Magistrate, Kangra at Dharamshala on 26.5.1997 for cancellation of the land is illegal, null and void. Hence, the suit.

4. The State, defendant No.1 therein, filed the written statement taking preliminary objections of locus-standi, estoppel, maintainability, suit is time barred, no cause of action, suit is bad for non-joinder of necessary parties, suit is not properly valued, suit is bad for issuance of legal notice under Section 80 CPC and the Court has no

jurisdiction under Section 10 of the H.P. Village Common Lands Act, 1974. On merits, it is pleaded that the plaintiff was allotted land from Khata No.114, Khatauni No.164, Khasra No.352/2 measuring 0-10-11 Hectares situated in Mohal Thamba Mauza Khaniara under the H.P. Village Common Lands Vesting and Utilization Act, 1974 on 14.11.1981. However, the plaintiff got the land mutated in his name vide mutation No.175 of 23.10.1994 after the gap of 15 years in the year 1995. He started cultivating the land and on 17.6.1995, the residents of the village came to know about the alleged allotment and they by way of representation to the Deputy Commissioner objected to the alleged allotment as the land is used as a path and other common passages. Secondly, three 'Kuhals' pass through the said suit land which irrigates the agricultural land of the Mohal and the land is also used by the children of the Primary School, Thamba, Barnala, Kaned as a play ground. On such representation, a detailed inquiry was got conducted by the Tehsildar Dharamshala who found the objection of the residents are well founded and submitted her report to Deputy Commission on 14.7.1995. Thereafter, proceedings were initiated against the plaintiff by the Commissioner and after hearing the plaintiff and objectors, allotment of the suit land was cancelled with direction to allot some other suitable land to the plaintiff. Objections qua jurisdiction, cause of action, limitation, non-joinder of necessary parties, valuation and maintainability were also raised.

5. Defendants No.2 to 4 by way of separate written statement claimed existence of two Kuhals, three paths, passing through the suit land and that school is located adjoining the suit land. It is being used as a play ground by school children and plaintiff obtained wrong allotment of the suit land in his favour in papers only. After such allotment, he never took possession of the land. When they came to know of allotment, approached Deputy Commissioner for cancellation and consequently Tehsildar Dharamshala visited the spot and recommended cancellation. Cancellation order is claimed to be legal and valid.

6. The plaintiff filed replication to the written statement of the defendants, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments made in the plaint.

7. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiff is owner in possession of the suit land, as alleged? OPP
2. Whether the plaintiff is entitled for the consequential relief of injunction? OPP
3. Whether the suit of the plaintiff is within time? OPP
4. Whether the suit of the plaintiff is not maintainable? OPD
5. Whether the plaintiff is estopped from filing the present suit by his act and conduct? OPD

6. Whether this Court has no jurisdiction to try the present suit? OPD
7. Whether the suit of the plaintiff is bad for non-issuance of notice under Section 80 CPC? OPD
8. Relief.

8. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff. In appeal, preferred before the learned first Appellate Court, against the judgment and decree of the learned trial Court, the learned first Appellate Court affirmed the findings, recorded by the learned trial Court and consequently, it affirmed the judgment and decree passed in favour of the plaintiff by the learned trial Court.

9. Now the defendants have instituted the instant Regular Second Appeals before this Court, assailing the findings recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeals came up for admission on 24.3.2006, this Court, admitted both the appeals instituted by the defendants against the judgment and decree rendered by the learned first Appellate Court, on, the hereinafter extracted common substantial question of law:-

1. Whether in view of the provisions of Section 10 of the H.P.Village Common Lands Vesting and Utilization Act, the civil Court did not have the jurisdiction to try and decide the suit?

Substantial Questions of Law No.1:

10. Mr.Sanjeev Kuthiala, Advocate, appearing for appellants/defendants No.2 to 4 and Mr.Vivek Singh Attri, learned Deputy Advocate General, appearing for the State have conjointly submitted before this Court that the findings rendered by the learned Courts below on issues No. 3, 4 and 6 necessitate interference by this Court. They succinctly submit that the suit land was allotted in favour of the plaintiff-respondent in the year 1981. The order of cancellation of grant of the suit land in favour of the plaintiff/respondent, rendered by the learned Additional District Magistrate-cum-Commissioner under the Himachal Pradesh Village Common Land Vesting and Utilization Act, 1974, comprised in Ext.D-16. Ext.D-16 is anvilled upon the power vested in the Commissioner under Clause 13 of the H.P. Village Common Lands Vesting and Utilization Scheme, 1975, which relevant clause is extracted hereinafter:-

> "13. (1) Any person aggrieved by an order, of Collector or any other authority competent to make such order, may within thirty days from the date of such order, or such longer period as the Commissioner may allow for reasons to be recorded in writing prefer an appeal in write the Commissioner.

Explanation:- In completing the period of thirty days, the time taken in obtaining the copy of the order appealed against shall excluded.

(2) An such appeal being preferred, the Commissioner may order stay of further proceedings in the matter pending decision on the appeal.

(3) The commissioner shall decide the appeal after giving the parties an opportunity of being heard and if necessary, after sending further record of the case from the Collector and after making such inquiry as he thinks fit either personally or through the Collector.

(4) if at any time, it comes to the notice of the Commissioner either through an application made by any person or otherwise, that the allotment of any land under this Scheme was made to a person who was not entitled or eligible for such allotment or the allotment was wrong on any other grounds, he may call for the record of the case and after making such enquiries as he thinks proper either in person or through a Revenue Officer subordinate to him and after giving an opportunity to the parties concerned, he may cancel the grant of land and make such other orders in connection therewith as he deems necessary in this circumstances of the case."

11. Sub clause (4) thereof vests jurisdiction and authority in the Commissioner to "at any time" cancel the grant of suit land on an application made to him by any person manifesting therein the fact that the allottee was not entitled to or ineligible for allotment or that the allotment was wrong on any other grounds. However, such cancellation of grant is to be preceded by an inquiry and the affording of an opportunity of being heard to all affected.

12. In view of the fact that the allotment of the suit land was made in favour of the plaintiff-respondent in the year 1981 and the said allotment came to be rescinded in the year 1994 that hence it is contended by the learned counsel for the plaintiff that the import and purport of the phraseology "if at any time" occurring in Sub clause(4) of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 cannot be inordinately stretched to facilitate the Commissioner exercising the powers to cancel any allotment of land made by the competent authority to proceed to cancel it in the year 1994, especially when the grant/allotment of the suit land was made in favour of the plaintiff respondent in the year 1981. True it is that the power vested in Sub clause 4 of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 authorizing or empowering the Commissioner to rescind the grant or allotment of land made in favour of the plaintiff-respondent was exerciseable 'at any time'. So also it is true that the import and purport of the phraseology 'at any time' cannot be given the connotation of it having an untrammeled or

unrestricted limit qua time, besides the said power obviously is to be exercised within a reasonable time. However, the reasonableness of time within which the power of rescission or cancellation of allotment of land made by the competent authority in favour of the allottee, who is the plaintiff-respondent, is exercisable, is also to be adjudged from the stand point of the time when knowledge of the grant was acquired by the persons affected by the grant. If the persons affected by the grant, hence, proceeded to seek revocation or cancellation of grant within a reasonable time from the date of theirs having acquired knowledge of the grant in favour of the allotee, then the power of cancellation exercised by the authority vested with such a power acquires the colour of validity, inasmuch, as it having been exercised within a reasonable time. The acquisition of knowledge by the defendants-appellants qua the factum of allotment or grant of the suit land having been made in favour of the plaintiff-respondent was acquired or was gained by them on attestation of mutation of allotment of the suit land in the year 1994. As such when the affected persons or persons aggrieved by the grant who are the residents of Mohal Ghiana Kalan, Tehsil Dharamshala, having immediately on acquisition of knowledge qua the grant or allotment of the suit land in favour of the plaintiff-respondent, which acquisition of knowledge arose on the attestation of mutation of allotment of the suit land recorded in favour of the plaintiff-respondent in the year 1994 and theirs in quick spontaneity on 14th July, 1995 instituted before the competent authority a representation/complaint for cancellation of the grant of the suit land, which complaint sequelled the elicitation of a report from the Tehsildar existing at page 263 of the Paper Book on which report of the Tehsildar, the order rescinding the allotment of the suit land in favour of the plaintiff-respondent comprised in Ext.D-16 was rendered, all cumulatively constitute facts which portray that neither there was any indolence or inertia on the part of the villagers of Mohal Ghiana Kalan, Tehsil Dharamshala District Kangra, to, on acquisition of knowledge qua the allotment of the suit land in favour of the plaintiff-respondent come to agitate their grievances before the competent authority nor also it can be concluded that when though the import of the phrase 'if at any time' existing in sub clause 4 of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 does not ipso facto communicate that it contemplates an untrammeled or unrestricted period of time for the authority concerned to cancel the grant, that the exercise of power of rescission is not within a reasonable time. Rather, given the fact that the exercise of power to cancel grant 'at any time' is to be read in context with and in entwinement with the proven fact of promptitude or quick spontaneity within which the affected persons proclaim their grievances qua allotment reckonable from the date of acquisition of knowledge by them of the purported untenable grant of the suit land made in favour of the plaintiff-respondent. Consequently, given the fact that the connotation borne by the phraseology 'at any time' existing in sub clause 4 of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 inherently bespeaks of the power of cancellation of grant of the suit land being exercisable by the competent authority within a reasonable time to

be adjudged from the date of acquisition of knowledge by the persons affected by the grant, as such, when from the date of acquisition of knowledge by the affected persons of the grant of the suit land in favour of the plaintiff-respondent which arose on the date of attestation of mutation of allotment of the suit land in favour of the plaintiff-respondent in October, 1994 theirs having in the year 1995 proclaimed their grievances, cannot, either render their act to be procrastinated or elongated so as to interdict them to seek its rescission nor also the amplitude of the plenary powers vested in the authority concerned envisaged in sub clause 4 of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 can be said to be either circumscribed or curtailed it having proceeded to exercise the power of rescission even when the affected persons despite having knowledge qua its grants even prior to attestation of mutation of allotment of the suit land in favour of the plaintiff-respondent in the year 1994 having then not moved the authority concerned for its rescission or cancellation. Even otherwise, there is no material on record to portray that the persons affected by the grant had prior to the attestation of mutation of allotment of the suit land in favour of plaintiff respondent had acquired knowledge qua its grant in favour of the plaintiff-respondent. For lack of said evidence, it is to be aptly concluded that they acquired knowledge of the allotment of the suit land in favour of the plaintiff-respondent only in the year 1994. Furthermore, the communication by the Tehsildar in his report submitted to the Deputy Commissioner, Kangra on an application moved by the villagers of Mohal Ghiana Kalan for cancellation of grant communicates/records certain pertinent facts sequelled by an inspection of the suit land by him in the presence of the aggrieved as well as the plaintiff-respondent devolving upon the factum of the plaintiff-respondent having not prior to 1994 committed any overt act upon the suit land so as to then equip the defendants/appellants with the requisite knowledge qua the allotment of the suit land in his favour and theirs despite having acquired knowledge earlier, omitted to seek cancellation of the suit land. The preponderant fact, as recorded in the report, furnished by the Tehsildar existing at Page 263 of the Paper Book, is rather of the plaintiff-respondent only after attestation of mutation of allotment of the suit land recorded in his favour in the year 1994 having then commenced to proceed till or cultivate the suit land. The aforesaid fact, constrains this Court to record an inference that when the plaintiff-respondent commenced to cultivate or till the suit land only after attestation of mutation recorded in the year 1994 he had not cultivated it earlier. The inference gains fortification in the face of the fact of it having been founded upon the presence of both the aggrieved and the allottee who is the plaintiff-respondent during the course when the Tehsildar carried out an inspection of the suit land. As a corollary, when the fact, aforesaid, as elucidated in it, are founded upon the factum of it being recorded or it being unraveled in the presence of the persons aggrieved as well as in the presence of the allottee of the suit land, as a sequel then when no evidence cogent and weighty has been adduced by the plaintiff-respondent that the manifestation, aforesaid, in the report of the Tehsildar is unworthy of credence. Consequently, the factum, as

divulged in the report of the Tehsildar of the plaintiff-respondent having not commenced cultivation of the suit land prior to the year 1994, attains conclusiveness and forestalls as well as estops the plaintiff to claim that prior to year 1994 he has commenced cultivation of the suit land. The further concomitant is that it estops the plaintiff-respondent to now contend that prior to 1994, he had tilled or cultivated the suit land. With the formation of the above deduction, the ensuing corollary is that the plaintiff-respondent omitted to utilize the land earlier so as to proclaim to the affected persons the factum of his having allotted the suit land. Naturally then, the concomitant inference is that the persons affected by the grant remained unaware of the grant or hence did not acquire knowledge of its grant, as such, were dis-empowered to at a stage earlier than 1995, seek its cancellation by moving the authority concerned. Even though the plaintiff-respondent has in his deposition proclaimed that he has utilized the suit land earlier and his acts of utilization bestowed knowledge or conferred knowledge upon the affected persons of its allotment in his favour and theirs having omitted to assail the grant earlier before the authority concerned estops them now at an inordinate stage to seek its rescission. However, the above deposition is benumbed by the report of the Tehsildar as also it stands benumbed by the fact of omission on the part of the plaintiff-respondent to adduce the best evidence comprised in the Khasra Girdawaris qua the suit land prior to year 1995 and their enunciating the factum of plaintiff-respondent having utilized the land earlier. For their non adduction, the clinching conclusion, hence is that the plaintiff-respondent had not utilized the land earlier than 1994 rather had utilized the suit land only after attestation of mutation of allotment of the suit land in his favour. Therefore, the acquisition of knowledge by the affected persons by the allotment as portrayed by them to have been acquired only on the recording of the attestation of mutation of allotment in favour of the plaintiff-respondent and its subsequent cultivation by the allottee in the year 1994 acquires an aura of truth and remains un-prevaricated.

13. It is hence held with aplomb that the rescission of the allotment recorded in Ext.D-16 is not out side the period of limitation rather when the power of rescission or cancellation of allotment of the suit land in favour of the plaintiff-respondent has been mandated to be exercisable “at any time” by the authority concerned, exercise whereof is to be done within a reasonable time, to be viewed from the date of acquisition of knowledge by the persons affected by the grant/allotment of the suit land in favour of the plaintiff-respondent. Consequently, when given the clinching fact of the persons affected by the grant having acquired knowledge of its grant/allotment only in the year 1994, theirs having ventilated their grievance qua its grant in the year 1995, which sequelled the rendition of the report of the Tehsildar in the year 1995 and ultimately consummated in the order of rescission comprised in Ext.D-16, is within limitation. The findings recorded by the learned Courts below on the issue relating to limitation hence is liable to be reversed and set-aside.

14. Furthermore, the learned counsel for the plaintiff-respondent contends that the statutory bar envisaged in Section 10 of the H.P.Village Common Lands Vesting and Utilization Act, 1974 ousts the jurisdiction of Civil Courts to adjudicate upon any order rendered by the Collector or State Government or any Officer authorized by it under the provisions of the Act. However, true it is that the provisions of Section 10 of the Act, which are extracted herein-after, exclude the jurisdiction of the Civil Courts to adjudicate upon any order rendered by the authorities concerned relating to allotment of land/grant of land made in favour of any beneficiary under the provisions of the Act, which reads as under:-

> "10. Bar of Jurisdiction:- Save as otherwise expressly provided in this Act, no order made by the Collector or the State Government or any officer authorized by it, as the case may be, shall called in question by any Court or before any officer or authority."

15. However, it is also settled law that the statutory prohibition engrafted in Section 10 of the Act against the Civil Courts exercising the jurisdiction qua subjects explicitly enunciated in Section 10 does not omnibously usurp the jurisdiction of Civil Courts to test the legality of orders rendered by the officer concerned while exercising powers vested in H.P.Village Common Lands Vesting and Utilization Scheme, 1975. Rather, it is settled law that the civil Courts would continue to retain jurisdiction or would be vested with jurisdiction to test the legality of or adjudicate upon any order rendered by any authority concerned exercising powers under the H.P.Village Common Lands Vesting and Utilization Scheme, 1975. In the event when such orders, as rendered by any authority concerned under the aforesaid Act, are permeated with the vice of infraction of principles of natural justice or are also beyond jurisdiction. Therefore, it was incumbent upon the learned counsel for the plaintiff/respondent to establish that the orders comprised in Ext.D-16 are vitiated with an infirmity inasmuch as they have been rendered in transgression of the principles of natural justice inasmuch as preceding its rendition, the plaintiff-respondent had neither been summoned nor participated, hence, was condemned unheard. However, with an explicit communication Ext.D-16, of the plaintiff-respondent having been summoned and his having been afforded an opportunity of being heard prior to the rendition of Ext.D-16, as such, in face thereof and when for displacement of the explicit enunciation aforesaid in Ext.D-16, no evidence to the contrary has been adduced by the plaintiff-respondent. Consequently, an invincible conclusion which fosters is that there is no force or weight in the submission of the learned counsel for the plaintiff-respondent that preceding to the rendition of Ext.D-16, the plaintiff-respondent had neither been served nor had participated in the proceedings preceding the rendition of Ext.D-16. Nor also he can contend that it is vitiated while it having been rendered behind his back or his having come to be condemned unheard. In sequel, Ext.D-16 remains un-vitiated. Consequently, when this Court has formed the conclusion that the order comprised in Ext.D-16 is not vitiated for

transgression of principles of natural justice at the instance of the authority who has rendered it. The sequel thereof is that it foments an inference that hence the saving or excepting principle to the statutory bar against the exercise of jurisdiction by the Civil Courts qua the subject matters explicitly enshrined in Section 10 of the H.P.Village Common Lands Vesting and Utilization Act, 1974 remains unattracted. Consequently, the Civil Courts had no jurisdiction to test the legality or adjudicate upon the vires of pronouncement rendered by the competent authority in Ext.D-16. As a sequel, the findings rendered by the learned trial Court qua the maintainability of the civil suit before the civil Court and its having jurisdiction are set aside. Furthermore, the learned counsel for the plaintiff-respondent has also contended that the order comprised in Ext.D-16 has been rendered by an Officer not vested with the jurisdiction to render it, inasmuch, as, it has not been rendered by a "Commissioner" who is the authority vested with the jurisdiction under the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 to exercise the powers vested under Sub-Clause (4) of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975, for rescinding or canceling a grant made in favour of an allottee. However, the said submission, too, is rudderless in face of the statutory meaning attributed to the term 'Commissioner' in Section 2bb of the Act, which is extracted herein-after:-

> "Commissioner" means the Commissioner, Himachal Pradesh and includes an officer appointed as such by the State Government."

16. The signification which is apparent on a reading of the phraseology "Commissioner" who is the competent authority to rescind or cancel a grant, is of the designation, aforesaid comprising the Commissioner, Himachal Pradesh and its also including an officer appointed as such by the State Government. When the plaintiff-respondent had omitted to adduce, cogent, potent and best evidence comprised in adduction of a notification apposite, to rendering a determination that the proclamation by the officer who rendered Ext.D-16 of his having rendered Ext.D-16, while his exercising the powers of Commissioner under the H.P.Village Common Lands Vesting and Utilization Scheme, 1975, is legally unwarranted and fictitious. Its non adduction sequels the inference that the reflection in Ext.D-16 by the officer who rendered Ext.D-16 of his having rendered it while exercising the powers of Commissioner under the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 is a true portrayal of his being, as a matter of fact, an officer appointed as Commissioner within the signification borne by the word 'Commissioner' as defined in Section 2bb of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975. Consequently, even if he was Additional Deputy Commissioner and not a 'Commissioner', yet when hence he is to be construed to be an officer who has been empowered as a Commissioner to exercise the powers vested in a "Commissioner" under sub-clause (4) of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975, the orders of cancellation or revocation of grant comprised in Ext.D-16

cannot be construed to be without jurisdiction having been rendered by an officer not empowered to render it.

17. Lastly, the learned counsel for the plaintiff-respondent has contended that since it is un-controverted that he was both entitled to as well as eligible for the grant, besides when the further ground contemplated in sub-clause (4) of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975 for revocation of the grant by the Commissioner, inasmuch as of it being revocable on "any other grounds" was un-available inasmuch as when the land allotted to the plaintiff-respondent stood or existed in the allotable pool, its de-allotment was unwarranted. However, a deep and incisive perusal of the report of the Tehsildar, existing at page 263 of the file of the trial Court reflects that the persons aggrieved by the grant had proclaimed their grievances against its allotment in favour of the plaintiff-respondent on the strength of it being used by them for the purposes as divulged in it as well as in the order comprised in Ext.D-16 which purposes constitute public purpose. In sequel, when the ambit of the phraseology 'any other ground' on which anchorage the Commissioner was competent to rescind it is extendable to encompass dehors eligibility or entitlement of the plaintiff-respondent for the grant or the allotment of the suit land, also the implicit and inherent rights/interests of the larger village body in the suit land when proven to be liable to be prejudiced, jeopardized as well as affected in case the allotment of the grant of the suit land remains un-rescinded. Consequently, when the communications in the report of the Tehsildar on which Ext.D-16 is founded, unravels the fact of the land being available for use for advancing larger public interest, which unfoldment therein remain un-controverted, as a sequel, it has to be concluded that the suit land was meant for being used by the village community, hence, they have entrenched interests in its being preserved for the protection of their inherent community rights in it which rights would get eroded in case the allotment is not decided. Therefore, cancellation or rescission of the allotment of the suit land in favour of the plaintiff-respondent on the score that if not rescinded, public interest would be jeopardized, does comprise a sufficient "any other grounds" envisaged in sub-clause (4) of Clause 13 of the H.P.Village Common Lands Vesting and Utilization Scheme, 1975, for hence vesting in the authority concerned on its implicit proof, as exists in Ext.D-16, the power to cancel it. Therefore, even if the suit land was in the allotable pool, yet for saving and preserving it for public interest, its de-allotment or rescission was tenably done.

18. For the foregoing reasons, both the appeals are allowed and the judgments/decrees, rendered by the learned Courts below, are set aside. The suit of the plaintiff is dismissed. The substantial question of law is answered accordingly. No order as to costs.

19. Pending application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Mohan Lal ..... Petitioner
Vs.
State of H.P. & ors. ..... Respondents

CWP No. 10625 of 2011.
Date of decision: 5.11.2014.

Constitution of India, 1950- Article 226- Petitioner was engaged as daily wage Beldar- he worked as Assistant fitter and thereafter as daily wage beldar- his services were regularized as beldar- respondent stated that the private respondents had joined subsequently but they had forefeited their seniority for the period when they had worked as beldar and were appointed as fitter on the completion of 8 years of services on the said post - held, that respondent is a model employer and is under an obligation to conduct itself with high probity-it should not take advantage of the employees- respondent had exploited the petitioner as well as private respondents- when a person had rendered service in two or three capacities, an option was required to be obtained from him - petition allowed and the respondent directed to take appropriate action in accordance with law. (Para- 4 to 9)

Case referred:
Gauri Dutt & ors. Vs. State of H.P Latest HLJ 2008(HP) 366

For the petitioner : Mr. B.N. Sharma, Advocate.
For the respondents : Ms. Meenakshi Sharma, Addl. Advocate Generals with Ms. Parul Negi, Dy. Advocate General, for respondents No. 1 to 3.
Mr. Shashi Shirshoo, Advocate for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner has approached this court for grant of following substantive relief:-

a) That a writ in the nature of mandamus may kindly be issued directing the respondents to regularize the services of the petitioner as Fitter instead of helper on which post the petitioner has been working since 1983 and granted work charge status in the year 1996 and further they may kindly be directed to pay the arrears with interest on the revised pay scales of Fitter from 1996 onwards with all consequential benefits.

2. The uncontroverted facts are that petitioner was engaged as a daily waged Beldar on 1.6.1983 and worked as such up to 30.4.1985. Thereafter he worked as an Assistant Fitter w.e.f. 1.5.1985 to 24.7.1987 and thereafter he worked as daily-waged Fitter w.e.f. 25.7.1987 up to 18.1.1995. Now the grievance of the petitioner is that when it got down to regularization of his services, instead of being regularized as a Fitter, the respondents regularized his services as Beldar, that too from the years 2004, while the private respondents who had been appointed much after the petitioner in the year 1990, had been regularized prior to the petitioner.

3. The respondents have not denied these averments and contended that private respondents had in fact been appointed subsequently, but they had forfeited their seniority of the period when they worked as Beldar and were thereafter appointed as Fitters on their completion of eight years of service on the said post.

4. The stand of the respondents to say the least is absolutely unfair not only qua the petitioner but even as against the private respondents themselves. The respondent is a model employer and what has been expected from model employer has been succinctly dealt with by this court in **LPA No. 386 of 2012 titled H.P. State Industrial Corporation Ltd.** vs. **Shri Rajesh Kumar Kashyap, decided on 7.4.2014,** wherein it has been held as follows:-

> *"17. The Central Government, State Governments and likewise all Public Sector Undertakings are expected to function like model employers . A model employer is under an obligation to conduct itself with high probity and expected candour. An employer who is duty bound to act as a model employer has social obligation to treat an employee in an appropriate manner so that an employee is not condemned to feel totally subservient to the situation. A model employer should not exploit the employees and take advantage of their helplessness and misery."*

5. The official respondents have exploited not only the petitioner, but even the private respondents. The petitioner was granted work-charge status for the first time in the year 1996 and was regularized only in the year 2006, that too, on the post of Beldar. While in the case of private respondents, they were made to forfeit their seniority for the period they worked as Beldar and it is only thereafter that on completion of eight years of service as daily-waged Fitters, their services came to be regularized. It is also absolutely clear that official respondents have not conducted themselves with high probity and expected candour. They have not treated their employees in an appropriate manner and have rather exploited them taking advantage of their helplessness and misery. The conduct of the official respondents is reprehensible and falls short of expectation of a model employer.

6. The petitioner, even as per reply of the respondents had worked as a Fitter from 25.7.1987 to 18.1.1995, while on the other hand the private respondent No. 4 Fakerjeet had been engaged as a

daily-waged Beldar on 19.2.1988 and had worked as such till 31.7.1995 and it is only thereafter that he had worked as a Fitter from 1.8.1995 to 19.3.2004. While on the other hand the respondent No. 5 had been engaged as Beldar on 25.8.1991 and had worked as such up to 30.11.1994 and it is thereafter that he worked as a Fitter w.e.f. 1.12.1994 to 19.3.2004. The comparative particulars of the petitioner and private respondents clearly demonstrate that petitioner had been engaged much prior to the private respondents not only as a Beldar, but had been assigned the duties of Fitter prior to the private respondents.

7. It cannot be disputed that in such like cases where a person has rendered service in two or three capacities, an option was required to be obtained from him in terms of learned Division Bench judgement in case titled **Gauri Dutt & ors.** Vs. **State of H.P Latest HLJ 2008(HP) 366,** wherein this court held as follows:-

> *"18. The last question raises some interesting points. There have been instances where some employee has worked as beldar for some time and thereafter he has been engaged in a higher scale as mate or supervisor etc. The Tribunal in most of these cases has directed that the employee should be granted work charge status in the higher post of completion of 10 years of service after combining the service rendered in the lower scale and the higher scale. The State is aggrieved by these directions. According to the learned Advocate General the State has offered work charge status to these employees on completion of 10 years of combined service in the lower of the two scales and the State cannot be directed to grant work charge status in the higher scale. On the other hand, it is contended on behalf of the employees that since the employees are already working in the higher scale, it would not be fair and equitable to grant them work charge status in the lower scale.*
>
> *19. We have considered the arguments from all angles. <u>We are of the view that the employee cannot be given the benefit of combining service rendered in both the scales and be granted work charge status in the higher scale. We do, however, feel that at times it may be inequitable to grant the employee work charge status in the lower scale without giving him an option in this regard</u>. We are giving two examples to illustrate two extreme positions. In example (i) we will deal an employee (A) who joined service on 1.1.1990. He works in the lower scale of Beldar from 1.1.1991 to 31.12.1999. He is thereafter posted as Supervisor in the higher scale. Should he be granted work charge status as beldar or as Supervisor w.e.f. 1.1.2001? The clear other example is converse. Supporting employee (B) has worked as beldar w.e.f. 1.1.1991 to 31.12.1991 and from 1.1.1992 he was worked as Supervisor. From which date should we grant him work charge status and in what scale? It is obvious that in the first case the employee would not mind being granted work charge status even in the lower scale after 10 years w.e.f. 1.1.2000 since granted of work charge status would mean that he would get regular scale of pay. But should the employee be*

granted work charge status in the higher scale? We cannot agree with the preposition.

20. After considering all the pros and cons and keeping in view the fact that various anomalous situations may arise we are of the considered view that when an employee completes 10 years of continuous service combined in two scales, an option should be given to the employee to either accept work charge status in the lower scale or he may continue to work on daily rated basis in the higher scale and claim work charge status in the higher scale of completion of 10 years of continuous service in the said scale. In the examples given above employee (A) may prefer to accept work charge status w.e.f. 1.1.2001 even in the lower scale of beldar because otherwise he may have to wait for 9 years before he is granted work charge status. On the other hand, employee (B) in the second example may prefer to delay of 3 grant of work charge status by one year so that he can get work charge status in the higher scale. We feel that in each case the choice should be left to the employee. However, if the employee on being given a change to exercise his option does not convey his option within 30 days, he shall be granted work charge status in the lower scale by combining the service rendered in both the scales. This answers the fourth question."

8. The case of the petitioner is squarely covered by the aforesaid judgement and consequently directions issued in **Gauri Dutt's case** (supra) shall mutatis mutandis apply to the present case also.

9. Resultantly, the petition succeeds and the respondents are directed to take appropriate action in accordance with law laid down by this court in **Gauri Dutt's case** (supra) within a period of three months from the date of receipt of certified copy of this judgement, failing which the petitioner shall be entitled to interest at the rate of 9% per annum. Needless to add that petitioner shall be granted all consequential benefits including and not restricted to pay, arrears, seniority etc. from the due date. Costs easy.

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

Smt.Sudesh Sood wife of
Sh Chandu Lal Sood and another. ...Petitioners.

Versus:

State of HP and others. ....Respondents.

CWP No. 6600 of 2011.
Order reserved on:22.10.2014.
Date of Order: November 5 ,2014.

Constitution of India, 1950- Article 226- Central Civil Services (Leave) Rules 1972 - son of petitioners and husband of respondent No. 5 and father of respondents No. 6 and 7, who was serving as medical officer died in harness- Leave encashment amount was not paid by the State- held, that the Leave encashment amount after the death of employee who died during service is payable by State under Rule 39-C - Father and Mother fall in class (v) and (vi) while Widow falls in class (i) - First category will be preferred over class (v) and (vi)- therefore, the petitioners are not entitled for the payment of Leave encashment amount - leave rules will supersede the general law contained in Hindu Succession Act. (Para-5 and 6)

Constitution of India, 1950- Article 226- Predecessor of the petitioners died in harness- Petitioners claimed death-cum-retirement gratuity amount - held, that as per Central Civil Services (Leave) Rules 1972 widows has a preferential right of payment of death-cum-retirement gratuity amount- therefore, the petitioners being father and mother are not entitled to death-cum-retirement gratuity amount. (Para-7)

For the petitioners:	Mr.Ashwani Sharma, Advocate.
For Respondents-1 to 4.	Mr. M.L.Chauhan, Addl. Advocate General.
For Respondent-5	Mr.S.K.Sood, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present Civil Writ Petition is filed under Article 226 of the Constitution of India. It is pleaded that on dated 28.8.2007 Dr. Naveen Sood son of petitioners and husband of respondent No.5 and father of respondents No.6 and 7 who was serving as medical officer died in harness. It is further pleaded that on dated 22.9.2009 final payment of General Provident Fund in respect of deceased Dr. Naveen Sood was paid by respondent No. 4 in terms of clarification issued by respondent No.3 vide letter dated 13.7.2009 Annexure P1 to respondents No. 5 to 7 and petitioners in five equal shares since they were covered under the term 'Family'. It is further pleaded that dispute inter se the parties is regarding disbursement of claims relating to (1) Leave encashment amount (2) Death-cum-Retirement Gratuity amount (3) Group Insurance Scheme amount. It is further pleaded that on dated 8.4.2011 it was informed that amount of death-cum-retirement gratuity was Rs.5,85,000/- (Five lac eighty five thousand) and amount of leave encashment was Rs. 2,28,600/- (Two lac twenty eight thousand six hundred). It is further pleaded that the shares of the petitioners in leave encashment amount, death-cum-retirement gratuity amount and group insurance scheme amount should be ordered to be refunded from respondent No. 5 Smt Anuradha Sood who had received entire amount after the death of her husband. Prayer for acceptance of writ petition sought.

2. Per contra reply and counter claim filed on behalf of respondent No.5 Smt Anuradha Sood pleaded therein that civil writ petition is not maintainable. It is further pleaded that deceased Dr. Naveen Sood has filed his nomination on dated 13.9.1992. It is further pleaded that certified copy of nomination is Annexure R1. It is further pleaded that 2/5th share in the General Provident Fund given to petitioners is wrong and against the rules. It is admitted that Dr. Naveen Sood died on dated 28.8.2007 while working as medical officer at Health Centre, Takipur Tehsil and District Kangra HP. It is denied that deceased Dr Naveen Sood did not file any nomination papers in the name of respondent No.5 Smt. Anuradha Sood during his life time for the payment of his dues in the service record. It is further pleaded that deceased Dr Naveen Sood has filed his nomination on dated 13.9.1992 with the department and nomination was duly witnessed by Dr. Raj Kumar the then Medical Officer Incharge Civil Hospital Garli where he was working at that time. It is further pleaded that nomination was also witnessed by Sh Dhani Ram Kondal who was working as a Senior Clerk in the hospital at that time. It is further pleaded that replying respondents have also sent a copy of the aforesaid nomination to Accountant General HP vide registered AD No RLAD A 2226 dated 10.12.2007 vide Annexure R/2. It is denied that deceased Dr. Naveen Sood has not filed any nomination during his life time. It is further pleaded that deceased had left behind his widow and two daughters and they are legally entitled for leave encashment amount, death-cum-retirement gratuity and group insurance scheme amount. It is further pleaded that petitioners were not dependent upon the deceased. It is further pleaded that petitioners have independent ration cards of their own. It is further pleaded that petitioners are running a shop for the last 50 years in their own village at Pragpur and they are getting regular income from the shop. It is further pleaded that petitioners have landed property at Pragpur, Dhaliara, Theog and Shimla from which they are getting substantial income. It is further pleaded that petitioners have also acquired policies from the post office, insurance companies and mutual funds from which they are earning lot of money every month. It is further pleaded that petitioners are paying income tax every year. It is further pleaded that petitioners are also claiming medical reimbursement through their eldest son who is employed in the National Insurance Company at Jawalamukhi. It is further pleaded that replying respondents are living in a rented house. It is further pleaded that petitioners have intentionally made false statement that they were dependent upon the deceased at the time of his death. It is further pleaded that leave encashment amount, death-cum-retirement gratuity amount and group insurance scheme amount were paid to respondent No.5 strictly as per rules. Prayer for dismissal of writ petition sought. Respondent No.5 also filed counter claim for refund of amount of General Provident Fund paid to petitioners. Petitioners also filed rejoinder and reasserted the allegation pleaded in the writ petition.

3. Court heard learned Advocate appearing on behalf of the petitioners and learned Additional Advocate General appearing on behalf

of respondents No. 1 to 4 and Mr. S.K.Sood, learned Advocate appearing on behalf of respondents No.5 to 7 and also perused entire records carefully.

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

(1) Whether petitioners are legally entitled for payment of (1) Leave encashment amount (2) Death-cum-retirement gratuity amount (3) Group insurance scheme amount as alleged in the civil writ petition.

(2) Whether respondents No. 5 to 7 are legally entitled for refund of General Provident Fund amount as pleaded in counter claim.

(3) Final Order.

Finding upon Point No.1.

5. Submission of learned Advocate appearing on behalf of petitioners that petitioners are father and mother of deceased Dr Naveen Sood who died on dated 28.8.2007 and they are legally entitled for (1) Leave encashment amount (2) Death-cum-retirement gratuity amount (3) Group insurance amount which was payable to deceased Dr Naveen Sood is decided accordingly for the reason hereinafter mentioned. It is well settled law that amount of leave encashment payment of employee who died during service is governed by Central Civil Services (Leave) Rules 1972 and these Rules came into operation on 1.6.1972. Rule 39-C deals with payment of leave encashment amount. As per rule 39-C of Central Civil Services Leave Rules 1972 leave encashment amount after the death of employee is payable to different classes of relations mentioned in rule 39-C. There are 1 to 11 classes mentioned in Rule 39-C. Widow falls in class (i) of rule 39-C and Father and Mother falls in class (v) and (vi). First category will be preferred to other categories. All leave encashment payment is governed under Central Civil Services (Leave) Rules 1972. It is well settled law that under Article 309 of the Constitution of India any rules so made have effect of act. In view of fact that special Central Civil Service (Leave) Rules 1972 came into effect on 1.6.1972. It is held that payment of amount of leave encashment will be governed by rule 39-C of Central Civil Service (Leave) Rules 1972. It is held that petitioners are not legally entitled for payment of leave encashment amount of deceased Dr Naveen Sood in view of rule 39-C of Central Civil Service (Leave) Rules 1972

6. Submission of learned Advocate appearing on behalf of petitioners that payment of leave encashment amount will be governed by Hindu Succession Act and as per Hindu Succession Act mother falls as class-I heir and she is legally entitled for payment of leave encashment amount of deceased Dr Naveen Sood who died on dated on 28.8.2007 is rejected being devoid of any force for the reason hereinafter mentioned. It is held that Central Civil Services (Leave) Rules 1972 came into operation on 1.6.1972 for governing payment of leave encashment

amount. It is well settled law that when there is a conflict between general law and special law then special law always prevails over the general law. Part 14 of the Constitution of India deals with service matter under the Union and the State. As per Article 309 of the Constitution of India any rules so framed shall have the effect of act. Hence it is held that rules framed under Central Civil Services (Leave) Rules 1972 which came into operation on 1.6.1972 will prevail upon Hindu Succession Act 1956 qua payment of leave encashment amount of deceased employee. Hence it is held that payment of entire leave encashment amount to the widow of deceased has been paid by respondents No. 1 to 4 strictly as per rule 39-C(i) of Central Civil Service (Leave) Rules 1972 and there is no illegality in the payment of leave encashment amount to the widow of deceased who falls in the first category. Even petitioners did not fall within the definition of family because respondent No.5 has specifically stated by way of affidavit that petitioners are residing separately from respondents No.5 to 7 and petitioners have separate ration card. It is well settled law that after the preparation of separate ration card family did not remain joint family.

7. Another submission of learned Advocate appearing on behalf of the petitioners that petitioners are also entitled for death-cum-retirement gratuity amount is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that payment of gratuity amount of deceased employee is governed under Central Civil Services (Pension) Rules 1972. It is well settled law that Central Civil Services (Pension) Rules 1972 came into operation on 1.6.1972. As per Rule 51 of Central Civil Services (Pension) Rules 1972 the gratuity is payable by means of a nomination under Rule 53 and if there is no nomination then gratuity of employee should be paid as per rule 50 of sub-rule (6) of Central Civil Services (Pension) Rules 1972. As per rule 50 of sub-rule (6) eleven categories have been specified and widow has been shown in first category and father and mother have been shown in 6th and 7th category. It is well settled law that first category have a preferential right of payment than that to other category. In the present case no nomination document placed on record qua the payment of gratuity amount and only Annexure R1 has been placed on record which is related to General Provident Fund. It is well settled law that concept of Provident Fund and gratuity amount are two different concept. In the absence of any nomination qua gratuity amount the present case will be governed under rule 50 of sub-rule (6) of Central Civil Services (Pension) Rules 1972. In the present case widow of the deceased is still alive and she falls in first category and she has the preferential right of payment of death-cum-retirement gratuity amount. It is held that petitioners are not entitled for payments of death-cum-retirement amount of deceased Dr Naveen Sood in view of Central Civil Service Pension Rules 1972.

8. Another submission of learned Advocate appearing on behalf of the petitioners that petitioners are legally entitled for the amount of group insurance scheme is accepted for the reason hereinafter mentioned. Himachal Pradesh Government Employees Group Insurance Scheme 1984 came into force on 1st April, 1985. HP Government

Employees Group Insurance Scheme 1984 is relating to the amount deposited in Group Insurance Scheme and as per the Scheme the amount of Group Insurance Scheme should be paid to the person mentioned in the nomination form and in the absence of nomination the amount of insurance scheme should be paid to the member of the family of deceased as defined in General Provident Fund (Central Services) Rules 1960. No nomination paper qua payment of amount of Group Insurance Scheme placed on record. As per Rule 2 of sub-rule (C) of General Provident Fund (Central Services) Rules, 1960 family has been defined as wife, parents, children, minor brothers, unmarried sisters, deceased son's widow and children in the first category. Hence it is held that petitioners are entitled for payment of Group Insurance Scheme amount as per their shares. Point No.1 is decided accordingly.

Finding upon Point No.2.

9. Submission of learned Advocate appearing on behalf of respondent No.5 Smt Anuradha Sood that as per Annexure R2 placed on record she has been mentioned as nominee qua provident fund amount and respondents No. 1 to 4 have illegally paid the amount of provident fund in favour of the petitioners and the same be got refunded from the petitioners is decided accordingly for the reasons hereinafter mentioned. It is well settled law that amount of provident fund as per General Provident Fund (Central Services) Rules 1960 should be paid to nominee. It is held that as per rule 33 of General Provident Fund (Central Services) Rules 1960 the amount of General Provident Fund (GPF) should be paid to nominee and in the absence of nominee the same should be paid to the member of the family of deceased as defined under Section 2(c) of General Provident Fund (Central Services) Rules, 1960. It is well settled law that General Provident Fund (Central Services) Rules, 1960 came into operation on 1st April, 1960. As per Section 2(c) of General Provident Fund (Central Services) Rules 1960 wife, children and parents have been mentioned in first category. Admittedly petitioners fall within first category as defined in word 'family'. As the amount of General Provident Fund (GPF) already stood paid to the petitioners respondents No.5 to 7 are directed to file Civil Suit for refund of General Provident Fund amount paid to petitioners in view of the nomination Annexure R1 placed on record qua payment of General Provident Fund because nomination Annexure R1 qua payment of General Provident Fund is in dispute inter se parties. Point No.2 is decided accordingly.

Final Order

10. In view of the above stated finding it is held (1) That petitioners are not entitled for payment of leave encashment amount. (2) It is held that petitioners are also not entitled for payment of death-cum-retirement gratuity amount. (3) It is held that petitioners are entitled for payment of Group Insurance Scheme amount qua their shares only in the absence of nomination qua payment of Group Insurance Scheme. (4) It is held that respondents No.5 to 7 will be legally entitled to recover the amount from petitioners qua General Provident Fund on the basis of

nomination mentioned in Annexure R1 by filing civil suit in competent Civil Court. Respondent No.5 will refund the amount of Group Insurance Scheme to the petitioners as per their share(s) within one month. Writ petition is accordingly disposed of with no order as to costs. All miscellaneous application(s) are also disposed of.

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

LPA No. 62 of 2013
a/w LPA No. 149 of 2013
Reserved on: 28.10.2014
Decided on: 05.11.2014

LPA No. 62 of 2013

Mr. Sunil Kumar ...Appellant.
Versus
Indian Oil Corporation Ltd. (IOC) & others ...Respondents.

.....

LPA No. 149 of 2013

Ms. Promila Kumari Sandil ...Appellant.
Versus
The General Manager (LPG) & others ...Respondents.

Constitution of India, 1950- Article 226- Petitioner had applied for allotment in which he was awarded 10 marks- his grievance was that he was entitled to 25 marks as per criterion fixed by the respondent since he is an owner of land and has absolute title to it- held, that the revenue record produced by the petitioner shows that he is co-sharer and his mother and brother are also recorded as owners- brother does not fall within the definition of the family prescribed by the respondent, therefore, respondent had rightly awarded 10 marks to the petitioner. (Para- 6 and 9)

Practice and Procedure- Court should be conscious in entertaining the writ petitions which are aimed at preventing the eligible candidate to reap the fruits of selection. (Para- 15)

Case referred:

Sanjay Kumar Shukla versus M/s. Bharat Petroleum Corporation Ltd. & Ors., 2014 AIR SCW 4945

LPA No. 62 of 2013

For the appellant: Mr. Digvijay Singh, Advocate.

For the respondents: Mr. K.D. Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate, for respondents No. 1 and 2.
Mr. Navlesh Verma, Advocate, for respondent No. 3.

.....

LPA No. 149 of 2013

For the appellant: Mr. Dushyant Dadwal, Advocate.
For the respondents: Mr. K.D. Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate, for respondents No. 1 to 3.
Mr. Navlesh Verma, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Judgment and order, dated 12th December, 2012, made by the learned Single Judge in a bunch of writ petitions, lead case of which is CWP No. 6399 of 2010, titled as Pardeep Kumar versus General Manager and another (hereinafter referred to as "the impugned judgment"), has given birth to both these appeals. Thus, we deem it proper to determine both these appeals by this common judgment.

2. Appellant in LPA No. 62 of 2013 has questioned the impugned judgment so far it relates to CWP No. 920 of 2012, titled as Sunil Kumar versus Indian Oil Corporation and others and the appellant in LPA No. 149 of 2013 has questioned the impugned judgment so far it relates to CWP No. 7350 of 2010, titled as Ms. Promila Kumari Sandil versus the General Manager (LPG) and others.

3. The writ petitioners in CWPs No. 6399 and 6549 of 2010 have not questioned the impugned judgment on any count, has attained finality so far it relates to them.

4. The impugned judgment is to be tested only so far it relates to CWPs No. 920 of 2012 and 7350 of 2010 on the touchstone of Rules occupying the field read with the pleadings of the parties.

LPA No. 62 of 2013:

5. Appellant, i.e. the writ petitioner in CWP No. 920 of 2012, has specifically pleaded in the appeal as well as the writ petition that he was entitled to 25 marks instead of 10 marks awarded as per the criterion fixed by the respondents, details of which have been given in para 24 of the impugned judgment.

6. According to the writ petitioner, he is owner of land and is having absolute title because that land belongs to the family to which the writ petitioner belongs, but only ten marks were awarded, which is not according to the Rules, Regulations and the policy.

7. Admittedly, the extracts of revenue record produced by the writ petitioner before the respondents do disclose that he is a co-sharer; his mother and brother are also recorded as owners. Brother do not fall within the definition of family.

8. As per the definition, 'family' includes applicant, applicant's spouse, unmarried son(s)/daughter(s) and also the parents. It does not include married son(s), married daughter(s) or brother. Thus, the writ petitioner was not absolute owner of the said land and was not having the absolute title. The Writ Court has rightly recorded the findings in paras 24 and 25 of the impugned judgment, which are reproduced herein:

> *"24. The word 'owned' according to the policy, means having clear ownership title in the name of the applicant/family member of the 'family unit'. 'Family unit' of a married applicant consists of self, applicant's spouse and unmarried son(s)/ daughter(s) and also his parents, but the petitioner had attached the documents with the application of the land which was offered by him, it was an ancestral property and consent of the family members have not been furnished. Further, in the said land apart from the petitioner Tarsem Kumar, his married brother and mother are reflected as co-sharers to the extent of 3/14th share in the revenue record, who otherwise do not fall within the definition of 'family unit'. The selection guidelines provide marking under the heading "Capability to provide infrastructure and Facilities" and the same have been divided into three heads as below:*
>
> ***a. Owns mean having clear title/registered sales deed of the suitable land/godown-based on documents -- 25 marks,***
>
> ***b. Firm Offer having agreement to purchase suitable land/godown- based on documents***
>
> ***– 18 marks; and***
>
> ***c. Can arrange-Based on documents***
>
> ***– 10 marks.***
>
> *25. In the revenue papers aforesaid produced by the petitioner he was not having clear title of the plot/land offered, thus he was rightly awarded 10 marks under the sub-head (iii), i.e., 'can-arrange'. The land offered for construction of godown in the application form at Clause 12(a) is ancestral and undivided property. The value of the property is Rs. 2,03,49,000/- and the share of the petitioner comes out to Rs.43,60,500/- and in case the applicant is having property worth more than Rs.20 lacs then full 5 marks are to be awarded which was done, but in my opinion, the evaluation was rightly reviewed by the Committee after investigating his complaint, but despite*

> *that he failed to get merit. Thus, I do not find any force in the present petition, which also deserves to be dismissed."*

9. Having said so, the Writ Court has not committed any illegality and the appeal, i.e. LPA No. 62 of 2013, merits to be dismissed.

LPA No. 149 of 2013:

10. The appellant, i.e. writ petitioner in CWP No. 7350 of 2010, was supposed to produce the original copies of all the documents annexed with the form. She had applied in terms of the advertisement notice and has annexed photocopies of the documents, but had neither annexed the original nor had produced some of the originals at the relevant point of time before the respondents.

11. Learned counsel for the appellant admitted that she had annexed some documents in addition to the documents required and had not produced originals of all the annexed documents at the time of scrutiny, but, stated that she had shown the same to one Shri Sunil Thakur, an employee of the respondent-Oil Corporation, but he has not allowed her to enter inside the room, where the interviews were being held and has not even looked into the documents which she was having.

12. The appellant-writ petitioner has also alleged that said Shri Sunil Thakur had some grudge against her as there was some dispute between their families, has not been arrayed as a party in the writ petition, thus, anything said in the writ petition against him cannot be looked into and examined.

13. Learned counsel for the appellant stated that it is a fact that the appellant-writ petitioner had not produced the original of the revenue documents, which she was not supposed to annex or produce in terms of the advertisement notice.

14. We have examined the impugned judgment and the documents alongwith the policy and are of the considered view that the Writ Court has rightly dismissed the writ petition in terms of the findings given in paras 16 and 17 of the impugned judgment.

15. We also deem it proper to record herein that the Apex Court in a recent judgment in the case titled as **Sanjay Kumar Shukla versus M/s. Bharat Petroleum Corporation Ltd. & Ors.,** reported in **2014 AIR SCW 4945,** has commanded that the Courts should be cautious in entertaining the writ petitions which are aimed at to prevent the eligible candidate to reap the fruits of selection. It is apt to reproduce para 15 of the judgment herein:

> *"15. In the present case, fortunately, the litigation has not been very time consuming. Nothing has been suggested on behalf of the Corporation that the establishment of a retail outlet at Areraj, East Champaran District in the State of Bihar is not required as on date. It*

can, therefore, be safely understood that in the instant case the public of the locality have been deprived of the benefit of the service that the outlet could have generated. We have already indicated that the present litigation initiated by Respondent No. 7 does not constitute a very bona fide exercise on the part of the said Respondent and the entire litigation appears to have been driven by desire to deny the fruits of the selection in which the appellant was found to be the most eligible candidate. Whether the outlet is operated by the appellant or the Respondent No. 7 is of no consequence to the ultimate beneficiaries of the service to be offered by the said outlet. The above highlights the need of caution that was imperative on the part of the High Court while entertaining the writ petition and in passing orders therein. Be that as it may, in the totality of the facts of the present case, we are of the view that it would be just and proper to direct the Corporation, if it is of the view that the operation of the retail outlet is still justified by the exigencies, to award the same to the appellant by completing the requisite formalities in accordance with the procedure laid by the Corporation itself."

16. Having glance of the above discussions, this appeal also deserves to be dismissed.

17. Viewed thus, both the appeals are dismissed and the impugned judgment is upheld. Pending applications, if any, are also disposed of.

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Before Hon'ble Mr. Justice Mansoor Ahmad Mir, Chief Justice and Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Dharam Pal Thakur ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.

CWPIL No. 10 of 2014
Date of Order: 10.11.2014

Constitution of India, 1950- Article 226- Road Users and Pedestrians (Public Safety and Convenience) Act, 2007- respondents were directed to furnish the list of permit holders but the list was not furnished in accordance with the direction- respondent directed to file a fresh list along with name of the officers who had issued the permits in violation of the provisions of the Act –respondent further directed to cancel permits which were issued in breach of the Act- respondents also directed to furnish the list of the names of the police officers and to mention the action taken by police officials for violation of the Act- further, direction

issued to indicate the mechanism in place for managing the parking of vehicles. (Para- 2 to 14)

Present: Mr. Ajay Mohan Goel, Advocate, for the petitioner.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 1 to 5.
Mr. Hamender Chandel, Advocate, for respondent No. 6.
Mr. Dushyant Dadwal, Advocate, for respondent No. 7.
Mr. G.S. Rathore, Advocate, for respondent No. 8.
Mr. Ashok Sharma, Assistant Solicitor General of India, for respondent No. 9.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Keeping in view the fact that the vehicles of Union of India are also being plied on the sealed/restricted roads, Union of India through Secretary (Home) to the Government of India is arrayed as party-respondents and shall figure as respondent No. 9 in the array of respondents.

2. Issue notice to newly added respondent No.9. Mr. Ashok Sharma, learned Assistant Solicitor General of India, waives notice. Respondent No. 9 is directed to file status report indicating how the Army vehicles are being plied on Mall Road and whether the requisite permits have been issued in terms of the directions issued by this Court in CWPs No. 1916 of 2009 and 7784 of 2010. The particulars of all the permits be also disclosed.

3. Respondents No. 1 to 8 had to file compliance reports in terms of the directions contained in orders, dated 22nd July, 2014, and 22nd September, 2014, though have filed status reports, are evasive and not in accordance with the mandate of the said directions.

4. In the given circumstances, we deem it proper to direct respondents No. 1 to 8 to file fresh status reports indicating the steps taken by them to comply with the directions (supra) in letter and spirit and also to spell out what steps they have taken to implement the mandate of the Shimla Road Users and Pedestrians (Public Safety and Convenience) Act, 2007 (hereinafter referred to as "the Act").

5. The respondents have furnished the list of permit holders, which, on the face of it, appears not in tune with the mandate of the Act read with direction (b) contained in order, dated 22nd July, 2014, and para 22 of order, dated 22nd September, 2014. In addition to filing the compliance reports, they are directed to pin point who is/are the officer(s) who had issued the permits in violation of the provisions of the

Act and are also directed to cancel all those permits, which have been issued in breach of the mandate of the Act.

6. The affidavits filed do disclose that CCTV cameras have not been installed and it has also not been disclosed as to what is the mechanism in place. The concerned authorities to do the needful and report compliance by or before the next date of hearing.

7. The respondents, in addition to the compliance reports, shall also furnish the details of the police/traffic officers/officials, who are manning the entry points and what actions they have drawn if they have noticed any violation.

8. The affidavits filed by the respondents do not disclose how many parking places are in place and how many unauthorized parkings are being used. In addition to the compliance reports, they are directed also to indicate what action they have drawn to ban the said parking places. The list of the parkings, which have been misused or which are being misused, be also furnished.

9. Respondent No. 8, in addition to the compliance report, is also directed to indicate what is the mechanism in place for managing the parking of vehicles in terms of the said orders.

10. It appears that the respondents have complied with direction (f), but have not complied with other directions relating to the subject contained in para 16 of order, dated 22nd September, 2014.

11. Respondent No. 8 has filed affidavit in response to the directions, is an eye wash, is directed to file affidavit and also to place on record the policy read with the action drawn by it in terms of paras 18 to 20 contained in order, dated 22nd September, 2014.

12. Respondents No. 4 and 5 have virtually admitted that no long term vision plan is in place. Respondents No. 1 to 4 and 6 are directed to utilize the services of an Expert before submitting the compliance report in terms of para 5 of order, dated 22nd July, 2014.

13. Respondent No. 7 has filed affidavit and has given details that the permits have been issued in favour of the MLAs and also in favour of some officers/officials, is directed to file affidavit how permits were issued in favour of the officers/officials other than MLAs.

14. The authorities, which are empowered to issue permits, must ensure that the vehicle belongs to the person in whose name permit has been granted or is to be granted and whether the permit(s) is/are being misused.

15. Respondents No. 1 to 8 are directed to remain present in Court on next date of hearing. List on **24th November, 2014.**

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

Ram Lok .....Appellant.
Vs.
Nand Ram & others .....Respondents.

RSA No.287 of 2004
Reserved on 29.10.2014.
Decided on: 10.11.2014.

Code of Civil Procedure, 1908- Order 22 Rule 4- proforma defendants No. 3 to 5 were proceeded exparte- no written statement was filed by them- suit was filed for the benefit of proforma defendants No. 3 to 5- held, that death of proforma defendant No. 3 would not result in the abatement of the suit or appeal. (Para-10)

H.P. Land Revenue Act, 1954- Section 38- B was owner of the suit land and S was recorded as a tenant- revenue entries were repeated in the subsequent jamabandies- R was recorded as a tenant for the first time in the jamabandi for the year 1973-74- held, that there was no record to show as to how R was recorded as a tenant- Patwari is required to notify in writing to the person or persons likely to be adversely affected by change of the entries and retain on record proof of the notifications - entries are required to be verified by the '*Lumberdar*' or '*Panch* and any entry made in violation of these instructions are void. (Para-18 and 19)

Cases referred:

Sushil K. Chakravarty vrs. Tej Properties Private Ltd., reported in (2013(9) SCC 642

Mata Prasad Mathur versus Jwala Prasad Mathur and others, reported in (2013) 14 SCC 722

Bhagirath Mal vrs. Bhagwan Dutt, reported in AIR 1996 Rajasthan 27

Ram Sarup vrs. Chandra Bhan and ors. reported in 1992 PLJ 179

For the appellant: Mr. Rajnish K. Lall, Advocate.
For the respondents: Mr.N.K.Thakur, Sr. Advocate, with Mr. Rohit Bharoll, Advocate, for respondents No. 1 to 3 & 6.

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, dated 5.5.2004 passed in Civil Appeal No. 68 of 2002.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs, for the convenience sake), filed a suit for declaration to the effect that the plaintiffs alongwith proforma defendants are owner-in-possession to the extent of 34749 shares and tenant in possession to the extent of 3395 shares under defendant No. 2 over the land measuring 0-80-15 hectares, comprised in Khewat No. 238, Khatauni No. 401, Khasra Nos. 644 and 645 as per *Misal Haquiat* Settlement for the year 1986-87 and the change of the revenue entries in the name of defendant No. 1 as non-occupancy tenant and subsequent order dated 10.6.1985 of Assistant Collector, IInd Grade, Amb sanctioning mutation No. 971 of proprietary rights in the name of defendant No. 1, were absolutely wrong, false, baseless, illegal and without jurisdiction and contrary to the provisions of H.P. Tenancy and Land Reforms Act and Rules with a consequential relief of permanent injunction restraining the defendant No. 1 from interfering in any manner or raising any sort of construction and cutting trees from the suit land.

3. The suit land was coming in possession of the plaintiff and proforma defendant Nos. 3 to 5 since the time of ancestors as non-occupancy tenants under Shri Bhagat Singh etc. owners on payment of rent and after coming into force of H.P. Tenancy and Land Reforms Act, the plaintiff had become owner to the extent of 34749 shares and tenant in respect of 3395 shares under the defendant No. 2 who is widow. Earlier the old Khasra No. of the suit land was 284 which was converted into new Khasra No. 293 during consolidation and thereafter the suit land was denoted by Khasra No. 644 and 645 during settlement operation. The defendant No. 1 with the connivance of the revenue staff got changed the entries of the suit land in his name as non-occupancy tenant and also got sanctioned mutation No. 971 of proprietary rights from Assistant Collector, IInd Grade, Amb. On 10.6.1985.

4. The suit was contested by defendant No. 1, namely Ram Lok. He filed the written statement. According to him, the suit land was coming in his possession as non-occupancy tenant on payment of rent to the owners since June, 1970 and now under the provisions of H.P. Tenancy and Land Reforms Act, the defendant has become owner vide mutation No. 971 dated 10.6.1985. The defendant Nos. 2 to 5 despite service did not appear and they were proceeded ex-parte in the trial Court.

5. The plaintiffs filed replication to the written statement filed by the defendant. The issues were framed by the learned Sub Judge (Ist Class), Amb. The learned Sub Judge (Ist Class), Amb, decreed the suit on 27.6.2002. The defendant Ram Lok filed an appeal against the judgment and decree dated 27.6.2002 before the learned District Judge, Una. The learned District Judge, Una, dismissed the same on 5.5.2004. Hence, this regular second appeal .

6. The regular second appeal was admitted by this Court on 16.3.2005 on the following substantial questions of law:

> "1. Whether the Civil Court had jurisdiction to try the suit as framed for correction of entries and setting aside the order confirming the ownership rights on the appellant under the provisions of H.P. Tenancy and Land Reforms Act?
>
> 2. Whether on a proper construction of H.P. Tenancy and Land Reforms Act, the onus to disprove the tenancy of the appellant which lay on the plaintiff was discharged and the court below mis-directed in directing the appellant to establish his tenancy?
>
> 3. Whether the judgment of the Court below is vitiated as the suit had abated because of the death of defendant No. 3 Prabhu and which question of abatement could only be decided by the trial Court where abatement had occurred?"

7. Mr. Rajnish K. Lall, Advocate, on the basis of substantial questions of law framed, has vehemently argued that the Civil Court had no jurisdiction to try the suit. He then contended that the plaintiffs have not become owners. The suit had abated because of the death of defendant No. 3 Sh. Prabhu and this question could only be tried by the trial Court where the abatement had occurred. On the other hand, Mr. Naresh Thakur, Sr. Advocate, has supported the judgments and decrees passed by both the Courts' below. In addition thereto, he has referred to the order passed by the learned District Judge on 13.6.2003 in CMA No. 52 of 2003.

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

9. Since all the questions of law are inter-related, hence in order to avoid repetition of evidence, these were taken up together for discussion.

10. Now, as far as the question of abatement is concerned, defendant No. 3 Sh. Prabhu has died on 9.12.1999. At the time of death of Prabhu, the suit was pending before the trial Court. The application for bringing on record the legal representatives of Prabhu was filed under Order 22 Rule 4 CPC on 7.3.2003. The application was contested. Sh. Prabhu was admittedly arrayed as proforma defendant No. 3 by the plaintiffs in the suit. Defendant No. 3 refused to accept the summons. Defendants No. 3 to 5 were proceeded ex parte vide order dated 29.4.1993. No written statement was filed by proforma defendants No. 3 to 5. According to the plaint, the plaintiffs have filed suit for declaration to the effect that the plaintiffs alongwith the proforma defendants No. 3 to 5 were owner-in-possession to the extent of 34749 shares in the suit land. The suit was filed for the benefit of proforma defendants No. 3 to 5. No relief was sought against the proforma defendant No. 3. Defendants No. 3 to 5 have not filed any written statement. In view of this, death of proforma defendant No. 3 would not

result in abatement of the suit even if no application had been filed nor permission as required under Order 22 Rule 4 (4) CPC was obtained. Thus, the death of Prabhu i.e. proforma defendant No. 3 would not result in abatement of the suit or appeal, as argued by Mr. Rajnish K. Lall, Advocate.

11. In the case of ***Sushil K. Chakravarty vrs. Tej Properties Private Ltd.,*** reported in ***(2013(9) SCC 642,*** their lordships of the Hon'ble Supreme Court have held that when the suit was allowed to proceed further, without insisting on the impleadment of the legal representatives of 'S', it was done on the Court's satisfaction, that it was a fit case to exempt the plaintiff 'T' from the necessity of impleading the legal representatives of the sole defendant 'S'. Their lordships have held as under:

> "31.3. A trial court can proceed with a suit under the aforementioned provision, without impleading the legal representatives of a defendant, who having filed a written statement has failed to appear and contest the suit, if the court considers it fit to do so. All the ingredients of Order XXII Rule 4(4) of the Code of Civil Procedure stood fully satisfied in the facts and circumstances of this case. In this behalf all that needs to be noticed is, that the defendant Sushil K.C. having entered appearance in CS (OS) no. 2501 of 1997, had filed his written statement on 6.3.1998. Thereafter, the defendant Sushil K.C. stopped appearing in the said civil suit. Whereafter, he was not even represented through counsel. The order to proceed against Sushil K.C. ex- parte was passed on 1.8.2000. Even thereupon, no efforts were made by Sushil K.C. to participate in the proceedings of CS(OS) no.2501 of 1997, till his death on 3.6.2003.
>
> 31.4. It is apparent, that the trial court was mindful of the factual position noticed above, and consciously allowed the suit to proceed further. When the suit was allowed to proceed further, without insisting on the impleadment of the legal representatives of Sushil K.C. it was done on the court's satisfaction, that it was a fit case to exempt the plaintiff (Tej Properties) from the necessity of impleading the legal representatives of the sole defendant Sushil K.C. (the appellant herein). This could only have been done, on the satisfaction that the parameters postulated under Order XXII Rule 4(4) of the Code of Civil Procedure, stood complied. The fact that the aforesaid satisfaction was justified, has already been affirmatively concluded by us, hereinabove.
>
> 31.5. We are therefore of the considered view, that the learned Single Judge committed no error whatsoever in proceeding with the matter in CS (OS) no.2501 of 1997 ex-parte, as against the sole defendant Sushil K.C., without impleading his legal representatives in his place. We therefore, hereby, uphold the determination of the learned Single Judge, with reference to Order XXII Rule 4(4) of the Code of Civil Procedure."

12. Similarly in the case of ***Mata Prasad Mathur versus Jwala Prasad Mathur and others,*** reported in ***(2013) 14 SCC 722,*** their lordships of the Hon'ble Supreme Court have held that in order to expedite process of law, courts may exempt plaintiff from substituting LRs of a defendant who failed to appear or contest the suit. Their lordships have held as under:

> "3. Having heard learned counsel for the parties, we are inclined to agree with the order of the First Appellate Court that the suit had not abated no matter for a reason different from the one that prevailed with that Court. It is common ground that Virendra Kumar-defendant was proceeded ex parte as he had not appeared to contest the suit or file a written statement. Substitution of the legal representatives of such a defendant could be legitimately dispensed with by the trial Court in view of the provisions of Order XXII Rule 4 Sub-Rule 4, which is as under:
>
> "4. Procedure in case of death of one of several defendants or of sole defendant.-
>
> (1) xxxxx
>
> (2) xxxxx
>
> (3) xxxxx
>
> (4). The court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."
>
> 4. The High Court has, in our view, rightly noticed this aspect in its order albeit the manner in which the High Court dealt with the same is not all that satisfactory. Be that as it may, so long as the power of exemption was available to the trial Court, the same could and ought to have been exercised by the First Appellate Court while hearing an appeal assailing the dismissal of the suit as abated.
>
> .....
>
> 9. It would appear from the above that the Legislature incorporated the provision of Order XXII Rule 4(4) with a specific view to expedite the process of substitution of the LRs of non-contesting defendants. In the absence of any compelling reason to the contrary the Courts below could and indeed ought to have exercised the power vested in them to avoid abatement of the suit by exempting the plaintiff from the necessity of substituting the legal representative of the deceased defendant-Virendra Kumar. We have no manner of doubt that the view taken by the First

Appellate Court and the High Court that, failure to bring the legal representatives of deceased Virendra Kumar did not result in abatement of the suit can be more appropriately sustained on the strength of the power of exemption that was abundantly available to the Courts below under Order XXII Rule 4 (4) of the CPC."

13. The learned Single Judge in the case of ***Bhagirath Mal vrs. Bhagwan Dutt,*** reported in ***AIR 1996 Rajasthan 27,*** held that the decree against a dead person is not nullity when deceased-defendant had not filed written statement and had not made legal appearance during pendency of trial and in fact the trial has proceeded against him ex parte. It has been held as follows:

"3. I have heard the learned counsel for the parties. During the course of arguments it has not been disputed by the learned counsel for the non-applicant that no legal appearance had been made by the deceased during the pendency of the trial and that the learned counsel for the applicant-defendant had put in appearance on behalf of the deceased also without filing any Vakalatnama and that during the pendency of the suit statement was made by the learned counsel representing the applicant in the learned trial Court that the written statement filed by the applicant-defendant should be treated as the written statement of the deceased-defendant as well, but the learned trial Court had refused to treat the same as the written statement of the deceased-defendant. The suit in question had been filed by the non-applicant for specific performance of the agreement to sell said to have been executed by the deceased in his favour in respect of the property in dispute which is said to have been sold by the deceased to the applicant in violation of the terms of the agreement and the defendant-applicant had been put in possession of the property. It is also the common case of the parties that the property in dispute is situated in District Jhunjhunu within the State of Rajasthan and the deceased was resident of the State of Bihar and that the sale deed in favour of the applicant had been executed by a person who had been given a Power of Attorney by the deceased. The deceased-defendant not having made appearance and the appearance having been made on his behalf without any authority from him on the basis of a memorandum of appearance and the counsel on the basis of the said memorandum having not been accepted as a duly appointed Advocate and because of that fact the written statement filed by the applicant was not taken as the written statement of the deceased shows that, although, no specific order in this regard was passed, proceedings against him were ex parte, and in these circumstances, it cannot be said that it was within the knowledge of either the plaintiff non-applicant or the defendant-applicant that deceased had died during the pendency of the suit and in these circumstances this fact was not brought to the notice of the learned trial Court who passed the impugned decree. Even otherwise, in view of sub-rule (4) of Rule 4 of Order 22 of the Code

of Civil Procedure it was not obligatory, in the circumstances, for the plaintiff to have brought on record the legal representatives of the deceased during the pendency of the suit and as such the appeal having been filed by the applicant impleading the deceased as respondent No. 1 and the report having been received that he had died, there was no question of impleading his LRs as he had died before the suit was decided and not during the pendency of the appeal. In view of these facts, I am of the view that it cannot be said that the appeal can be said to have abated or that the decree passed by the learned trial Court was nullity as no legal representative had been brought on record. Consequently, I am of the view that the order dated 5-11-1993 dismissing the appeal as having abated should be recalled and appeal should be heard on merits.

4. Consequently, while holding that neither the appeal had abated nor the decree was nullity, the application dated 25-4-1994 filed for recalling the order is allowed. The order dated 5-11-1993 passed by me is recalled and the appeal is restored with a direction that it should be registered at its original number and be placed before the regular Bench hearing first appeals."

14. In ***Ram Sarup vrs. Chandra Bhan and ors.*** reported in ***1992 PLJ 179,*** the learned Single Judge has held that when no relief was sought against the defendant who died, suit would not abate and it is not necessary that all those who succeed to estate must be made a party. It has been held as under:

"3. Mr. Sharma, learned counsel for the appellant forcefully contended that the learned Courts below have not at all applied their mind to the facts of the case and inasmuch as Chandni was not a necessary party to the litigation nor any relief was claimed against her, her death could not entail dismissal of the suit as having abated.

.....

5. After hearing the learned counsel for the parties, I find sufficient force in the contention of Mr. Sharma, learned counsel for the appellant. Plaintiff had challenged the Will said to have been executed by Nand Lal in favour of respondents No. 1 to 6. If the suit was to be decreed, the benefit of the said judgment would have been available to all those who are entitled to succeed in the estate of Nand Lal. Even one of the successors without impleading others could successfully maintain the suit. Although, it is true that on declaration that the Will was a forged document or that Nand Lal had not executed the Will, the plaintiff alone would not succeed to the entire estate but it cannot, as a necessary corollary, be held that all those, who were to succeed to the estate must have been made a party. As has been mentioned above, no relief was claimed against Smt. Chandni and for that

reason as well, her death could not result into abatement of the suit."

15. Now, the Court would advert to the substantial question of law whether the plaintiffs and proforma defendants No. 3 to 5 have become owners to the extent of 34749 shares and tenant in possession to the extent of 3395 shares under defendant No. 2 and also whether the change of revenue entry in favour of defendant No. 2 was wrong including the order passed by the A.C. IInd Grade, Amb, dated 10.6.1985 sanctioning mutation No. 971 of proprietary rights in favour of defendant No. 1. It is admitted fact that Bhagat Singh was the owner of the suit land and initially Santu son of Mangu alongwith Sikh son of Bardu i.e. plaintiff was recorded as a tenant over old Khasra No. 284 measuring 20 kanals 18 marlas on payment of rent as per *jmabandi* for the year 1945-46, Ext. P11. These revenue entries were also repeated in the subsequent *jamabandis* 1954-55, Ext. P-12, 1963-64 Ext. P-13 and 1968-69 Ext. P-14. The change in entry had taken place for the first time in the *jamabandi* for the year 1973-74, Ext. P-1. Ram Lok was recorded as tenant in respect of 10 kanals 9 marlas over Kh. No. 284 min. Initially, as per the remarks column of *jamabandi* Ext. P-1, mutation regarding conferment of the proprietary rights was ordered to be sanctioned in view of notification in favour of the plaintiff and proforma defendants on 21.5.1976. The proprietary rights were to be given to the plaintiffs only in respect of 17 kanals out of the land and share of widow co-owner was to remain intact during her life time. In *jamabandi* for the year 1984-85 Ext. P-2, Ram Lok during the course of consolidation was shown to be tenant over old khasra No. 284, new khasra No. 293 measuring 20 Kanals 18 marlas under the ownership of Bhagat Singh. The name of the plaintiff was deleted as tenant in *jamabandi* Ext. P-2 for the year 1984-85. The *jamabandi* for the year 1986-87 Ext. P-3 prepared during the course of settlement, suit land comprised in old Kh. No. 293 min was denoted by new khasra Nos. 644 and 645 kita 2 measuring 0-80-15 wherein defendant No. 1 Ram Lok was shown to be *'gair marusi tenant'* except the share of Sita Devi widow.

16. PW-1 Ajit Kumar Patwari, has testified that the suit land falls in his Patwar Circle. He has brought the record pertaining to '*khasra girdawari*' of the suit land from the year 1972 to 1979. According to him, the change of entry was reflected in favour of defendant No. 1 firstly in *rabi* 1976, but there was no order of any revenue officer regarding the change of entry nor there was any mutation or *rapat* to this effect in the revenue record.

17. PW-2 Kewal Krishan, Patwari has produced '*register karvai*' pertaining to the suit land alongwith '*rapat roznamachas'*. PW-3 Naresh Kumar, Patwari has deposed that there was no order of any revenue officer regarding the change of entry as tenant in favour of defendant No. 1. Sh. Nandu Ram has examined himself as PW-4. He has supported the averments made in the plaint. According to him also, no order was passed by the competent authority for effecting change of

entry in the suit land in the presence of the recorded tenants i.e. plaintiffs. PW-5 Prem Chand has supported the version of the plaintiffs.

18. According to DW-1 Ram Lok, Bhagat Singh was the owner of the suit land. The suit land was given by the owners in the year 1970 to him for the purpose of cultivation as tenant. He was regularly paying rent to the owners since 1970. The plaintiff Nandu was present on the spot when proprietary rights were conferred upon him but no-objection was raised by him. He admitted categorically that the suit land was partitioned and after consolidation only khasra number of the suit land changed. He has not filed any application regarding the correction of the entries. The defendant has also examined Bhagat Singh co-owner of the suit land. According to him, the defendant No. 1 was cultivating the suit land as tenant since 1970.

19. There is no order of the Revenue Officer how the change was effected showing defendant No. 1 Ram Lok as tenant in the *jamabandi* for the year 1973-74 and also in *jamabandi* for the year 1984-85, Ext. P-1 and P-2, respectively. The revenue entries before 1973-74 were in favour of the plaintiffs. According to the instructions issued by the Financial Commissioner, it is the duty of the Patwari before making any change in the existing entry at the time of harvest inspection, to notify in writing to the person or persons likely to be adversely affected by such a change of the entries and retain on record proof of the notifications. The entries are required to be attested by the '*Lumberdar*' or '*Panch*' of the village concerned. The entries made in violations of these instructions are null and void. The first entry was made in favour of the plaintiffs and proforma defendants in *jamabandi* for the year 1945-46, Ext. P-11. The defendant has failed to prove how the entries were changed in his favour without any order from the competent authority. The plaintiff alongwith the proforma defendants were recorded as tenants since 1945-46. These entries, as noticed above, were changed abruptly in the *jamabandi* for the year 1973-74. The plaintiffs have conclusive proof that they are owners in possession of the suit property and the entries made in favour of the defendant were wrong.

20. The dispute primarily is between the previously recorded tenants i.e. plaintiff and proforma defendants on the one hand and defendant No. 1 on the other, who was abruptly recorded as tenant for the first time in the *jamabandi* for the year 1973-74. The entries have been changed without hearing the plaintiffs. The mutation was attested in their absence. The revenue authorities have not followed the prescribed procedure for making changes in the revenue entries. Thus, the civil Court has the jurisdiction to adjudicate the matter regarding validity of the tenancy. The Assistant Collector, IInd Grade, Amb was not competent to make correction of tenancy entry or conferring proprietary rights in favour of defendant no. 1. The final order dated 10.6.1985 has been passed by the Assistant Collector, IInd Grade, Amb, behind the back of the plaintiff- Sikh Ram. It was in violation of the principles of natural justice. In these circumstances, the conferment of proprietary rights in favour of defendant No. 1 was null and void. The plaintiffs were

recorded as tenant on payment of rent. The defendant No. 1 has failed to prove how the entries were changed abruptly in his favour. The substantial questions of law are answered accordingly.

21. Consequently, the appeal is dismissed.

****

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

Arvind Bhardwaj ..... Appellant.

Vs.

Himachal Pradesh Subordinate Services Selection Board and others .... Respondents.

LPA No. 25 of 2013
Reserved on: 29.10.2014
Date of decision: November 12, 2014

Constitution of India, 1950- Article 226- Petitioner appeared for the post of Junior Engineer (Electrical) in the sports quota- he was held ineligible on the ground that he had not participated three times in national championship and one time in senior national championship- held, that the mere fact that petitioner had appeared in screening test and had qualified the same would not entitle him for the appointment – he was required to fulfill the criteria and mere possession of merit certificate is not sufficient- petition dismissed. (para- 7 and 8)

For the Appellant : Mr. Tara Singh Chauhan, Advocate.

For the Respondents Ms. Archana Dutt, Advocate, for respondent No.1.
Ms. Richa Sharma, Advocate, for respondent No.2.
Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Addl. Advocate General, Mr. J.K.Verma and Mr. Kush Sharma, Dy. Advocate Generals, for respondent No. 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The appellant, who was respondent No.3 before the writ Court, is aggrieved by the judgment passed by the learned writ Court whereby both the writ petitioner and the appellant herein, were held to be ineligible to be considered for appointment in general (sportsman) quota.

2. The facts in brief, may be noticed. Advertisement No. 11/2007 was got issued by respondent No.1 on 6.7.2007 inviting applications for filling up the posts of Junior Engineer (Electrical) and last date for receipt of the application was 14.8.2007. The respondents conducted a written screening test. The claim of the writ petitioner was rejected by the learned Single Judge and the findings have attained finality. Insofar as the appellant is concerned, he initially was not a party to the writ petition and vide CMP No.5723 of 2009 he had sought his impleadment on the ground that he was already selected and the learned writ Court vide its order dated 4.4.2012 impleaded the appellant by passing the following order:

> ***"CMP No. 5723 of 2009***
>
> *Heard.*
>
> *Since the applicant is a selected candidate, he is permitted to be arrayed as respondent No.3. Registry is directed to carry out the necessary corrections in the memo of parties. The application stands disposed of."*

Now what appears from the perusal of the aforesaid order is that the precise case of the appellant was that he had been selected and therefore, ought to be appointed.

3. When the matter came up before the learned Single Judge on 18.4.2012, then on the request of the writ petitioner, the Director (Youth & Sports) was added as a party respondent No.4 and was directed to file supplementary affidavit as to whether the petitioner and respondent No.3 (appellant herein) were eligible for being considered under the category of sportsman, as per criteria adopted by respondent No.1.

4. In compliance to the directions issued by the learned writ Court, the Director (Youth & Sports) i.e. respondent No.4 filed supplementary affidavit, the relevant portion whereof reads as follows:

> *"1. It is submitted that the State Government has provided 3% reservation to the distinguished sportspersons in various services under the Government vide Notification No. 2-11/72-DP (A-II) dated 28th May, 1999, No. PER (AP)-C-F(I)-3/2011 dated 22nd January, 2002, No. PER (AP)-C-F(I)-3/2001 dated 2.8.2008, No. YSS-C(15)3/2008 dated 24.7.2009 and No. YSS-A(4)1/2008-Loose dated 10th February, 2011. The names of distinguished sportspersons are registered in the Sports Cell and on receiving of requisition from any of the recruiting Department names were sponsored from amongst the eligible sportspersons, fulfill the required educational and essential professional education prescribed under the R & P Rules for any of the post. Under the 3% reservation scheme, criteria for selection of outstanding sportspersons who will be eligible for employment in Govt. Department/Boards/Corporations and Universities is as under:*

The various sports competitions will be classified as follow:

Category No. I	*I.*	*Medal winners of Olympic Games/Winter Olympics.*
	II	*Commonwealth Games*
	III	*Medal winners of Asian Games/Winter Asiad.*
Category No.II	*I.*	*Participation in Olympic Games.*
	II.	*Participation in Commonwealth Games.*
	III.	*Participation in Asian Games.*
Category No.III	*I.*	*Medal winners in South Asian Federation (SAF) Games.*
	II.	*Medal winners in National Games.*
	III.	*Medal winners in recognized Senior National Championship.*
Category No.IV	*I.*	*Medal winners in All India Inter Versity Sports Tournaments.*
	II.	*Medal winners in All India National School Games, All India Rural Sports Tournaments and National Sports Festival for Women organized under the PYKKA competitions.*
	III.	*Medal winners in recognized Jr. National Sports Championships.*
	IV.	*Participation in South Asian Federation (SAF) Games.*
	V.	*At least three times participation in National Championship and Senior National Championship.*

: *(Copy annexed vide Annexure R-I).*

2. The sports achievements of the petitioner and respondent No.3 as per record provided and those are recognized events are as under:

1. Rajinder Singh (Petitioner)

1. 1st place in 10th H.P. State Athletics championship held at Sundernagar on 23-24/12/1998.

2.1st place in 15th H.P. State Athletics meet held at Sundernagar on 1/1994.

3. 2nd place in H.P. State Sub-Junior Boxing championship held at Shimla on 28-30/8/1992.

2. Arvind Bhardwaj (respondent No.3).

1. Participated in 51st Sr. National Ball Badminton championship held at Quilan (Kerla) on 8-11th February, 2006.

2.1st place in State Handball championship held at Una on 7-9/2/1997.

3.State Level Cricket tournament held at Chamba in 1998-99.

4. State Level Cricket tournament held at Nahan in 1999-2000.

3. Therefore, as per criteria fixed for eligibility of sportspersons under 3% reservation policy, these both candidates do not falls under distinguished sportspersons category and are not eligible for appointment under the scheme. The minimum eligibility for sportspersons is atleast 3 times participation in National championship and Sr. National championship in one game. It is also submitted for the information of the Hon'ble Court that during 2009 respondent No.3 Sh. Arvind Bhardwaj attended this office for getting his name sponsored for the post of J.E. (Electrical) to Chief Engineer (Operation) North, HPSEB, Dharamshala under 3% sports quota. He has been informed vide this office letter No. 6-1/2006-YSS-1870 dated 2.4.2009 (copy annexed vide Annexure R-II) and letter No. 6-1/2006-YSS-2902 dated 29.6.2009 (copy annexed vide Annexure R-III) that his claim for appointment under sports quota can not be considered since, he do not fulfill the required criteria prescribed under the 3% reservation policy. A copy of the scheme has also been provided to him by this office on his demand."

Further in para-5 of the supplementary affidavit, it has been averred:

"It is, therefore, most respectfully prayed that as stated in present Supplementary Affidavit to this case, it is humbly stated that this Department sponsor the names of eligible sportspersons for all requisitioned post on the basis of their sports achievements and suitability for any of the post. The names of the petitioner and respondent No.3 are not registered with the cell since they do not fulfill the criteria specified under 3% reservation policy…"

Based upon the aforesaid contents of the supplementary affidavit, the learned writ Court dismissed the writ petition.

5. The learned counsel for the appellant has vehemently argued that the learned writ Court has not taken into consideration the fact that there are two modes of recruitment for the post of Junior Engineer (Electrical) out of which one is on batch-wise basis wherein the quota and posts are reserved for sports person and secondly through the competitive examination in which the posts are reserved for sportsman and filled up by way of examination held by the Himachal Pradesh Subordinate Services Selection Board. The appellant falls in the latter class and had appeared in the competitive examination and despite having secured highest marks he had not been offered appointment. According to appellant, the learned writ Court has wrongly applied the procedure applicable to candidates, who were to be appointed on batch-wise basis to the case of the appellant and thereby reached a wrong conclusion. He would further contend that the appellant was meritorious sports person and was required to be appointed since he had participated in the games recognized and notified by the respondents themselves.

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

7. There is inherent fallacy in the argument of the appellant that he had been selected and, therefore, ought to have been appointed. No doubt, the petitioner appeared in the screening test and qualified that, but that in itself would not entitle him for appointment. In order to be selected, he was further required to fulfill the eligibility criteria in terms of the notifications referred to by respondent No.4 in the supplementary affidavit (supra). This criteria of selection was applicable to the categories not only of the batch-wise selection but even to the case of candidates, who appeared in the competitive examination and passed the same. The merit of the appellant was not to be judged solely on the basis of screening test as this was only for the purpose of judging the basic eligibility of the candidates, thereafter the selection under a specified category i.e. sports was to be carried out in accordance with the criteria laid down for the same.

8. The other contention of the appellant that he possessed certain merit certificates wherein he had excelled in sports and, therefore, ought to have been appointed is again without any force. The mere fact that the appellant possessed certain certificates would not ipso facto entitle him to be appointed under the sports quota because unless and until the petitioner did not fulfill the criteria of selection under this category as had been laid down by the respondents, he could not have been selected. The respondent No.4 after taking into consideration all the certificates produced by the appellant has not found the appellant to be fulfilling the required criteria prescribed under 3% reservation policy as he did not fall in distinguished sportspersons category.

9. For the detailed reasons stated above, we find no merit in the appeal and the same is accordingly dismissed, leaving the parties to bear their own costs.

****

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

Jai Parkash son of Sh. Krishan Chand. ...Applicant.
Versus
State of Himachal Pradesh. ...Non-applicant.

Cr.MP(M) No.1150 of 2014.
Order reserved on: 20.10.2014.
Date of Order : November 12 , 2014.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 467, 468, 471 and 120B of IPC- held that Court has to see nature and seriousness of offence, the character of the evidence, circumstances which are peculiar to the accused, possibility of the presence of the accused at the trial or investigation, reasonable

apprehension of witnesses being tampered with and the larger interests of the public or the State- allegations against the petitioner were regarding the embezzlement of Rs. 19,70,000/-- investigation was undergoing and specimen signatures were to be taken- since the investigation was not complete, therefore, bail rejected.

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration, AIR 1978 SC 179

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

Sidharam Satlingappa Mhetre Vs. State of Maharashtra and others, AIR 2011 SC 312

State of Kerala Vs. Raneef, AIR 2011 SC 340

For the applicant: Ms. Anjali Soni Verma, Advocate.
For the respondent: Mr. M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 138 of 2014 dated 18.6.2014 registered under Sections 420, 467, 468, 471 and 120B of Indian Penal Code at Police Station Kangra Himachal Pradesh.

2. It is pleaded that FIR has been registered on false and frivolous ground just to harass the applicant. It is further pleaded that complainant Bank i.e. Branch Manager Canara Bank Branch Office opposite Old Bus Stand Kangra District Kangra HP filed complaint alleging that Canara Bank advanced loan to one Sh Rakesh Verma for purchase of tractor to the tune of Rs.4,70,000/- (Four lac seventy thousand) and one JCB to the tune of Rs.15,00,000/- (Fifteen lac) on dated 30.8.2013 and 17.10.2013 respectively. It is further pleaded that payments were credited in the account of dealer of the said vehicles i.e. M/s Sood Enterprises to whom the applicant is working as Manager. It is further pleaded that when the payment was made in the account of M/s Sood Enterprises then the amount was to be utilized by M/s Sood Enterprises only. It is further pleaded that all records pertaining to the transaction stood seized by the investigating agency and nothing is to be recovered from the applicant. It is further pleaded that applicant is working as Manager with M/s Sood Enterprises and undertaking to abide any terms and conditions imposed by the Court. It is further pleaded that applicant is not required for investigation purpose. Prayer for acceptance of anticipatory bail application filed under Section 438 of the Code of Criminal Procedure sought.

3. Per contra police report filed pleaded therein that FIR No. 138 of 2014 dated 18.6.2014 was registered under Sections 420, 467, 468, 471 and 120B IPC at Police Station Kangra HP. There is recital in police report that applicant Jai Parkash Sood while exercising the powers of Manager in M/s Sood Enterprises issued advance payment receipts. There is further recital in police report that applicant Jai Parkash has also signed the papers on behalf of Sh Samir Sood. There is further recital in police report that sample of signature would be sent to RFSL for comparison with admitted hand writing. There is further recital in police report that applicant Jai Parkash, Samir Sood, Rakesh Verma loanee and Manager Gopal Krishan are all involved in the embezzlement of amount to the tune of Rs.19,70,000/- (Nineteen lac seventy thousand). There is further recital in police report that applicant will induce the prosecution witness and prayer for rejection of anticipatory bail sought.

4. Following points arise for determination in the present bail application:

(1) Whether application filed under Section 438 of the Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of bail application.

(2) Final order.

5. Court heard learned Advocate appearing on behalf of applicant and learned Additional Advocate General appearing on behalf of State and also perused entire records carefully.

Finding upon Point No.1

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case and on this ground present bail application be allowed is rejected being devoid of any force for the reason hereinafter mentioned. The fact whether applicant is innocent or not cannot be decided at this stage. The same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that recovery already stood effected by the investigating agency and nothing is to be recovered and applicant will not influence or temper the prosecution witness and shall join investigation as and when directed by the investigating agency and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors are considered (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** **Also see** ***AIR 1962 SC***

253 titled The State Vs. Captain Jagjit Singh. In the present case the allegation against the applicant are very grave and heinous in nature qua embezzlement of public money to the tune of Rs.19,70,000/- (Nineteen lac seventy thousand). Specimen of hand writings are still to be obtained from the applicant in order to compare with the signature of receipts of advance payment issued by applicant Jai Parkash. It is held that custodial investigation is essential in the present case in order to ascertain the truth qua embezzlement of amount to the tune of Rs. 19,70,000/- (Nineteen lac seventeen thousand). It is held that if anticipatory bail is granted to the applicant at this stage then investigation of the case will be adversely effected qua embezzlement of amount to the tune of Rs.19,70,000/- (Nineteen lac seventy thousand). In the present case public exchequer to the tune of Rs.19,70,000/- (Nineteen lac seventy thousand) is involved. It is well settled law that if there is conflict between the public interest and individual interest then public interest always prevails over the individual interest in the ends of justice. It is well settled law that grant or refusal of anticipatory bail depends upon the facts and circumstances of each case. In anticipatory bail application Court has to keep balance keeping in view the fact that no prejudice should be caused to free fair and full investigation. The facts and case law cited by learned Advocate appearing on behalf of the applicant reported in **AIR 2011 SC 312 titled Sidharam Satlingappa Mhetre Vs. State of Maharashtra and others** and in case reported in **AIR 2011 SC 340 titled State of Kerala Vs. Raneef** are entirely different. Hence the facts of the case law cited supra are not applicable in the present case because in the present case there is allegation of embezzlement of public amount to the tune of Rs.19,70,000/- (Nineteen lac seventy thousand) against the applicant from public exchequer. It is held that in order to conduct fair investigation and in order to ascertain the truth qua embezzlement of amount to the tune of Rs.19,70,000/- (Nineteen lac seventy thousand) custodial investigation is essential in the present case. Hence point No.1 is answered in negative against the applicant.

Final order.

8. In view of the above stated facts present anticipatory bail application filed under Section 438 of the Code of Criminal Procedure 1973 is rejected. Observation made hereinabove is strictly for the purpose of deciding the present anticipatory bail application and it shall not effect merits of case in any manner. All pending application(s) 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

K. P. Singh ...Petitioner

Versus

High Court of H.P. and others ...Respondents.

Civil Review No. 2 of 2012
Judgment reserved on: 28.10.2014
Date of Decision : November 12, 2014.

Code of Civil Procedure, 1908- Section 114 - Review petition was preferred on the ground that additional evidence taken by Inquiry Officer was in violation of Rule 14 (15) of CCS (CCA) Rules- Inquiry Officer was biased and there was violation of Rule 17 – held, that the points raised by the petitioner were also raised before the single judge and thereafter before division bench- there was no error apparent on the face of record- therefore, it is not permissible to set aside the decision- an erroneous decision can be corrected by higher forum in appeal and not by the same court in exercise of the judicial review. (Para-10 and 12)

For the Petitioner : Mr. Jiya Lal Bhardwaj, Advocate.
For the respondents :Ms. Jyotsna Rewal Dua, Advocate, for respondent No. 1.
Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma, Mr. V.S. Chauhan, Addl. A.Gs, Mr. J.K.Verma and Mr. Kush Sharma, Dy. A.Gs. for respondent No. 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This review petition under Section 114 read with Order 47 of the Code of Civil Procedure has been preferred by the petitioner for reviewing the judgment dated 21.4.2011 passed by this Court in LPA No. 163 of 2009 whereby the judgment passed by the learned Single Judge has been affirmed and consequently the writ petition preferred by the petitioner seeking quashing of the order dated 5.6.2004 whereby the petitioner has been ordered to be removed from service has been dismissed.

2. At the outset, it may be observed that against the ju

> *"Learned counsel appearing for the petitioner seeks permission to withdraw this petition to enable the petitioner to file a review petition. Permission is granted. The special leave petition is disposed of as withdrawn."*

3. According to the petitioner, there is error apparent on the face of the record inasmuch as this Court while delivering its judgment on 21.4.2011 has not taken into consideration:

(i) That the additional evidence taken on record by the Inquiry Officer was in violation of Rule 14 (15) of CCS (CCA) Rules

(for short 'Rules') and non-compliance thereof had caused material prejudice to the petitioner;

(ii) The Inquiry Officer was biased and this Court had held that since the petitioner had not approached the reviewing authority for change of the Inquiry Officer, his plea was turned down, while as a matter of fact, the petitioner had approached the reviewing authority vide Annexure P-7 for change of Inquiry Officer; and

(iii) There was violation of Rule 17 of the Rules which mandated the Disciplinary Authority to supply to the petitioner, the copy of the findings/statement of findings on each article of charge after considering the representation submitted by him which was not supplied to him.

4. Before we proceed any further, we may take note of a decision rendered by this Bench in Civil Review Petition No. 4084 of 2013 titled M/s Harvel Agua India Private Ltd. vs. State of H.P. and others, decided on 9.7.2014 wherein after reviewing the entire case law on the subject, this Court held as follows:

> ***"10. Thus what appears to be more than settled law is that an error contemplated under the rule must be such, which is apparent on the face of the record and not an error which has to be fished out and searched. It must essentially be an error of inadvertence and definitely something more than a mere error and must be one which must be manifest on the face of the record. If the error is so apparent that without further investigation or inquiry only one conclusion can be drawn in favour of the applicant, in such circumstances, the review will lie. However, under the guise of review, the parties are not entitled to re-hearing of the same issue but the issue can be decided just by a perusal of the record and if it is manifest can be set right by reviewing the order. It must be remembered that in exercise of the powers of review this court cannot sit in appeal over its own order. Re-hearing of the matter is impermissible in law, since the power of review is an exception to the general rule that once the judgement is signed or pronounced, it should not be altered. It has to be remembered that power of review can be exercised for correction of a mistake but not to substitute a view. The review cannot be treated like an appeal in disguise.***
>
> ***11. The error contemplated under the rule is that the same should not require any long-drawn process of reasoning. The wrong decision can be subject to appeal to a higher form but a review is not permissible on the ground that court proceeded on wrong proposition of law. It is not permissible for erroneous decision to be "re-heard and corrected." There is clear distinction between an erroneous***

decision and an error apparent on the face of the record. While the former can be corrected only by a higher form, the latter can be corrected by exercise of review jurisdiction. A review of judgement is not maintainable if the only ground for review is that point is not dealt in correct perspective so long the point has been dealt with and answered. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition of old and overruled arguments cannot create a ground for review. The present stage is not a virgin ground but review of an earlier order, which has the normal feature of finality.

12. Having observed so, it would be seen that the petitioner is seeking the present review on the ground that points raised in the petition have not been dealt in correct perspective, though the same have admittedly been dealt with. We are afraid that such questions cannot be gone into and determined by this court in exercise of its review jurisdiction, particularly when a detailed judgment running into 35 pages has been delivered by this court, wherein not only the factual but even the legal aspects of the case have been dealt with in detail."

5. Undisputedly, all the points as have been raised herein have been dealt with in detail not only by the learned Single Judge but even by this Court while deciding LPA No. 163 of 2009. The learned Single Judge while deciding the case had culled out the following points for determination:

"27. On the basis of submissions made by the learned counsel for the petitioner, the following points emerge for determination:-

(1) The Inquiring Authority was authorized by disciplinary authority to conduct the inquiry, the impugned order dated 5.6.2004 was passed by the State Government. Therefore, in the present case the disciplinary authority was the Inquiring Authority.

(2) The Inquiring Authority has taken on record various documents of presenting side in violation of Rule 14(15) of the Rules.

(3) The Rule 15(2) and Rule 15(2A) of the rules have been violated.

(4) The impugned order/ notification is not a speaking order. The Rule 17 has been violated. The proceedings of the Full Court meeting dated 7.4.2004 were not supplied to the petitioner, which has caused prejudice to the petitioner.

> ***(5) The statements of most of the witnesses of the presenting side were not supplied at the proper time to the petitioner. The Inquiring Authority did not provide appropriate opportunity to the petitioner to lead defence evidence. The Inquiring Authority was biased. The Inquiring Authority has only considered the case of the presenting side and the evidence led by the petitioner has not been considered. There is no legal evidence in the inquiry in support of various charges. The written arguments submitted to the Inquiring Authority were not considered.***
>
> ***(6) The Disciplinary Authority did not give personal hearing at the stage of considering reply to chargesheet and also at the final stage when the comments of the petitioner to the inquiry report were sought."***

It was after giving detailed findings on each of the points that the writ petition was dismissed.

6. Likewise, when the matter came up before this Court, the petitioner raised the following contentions:

> ***"3. Before us, the main contentions are:***
>
> ***i) The inquiry is conducted in violation of the provisions of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, in particular Rule 14(15);***
>
> ***ii) The report is based on no evidence;***
>
> ***iii) The inquiry officer was biased in the sense also that his version of the absence was not taken into consideration;***
>
> ***iv) The disciplinary authority, namely the High Court has not considered the comments offered by the delinquent officer to the inquiry report and recorded its findings and that such findings have not been communicated to the petitioner whereby the whole proceedings are vitiated; and***
>
> ***v) There is violation of the principles of natural justice in not granting an opportunity for personal hearing."***

This Court dealt with all the aforesaid five contentions in detail and dismissed the appeal preferred by the petitioner-appellant.

7. While dealing with the first contention as now again raised by the petitioner in this petition, this Court held:

> ***"4. The main allegation is that after closing the evidence, new evidence has been permitted to be adduced. Whether it is permissible is the question. Rule 14 of the Central Civil***

Services (Classification, Control and Appeal) Rules, 1965, provides for procedure for imposing major penalties. Sub Rule 15 of Rule 14 reads as follows:

> ***"(15) If it shall appear necessary before the close of the case on behalf of the Disciplinary Authority, the Inquiring Authority may, in its discretion, allow the Presenting Officer to produce evidence not included in the list given to the Government servant or may itself call for new evidence or recall and re-examine any witness and in such case the Government servant shall be entitled to have, if he demands it, a copy of the list of further evidence proposed to be produced and an adjournment of the inquiry for three clear days before the production of such new evidence, exclusive of the day of adjournment and the day to which the inquiry is adjourned. The Inquiring Authority shall give the Government servant an opportunity of inspecting such documents before they are taken on the record. The Inquiring Authority may also allow the Government servant to produce new evidence, if it is of the opinion that the production of such evidence is necessary in the interests of justice.***
>
> ***Note.-- New evidence shall not be permitted or called for or any witness shall not be recalled to fill up any gap in the evidence. Such evidence may be called for only when there is an inherent lacuna or defect in the evidence which has been produced originally."***

5. A perusal of the Rule would clearly show that there is no absolute bar under the Rules in production of new evidence at the stage of closing the case on behalf of the disciplinary authority. It is permissible at the discretion of the Inquiry Officer. It is the duty of the Inquiring Authority to make every possible and permissible attempt to find out the truth and that is why it is sometimes termed as fact finding enquiry. In the event of the Inquiry Officer allowing the production of such new evidence, the delinquent government servant shall be entitled to have, if he deems, a copy of the list of further evidence proposed to be produced and an adjournment by clear three days before the production of such new evidence. The delinquent shall also be entitled to inspect such documents and he may also seek for an opportunity to produce new evidence on his part. The note under Sub Rule 15 bars the production of new evidence to fill up any gap in the evidence; however, such evidence is permitted when there is an inherent lacuna or defect in the evidence which has been produced originally. The documents Exhibits P-2A, P-4A to P-7A, P-11A to P-13A, P-42 to P-48, P-49 and P-50, are the documents which according to the petitioner have been permitted to be produced after closure

of evidence by both the sides. Exhibit P-2A is the certified copy of the passenger manifest of Flight No. TG 316 on 10.12.2002, Delhi to Bangkok and that of Flight No. TG 315 from Bangkok to Delhi on 22.12.2002. Exhibit P-2 originally produced was the computer print out. Likewise, Exhibit P-4A to P-7A are the details of embarkation of the delinquent officer and Smt. Deepa Singh. In the place of those certified copies, computer print outs had already been produced. Exhibit P-11A to P-13A are again the certified copies of the embarkation and dis-embarkation cards, the computer print outs of which had already been produced. Exhibit P-42 to P-48 are the applications of the delinquent officer for visa on arrival, his clear photograph, embarkation form, embarkation form of Ms. Deepa Singh, application for duplicate Passport of delinquent officer, visa application form, the flight manifest of the return flight from Bangkok to Delhi and letter of Royal Thai Embassy, New Delhi, regarding the travel of delinquent officer. Going through the proceedings of inquiry, we find that these documents have been produced with clear three days notice to the delinquent officer and on 27.12.2003, the appellant has acknowledged the receipt of the documents. On 3.1.2004, the statement of the delinquent officer as counter signed by him reads as follows:

> ***"I do not want to lead any evidence in rebuttal to rebut the documents, Exhibits P-2A, P-4A, P-5A, P-6A, P-7A, P-11A, P-12A, P-12A, P-13A, P-41, P-42, P-43, P-44, P-45, P-46, P-47 and P-48, which have been introduced by the presenting side after closure of their evidence. I shall only argue orally with regard to admissibility of these documents and production at a late stage."***

(emphasis supplied)

6. As we have already discussed above, Rule 14(15) does not in any way bar the recalling of any witness or production of new evidence. If such a process is adopted, certain safeguards are prescribed under the Rule so as not to cause any prejudice to the delinquent officer. He is to be given the list of documents, he is to be granted three clear days time, he is to be granted an opportunity to inspect the documents and he is also to be given an opportunity to lead fresh evidence if it is required in the interest of justice. The only restriction is that the evidence thus led shall not be to fill the gaps in the evidence already tendered. But such evidence is permissible to fill up any inherent lacuna or defect in the evidence which has already been tendered. Filling up any gap in the evidence and filling up an inherent lacuna or defect in the evidence are provided in the Rule in contradistinction to each other. The very purpose of inquiry is to find out the facts on the best available evidence. But, in

the process the course of justice shall not be deflected. Sharpening the evidence is different and distinct from filling up any gap or in-consistency in the evidence. Curing any defect in the evidence already tendered so as to make it legally perfect is different from filling up the gap in evidence. What has been done in the instant case is only production of the certified copies of the travel documents on which evidence had already been tendered by producing the un-certified computer print outs. With the leave of the Inquiry Officer, certain documents which have been obtained belatedly from the Thai Embassy also were produced. On an application for producing Exhibits P-49 and P-50 filed on 3.1.2004 by the presenting officer, the delinquent officer stated that:

> ***" I do not want to file any reply to the application produced by the presenting side today. However, I orally oppose the tendering of the documents in evidence at this stage because the evidence of the presenting side has already been closed and the documents cannot be now tendered to fill in a lacuna in the evidence of the presenting side."***

7. In this context, we may also extract the statement of the delinquent officer with regard to Exhibits P-49 and P-50 on 3.1.2004.

> ***" I do not want to lead any evidence to rebut the documents Exhibit P-49 and P-50, which have been produced by the presenting side in the evidence today. I shall, however, rebut these documents in the course of my arguments with regard to their admissibility and late production etc."***

Thus, the only objection of the delinquent officer is with regard to admissibility of the documents and not on the contents of the documents. Exhibit P-49 is a letter from the Royal Thai Embassy, New Delhi addressed to the Registrar of the High Court of Himachal Pradesh. The letter reads as follows:

> ***"The Royal Thai Embassy presents its compliments to the High Court of Himachal Pradesh, Shimla and would like to refer to the latter's letter No. HHC/VIG/PS/2003-3585 dated 26th December 2003 requesting the Embassy to certify the copies of documents of Shri Kiran Pal Singh.***
>
> ***In this connection, the Embassy has the honour to inform the High Court that it has attested a copy of Shri Kiran Pal Singh's visa application form as herewith enclosed. In addition the Embassy has the honour to further inform the latter that the Shri Kiran***

Pal Singh has obtained the visa No. 17908 issued on December 10, 2002 by the immigration office at Chiangmai International Airport, Thailand.

The Royal Thai Embassy avails itself of this opportunity to renew to the High Court of Himachal Pradesh, Shimla the assurances of its highest consideration."

8. Exhibit P-50 is the application for visa on arrival at Bangkok. There is no dispute with regard to the Passport and the details with regard to the address of the applicant and the date on which the application has been filed at Thailand. Having stated before the inquiry officer that the delinquent employee does not have anything to rebut on the evidence thus produced, it is absolutely futile to contend that the documents have been admitted in evidence in violation of the procedure under Rule 14(15). The production being legally permissible, it cannot be said that the inquiry has been conducted in violation of the Rules.

9. PW-1, Shri Promod Sood, Manager, Liaison and Customer Services of Thai Airways International, PCL, New Delhi, has clearly stated before the Inquiry Officer that .....".as per the passengers manifest, which I have brought today (Ext. P-2), a person named Singh K.P. had travelled by our flight No. TG 316, dated 10th December, 2002 from Indira Gandhi International Airport, Delhi to Bangkok. ..... As per the passengers manifest, Singh Deepa has also travelled by this flight from New Delhi to Bangkok. As per the passengers manifest, Singh Deepa Ms and Singh K.P. Mr. returned from Bangkok to New Delhi by Flight No. TG 315 on 22nd December, 2002.".....

10. PW-2 Shri Sandeep Goel, I.P.S., Foreigners Regional Registration Officer, Delhi, referring to the passenger name recorded as retrieved from the computer system and passenger manifest, Exhibits P-3 to P-7 stated that ..... " Sh. Kiran Pal Singh holder of Passport No. R-489789 and Deepa Singh holder of Passport No. E-3033381 have departed from Indira Gandhi International Airport Delhi on 10.12.2002 by flight No. TG 316 of Thai Airways. Both of these passengers have returned to India at I.G.I.A. Delhi on 22.12.2002 by flight No. TG 315 of the airways.".....

11. The delinquent appellant does not have, even according to his own statement, any evidence to lead in rebuttal to the documentary evidence referred to above. Thus, it is not a case of evidence adduced in violation of the Rules or it is not a case of no evidence. It is a fact and it has been also established that the delinquent was in Thailand between 10th December, 2002 to 22nd December, 2002, for which period he later submitted an application for earned

leave on medical grounds. As far as the illicit relationship of Advocate Deepa Singh with the delinquent officer is concerned, the husband of Smt. Deepa Singh and also the son of Smt. Deepa Singh have stated in detail before the inquiry authority. Though it was not necessary for us to extensively refer to facts as above, in view of the vehement contention advanced by the petitioner that it is a report on no evidence and that it is a report on evidence otherwise impermissible and that the version of the delinquent has not been taken into consideration, we have referred to the same. It is settled law that the High Court is not a Court of appeal under Article 226 of the Constitution of India on the decision of the authorities holding departmental inquiry. The Court is concerned to determine whether the inquiry held by a competent authority is done in accordance with the procedure prescribed in that behalf, whether principles of natural justice have been applied, whether there is some evidence for the inquiry officer to reasonably support the conclusion that the delinquent officer is guilty of charge and whether there is overall fairness in the procedure. The Court may also examine whether the conclusion ex-facie is wholly arbitrary or capacious that no reasonable person could ever have arrived at that conclusion."

The detailed findings quoted above, leaving no manner of doubt that this Court had dealt with all the contentions raised by the petitioner minutely and there is nothing on record to suggest even remotely that there is any error much less error apparent on the face of such findings, which may call for interference.

8. Insofar as second contention regarding bias is concerned, the same have been dealt with in the following manner:

"15. As far as the allegation of bias is concerned, admittedly, the petitioner has not approached the reviewing authority for change of inquiry officer or with any such allegation, though made an attempt before the inquiry authority. The inquiry authority having turned down the application on merits, rules permitted him to approach the reviewing authority namely the High Court. Such a step having not taken by the delinquent officer, it cannot be said that there is any basis on the allegation of bias. Therefore, the report of inquiry cannot be assailed as invalid on that count."

9. No doubt, the petitioner had approached the reviewing authority for change of Inquiry Officer on the allegation of bias, but the question is as to whether the Inquiry Officer was in fact biased. This issue has been dealt with in detail by the learned Single Judge in the following manner:

> ***"The Inquiry Officer has the power to take on record additional evidence under sub-rule (15) of Rule 14. The application dated 31.12.2003 indicates that petitioner had raised some grievance for taking on record documents during inquiry from 22.12.2003 to 26.12.2003. There is no allegation in the application that the Inquiring Authority intentionally and with ulterior motive allowed the presenting side to place on record certain documents. In the application dated 31.12.2003, no specific violation of any rule has been alleged for taking on record the documents during inquiry by the Inquiring Authority. Simply because, some orders were passed by the Inquiring Authority, which were not to the liking of the petitioner and according to the perception of the petitioner those orders were wrong, therefore, it cannot be said that the Inquiring Authority had conducted the inquiry in a biased manner. In the application dated 31.12.2003, it has not been stated that the documents taken on record by the Inquiring Authority have caused prejudice to the petitioner. In the application dated 31.12.2003, there is no allegation that statements of witnesses and documents were not supplied to the petitioner at the proper time. In the application, there is no allegation that Inquiring Authority has not given appropriate opportunity to the petitioner to lead defence evidence. The application dated 31.12.2003 for change of Inquiring Authority was considered by the Disciplinary Authority and was rejected. The rejection was accepted by the petitioner. He did not challenge the order of Disciplinary Authority rejecting the request to change Inquiring Authority. The Inquiring Authority has denied the allegation of bias in his reply. The petitioner has failed to establish that Inquiring Authority was biased against the petitioner."***

10. Once the learned Single Judge has come to a categoric conclusion that petitioner had failed to establish that the Inquiring Authority was biased against him, which findings have been upheld by this Court, it is not open for this Court in exercise of its review jurisdiction to interfere with such findings. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the former can be corrected only by a higher forum, the latter can be corrected by exercise of review jurisdiction. It is settled law that even if a decision is erroneous even then it is not permissible for this Court in exercise of its review jurisdiction to re-hear and correct the same.

11. Lastly, insofar as the third contention regarding violation of Rule 17 of CCS (CCA) Rules is concerned, the same has been dealt with exhaustively by this Court in the following manner:

> ***22. The requirement of Rule 17 on communication of orders infact has laid stress on the communication of the***

orders with respect to the findings on each article of charge. In the instant case the disciplinary authority had already communicated the findings on the articles of charge which were established before the inquiry authority.

23. No doubt, right to reason is also one of the facets of the principles of natural justice. However, under the scheme of the disciplinary proceedings as per the CCS (CCA) Rules, though an opportunity to make a representation on the report of the inquiry has been conferred on the delinquent employee, it cannot be said that the representation should be disposed of with reference to all the contentions or on the points urged in the representation. The disciplinary authority having considered the representation in the light of the report of the inquiry officer and having decided to accept and act on the report and having also decided not to dis-agree or reverse any of the findings in the report of inquiry and under the scheme of the proceedings the recommendation for imposition of major penalty being binding on the government which has passed the formal order, it cannot be said that any prejudice has been caused to the delinquent in the process or that there is failure of justice. In other words, reasons of the inquiring authority have only been endorsed by the disciplinary authority and thus requirement of right to reason has been satisfied. Learned counsel for the appellant inviting reference to the decision of the Supreme Court in Pragdas Vrs. Union of India, reported in 1967 MPLJ 868, submitted that the disciplinary authority should have recorded the reasons for the findings. At paragraph 5 of the judgment, it has been held as follows:

> ***" The reasons in support of the order had to be recorded and disclosed to the parties concerned by the Central Government; the reasons could not be gathered from the "notings" made in files of the Central Government. Recording of reasons and disclosure thereof is not a mere formality. The party affected by the order has a right to approach this Court in appeal and an effective challenge against the order may be raised only if the party aggrieved is apprised of the reasons in support of the order."***

24. There cannot be any dispute with regard to the principle of law as stated in the decision. But as already observed above, the disciplinary authority in the instant case has only accepted the report of the inquiring authority and its findings on the findings thus accepted and recorded, which had already been communicated to the petitioner while supplying the inquiry report, the action has been taken. Thus, there is consideration, there is recording of the finding and communication thereof. The reasons leading to the findings are already there in the inquiry report. Nothing

in the report has been added, varied, implied or reversed by the disciplinary authority."

The petitioner has failed to point out as to how there is an error apparent in the aforesaid findings.

12. In case the submissions of the petitioner are tested on the touch-stone of what has been laid down by this Court in ***M/s Harvel Agua India Private Limited*** (supra)**,** it would be seen that under the guise of review the petitioner is seeking re-hearing of the issues, which is impermissible in law. The petitioner under the guise of review is not seeking correction of any mistake but is seeking substitution of a view. Review of judgment is not maintainable if the only ground for review is that point is not dealt in correct perspective so long the point has been dealt with and answered. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition of old and overruled arguments cannot create a ground for review. The judgment sought to be reviewed has to be read as a whole and the petitioner cannot be permitted to pick up or single out a paragraph and juxtapose the same with another paragraph to contend that there is an error apparent on the face of record.

13. In view of aforesaid discussion, the petitioner has failed to make out a case calling for interference under Section 114 read with Order 47 of the Code of Civil Procedure. Accordingly, we find no merit in this review petition and the same is dismissed, leaving the parties to bear their own costs.

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

Shri Karam Singh ...Petitioner.
Versus
Managing Director & another ...Respondents.

CWP No. 8238 of 2014-D
Decided on: 12.11.2014

Constitution of India, 1950- Article 226- Petitioner was posted in Shimla and was transferred to Reckong Peo, a tribal area- he completed his tenure but was not transferred- respondents directed to consider the case of the petitioner for transfer within one week and to take disciplinary action against the transferred employee who have failed to join the duty within stipulated period. (Para- 4 and 5)

For the petitioner: Mr. S.D. Gill, Advocate.
For the respondents: Mr. B.N. Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

It is contended that the petitioner was appointed as Conductor in the year 2007, was posted at Shimla till 21st January, 2010, thereafter, was transferred to Reckong Peo, District Kinnaur, which is a tribal area, on 21st January, 2010, has completed his normal tenure, as given in the transfer policy, on 21st January, 2013, but despite that, the respondents have not transferred him and is still working on the said post.

2. Issue notice. Mr. B.N. Sharma, Advocate, waives notice on behalf of the respondents.

3. We hope and trust that learned Advocate General will advise all the departments to strictly follow the transfer policy, particularly in case of the persons, who are posted at hard/tribal areas.

4. At this stage, learned Advocate General stated that all the departments concerned be directed to ensure that the employee(s), who is/are transferred to tribal/hard areas, join(s) forthwith, in default, the departments are to draw disciplinary action.

5. We deem it proper to dispose of this writ petition by directing the respondents to consider the case of the petitioner for his transfer within one week. Respondents are also directed to draw disciplinary action against the transferred employee(s), who fail(s) to join within the stipulated period.

6. Learned Advocate General is at liberty to convey this direction to the Heads of all the Departments.

7. The writ petition is disposed of accordingly alongwith all pending applications.Copy **dasti.**

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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.8149 of 2010 a/w CWPs
No.8284 of 2010, 653 of 2003 and
CWPIL No.34 of 2011
Date of order : 12.11.2014

1. CWP No.8149 of 2010

People for Animals Kasauli and another .....Petitioners

Versus

Union of India & others ..... Respondents

2. CWP No.8284 of 2010

Animal and Birds Charitable Trust .....Petitioner

Versus
State of H.P. & others ..... Respondents

3. CWP No.653 of 2003
Kanwar Rattanjit Singh .....Petitioner
Versus
Union of India & others ..... Respondents

4. CWPIL No.34 of 2011
Court on its own motion .....Petitioner
Versus
State of H.P. & others ..... Respondents

Constitution of India, 1950- Article 226- PCCF (Wildlife)-cum-Chief Wildlife Warden, H.P., Shimla had written a letter to Additional Director General (Wildlife), Government of India, Ministry of Environment and Forests, Paryavaran Bhavan, CGO Complex, New Delhi, to deal with the monkey menace, but no decision was taken- therefore, Union of India directed to file compliance report as well as report regarding the steps taken in terms of letter.

(Para-2 and 3)

For the petitioners: Mr. Gaurav Sharma, Advocate vice Ms. Vandana Kuthiala, Advocate, for the petitioners in CWP No. 8149 of 2010.

Mr. R.L. Sood, Senior Advocate with Mr. Sanjeev Kumar, Advocate, for the petitioner in CWP No. 653 of 2003.

Mr. Arvind Sharma, Advocate, for the petitioners in CWP No.8284 of 2010.

For the respondents: Mr. Ashok Sharma, ASGI, for Union of India.

Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr.V.S. Chauhan, Additional Advocates General and Mr. J.K. Verma Deputy Advocate General, for the respondents-State.

Mr. Hamender Chandel, Advocate, for Municipal Corporation.

Mr. Y.K. Thakur, Advocate, for the Animal Welfare Board.

Mr. Bhupinder Kanwar, Advocate, for the applicants.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

CWP No.653 of 2003 is in the docket of this Court for the last 11 years and other writ petitions are pending for the last more than four years. Speaking orders have been passed from time to time but despite of that neither the State of Himachal Pradesh nor the Union of India has taken requisite steps to do the needful in order to prevent monkey menace and also to take steps how to manage stray dogs.

2. It appears that the letter dated 13th November, 2013, made by PCCF (Wildlife)-cum-Chief Wildlife Warden, H.P., Shimla to Additional Director General(Wildlife), Government of India, Ministry of Environment and Forests, Paryavaran Bhavan, CGO Complex, New Delhi, deals with the subject. On noticing the said letter, concerned Authority of Union of India was directed to make decision and to do the needful, has not taken steps till today. The growth of monkeys is at peak and also the number of stray dogs is increasing day by day, which is causing threat to everybody and it is shocking to record that in the last week we have lost a precious life of young woman.

3. Keeping in view the orders passed from time to time and the above circumstances, this Court has to pass coercive orders to save human lives and property of the State of Himachal Pradesh, but we refrain to pass such orders at this stage and deem it proper to direct Mr.Ashok Sharma, learned Assistant Solicitor General of India to file compliance report in terms of orders passed by this Court from time to time and also file report as to what steps were taken in terms of letter (supra).

4. Mr. R.L. Sood, Senior Advocate, has filed suggestions, which are taken on record. Learned Advocate General and learned Assistant Solicitor General of India and other Advocates present are at liberty to file response.

List on 9th December, 2014. **Dasti copy**.

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

LPA Nos. 4074 of 2013 and 186 of 2014.
Judgement reserved on: 28.10.2014.
Date of decision: 12.11.2014.

1. LPA No. 4074 of 2013.

State of H.P. & ors. ..... Appellants.

Vs.

Dr.(Mrs.) Man Mohini Sharma & anr. ..... Respondents

2. LPA No. 186 of 2014.

State of H.P. & ors. ..... Appellants.

Vs.

Dr. Bharat Bhushan Sharma & anr. ..... Respondents

Constitution of India, 1950- Article 226- Petitioners were appointed as Assistant Surgeon and Assistant Professor in the department of Health and Medical Education, Jammu and Kashmir – they had applied through proper channel for the post of Lecturer/ Assistant Professor at IGMC, Shimla- they made representation for counting the services rendered by them in Jammu and Kashmir for the purpose of pensionary benefits- Govt. refused to do so on the ground that there was no reciprocal arrangement with the State of Jammu and Kashmir- held, that as per CCS (Pension) Rules, 1972 and decision No. 5(2)(b) of Rule 14 liability is to be borne in full by the Central/ State department and no recovery is to be made from Central/State Government under whom employee had served, therefore, it was not open for the State Government to decline the claim of the petitioners on the ground that there was no reciprocal arrangement with the State of Jammu and Kashmir. (Para-12 to 14)

For the appellants : Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. V.S. Chauhan, Additional Advocate Generals, Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals, in both the appeals.

For the respondents : Mr. K.D.Shreedhar, Senior Advocate with Mr. Yudhvir Singh Thakur, Advocate, for respondent No. 1, in both the appeals.
Nemo for respondent No.2 (in both appeals).

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common question of law and fact is involved in both these appeals, the same are taken up together for disposal.

2. The respondents- writ petitioners had worked as Assistant Surgeon and Assistant Professor, respectively, in the department of Health and Medical Education, Jammu and Kashmir. Dr. Man Mohini Sharma served the government of Jammu and Kashmir from 1967 to 1983, while Dr. Bharat Bhushan served there from 1966 to 1980. Undisputedly, both of them applied through proper channel for the post of Lecturer/ Assistant Professor at Indira Gandhi Medical College (IGMC), Shimla and after being relieved on 12.4.1983 and 10.12.1980 joined immediately on 12.4.1983 and 12.12.1980, respectively. After joining at

Shimla, the petitioners made various representations for counting the service rendered by them with the Jammu and Kashmir Government for the purpose of pensionary benefits. Pursuant to which various inquiries were held and government of Jammu and Kashmir vide letter dated 29.7.1999 unequivocally and unconditionally gave their no objection in case the service of the petitioners rendered by them with the government of Jammu and Kashmir is counted for the purpose of pension.

3. Thereafter the State Government appears to have sought a clarification from the Principal, Indira Gandhi Medical College to the effect as to whether the resignation tendered by the writ petitioners was required for administrative reasons or for satisfying a technical requirement. The State of Jammu and Kashmir informed that the resignation was on account of administrative reasons for satisfying the technical requirement and not for any other reason. Despite all these communications, when the appellants failed to count the service rendered by the writ petitioners in the State of Jammu and Kashmir for the purpose of pension, they filed the Original Applications before the erstwhile Tribunal.

4. Out of them, one of the petitions being OA No. 1837 of 2008 preferred by Bharat Bhushan Sharma came to be dismissed on 3.5.2006 on the ground that unless and until there was reciprocal arrangement or unless the government of Jammu and Kashmir agreed for proportionate contributory liability, the services of the petitioners therein could not be counted.

5. Against this finding, Civil Review (T) No. 20 of 2008 was preferred by Bharat Bhushan Sharma respondent herein, which came to be allowed on 25.10.2010, wherein this court observed as under:-

> *"….Inviting reference to 14(2)(b) of CCS (Pension) Rules, it is submitted that liability is to be borne by the government under whom the petitioner served at the time of retirement. This aspect of the matter has not been considered in the order. Therefore, the review petition is allowed and the order dated 3.5.2006 is recalled."*

Upon closure of the Administrative Tribunal, these petitions were transferred to this court and were registered as CWP(T) No. 33 of 2010 and CWP(T) No. 3073 of 2008 respectively. The petition filed by Bharat Bhushan Sharma was disposed of with the following observations:-

> *"The petition is filed with the following prayer:-*
>
> > *"(i) That respondents No. 1 to 3 be directed to count the service of 14 years, 4 months and 4 days (with effect from 15.8.66 to 11.12.80) rendered by the applicant under the State of Jammu and Kashmir prior to the joining the service of respondent No. 1 for the purpose of all pensionary benefits and after doing so, the necessary instructions be conveyed to the respondent No. 4 for calculating revised pension and gratuity and any other benefit payable to the applicant on this account."*

2. It is stated in the reply at Paras 6(i) to 6(xii) as follows:-

"Matter of record and hence not denied. However, it is stated that the request of Dr. Bharat Bhushan Sharma (applicant) for counting of his past service rendered under the Jammu & Kashmir Govt. is under consideration of the Govt. under the rules with the clear condition/understanding that the doctor concerned was appointed in IG Medical College, Shimla on the basis of his application received through proper channel in the H.P. Public Service Commission and that he was relieved by his parent organization in J&K for joining the new assignment in HP and was governed under GPF rules in his parent organization. From the perusal of copies annexed by the applicant with his application, it is evident that the replying respondent is processing the case for counting his past service rendered under the J&K Govt. on the above lines and will arrive at a decision at the earliest after completion of all formalities. It is wrong to say that the J&K Govt. has supplied the entire information sought by the Replying respondent as alleged by the applicant. In fact, the J&K Govt. has not responded to the specific query raised by the Replying Respondent through Principal IG Medical College Shimla to the effect whether the State Govt. of J&K will bear the proportionate pensionary liability in respect of service rendered by the applicant under the J&K Govt. to the extent such service would have been qualified for the grant of pension under the rules on service share basis. Similarly, the J &K Govt. has not informed whether the amount of GPF alongwith interest thereon was transfferrr4ed by the AG J&K to AGHP or not and if yes, the detail of transfer and if not reasons thereof. The Replying Respondent have no objection to the counting of past service rendered by the applicant for pensionary benefits in case the J&K Govt. gives its specific acceptance to bear the proportionate pensionary liability on service share basis. The Principal IGMC in his letter annexed at Annexure RA has informed that reply of the J&K Govt. is awaited and will be supplied as and when received.

From the position narrated above, it is evident that request of the applicant is under consideration of the Govt. and appropriate decision will be taken as and when specific information called for is received. The Replying Respondent has again taken up the matter with the J&K Govt. vide copy of letter annexed at R'B' to expedite the information enabling the Replying Respondent to take a decision at the earliest. The Replying Respondent is keen that the case is processed at the earliest in order to redress the grievances of the applicant under the rules."

3. Reference is invited to Government of India decision No. 5(2)(b) below Rule 14 of the CCS(Pension) Rules, 1972, which reads as follows:-

"The liability for pension including gratuity will be borne in full by the Central/State Department to which the Government servant permanently belongs at the time of retirement. No recovery of proportionate pension will be made from Central/State Government under whom he had served."

"4. It is submitted that the petitioner is entitled to get full pension of the services rendered in Jammu and Kashmir. There will be a direction to the first respondent to take a final decision in the matter and settle the pension case of the petitioner in the light of the Government of India's decision (No. 5(2)(b) below Rule 14 of the CCS (Pension) Rules, 1972), if not already taken, within two months from the date of production of copy of this judgement by the petitioner. Needless to say, eligible benefits, if any, to which the petitioner is entitled, shall be disbursed to him within another one month. The question of interest is left open."

6. In compliance to the aforesaid orders of this court, the appellants after reproducing the orders of this court, decided the matter in the following terms:-

"FD observes that the H.P. Govt. do not have any reciprocal agreement with J&K Govt. for sharing person and leave salary contribution and J&K Govt. has refused to bear proportionate pensionary liabilities of both these doctors."

7. Aggrieved yet again by the orders passed by the appellants, the petitioners approached this court by filing CWP Nos. 4295 of 2012 and 4296 of 2012 challenging the orders passed by the appellants. The learned single Judge allowed these petitions by observing as under:-

"6. This is no decision in the eyes of law. The only ground urged by the State is to deny pension to the petitioners on grounds which are untenable and against the very provision of the Pension Regulations. I find it extremely distressing that the direction issued by this Court should be left to the judgment of some lower rank Clerk in the secretariat who recommends to the Secretary (Health) to the Govt. of H.P. that there is no agreement with Jammu & Kashmir Government for sharing proportionate pensionary liability of both doctors. Rule 14 (2) (b) clearly provided that:

"2.....

(a).....

***(b) Pension**: The liability for pension including gratuity will be borne in full by the Central/State Department to which the Government servant permanently belongs at the time of retirement. No recovery of proportionate pension will be made from Central/State Government under whom he had served"*

7. Learned counsel appearing for the petitioner relies upon the decision in Prof.Dr.R.R.Sharma (Retd.) Vs. Post Graduate Institute of Medical Education and Research, Chandigarh, 2000(1)SCT 565, holding:

> *"12. The writ petition is allowed. The Post Graduate Institute is directed to pay to the petitioner the full amount of pension and the full amount of gratuity counting his qualifying and continuous combined service from September 25, 1954. This shall be done without any more waiting for the receipt of the proportionate amount from the Uttar Pradesh Government and the Karnal Institute. The arrears shall be paid to the petitioner within three months from the date of this order with interest at the rate of 12% per annum from November 1, 1991 till the date of payment. The Post Graduate Institute shall be at liberty to recover the amount of proportionate liability from the Uttar Pradesh Government and the Karnal Institute. It is further ordered that the Uttar Pradesh Government and the Karnal Institute shall pay the proportionate amount towards pension and gratuity to the Post Graduate Institute within three months from the date of this order." (P.567)*

8. It is against this judgement that the appellants are before this court and alleged that the findings recorded by the learned single Judge are contrary to the provisions of CCS (Pension) Rules, 1972, which were inapplicable to the case of the petitioners, since they were erstwhile employees of the Jammu and Kashmir Government and governed by Jammu and Kashmir Civil Service Regulations.

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

9. It is extremely distressing to note that despite the repeated observations of the court, the respondents have again rejected the claim of the writ petitioners only on account of their being no reciprocal arrangement with Jammu and Kashmir government for sharing person and leave, salary contribution and that the government of J&K had refused to bear proportionate pensionary liability of both these writ petitioners. What is more shocking is that this opinion is not even that of the employer i.e. Secretary (Health) who was to decide the case, but is in fact an opinion of the Finance Department.

10. Admittedly, the appellants herein did not challenge the findings recorded in the review petition which have attained finality and are now therefore clearly estopped from rejecting the claim of the writ petitioners on a ground which was already held to be not tenable.

11. Having said so, we still proceed to test the argument of the appellants that the writ petitioners were not entitled to counting of service rendered by them in the State of Jammu and Kashmir in view of CCS (Pension) Rules not being applicable to them and they being governed by the Jammu and Kashmir Civil Services Regulations.

12. We find no merit in the contention raised by the appellants for more than one reason. Firstly, the appellants were required to comply with the directions passed by the Division Bench of this Court in

CWP(T) No. 33 of 2010, wherein after taking into consideration the respective stand of the parties, this court had issued specific direction to the appellants to settle the pension case of the writ petitions in light of the Government of India's decision contained in decision No. 5(2)(b) below Rule 14, which reads thus:-

> *"The liability for pension including gratuity will be borne in full by the Central/ State Department to which the Government servant permanently belongs at the time of retirement. No recovery of proportionate pension will be made from Central/ State Government under whom he had served."*

Once this is the position, it was not open to the appellants to have rejected the claim of the writ petitioners on any other ground and the decision was required to be taken strictly in accordance with the directions so issued.

13. Secondly, this very plea of the appellants had already been negated by this court while allowing Civil Review (T) No. 20 of 2008.

14. Thirdly, decision No. 5(2)(b) of Rule 14 of CCS (Pension) Rules, 1972 categorically provides that liability for pension including gratuity will be borne in full by the Central/ State Government to which the government servant permanently belongs at the time of retirement and no recovery of proportionate pension will be made from Central/ State Government under whom he has served. The provisions of the rule are absolutely clear and unambiguous and do not contemplate any reciprocal agreement between two States for sharing persons and leave, salary contribution. Even otherwise the State of Himachal Pradesh is always at liberty to recover the proportionate liability from the State of Jammu and Kashmir. The mere fact that the State of Himachal Pradesh has not been able to recover the proportionate liability from the State of Jammu and Kashmir or that the State of Jammu and Kashmir has refused to bear proportionate pensionary liabilities of the respondents cannot be a ground to deny the benefit of the rule to the respondents.

15. Accordingly, we find no merit in these appeals and the same are dismissed, leaving the parties to bear their own costs.

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

Suresh Kumar ...Petitioner.
Versus
State of H.P. & others ...Respondents.

CWP No. 8235 of 2014-D
Decided on: 12.11.2014

Constitution of India, 1950- Article 226- Petitioner was transferred from Pangi, a tribal area to GHS Tippar from where he was transferred to

GMS Jhaniker and again to tribal area- transfer policy framed by the Government provides that employee who served in Tribal/ Hard/Difficult Areas as well as in Remote/Rural Areas are not to be transferred to the same area again- hence, respondents directed to examine the case of the petitioner afresh and to pass appropriate order. (Para-3 and 4)

For the petitioner:	Mr. Kulbhushan Khajuria, Advocate.
For the respondents:	Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma, Additional Advocate General, and Mr. J.K. Verma & Ms. Parul Negi, Deputy Advocate Generals

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

It is contended that the petitioner was posted at GHS Sural, Tehsil Pangi, District Chamba, which is a tribal area, was transferred on completion of his normal tenure to GHS Tippar, District Hamirpur, was again transferred to GMS Jhaniker under complex GHS Barara, and, as on today, is at GMS Bhebar under complex GSSS Biar, District Hamirpur, now has been transferred, on the behest of MLA, in terms of order, dated 15th October, 2014, to again a tribal area, which is in violation of the transfer policy.

2. Issue notice. Mr. Romesh Verma, learned Additional Advocate General, waives notice on behalf of respondents No. 1 to 3.

3. It appears that the impugned order has been passed in violation of the transfer policy. It is apt to reproduce clause 12 of the said policy, dated 10th July, 2013, herein:

> *"**12. Posting of Employees in Hard/Difficult/ Remote/Hard Areas:** In view of the observations made by the Hon'ble High Court vide judgment dated 27-08-2007 in CWP No. 1105/2006 titled as Sushila Sharma, Head Teacher V/s State of H.P. & others, every department will ensure that all the employees are treated fairly and equally in the matter of transfer and posting. The Departments may also ensure that every employee during his tenure of service, serves in Tribal/ Hard/Difficult Areas and also in Remote/Rural Areas. While making transfers the Department shall ensure that the employees who have already served in Tribal/Hard Areas as well as in Remote/Rural Areas are not again sent to these Areas and there may be a continuous process of change whereby all the employees have a chance to serve in Tribal/Hard Areas as well as Remote/Rural Areas and measures shall be taken to ensure that employees remained posted in the Urban Areas/Cities*

for a long period, are transferred and posted to Rural/Remote Areas and Hard/Tribal Areas in the transfer season when the transfers are made. It will be the responsibility of concerned Head of Department/competent authority to relieve the officer/official transferred to tribal / difficult / hard / remote / rural areas.

12.1 All the Departments will ensure that all employees during their entire period of service will serve for at least single tenure in the Tribal/Difficult/Hard areas and remote/rural areas. In order to earn their promotion, service in such areas will be mandatory. This would be subject to adequate number of posts being available in such areas. However, this will not apply to those employees who have less than 5 (Five) years to superannuate. This stipulation is to be incorporated in R&P Rules wherever applicable. A common provision to this effect has been devised by the Department of Personnel after having obtained the approval of competent authority. No Government employee can claim his transfer or posting as a matter of right. It will be the discretion of the State Government to post/transfer any employee anywhere in the State keeping in view of the administrative exigencies/convenience."

4. In the given circumstances, we deem it proper to dispose of this writ petition by directing the respondents to examine the case afresh and pass orders within four weeks. Till then, the impugned order is stayed.

5. The writ petition is disposed of accordingly alongwith all pending applications. Copy **dasti.**

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

H.P. State Electricity Board Ltd. .....Appellant
Versus
Sh. Jeet Ram Panwar and others ...Respondents.

LPA No. 93 of 2011.
Date of decision: 13th November, 2014.

Constitution of India, 1950 - Article 226- Appellants were directed by writ court to remove the anomaly in the pay scale by giving benefits of stepping up of the pay along with interest @ 7 % per annum- held, that

the order passed by the Writ Court does not suffer from any infirmity- appeal dismissed. (Para-2 and 4)

Case referred:
Er. Gurcharan Singh Grewal and another vs. Punjab State Electricity Board and others, 2009 (1) Scale 535

For the appellant: Mr. Satyen Vaidya, Advocate.
For the respondents: Mr. Subhash Sharma, Advocate.

The following judgment of the Court was delivered:

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

The challenge in this Letters Patent Appeal is to the judgment and order dated 27.10.2010, passed by the learned Single Judge of this Court in CWP(T) No.5138 of 2008, titled *Jeet Ram Panwar and others vs. Himachal Pradesh State Electricity Board*, whereby impugned letter dated 11.1.2000 was quashed and the appellant-Board was directed to remove the anomaly by giving the benefit of stepping up of pay to the petitioners from due date alongwith interest @ 7% per annum, for short "the impugned judgment."

2. We have gone through the impugned judgment and are of the considered view that the Writ Court has rightly made the impugned judgment. 3. The learned counsel for the appellant was asked to carve out a case for interference by this Court but he failed to do so.

4. The Writ court has specifically made the mention of the case of the writ petitioners in paras 1 and 2 of the impugned judgment and also rightly discussed the ratio of the judgment of the apex Court in ***Er. Gurcharan Singh Grewal and another vs. Punjab State Electricity Board and others, 2009 (1) Scale 535.***

5. In view of the above stated position, no case for interference is made out. The appeal merits dismissal and is accordingly dismissed alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Miss Lata Sharma .....Appellant
Versus
The H.P. State Electricity Board and others ...Respondents.

LPA No. 34 of 2010.
Date of decision: 13th November, 2014.

Constitution of India, 1950- Article 226- Petitioner sought regularization of her services- respondent contended that the services of

the petitioner were not terminated and she had abandoned her job voluntarily- petitioner had not placed on record any termination letter- held that, the version of the respondent that the petitioner had abandoned her services is more probable, therefore, petitioner is not entitled for any relief. (Para 5 and 6)

For the appellant: Mr. Rajinder Sharma, Advocate.
For the respondents: Mr. Satyen Vaidya, Advocate.

The following judgment of the Court was delivered:

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

The challenge in this Letters Patent Appeal is to the judgment and order dated 11.5.2009, passed by the learned Single Judge of this Court in CWP(T) No.4371 of 2008, (OA 1053/97) titled *Miss Lata Sharma vs. The HP State vs. The Himachal Pradesh State Electricity Board and others*, on the grounds taken in the memo of appeal, for short "the impugned judgment."

2. We have gone through the impugned judgment and the petition filed by the petitioner.

3. It appears from the record that the petitioner had invoked the jurisdiction of the Erstwhile Tribunal by filing Original Application and sought reliefs commanding the respondent-Board to re-instate and regularize her services.

4. The respondents have filed the reply. It is stated that she was working with them w.e.f. 12.6.1985 to 25.7.1987 with certain interruptions/ breaks as shown in Annexure RA-2. Thereafter she at her own did not perform her duties w.e.f. 25.7.1987. They have specifically stated that they have not terminated the service of the petitioner. It is apt to reproduce para 2 of the reply on preliminary objections and paras 3, (vi), (ix) and (x) of the reply on merits herein:

> *"2.In this context, the replying respondents submit with utmost respect that the applicant herein was initially engaged by the respondent No. 2 at Panchrukhi (under respondent No.3) on daily wages against the post of bill distributor on 12.6.1985 on the basis of request made by the petitioner received by the respondent No. 2 through the respondent No.1 (Annexed atRA-1). The applicant worked under respondent No. 3 w.e.f. 12.6.1985 to 25.7.1987 with certain interruptions/breaks. A copy of statement showing presence/absence of the applicant is placed on record as (Annexurer-RA-2) and there after applicant left the job of her own accord on w.e.f. 25.7.1987. The respondent No.3 has never terminated the services of the applicant rather she left the service at her own will as back as in the year of 1987 i.e. 10 years back, hence the question of terminating her service*

does not arise at all. Therefore, the original application is not maintainable."

Para-3. Denied to the extent that the services of the applicant were ever dispensed with by the respondent No. 3 rather she abandoned the ob at her own accord. Although she was engaged as bill distributor on daily rated and subsequently she was also performing the duties of MLCS, as and when required but it is incorrect to say that she was paid the wages of daily rated labourer (as per annexed RA-3). In fact she was paid wages of clerk w.e.f. 29.8.85 to 25.7.87 in compliance with the directions of the Hon'ble High Court passed in the CWP 647 titled Sh. Tirath Raj versus HPSEB and @ rates as applicable from time to time and considering that she has oftenly been performing the duties of MLCs,.

4-5.....

6. (i) to (v).....

(vi)That contents of this sub-para as stated are wrong and hence denied. It is submitted respectfully that the respondent No. 3 has never terminated the services of the petitioner rather she abandoned the job of her own accord. It is further added that after completion of 240 days one does not become entitled for appointment on regular basis as claimed by the applicant in t his sub-para.

(vii) to (viii).....

(ix)The contents of this sub-para are wrong and hence denied. The petitioner was given casual cards for the period she worked with the respondent No.3.However, her name was not included in the seniority list as she had neither put in six months un-interrupted service nor actually worked or 120 days prior to 31.8.1986 as per details annexed RA-3 and was not eligible to be brought on the seniority list according to the principle laid down in the CWP 190 of 1984 communicated vide respondent No. 1 letter No. HPSEB (SECTT)/LWO-7-5/84-60748-907 dated 8.6.1984 in consonance to instructions circulated vide Secretary (Labour & Employment) to HP Govt. Letter No. Shram (I)-8/84-II dated 26.9.1986 (Copy annexed at RA-4. The applicant never requested respondent No.2 and 3 for the issuance of casual cards for full period and seniority list and as indicated in para (vii) above also her services were not terminated by the respondent No. 3 hence question of any malafide intention on the ground that respondent No.3 did not want to regularize her services does not arise as she was initially appointed as Bill Distributor subsequent to her working as MLC from time to time she was paid the wages of the Clerk w.e.f. 29.8.1985 to 25.7.87, because the rates for Clerk were notified w.e.f. 29.8.85.

(x) The contents of this sub-para are wrong and hence denied. It is submitted that the respondent No. 3 had never terminated the services of the petitioner rather she left the job of her own accord. As such, the compliance of Section 25 (g) and 25 (f) of the Industrial Dispute Act, 1947 is not mandatory in this case. However, it is correct that she performed the duties of clerk as and when required and accordingly the wages of Daily rated Clerk has already been paid top her as per details (Annexed RA-1) In fact the rate of Rs10/- per day has only been given to her w.e.f. 12.6.85 to 28.8.85."

5. The petitioner has not filed any rejoinder and has also not been able to place on record the termination order. The petitioner has not stated the reasons why she left/ abandoned the duties right from 25.7.1987. Though, she has filed the writ petition before this Court which was dismissed for want of jurisdiction but no liberty was granted to her. Thereafter OA was filed before the HP State Administrative Tribunal.

6. The petitioner on her own has abandoned the service, so the question of issuance of mandamus directing her re-instatement does not arise at all.

7. The learned Single Judge after going through the pleadings and hearing the arguments rightly made the well reasoned judgment, needs no interference. Accordingly, the appeal is dismissed alongwith pending applications, if any.

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

Shri Rattan Chand son of Lachho Ram ....Appellant/Defendant
Versus
Pushpa Devi widow of Shri Balwant Singh
and others ....Respondents/Plaintiffs

RSA No. 61 of 2014
Judgment Reserved on 31st October, 2014
Date of Decision 13th November, 2014

H.P. Land Revenue Act, 1954- Section 107- Demarcation- demarcation was conducted on the basis of Aks Shazra- held, that demarcation should be conducted on the basis of Aks Musabi and the demarcation conducted on the basis of Aks Shazra is not permissible. (Para-10)

Case referred:
State of H.P. vs. Laxmi Nand, 1996 Shimla Law Cases page 314

For the Appellant: Mr. Adarsh K. Vashista, Advocate.

For the Respondents: Mr. Ramakant Sharma, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure by the appellant against the judgment and decree dated 5.2.2013 passed by learned District Judge Hamirpur H.P. in Civil Appeal No. 55 of 2010 titled Rattan Chand vs. Balwant Singh and others whereby learned District Judge Hamirpur affirmed the judgment and decree passed by learned trial Court passed after remand of civil suit.

2. Brief facts of the case as pleaded are that deceased Balwant Singh and Smt. Sansaro Devi plaintiffs filed a suit for fixation of boundaries by way of demarcation of land comprised in Khata No. 107 min Khatauni No. 129 min Khasra Nos. 598, 599 kita 2 area 2 canals 4 marlas as per jamabandi for the year 1995-96 situated in Tika Anu Kalan Mauza Bajuri Tehsil and District Hamirpur with a consequential relief of permanent prohibitory injunction restraining the defendant from raising any construction or changing nature of land and also sought additional relief of possession by way of demolition of construction in case defendant succeed in raising construction over suit land or any part thereof during the pendency of suit. During the pendency of suit Balwant Singh died and his legal representatives brought on record. During the pendency of suit Smt. Sansaro Devi also died and name of Sansaro Devi was ordered to be deleted under Order 1 Rule 10 CPC vide order dated 22.6.1999. It is pleaded that deceased plaintiffs through their legal representatives are owners in possession of land comprised in Khata No. 107 min, Khatauni No. 129 min, Khasra No. 598, 599 measuring 2 canals 4 marlas situated in Anu Kalan, Mauza Bajuri Tehsil and District Hamirpur. It is further pleaded that there are other co-sharers in the suit land but they have not been impleaded as parties and further pleaded that plaintiffs did not deny their right title or interest in the suit land. It is pleaded that no relief is claimed against other co-sharers and it is also pleaded that present suit is filed for their benefit also. It is pleaded that defendant is stranger to the suit land and he has got no right title or interest in or over the suit land. It is pleaded that land of defendant is adjoining to the suit land and defendant had started digging the suit land and has uprooted the boundary and is threatening to raise forcible construction over the suit land and also threatened to dispossess the plaintiffs from the suit land. It is pleaded that plaintiffs requested the defendant on a number of time not to raise construction over the suit land but of no use. Prayer for decree the suit as mentioned in relief clause sought.

3. Per contra written statement filed on behalf of defendant pleaded therein that plaintiffs have no cause of action and further pleaded that other co-sharers are necessary parties. It is pleaded that defendant wanted to raise retaining wall in order to protect his immovable property and plaintiffs are creating interference over the land

of the defendant. It is pleaded that defendant has already filed suit against the plaintiffs and present suit is a counter blast to that suit. It is pleaded that defendant is not raising any construction over the suit land. It is also pleaded that defendant is not interfering over the suit land in any manner and suit has been filed with a malafide intention. Prayer for dismissal of suit sought.

4. Plaintiff filed replication and reiterated his pleadings pleaded in the plaint. As per the pleadings of parties learned trial Court framed following issues on dated 15.6.2002:-

1. Whether the plaintiff is entitled for the relief of fixation of boundaries by demarcation as alleged? …OPP
2. Whether the plaintiff is entitled for the decree of permanent prohibitory injunction as prayed for? …OPP
3. Whether the plaintiff is entitled for the decree of possession by demolition as prayed? OPP
4. Whether the plaintiff has no cause of action as alleged?....OPD
5. Whether the suit is bad for non-joinder of necessary parties as alleged? .....OPD
6. Relief.

5. On dated 14.6.2007 learned trial Court dismissed the Civil Suit No. 354 of 1998. Feeling aggrieved against the judgment and decree passed by learned trial Court Balwant Singh deceased through his legal representatives filed Civil Appeal No. 97 of 2007 titled Balwant Singh deceased through his LRs Pushpa Devi and others vs. Rattan Chand before learned District Judge Hamirpur and on dated 2.3.2009 learned District Judge Hamirpur accepted the appeal without costs and set aside the impugned judgment and decree passed by learned trial Court and remanded the case to learned trial Court for fresh disposal by getting local investigation done under Order 26 Rule 9 of Code of Civil Procedure through the Court and then to dispose of the suit in accordance with law. Thereafter learned trial Court on dated 10.3.2010 decreed the suit filed by plaintiffs for possession of Khasra No. 599/1 measuring 0 canal 5 marlas as per report Ext.PZ-2 and tatima Ext.DW4/A by way of demolition of structure existed upon the suit land at costs and risk of the defendant. Learned trial Court also granted consequential relief of permanent prohibitory injunction in favour of the plaintiffs and against the defendant and defendant was restrained from raising any construction and from changing the nature of suit land and from interfering over the suit land in any manner.

6. Feeling aggrieved against judgment and decree passed by learned trial Court dated 10.3.2010 Rattan Chand filed Civil Appeal No. 55 of 2010 titled Rattan Chand vs. Balwant Singh deceased through his LRs Pushpa Devi and others and same was disposed by learned District

Judge Hamirpur on dated 5.2.2013 and dismissed the appeal filed by appellant Rattan Chand.

7. Feeling aggrieved by judgments and decrees passed by learned trial Court and learned first Appellate Court appellant Rattan Chand filed present Regular Second Appeal and Hon'ble High Court admitted present appeal on the following substantial questions of law on dated 26.2.2014:-

1. Whether the learned Court below while passing the impugned judgment and decree was right in disregarding the demarcation report DW1/A which has been duly proved by the Appellant in accordance with law?
2. Whether the learned Court below while affirming the judgment and decree passed by learned trial Court was right in relying upon the demarcation report Ext.PZ/2 despite the fact that the said demarcation has been conducted in utter violation of the norms fixed for conducting the demarcation?
3. Whether the impugned judgment and decree are sustainable in the eyes of law being based on a demarcation report which is vitiated on account of non-adherence to the mandatory provisions of law governing the conduct of demarcation?

8. Court heard learned Advocates appearing on behalf of the parties and also perused the record carefully.

Evidence adduced by parties

9. PW1 Balwant Singh has stated that he is owner of suit land along with his brothers. He has stated that area of suit land is 2 canals 4 marlas and he has stated that defendant has no legal right title or interest in and over the suit land. He has stated that in the year 1998 defendant started digging the suit land. He has further stated that he requested the defendant not to dig the suit land but defendant did not accept his request and thereafter he filed the civil suit and obtained the ad-interim injunction. He has stated that despite ad-interim injunction defendant started construction of retaining wall, stairs, septic tank and bathroom. He has stated that Local Commissioner has demarcated the suit land and construction was found by defendant upon Khasra No. 599/1. He has stated that defendant agreed that he would exchange 5 marlas of encroachment with Khasra No. 604 but defendant did not give any land in exchange despite assurance. He has denied suggestion that plaintiff has obtained demarcation report in collusion with the concerned authorities.

9.1. PW2 Yog Raj has stated that he has seen the suit property and has further stated that land of defendant is adjoining to the land of plaintiff. He has stated that he was present at the time of demarcation. He has stated that 5 marlas of land was encroached by defendant by way of construction of retaining wall, septic tank and bathroom. He has stated that defendant agreed that he would give 5 marlas of land in

exchange. He has denied suggestion that no compromise was executed between the plaintiff and defendant.

9.2 PW3 Ishwar Chand has stated that lands of parties adjoin to each other and he was present at the time of demarcation. He has stated that Local Commissioner took the statements of parties and further stated that it was found that defendant had encroached 5 marlas of land of plaintiff. He has denied suggestion that he was deposing falsely in Court.

9.3 PW4 Arvind Civil Ahalmad posted in Court No. 3 Hamirpur has tendered the record of file No. 413/98 titled Rattan Chand vs. Balwant Singh.

9.4 PW5 Laxmi Dutt has stated that he was appointed as Local Commissioner and he has submitted report Ext.PW5/A which is correct as per original record. He has stated that tatima is Ext.PW5/B, field book is Ext.PW5/C and statements of parties are Mark X and Y. He has stated that in his presence defendant did not agree to exchange the land. He has stated that he fixed the permanent points ABC from Khasra No. 560, 561 and 559/1. He has stated that he also demarcated Khasra Nos. 560, 561, 562, 563, 445, 1281/589, 1282/589, 559, 556 and 558. He has denied suggestion that he has not properly demarcated the land. He has stated that he has given the demarcation from Aks Musabi. He has denied suggestion that he did not record the statements of parties after demarcation. He has denied suggestion that he did not demarcate the land as per factual position.

9.5 DW1 Dev Raj has stated that on dated 24.11.1998 he went to demarcate the land in case titled Balwant Singh vs. Rattan Chand. He has stated that he demarcated the immovable land in presence of parties and also fixed the boundaries. He has stated that there is road between the lands of parties. He has stated that demarcation report is Ext.DW1/A and copy of Aks Sajra is Ext.DW1/B and copies of statements of parties are Ext.DW1/C and copies of statements of witnesses are Ext.DW1/D. He has stated that he had given the demarcation as per factual position. He has denied suggestion that Balwant Singh was not satisfied with demarcation. He has denied suggestion that he did not conduct demarcation as per demarcation Rules.

9.6 DW2 Besar Chand has stated that he is Pardhan of Gram Panchayat since 17 years and parties are known to him. He has stated that he has seen the suit property. He has stated that a road passes through the lands of parties and further stated that house of Rattan Chand was constructed in the year 1971-72 and he has stated that bathroom and latrine were constructed in the year 1987-88. He has stated that thereafter defendant did not construct anything and further stated that he was present at the time of demarcation. He has also stated that as per demarcation no encroachment on the part of defendant was found.

9.7 DW3 Rattan Chand has stated that he did not raise any construction over the land owned by plaintiffs. He has stated that there is road between the land of plaintiffs and defendant. He has stated that he had old house and further stated that in the year 1988 he had constructed latrine and bathroom. He has stated that in the year 1998 he took the demarcation. He has admitted that he retired as Superintendent from Education Department. He has stated that he served for 37 years and 11 months.

9.8 DW4 Dhyan Singh Kanungo DC Office Hamirpur has stated that he has demarcated the land from triangle system and he also fixed ABC points. He has stated that permanent points were fixed from Khasra No. 555, 589 and 596. He has stated that Khasra numbers of suit land were 598 and 599. He has stated that he demarcated the immovable land from Musabi. He has denied suggestion that he did not properly demarcate the suit land. He has denied suggestion that he did not demarcate the suit land as per instructions of Financial Commissioner. He has stated that he issued notice to the parties Ext.PX on dated 9.6.2006 and recorded the statements of parties Ext.PY. He has stated that copy of Musabi of consolidation for the year 1961-62 is Ext.PZ and copy of musabi of settlement is Ext.PZ-1. He has stated that his report is Ext.PZ-2 which is correct as per original record.

Findings upon Substantial Question of law No.1 framed by Hon'ble High Court:-

10. Submission of learned Advocate appearing on behalf of the appellant that learned trial Court and learned First Appellate Court were not right in disregarding demarcation report Ext.DW1/A dated 24.11.1998 which was proved by appellant in accordance with law is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused demarcation report Ext.DW1/A placed on record. Demarcation vide report Ext.DW1/A was conducted on dated 24.11.1998 by Dev Raj Sharma Tehsildar (Retired). Dev Raj Sharma Tehsildar (Retired) conducted the demarcation report Ext.DW1/A on dated 24.11.1998 on the basis of Aks Sajra Ext.DW1/B placed on record. It is well settled law that demarcation should be conducted through Aks Musabi issued by office of District Collector for demarcation purpose. It is well settled law that any demarcation from Aks Sajra Kishatwar is not proper demarcation because Aks Sajra is prepared from Latha kept in Tehsil. It is well settled law that copy of Aks Musabi is kept in office of District Collector. It was held in case reported in ***1996 Shimla Law Cases page 314 titled State of H.P. vs. Laxmi Nand*** that demarcation from Latha is not permissible. It was further held that in boundary dispute while demarcation following instructions should be followed. (1) If a boundary is in dispute the Field Kanungo should relay it from the village map prepared at the last settlement. If there is a map which has been made on the square system he should reconstruct the square in which the disputed land lies. He should mark on the ground on the lines of the squares the places where the map shows that the disputed boundary intersected those lines and then to find out the position of

points which do not fall on the lines of the squares, he should with his scale read on the map the position and distance of those points from line of a square and then with a chain and cross staff mark put the position and distance of those points. Thus he could set out all the points and boundaries which are shown in the map. But if there is not a map on the square system available he should then find three points from different sides of the place in dispute as near to it as he could. He would chain from one to another of these points and compare the result with the distance given by the scale applied to the map. If the distance when thus compared agree in all cases he could then draw lines joining these three points in pencil on the map and draw perpendiculars with the scale from these lines to each of the points which it is required to lay out on the ground. (II) In the report to be submitted by him, the Kanungo must explain in detail how he made his measurement. He should submit a copy of the relevant portion of the current settlement field map of the village showing the fields if any with their dimensions (Karu Kan) of which he took measurement situated between the points mentioned in Instruction above and the boundary in dispute. This is necessary to enable the Court to follow the method adopted and to check the Field Kanungo's proceedings. (III) If a question is raised as to the position of the disputed boundary according to the field map of the settlement proceeding of the current settlement that also should be demarcated on the ground so far as this may be possible and also shown in the copy of the current field map to be submitted under instruction No. II. (iv) On the same copy should be shown also the limits of existing possession. (v) The areas of the fields abutting on the boundary in dispute as recorded at the time of last settlement and those arrived at as a result of the measurement on the spot should be mentioned in the Field Kanungo's report with an explanation of the cause of increase or decrease if any discovered. (vi) When taking his measurement the field Kanungo should explain to the parties what he is doing and should enquire from them whether they wish anything further to be done to elucidate the matter in dispute. At the end he should record the statements of all the parties to the effect that they have seen and understood the measurements, they have no objection to make to this (or if they have any objection he should record it together with his own opinion) and that they do not wish to have anything further done on the spot. It constantly happens that when the report comes before the Court one or other party impugns the correctness of the measurement and asserts that one thing or another was left undone. This raises difficulties which the above procedure is designed to prevent. (vii) The above instructions should be followed by Revenue Officers or Field Kaungoes whenever they are appointed by a Civil Court Commissioners in suits involved disputed boundaries. There is no recital in document Ext.DW1/B that Aks Sajra was prepared from Aks Musabi. Dev Raj Sharma has given the demarcation on the basis of Aks Sajra prepared from Latha. Hence it is held that demarcation report Ext.DW1/A placed on record could not be relied in view of Ruling cited supra. Hence point No.1 of substantial questions of law is decided against the appellant.

Findings upon Substantial question of law No. 2 framed by Hon'ble High Court.

11. Submission of learned Advocate appearing on behalf of appellant that learned trial Court has illegally relied upon demarcation report Ext.PZ-2 given by Dhyan Singh Sadar Kanungo posted in DC Office is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that after remand learned trial Court appointed Tehsildar Hamirpur as Local Commissioner. It is also proved on record that thereafter Local Commissioner Hamirpur has refused to carry out the demarcation and thereafter learned trial Court appointed Dhyan Singh Sadar Kanungo as Local Commissioner to carry out the demarcation as directed by learned District Judge Hamirpur in Civil Appeal No. 97 of 2007 titled Balwant Singh deceased through LRs Pushpa Devi and others vs. Rattan Chand. It is proved on record that thereafter Dhyan Singh Sadar Kanungo demarcated the suit land and submitted his local commissioner report Ext.PZ-2. Court has carefully perused the report submitted by Dhyan Singh Sadar Kanungo Hamirpur. Dhyan Singh Sadar Kanungo Local Commissioner recorded the statements of parties Ext.PX and Ext.PY and also perused the copy of Aks Musabi issued from the office of District Collector Hamipur and also submitted the Field Book Ext.DW4/A placed on record. It is proved on record that Dhyan Singh has conducted the demarcation from Aks Musabi after fixing permanent points and had also prepared field book strictly in accordance with law. Shri Dhyam Singh has specifically mentioned that Shri Rattan Chand appellant has encroached upon 05 marlas of land comprised in Khasra No. 599/1 by way of construction of retaining wall, bathroom, stairs and gardening as mentioned in field book Ext.DW4/A placed on record. Hence it is held that learned trial Court and learned First Appellate Court have not committed any illegality by way of relying upon report Ext.PZ-2 submitted by Dhyan Singh Sadar Kanungo. Point No. 2 of substantial question of law is decided against the appellant.

Findings upon Substantial question of law No. 3 framed by Hon'ble High Court:-

12. Submission of learned Advocate appearing on behalf of the appellant that impugned judgments and decree passed by learned trial Court and affirmed by learned first Appellate Court are vitiated on account of non-adherence to the mandatory provisions of law governing the conduct of demarcation is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that Dhyan Singh Sadar Kanungo had conducted the demarcation from Aks Musabi by fixing permanent points and it is also proved on record that local Commissioner Dhyan Singh Sadar Kanungo had also prepared field book strictly in accordance with law and it is held that Dhyan Singh Sadar Kanungo had complied the mandatory provisions of law governing the conduct of demarcation properly. Dhyan Singh appeared in witness box and proved demarcation report in accordance with law. It is held that learned trial Court has rightly rejected the objection of appellant filed

upon local commissioner report submitted by Dhyan Singh Sadar Kanungo. Hence point No. 3 of substantial question of law framed by Hon'ble High Court of H.P. is decided against the appellant.

13. In view of above stated facts appeal is dismissed. Judgment and decree passed by learned trial Court in Civil Suit No. 354 of 1998 decided on dated 10.3.2010 and judgment and decree passed by learned District Judge Hamirpur in Civil Appeal No. 55 of 2010 decided on dated 5.2.2013 are affirmed. Parties are left to bear their own costs. Record of learned trial Court and learned first Appellate Court be sent back forthwith along with certified copy of this judgment. Appeal stands disposed of accordingly. All pending miscellaneous application(s), if any, also stands disposed of.

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

Naresh Kumari .....Petitioner.
Versus
State of H.P. & others. .....Respondents.

CWP No. 4334 of 2012.
Reserved on: 16.9.2014.
Decided on: 3.11.2014.

Constitution of India, 1950- Article 226- Petitioner and respondent No. 3 appeared in an interview for the post of trained Dai in which respondent No. 3 was selected - petitioner filed an application before Administrative Tribunal, which was transferred to the High Court- petitioner was permitted to make a representation which she did – however, representation was rejected by Medical Officer- respondent No. 3 had undergone one month's training and not six months' training - Principal Secretary (Health) passed an order holding that there was no requirement of training as per Recruitment and Promotion Rules- held, that trained Dai would mean a Dai who had undergone training and got her name registered under Section 18(2) of H.P. Nurses Registration Act- since, respondent No. 3 had not undergone 6 months' training, therefore, appointment of respondent No. 3 is quashed- respondent No. 2 directed to consider the case of the petitioner and offer her appointment in case she is found eligible. (Para- 14 to 16)

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Parmod Thakur, Addl. Advocate General for respondents-State.
Mr. K.S.Banyal, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The Civil Writ Petition was allowed by this Court vide judgment dated 12.3.2013. The appointment of respondent No. 3 as 'Dai' was quashed and set aside. The respondent No. 3 filed LPA bearing No. 4007 of 2013. The matter was remanded to this Court by setting aside the judgment dated 12.3.2013 in view of the decision taken by the Principal Secretary (Health) to the Government of Himachal Pradesh dated 11.3.2013.

2. Key facts. Interviews for the post of trained Dai were held on 6.8.1997. The petitioner and respondent No. 3 participated in the selection process. The then Medical Officer, Kangra at Dharamshala, vide letter No. Estt./VI/95-6516 dated 12.8.1997 appointed respondent No. 3 as 'Dai'. The petitioner challenged the appointment of respondent No. 3 by filing O.A. before the erstwhile H.P. State Administrative Tribunal. The same was transferred to this Court and assigned CWP-T No. 4528 of 2011. It was decided on 20.10.2010. The petitioner was permitted to make a representation. The petitioner made representation on 12.9.2011. The same was rejected by the Medical Officer Kangra at Dharamshala on 13.10.2011. It is in these circumstances, the petitioner has filed the present petition assailing the appointment of respondent No. 3 being not eligible as per the Recruitment and Promotion Rules, governing the conditions of service of post in question.

3. The petitioner has sought information under R.T.I. about the time duration of the course held at C.H.C. Thural w.e.f. 1986 to 1992 and name wise

list of trainees of the course. The information was supplied to the petitioner by the C.M.O.-cum-P.I.O., District Kangra, vide Annexure P-4 dated 12.1.2012. The name of the petitioner is mentioned at Sr. No. 11 for undergoing training at C.H.C. Thural alongwith other candidates w.e.f. 20.9.1985 to 19.3.1986. The name of respondent No. 3 is not mentioned in this communication. The name of respondent No. 3 has been registered vide Annexure P-5, by the H.P. Nurses Registration Council on 30.4.1997. According to Annexure P-5, respondent No. 3 has undergone training of 'Dai' at C.H.C., Thural from 5.8.1988 to 5.3.1989.

4. Respondents No. 1 & 2 have filed the reply. According to them, respondent No. 3 was fully eligible and qualified to be considered for the post of trained 'Dai' on having been selected by the Selection Committee on the basis of certificate issued by the Block Medical Officer, C.H.C., Thural as also the certificate of her registration issued by the Registrar, H.P. Nursing Registration Council vide Annexure P-5. It has been admitted in the reply that respondent No. 3 has not got her name renewed till date.

5. Respondent No. 3 has also filed the reply. According to her, she has done training of 'Dai' at C.H.C. Thural from 5.8.1988 to 5.3.1989 vide NHRC No. 7428 'Dai' dated 30.4.1997.

6. The parties have also placed on record information supplied by the B.D.O. at page 39 of the Paper Book. According to the information placed on record, respondent No. 3 has undergone one month's training w.e.f. 1.2.1989 to 8.3.1989. Her name was at Sr. No. 19 as per page 40 of the paper book. The Registrar, H.P. Nurses Registration Council, Shimla has also sent communication to P.I.O., Directorate of Medical Education, Kasumpti, Shimla specifically stating therein that the registration of respondent No. 3 was on the basis of 6 months training course, which she has completed from C.H.C. Thural w.e.f. 5.8.1988 to 5.3.1989. As per the record available in the HPNRC in old register on page No. 222. Accordingly, the Block Medical Officer, Thural was directed to file supplementary affidavit as to the variance in the information under the RTI Act and subsequent communication/affidavit filed by the B.M.O. on 11.12.2013. According to the averments contained in the supplementary affidavit, the Block Medical Officer, Thural, received a letter dated 5.1.2012 from the Chief Medical Officer, Kangra alongwith the photocopy of the certificate dated 2.6.1995 issued in favour of respondent No. 3 for verifying the contents of the certificate. The record of the Community Health Centre, Thural was again scrutinized and an old file with regard to the training course of TBAs was traced out also containing therein an award roll of 3 number of TBAs having undergone 30 working days training w.e.f. 1.2.1989 to 8.3.1989 including respondent No. 3. This factual position was also conveyed to the Chief Medical Officer by the Block Medical Officer, vide Annexure P-4 dated 27.1.2012.

7. Thus, it is evident from the annexures at page 39 & 40 that respondent No. 3 has only undergone one month's training w.e.f. 1.2.1989 to 8.3.1989 and not 6 months training. This Court has also directed respondent No. 1 to look into the matter. The Principal Secretary (Health), passed the order on 11.3.2013. According to him, there was no requirement of training as per the Recruitment and Promotion Rules framed on 15.10.1973 in the Health Department.

8. The Registrar H.P. Nurses Registration Council, filed the affidavit in compliance to the orders passed by this Court. According to the affidavit filed on 16.1.2014, it was found that the original copy of the application for registration submitted by respondent No. 3 was verified by Block Medical Officer, Thural Kangra and countersigned by C.M.O, Kangra at Dharamshala on 30.4.1997. According to Annexure-'B', respondent No. 3 had made a representation for registering as trained 'Dai' who have completed 6 months said course at CHC Thural, Kangra, H.P. w.e.f. 5.8.1988 to 5.3.1989. Thus,

according to the Registrar, H.P. Nurses Registration Council, Shimla, the name of respondent No. 3 has rightly been registered as per the H.P. N.R.C. Act.

9. Mr. K.S.Banyal, Advocate, appearing for respondent No. 3 has also filed written submission on behalf of respondent No. 3. Alongwith the written submissions, he placed on record the copy of R & P Rules for Class-IV, Subordinate Service (Non-Gazetted) of the Medical and Public Health Department framed on 15.10.1973. According to these rules, the minimum educational qualification for appointment as 'trained Dai' was primary pass.

10. The Legislative Assembly of Himachal Pradesh has enacted the Himachal Pradesh Nurses Registration Act, 1977, (hereinafter referred to as the Act for brevity) to provide for the registration of nurses, health visitors, midwives, auxiliary nurse midwives and dais in Himachal Pradesh. Section 2(d) defines "dai" to mean any person, whether following a hereditary occupation or not, who ordinarily practices midwifery for gain and who has not passed any of the examinations in midwifery recognized by the Council. As per Section 2(o), "trained dai" means a dai who has been granted a training certificate under the bye-laws made by the Council or one who has been registered under sub-section (2) of Section 18. The detailed procedure has been given, the manner in which the registration of nurses, health visitors, midwives, auxiliary nurse midwives, nurse dais, trained dais and dais has to be made as per Section 18(2) of the Act.

11. I have heard the learned Advocates and gone through the records of the case very carefully.

12. What emerges from the facts enumerated hereinabove, is that the interviews for the post of 'trained Dai' were held on 6.8.1997. Respondent No. 3 was appointed on 20.10.1997. The representation was made by the petitioner pursuant to the judgment rendered by this Court in CWP(T) No. 4528 of 2010 on 20.10.2010. The representation was decided without passing a speaking order on 13.10.2011, vide Annexure P-3. It is evident from the information placed on the record by the petitioner vide Annexure P-4, that the name of respondent No. 3 was not included in the list supplied to the petitioner on 12.1.2012 of 'trained dai' who have undergone training w.e.f. 20.9.1985 to 1992. Respondent No. 3 has got her name registered with the Registrar H.P. Nurses Registration Council vide Annexure P-5 dated 30.4.1997. It is specifically stated in the certificate that respondent No. 3 had undergone training of 'Dai; at C.H.C. Thural w.e.f. 5.8.1988 to 5.3.1989.

13. Respondents No. 1 & 2 have filed the reply. According to the reply filed by respondents No. 1 & 2, respondent No. 3 has undergone the necessary training for six months. They have justified the appointment of respondent No. 3. The additional information was placed on record at page 40 & 42. According to this information, respondent No. 3 had only undergone one month's training w.e.f. 1.2.1989 to 8.3.1989. Her name was at Sr. No. 19. The stand of the Registrar H.P. Nurses Registration Council, as noticed hereinabove, is that respondent No. 3 was registered on the basis of 6 months training course which she has completed at C,H.C. Thural, Kangra, H.P. w.e.f. 5.8.1988 to 5.3.1989. Confronted with this situation, the Court permitted the B.M.O. to file supplementary affidavit explaining the variance. The B.M.O. filed the detailed affidavit on 11.12.2013. He has admitted categorically in his affidavit that respondent No. 3 had only undergone one month's training w.e.f. 1.2.1989 to 8.3.1989. This information was supplied by him to C.M.O, also. Respondent No. 3 has only undergone one month's training. The Court has also directed the Secretary (Health) to look into the matter. He looked into the matter without going into the entire gamut of the matter and decided against the petitioner on 11.3.2013.

14. The petitioner has also challenged Annexure P-9 dated 11.3.2013. There is no merit in the contention of Mr. K.S.Banyal, Advocate that respondent

No. 3 was eligible as per R & P Rules notified on 15.3.1973. The expression used is 'trained Dai'. The minimum qualification prescribed is primary pass. The expression 'trained Dai' would mean as per Recruitment and Promotion Rules, the 'Dai' who has undergone training and subsequently got her name registered under sub section 2 of Section 18 of the H.P. Nurses Registration Act, 1977. According to Section 2(o) of the H.P. Nurses Registration Act, 1977, only those 'trained Dais' could be registered who have been granted training certificate under the bye-laws made by the Council or one who has been registered under sub section (2) of Section 18. The specific stand of respondent No. 3 throughout was that she has done six months training w.e.f. 5.8.1988 to 5.3.1989, on the basis of which certificate was issued to her dated 30.4.1997, vide Annexure P-5.

15. According to the material placed on record, respondent No. 3 had only undergone 30 days training w.e.f. 1.2.1989 to 8.3.1989. The affidavits filed by respondents No. 1 & 2 to the contrary were apparently false. A definite attempt has been made by respondents No. 1 & 2 to mislead this Court by not placing the true facts before it. The B.D.O. in his supplementary affidavit has clearly stated that respondent No. 3 has only undergone 30 days training. The registration of respondent No. 3 by respondent No. 4 i.e. Registrar H.P. Nurses Registration Council was illegal and wrong in the eyes of law. Respondent No. 3 has never undergone six months training, as claimed by her. She could not have been registered by the H.P. Nurses Registration Council.

16. Accordingly, Writ Petition is allowed. Annexure P-9 dated 11.3.2013 is quashed and set aside. The appointment of respondent No. 3 dated 20.10.1997 is quashed and set aside. Respondent No. 2 is directed that in case the petitioner was found suitable in the interview held on 6.8.1997, she be offered appointment as 'Dai' within 8 weeks from today. It is made clear that in the eventuality of the petitioner being offered appointment, she will not be entitled to arrears of salary but the entire period shall be counted for the purpose of increments and pension. The disciplinary proceedings be initiated against respondent No. 3 for obtaining the appointment as 'Dai' in breach of the mandatory provisions of Recruitment and Promotion Rules. The registration of respondent No. 3 vide annexure P-5 dated 30.4.1997, by respondent No. 4 is set aside. It shall be open to respondents No. 1 & 2 to make recovery from the salary of respondent No. 3 from her initial date of appointment i.e. from 20.10.1997 till date.

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

State of Himachal Pradesh .....Appellant
Versus
Soni Kumar and another .....Respondents

Cr. Appeal No. 592/2008
Reserved on: 30.10.2014
Decided on : 3.11.2014

Indian Penal Code, 1860- Sections 498-A and 306- deceased was married to the accused- a daughter aged 3 years old and son aged 9 months were born out of wedlock- accused started beating the deceased and denied maintenance to her- matter was reported to Panchayat- the deceased committed suicide- held, that prosecution witnesses had made improvements in their testimonies -no specific instance was given when the beatings were given to the deceased- father of the deceased had never

made any complaint regarding the beating given to his daughter - no application for maintenance was made by the deceased- hence, version of the prosecution that deceased was forced to commit suicide by accused was not reliable- in order to prove cruelty, there has to be series of events which were not proved- accused acquitted. (Para-15 and 16)

For the Appellant : Mr. Ramesh Thakur, Asstt. AG.
For the Respondents : Mr. N.S. Chandel, Advocate

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted by the State against the judgment dated 28.5.2008, rendered by learned Addl. Sessions Judge (II) Kangra at Dharamshala, HP, in Sessions Case No. 4-G/VII/2006, whereby the respondents-accused (herein after referred to as "the accused" for convenience sake), who were charged with and tried for offences punishable under Sections 498-A and 306 read with section 34 IPC, have been acquitted.

2. The case of the prosecution in a nutshell is that the statement of PW-1 Amar Singh was recorded under Section 154 Cr.P.C. vide Ext. PW-1/C. According to him, his daughter Kalpana was married about 4 years back with accused Soni Kumar son of Munshi Ram, resident of Village Saloha. His daughter had one daughter aged 3 years and 1 son aged nine months. He has given sufficient dowry to his daughter. After some days of marriage, accused started giving beatings to Kalpana Devi. They used to harass her. His daughter disclosed these facts to him as well as to her mother and brothers whenever she visited their house. False acquisitions were made against his daughter. She was denied maintenance. He had taken up the matter with the Panchayat. On 19.6.2005, at about 8.30 PM, he received telephonic information from Pradhan that his daughter had died by drowning while washing the clothes. He went to the house alongwith the co-villagers and members of Gram Panchayat. He found the dead body of Kalpana Devi lying on the rock in the Nallah. She had received injuries. The In-laws of his daughter were talking about second marriage of Sonu. FIR was registered on the basis of Ext. PW-1/C. The police visited the spot. The dead body was sent for post mortem examination. The police also took into possession one pair of Chappal, one Thapi, one bucket containing clothes including clothes which were lying at the spot. The police had also taken the photographs of the spot. The police had also taken into possession compromise mentioned as "*Bahami Razinama*". The report of the FSL was obtained and thereafter, the matter was investigated. The police on completion of the investigation, put up the challan before the Court after completing all the codal formalities.

3. The prosecution has examined as many as 11 witnesses to prove its case. Statement under section 313 of the Cr.P.C. of the accused persons was recorded. The accused have denied the prosecution allegations. According to them they were falsely implicated. The learned trial Court acquitted the accused vide judgment dated 28.5.2008.

4. Mr. Ramesh Thakur, learned Assistant Advocate General has vehemently argued that the prosecution has proved its case against the accused persons. On the other hand, Mr. N.S. Chandel, Advocate, appearing for the accused, has supported the judgment dated 28.5.2008.

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

6. PW-1 Amar Singh has deposed that his daughter was married to the accused Soni Kumar in the year 2001. She was maintained properly for 2 ½ years. Thereafter, no maintenance was given to her. She was given beatings. He has taken up the matter with the Panchayat. He had sent his son on 19.6.2005 to enquire about the welfare of his daughter. The son came back at 1.30/2.00 PM. He disclosed that his daughter was apprehending danger to her life. On 19.6.2005, at 8.30/9.00 PM, he received information from the Ward Member Smt. Bhago Devi that his daughter had died by drowning. She further informed that the body of his daughter was lying on the rock. There was no member from her in-laws present on the spot. He has noticed injuries over eye and there was bleeding from her nose. Her arm was found fractured. There were other injuries on the back side of the body. In his cross examination he has deposed that he disclosed to the police that he had sent his son to the house of his daughter on 19.6.2005. Volunteered that the police did not hear their version. He was confronted with statement recorded under Section 154 Cr.P.C. Ext. PW-1/C, where it is not so recorded. He also admitted in his cross examination that accused used to go early in the morning to the shop and come back late in the evening. He used to visit the house of his daughter after some interval to enquire about her welfare. He has admitted that his daughter has never moved any application for maintenance against the accused before any authority. He has never made any complaint before any authority of giving beatings to his daughter.

7. PW-2 Sudha Kaundal, deposed that she visited the spot and found that the deceased was lying dead on the rock. There were injuries on the forehead and arm of the deceased. She was bleeding from her nose. The police have taken into possession, one washing soap, and wooden plank "Thapi'. These were taken into possession vide memo Ext. PW-2/A.

8. PW-3 Susheel Kumar deposed that whenever his sister Kalpana visited her parental house, she used to disclose that she was being beaten up by her husband and mother-in-law and even sometimes, she was denied food and the matter was reported to the Panchayat. On 19.6.2005, he went to the house of his sister Kalpana to find out about her welfare. She disclosed that she has been threatened by the accused. The accused used to give her beatings. When he visited the house of his sister, he also visited the water source. He came back to the house at 1.30. A telephonic message was received disclosing that his sister Kalpana had died. His family members, including villagers went to the spot and found the dead body of his sister in the Nallah. In his cross examination he admitted that he and his brother as well as his father were frequent visitors to the house of the deceased. He also admitted that accused Soni Kumar had filed complaint before the Panchayat against his sister and his brother Lekh Raj, in which the compromise had been arrived at.

9. PW-4 Pritma Devi deposed that they had taken the matter before Gram Panchayat and representatives of Gram Panchayat went to the accused where the compromise had been arrived at. She disclosed that on 19.6.2005, she sent her son to find out the welfare of her daughter in her in-laws house. He told her that he met his sister while she was going to bring water. He disclosed that his sister was apprehending threat to her life. They were informed that their daughter had died. In her cross examination, she admitted that they never made any application or complaint before any authority against the accused.

10. PW-5 Dr. Puran Chand has conducted post mortem on the dead body of the deceased. He issued post mortem report Ext. PW-5/D. According to him, the injuries were ante mortem in nature caused by blunt weapon within a duration of 24 hours. According to his opinion, the deceased died to ante mortem drowning.

11. PW-6 Bhago Devi stated that she received a telephonic information from Pradhan Gram Panchayat Gummer to the effect that Kalpana

Devi had died. She informed the police and also parents of the deceased. Thereafter, she went to the village Saloha. In her cross-examination she admitted that the close relationship with the parents of the deceased.

12. PW-7 Ram Lok deposed that after the marriage, accused Soni Kumar started giving beatings to Kalpana Devi as the father of deceased had told him 3-4 times about the beatings. He went on 27.5.2004 to Gram Panchayat Haroli and Razinama (compromise) had taken place. The compromise is Ext. PW-6/A. In his cross examination he admitted that deceased Kalpana had never made any written complaint against the accused before their Gram Panchayat.

13. Statements of PW-8 HC Ravi Kumar, PW-9 HHC Thakru Ram and PW-10 Rakesh Kumar are formal in nature.

14. PW-11 SI Ranjeet Singh has carried out the investigation of the case. He visited the spot on 20.6.2005. He recorded the statement of PW-1 Amar Singh under Section 154 Cr.P.C. He took photographs of the dead body. He prepared inquest reports Ext. PW-5/B and Ext. PW-5/C. He got the post mortem conducted. He took into possession "Thapi" (wooden plank) and clothes of the deceased. He also took into possession one application for 'Razinama' Ext. PW-1/B. In his cross-examination he deposed that when he reached the spot, the dead body had already been lying on the rock. He was told that the dead body was taken out from the water and depth of the water was 15 feet from where the dead body was taken out. He also admitted that Bihari Lal had disclosed in his statement that accused Soni Kumar had taken out dead body of deceased from water. He has also admitted that Kultar Singh deposed in his presence that accused Soni Kumar had been locating the dead body of the deceased. The water was deep.

15. What emerges from the facts enumerated herein above is that the marriage between Soni Kumar and Kalpana Devi was solemnized in the year 2001. The relations between them were cordial for 2 ½ years. Thereafter, accused started giving beatings to deceased Kalpana Devi. The statement of PW-1 Amar Singh was recorded under section 154 Cr.P.C. He deposed that he had sent his son Susheel Kumar on 19.6.2005 to enquire about the welfare of his daughter. PW-3 Susheel Kumar has also deposed that he went to his sister's house on 19.6.2005 to enquire about her welfare. PW-4 Pritma Devi, mother of deceased deposed that on 19.6.2005, she sent her son to find out the welfare of her daughter. There is no such averment contained in Ext. PW-1/C. In case PW-3, Susheel Kumar was sent to visit the house of Kalpana Devi, it should have been stated in Ext. PW-1/C. PW-1 Amar Singh, PW-3 Susheel Kumar and PW-4 Pritma Devi have made improvements in their statements. According to PW-1 Amar Singh there are no specific instances given when the accused has given beatings to deceased Kalpana Devi. The averments made are vague. PW-1 Amar Singh has admitted in his cross-examination that he has never made any complaint before any authority against the accused about the beatings given to his daughter. He has also admitted that his daughter has never made any application seeking maintenance against the accused. PW-4 Pritma Devi has also deposed that they never made any application /complaint before any authority against the accused.

16. PW-6 Bhago Devi is closely related to the family of the deceased. PW-7 Ram Lok has admitted that Kalpana Devi has never made any written complaint against the accused before their Panchayat. The deceased has died due to drowning. The drowning was ante mortem. The deceased has received certain injuries. But these injuries could be attributed by falling into the water, as per the statement of PW-5 Dr. Puran Chand. She had gone to wash clothes. The water at the spot was very deep. The possibility of her slipping into the water cannot be ruled out. The Prosecution has failed to prove that the accused have treated the deceased with cruelty. The deceased has never moved an

application for maintenance etc. before any authority. Thus, it can safely be presumed that the deceased was never driven to commit suicide by the accused. In order to prove cruelty, there has to be series of events. However, in the instant case, the prosecution has failed to prove that the deceased was meted out cruelty by the accused.

17. Accordingly, the prosecution has failed to prove the case against the accused persons. The accused persons have been acquitted by a well reasoned judgment dated 28.5.2008 of the learned trial Court.

18. Consequently, there is no merit in the appeal and the same is dismissed.

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

Gopal Singh. ...Appellant.
Versus
State of Himachal Pradesh. ...Respondent.

Cr.A.No. 120 of 2011
Reserved on: 3.11.2104
Decided on: 4.11.2014

Indian Penal Code,1860 - Sections 376 (2) (f) and 84- Prosecutrix aged four and half years was raped by the accused- Accused pleaded that he was suffering from schizophrenia- he was examined by the Doctor and was declared fit for trial- held, that crucial point of time at which the unsoundness of mind has to be established is when the offence was committed, the Court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that what have he was doing was contrary to the law-since there was no evidence that the accused was insane at the time of commission of offence therefore, accused is not entitled to the acquittal on the ground of unsoundness of mind. (Para-22 to 32)

Cases referred:

State of Madhya Pradesh v. Ahmadulla, AIR 1961 SC 998
Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat, AIR 1964 SC 1563
Ratan Lal v. The State of Madhya Pradesh, AIR 1971 SC 778
Sheralli Wali Mohammed v. State of Maharashtra, AIR 1972 SC 2443
Elavarasan vs. State represented by Inspector of Police, (2011) 7 SCC 110
Surendra Mishra vs. State of Jharkhand, (2011) 11 SCC 495
Mariappan vs. State of Tamil Nadu, (2013) 12 SCC 270

For the Appellant: Mr. Gurdev Singh Thakur, Advocate.
For the Respondent: Mr. M.A. Khan, Addl. A.G.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 21.12.2009 rendered by the Additional Sessions Judge, Sirmaur, District at Nahan in Sessions Trial No. 18-N/7 of 2002, whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and

tried for offence punishable under section 376 (2) (f) of the Indian Penal Code has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.10,000/- and in default of payment of fine, he was further ordered to undergo rigorous imprisonment for a period of one year. Hence, the present appeal.

2. Case of the prosecution, in a nutshell, is that on 21.8.2002, prosecutrix (PW-3) daughter of PW-1 Kunta Devi, aged about 4½ years, at about 2.30 P.M. was playing outside her house alongwith other children at village Uttamwala. Accused took the prosecutrix to the field on the pretext to bring maize. He committed sexual intercourse with the prosecutrix. Prosecutrix cried. The cries were heard by PW-2 Uma Devi. PW-2 Uma Devi informed PW-1 Kunta Devi, mother of prosecutrix about the same. PW-1 Kunta Devi went to the spot and saw the accused committing sexual assault upon the prosecutrix in the filed. She was laid down on the ground. She lifted the prosecutrix from the lap of the accused and snatched her from the accused. Prosecutrix was naked. She was brought alongwith her clothes to the house. Blood was oozing out from the private parts of the prosecutrix. The Pajami of the prosecutrix was stained with blood. Husband of PW-1 Kunta Devi, who was out of house was called and told about the occurrence. PW-1 Kunta Devi and her husband Babu Ram went to the Police Station, Nahan. They lodged FIR Ext.PW.1/A. PW-4 Dr. Nirmla Vaish examined the prosecutrix. She issued MLC Ext.PW-4/A. She preserved Pajami Ext.P-1 and Ext.P-2 of the prosecutrix and prepared three slides of the fluid taken from the posterior fornix. She also preserved blood samples of the prosecutrix. All the articles were handed over to the police for chemical examination. The prosecutrix remained admitted in the hospital. She was discharged on 31.8.2002. Accused was medically examined by PW-8 Dr. S.C. Goel. Site plan was prepared. Date of birth certificate Ext.PW-9/A of the prosecutrix was obtained. Statements of the witnesses were recorded. Police investigated the case and the challan was put up in the court after completing all the codal formalities.

3. The defence counsel intimated the court on 6.3.2003 that accused was suffering from major mental disorder, namely, schizophrenia. Dr. Ramesh Kumar, Assistant Professor, Department of Psychiatry, I.G.M.C., Shimla opined that accused appeared to be suffering from major mental disorder, i.e. schizophrenia. He was examined as CW-1. Accused was ordered to be examined by the Board of senior doctors of the Department of Psychiatry, I.G.M.C., Shimla, vide order dated 17.6.2003. Dr. Hardyal Chauhan, Senior Medical Superintendent, I.G.M.C., Shimla was appointed as Chairman. He constituted a Medical Board of doctors. He was examined as CW-2. He opined that accused appeared to be suffering from mental disorder, as such, he was not capable of defending himself of criminal charge against him. Direction was issued to the Superintendent, Model Central Jail, Nahan and also to the Superintendent of Police, Sirmaur District at Nahan to get the accused examined from the fresh Board. Dr. Ravi Sharma, Professor and Head, Department of Psychiatric, I.G.M.C., Shimla was examined in the Court on 16.12.2003. The Board suggested that the accused should be referred to the Department of Psychiatric, P.G.I., Chandigarh for second psychiatric opinion. The Court directed the accused to be examined from another Medical Board of senior psychiatric, P.G.I., Chandigarh. The Medical Board examination report dated 17.2.2004 was received from P.G.I., Chandigarh. The Board opined that the accused was suffering from paranoid schizophrenia.

4. Accused moved an application under Section 330 of the Code of Criminal Procedure. The Court vide order dated 27.3.2004, ordered the detention of the accused in Psychiatric Department, I.G.M.C., Shimla. Reports of the Himachal Hospital of Mental Health and Rehabilitation, Shimla were received from time to time qua the mental health of the accused. As per report dated 26.9.2008, accused was opined to be capable of making his defence in the

Court. He did not have features of active mental disorder. Senior Medical Superintendent vide letter dated 17.12.2008 declared that patient was fit to be discharged from the hospital for facing the trial. On 2.1.2009, accused was found to be fit for trial. Charge under Section 376 (2) (f) of the Indian Penal Code was framed. He pleaded not guilty.

5. Prosecution examined as many as 12 witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He has denied the case of the prosecution in entirety. According to him, he is suffering from mental disorder. Learned trial Court convicted and sentenced the accused as noticed hereinabove.

6. Mr. Gurdev Singh Thakur, learned counsel for the appellant has vehemently argued that the prosecution has failed to prove its case against the accused.

7. Mr. M.A. Khan, leaned Additional Advocate General has supported the judgment passed by the trial Court.

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

9. PW-1 Kunta Devi is the mother of prosecutrix. According to her on 21.8.2002, she was at her home. Her sister-in-law (Jethani) and parents-in-law were also in the house. Her youngest daughter was playing outside the house. She was 4½ years old. At about 2.30 P.M., her sister-in-law Uma Devi called her from the roof of the house and told that her daughter was crying in the fields. She went to the spot. It was at a distance of 100-150 meters from the house. She saw that her daughter was laid on the ground by the accused. He was committing sexual assault upon her daughter. When she reached there, accused lifted her daughter and took her into his lap. She snatched her daughter from the accused. Her daughter was naked. She took her daughter to the house alongwith her clothes. Blood was oozing out from the private part of her daughter. She narrated the occurrence to other family members. They also examined the prosecutrix. Pajama of prosecutrix was having blood stains on it. Her husband was out of house. She called him and narrated the occurrence. They went to the Police Station, Nahan. They lodged FIR. Prosecutrix was medically examined in the hospital at Nahan. She remained admitted in the hospital. She was discharged on 31.8.2002 vide Ex.PW-1/B. She has identified Pajami Ex.P-1 and P-2. In her cross-examination, she has denied the suggestion that accused was suffering from mental ailment since his childhood. He used to work as labourer. She has also denied the suggestion that there was dispute between her family and family of the accused.

10. PW-2 Uma Devi has deposed that Kunta Devi is her Devrani. On 21.8.2002, she was on the roof of her house at about 2 – 2.30 P.M. She heard the cries of daughter of Kunta from the field of maize. She informed Kunta Devi about the crying of her daughter. Kunta Devi went to the field and brought her daughter from the field to the house. The victim was naked and she was bleeding from her private part. Her salwar was having blood on it. Kunta Devi told that accused was in the field. He committed sexual act with her daughter. She has also denied the suggestion that accused was suffering from mental disorder. Volunteered that he was mentally sound at that time. She did not know that father of accused used to take him for medical treatment to Dharampur.

11. PW-3 is the prosecutrix. Her statement was recorded without oath. She has deposed that she was taken away from her house to the fields by the accused. She was playing outside in her house alongwith other children. Accused stated that they will bring maize from the field. Maize field was near the house. She did not know what accused did with her as she was small kid at that time and was not capable of understanding the things. She cried in the

field. Her mother came there on hearing her cries. She was brought to Nahan. She remained admitted in the hospital for some days. She has denied the suggestion that she has named the accused at the instance of her parents.

12. PW-4 Dr. Nirmal Vaish has medically examined the prosecutrix. She has issued MLC Ex.PW-4/A. According to her, rape was done and the probable duration was within 12 hours. She identified Pajami Ex. P-1 and P-2. There were marks of injury on the private parts. There was second degree perineal tear in the vagina. There was one scratch mark over the right side of the thigh lying obliquely. There were three or four nail marks over left side of the thigh. The patient was admitted for stitching of tear (perineal). Treatment was given and the patient was discharged after 3-4 days.

13. PW-5 Balbir Singh has deposed that on 22.8.2002 Constable Suresh Kumar deposited two sealed parcels sealed with seal impression 'ZH' and LC Raksha Devi deposed four sealed parcels with seal impression 'ZH' with him. He made entries in the register of Malkhana at Sr. No. 269 and 270. He forwarded all the parcels vide RC No. 185/2002 for F.S.L. Bharari through Constable Inder Dutt.

14. PW-6 Constable Inder Dutt has deposed that on 26.8.2002 MHC Balbir Singh handed over to him six sealed parcels for chemical examination vide RC 185/02. He deposited the same at F.S.L. Bharari on 26.8.2002.

15. PW-7 Dr. Ranjana Oberoi has examined the prosecutrix. She issued discharge slip Ex.PW-1/B. According to her, prosecutrix was having injuries perineal and tear was present. It was stitched by Dr. Nirmal Vaish.

16. PW-8 Dr. S.C. Goel has examined the accused on 22.8.2002. He has issued MLC Ext. PW-8/A. According to him, there was a big contusion mark reddish blue on left arm, lower part on anterior aspect. Clothes were preserved. There was no suggestion that the patient was not able to perform coitus.

17. PW-9 Kailash Kataria has issued birth certificate of prosecutrix PW-9/A.

18. PW-10 H.C. Daleep Singh has taken the photographs of the spot on 22.8.2002.

19. PW-11 Narveer Singh Rathour has deposed that he remained posted as S.H.O. Police Station Nahan. On 21.8.2002 Kanta Devi alongwith prosecutrix came to the police station. She got FIR Ext. PW-1/A registered. In order to get prosecutrix medically examined she moved an application to M.O. Zonal Hospital, Nahan vide Ext. PW-11/A. MLC of the prosecutrix was procured. Prosecutrix remained admitted in the hospital. Discharge certificate was Ex. PW-1/B. Accused was arrested on 21.8.2002. He was also got medically examined and MLC Ext. PW-8/A was obtained. On 22.8.2002, he visited the spot and prepared site plan Ext. PW-11/B. He has denied the suggestion that accused was suffering from acute mental disorder. He has also denied the suggestion that when the occurrence took place; accused was suffering from mental disorder.

20. PW-12 Dr. Ramesh Kumar has deposed that accused was under treatment. He has issued report Ext. PA. It was found on examination of the accused that presently, he did not have feature of active mental disorder. Thus, he was fit to be discharged from the hospital for facing the trial. However, patient was required to be continuously supervised.

21. Mr. Gurdev Singh Thakur has vehemently argued that accused was suffering from schizophrenia at the time of commission of offence. PW-1 Kunta Devi, in her statement, has categorically deposed that on 21.8.2002, she was told by PW-2 Uma Devi that her daughter was crying in the field. She went to the spot and recovered the girl and she saw accused committing sexual

assault upon her daughter. She was naked. She was brought to the house. She was admitted in the hospital. She was discharged from the hospital on 31.8.2002 vide Ex.PW-1/B. PW-2 Uma Devi has supported the version of PW-1 Kunta Devi. She informed PW-1 Kunta Devi about the crying of her daughter. Kunta Devi went to the field and brought her daughter from the field. She has denied the suggestion that accused was suffering from mental disorder. Volunteered that he was mentally sound at that time. PW-3 prosecutrix was only 4½ years. Her evidence inspires confidence. She has stated that she did not know what accused did with her. She was young girl of 4½ years. She cried in the field and her mother came there. She remained admitted in the hospital. She has denied the suggestion that she has named the accused at the instance of her parents. PW-4 Dr. Nirmal Vaish has issued MLC Ex.PW-4/A. According to her, rape was committed and the probable duration was within 12 hours. Hymen was torn. There was second degree perineal tear. Stitching was undertaken. PW-7 Dr. Ranjana Oberoi has issued discharge slip Ex.PW-1/B. She has noticed injuries on perineal tear, which was stitched by Dr. Nirmal Vaish. She was discharged on 31.8.2002. PW-8 Dr. S.C. Goel has also denied the suggestion that the accused was suffering from any mental ailment. As per version of PW-12 Dr. Ramesh Kumar in view of report dated 26.9.2008 received from Senior Medical Superintendent, Himachal Hospital Mental Health and Rehabilitation, Shimla, accused was opined to be capable of making his defence in the Court. He did not have features of active mental disorder. He was declared fit to be discharged from the hospital for facing the trial. PW-12 Dr. Ramesh Kumar has also declared that accused was fit to be discharge from the hospital for facing trial as per report Ex.PA. He has not noticed any active mental disorder.

22. What emerges from the statements of PW-1 Kunta Devi and PW-2 Uma Devi read in conjunction with statement of PW-7 Dr. Ranjana Oberoi that accused has committed forcibly rape on the young girl. She was only 4½ years old. She remained admitted in hospital for about ten days. There was second perineal tear in the vagina. Hymen was torn. The injury was stitched by Dr. Nirmal Vaish. Mr. Gurdev Singh Thakur has argued that there was enmity between the families. However, no evidence has been led to this effect. Accused was closely related with the family of victim. Thus, there was no occasion for impleading the accused in the case.

23. Their Lordships of the Hon'ble Supreme Court in ***State of Madhya Pradesh*** v. ***Ahmadulla***, AIR 1961 SC 998 have held that the crucial point of time at which the unsoundness of mind as defined in section 84 has to be established is when the act was committed. Their Lordships have held as under:

> **"2. There is very little dispute about the facts or even about the construction of S. 84 of the Code because both the learned Sessions Judge as well as the learned Judges of the High Court on appeal have held that the crucial point of time at which the unsoundness of mind, as defined in that section, has to be established is when the act was committed. It is the application of this principle to the facts established by the evidence that is the ground of complaint by the appellant-State before us.**
>
> **8. In this connection we might refer to the decision of the Court of Criminal Appeal in England in Henry Perry 14 Cri App Rep 48 where also the defence was that the accused had been prone to have fits of epileptic insanity. During the course of the argument Reading. C. J., observed :**
>
> > **"The crux of the whole question is whether this man was suffering from epilepsy at the time he committed the crime. Otherwise it would be a most dangerous doctrine if a man**

> **could say.' "I once had an epileptic fit, and everything that happens hereafter must be put down to that."**

In dismissing the appeal the learned Chief Justice said :

> **"Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. To establish insanity it must be clearly proved that at the time of committing the act the party is labouring under such defect of reason as not to know the nature and quality of the act which he is committing - that is, the physical nature and quality as distinguished from the moral - or, if he does know the nature and quality of the act he is committing, that he does not know that he is doing wrong ..... There is, however, evidence of a medical character before the jury, and there are statements made by the prisoner himself, that he has suffered from epileptic fits. The Court has had further evidence, especially in the prison records, of his having had attacks of epilepsy. But to establish that is only one step; it must be shown that the man was suffering from an epileptic seizure at the time when he committed the murders; and that has not been proved."**

We consider that the situation in the present case is very similar and the observations extracted apply with appositeness. We consider that there was no basis in the evidence before the Court for the finding by the Sessions Judge that at the crucial moment when the accused cut the throat of his mother-in-law and severed her head, he was suffering from unsoundness of mind incapable of knowing that what he was doing was wrong. Even the evidence of the father does not support such a finding. In this connection the Courts below have failed to take into account the circumstances in which the killing was compassed. The accused bore ill will to Bismilla and the act was committed at dead of night when he would not be seen, the accused taking a torch with him, access to the house of the deceased being obtained by stealth by scaling over a wall. Then again, there was the mood of exaltation which the accused exhibited after he had put her out of her life. It was a crime committed not in a sudden mood of insanity but one that was preceded by careful planning and exhibiting cool calculation in execution and directed against a person who was considered to be the enemy."

24. Their Lordships of the Hon'ble Supreme Court in ***Dahyabhai Chhaganbhai Thakkar*** vs. ***State of Gujarat***, AIR 1964 SC 1563 have held that that when a plea of legal insanity is set up, the Court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Their Lordships have held as under:

> **"9. When a plea of legal insanity is set up, the court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of S. 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime.**

14. The subsequent events leading up to the trial make it abundantly clear that the plea of insanity was a belated afterthought and a false case. After the accused came out of the room, he was taken to the chora and was confined in a room in the chora. P. W. 16, the police sub-inspector reached Bherai at about 9.30 a.m. He interrogated the accused; recorded his statement and arrested him at about 10.30 a.m. According to him, as the accused was willing to make a confession, he was sent to the judicial magistrate. This witnesses described the condition of the accused when he met him thus:

> **"When I went in the Chora he had saluted me and he was completely sane. There was absolutely no sign of insanity and he was not behaving as an insane man. He was not abusing. He had replied to my questions understanding them and was giving relevant replies. And therefore I had sent him to the Magistrate for confession as he wanted to confess."**

There is no reason to disbelive this evidence, particularly when this is consistent with the subsequent conduct of the accused. But P. W. 9, who attested the panchanama, Ex. 19, recording the condition of the accused's body and his clothes, deposed that the accused was murmuring and laughing. But no mention of his condition was described in the panchnama. Thereafter, the accused was sent to the Medical Officer, Matar, for examination and treatment of his injuries. The doctor examined the accused at 9.30 p.m. and gave his evidence as P. W. 11. He proved the certificate issued by him, Ex. 23. Nothing about the mental condition of the accused was noted in that certificate. Not a single question was put to this witnesses in the cross-examination about the mental condition of the accused. On the same day, the accused was sent to the Judicial Magistrate, First Class, for making a confession. On the next day he was produced before the said Magistrate, who asked him the necessary questions and gave him the warning that his confession would be used against him at the trial. The accused was given time for reflection and was produced before the Magistrate on April 13, 1959. On that date he refused to make the confession. His conduct before the Magistrate, as recorded in Ex. 31 indicates that he was in a fit condition to appreciate the questions put to him and finally to make up his mind not to make the confession which he had earlier offered to do. During the enquiry proceedings under Ch. XVIII of the Code of Criminal Procedure, no suggestion was made on behalf of the accused that he was insane. For the first time on June 27, 1959, at the commencement of the trial in the sessions court an application was filed on behalf of the accused alleging that he was suffering from an attack of insanity. On June 29, 1959, the Sessions Judge sent the accused to the Civil Surgeon, Khaira, for observation. On receiving his report, the learned Sessions Judge, by his order dated July 13, 1959, found the accused insane and incapable of making his defence. On August 28, 1959, the court directed the accused to be sent to the Superintendent of Mental Hospital, Baroda, for keeping him under observation with a direction to send his report on or before September 18, 1959. The said Superintendent sent his report on August 27, 1960 to the effect that the accused was capable of understanding the proceedings of the court and of making his defence in the court. On enquiry the court held that the accused could understand the proceedings of the case and was capable of making his defence. At the commencement of the trial, the pleader for the accused stated that the accused could understand the proceedings. The proceedings before the

Sessions Judge only show that for a short time after the case had commenced before him the accused was insane. But that fact would not establish that the accused was having fits of insanity for 4 or 5 years before the incident and that at the time he killed his wife he had such a fit of insanity as to give him the benefit of S. 84 of the Indian Penal Code. The said entire conduct of the accused from the time he killed his wife upto the time the sessions proceedings commenced is inconsistent with the fact that he had a fit of insanity when he killed his wife."

25. In the instant case, it cannot be said that accused was incapable of knowing the nature of act or that he was doing what was either wrong or contrary to law.

26. Their Lordships of the Hon'ble Supreme Court in ***Ratan Lal*** v. ***The State of Madhya Pradesh***, AIR 1971 SC 778 have held that the crucial point of time at which unsoundness of mind has to be proved is the time when the crime is actually committed. The burden of proving this can be discharged by the accused from the circumstances which preceded, attended and followed the crime. their Lordships have held as under:

"2. It is now well settled that the crucial point of time at which unsoundness of mind should be established is the time when the crime is actually committed and the burden of proving this lies on the accused. (See State of Madhya Pradesh v. Ahmadullah, (1961) 3 SCR 583 = (AIR 1961 SC 998). In D. C. Thakkar v. State of Gujarat, (1964) 7 SCR 361 = (AIR 1964 SC 1563); it was laid down that "there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the accused may rebut it by placing before the Court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that which rests upon a party to civil proceedings." It was further observed:

> **"The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of Section 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime."**

27. In the instant case there is no evidence or circumstance that accused was having unsoundness of mind at the time of commission of offence. There is no evidence that accused was having unsoundness of mind before the occurrence and at the time of commission of crime.

28. Their Lordships of the Hon'ble Supreme Court in ***Sheralli Wali Mohammed*** v. ***State of Maharashtra***, AIR 1972 SC 2443 have held that law presumes every person of the age of discretion to be sane unless the contrary is proved. It would be most dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. The mere fact that no motive has been proved why the accused murdered his wife and child, or the fact that he made no attempt to run away when the door was broken open would not indicate that he was insane or that he did not have the necessary *mens rea* for the commission of the offence. Their Lordships have held as under:

"12. To establish that the acts done are not offences under S. 84 of the Indian Penal Code, it must be proved clearly that, at the time of the commission of the acts, the appellant, by reason of unsoundness of mind, was incapable of either knowing the nature of the act or that the acts were either morally wrong or contrary to law. The question to be asked is, is there evidence to show that, at the time

of the commission of the offence, he was labouring under any such incapacity? On this question, the state of his mind before and after the commission of the offence is relevant. The general burden of proof that an accused person is in a sound state of mind is upon the prosecution. In Dahyabhai Chhaganbhai Thakkar v. The State of Gujarat, (1964) 7 SCR 361 at p. 367 = (AIR 1964 SC 1563), Subba Rao, J., as he then was, speaking for the Court said

> **"(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S. 84 of the Indian Penal Code: the accused may rebut it by placing before the Court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."**

13. With this in mind, let us consider the evidence to see whether the accused was in an unsound state of mind at the time of the commission of the acts attributed to him, P. W. 3, one of the brothers of the accused stated that the accused used to become excited and uncontrollable, that sometimes he behaved like a mad man, and that he was treated by Dr. Deshpande and Dr. Malville. P. W. 4, Hyderali, also a brother of the accused, has stated that the accused used to suffer from temporary insanity and that he was treated by Dr. Deshpande and Dr. Malville. The evidence of these two witnesses on the question of the insanity of the accused did not appeal to the trial Court and the Court did not, we think rightly, place any reliance upon it. No attempt was made by the defence to examine the two doctors. There was, therefore, no evidence to show that, at the time of the commission of the acts, the accused was not in a sound state of mind. On the other hand, P. W. 8, Rustom Mirja, has stated in his deposition that the accused has been working with him as an additional motor driver for the last 8 or 10 years and that his work and conduct were normal. He also stated that the accused worked with him on March 6, 1968, till 4 P.M. P. W. 16, Dr. Kaloorkar, who examined the accused at 7.20 A.M. on the day of the occurrence, has stated in his deposition that he found that the accused was in normal condition. His evidence has not been challenged in cross-examination.

We think that not only is there no evidence to show that the accused was insane at the time of the commission of the acts attributed to him, but that there is nothing to indicate that he had not the necessary mens rea when he committed the offence. The law presumes every person of the age of discretion to be sane unless the contrary is proved. It would be most dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. The mere fact that no motive has been proved why the accused murdered his wife and child or, the fact that he made no

attempt to run away when the door was broke open, would not indicate that he was insane or, that he did not have the necessary mens rea for the commission of the offence. We see no reason to interfere with the concurrent findings on this point either."

29. Their Lordships of the Hon'ble Supreme Court in ***Elavarasan*** vs. ***State represented by Inspector of Police***, (2011) 7 SCC 110 have held that the burden of bringing his/her case under section 84 of the Indian Penal Code lies upon person claiming benefit thereof. Standard of proof which accused has to satisfy for discharge of burden under section 105 is not same as is expected of prosecution. It is enough for accused to establish his defence on preponderance of probabilities as in a civil case. Their Lordships have held as under:

"22. The question, however, is whether the appellant was entitled to the benefit of Section 84 of Indian Penal Code which provides that nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or who is incapable of knowing that what he is doing, is either wrong or contrary to law. Before adverting to the evidence on record as regards the plea of insanity set up by the appellant, we consider it necessary to refer to two aspects that bear relevance to cases where a plea of insanity is raised in defence by a person accused of a crime. The first aspect concerns the burden of proving the existence of circumstances that would bring the case within the purview of Section 84 of the I.P.C. It is trite that the burden of proving the commission of an offence is always on the prosecution and that the same never shifts. Equally well settled is the proposition that if intention is an essential ingredient of the offence alleged against the accused the prosecution must establish that ingredient also.

23. There is no gainsaying that intention or the state of mind of a person is ordinarily inferred from the circumstances of the case. This implies that, if a person deliberately assaults another and causes an injury to him then depending upon the weapon used and the part of the body on which it is struck, it would be reasonable to assume that the accused had the intention to cause the kind of injury which he inflicted. Having said that, Section 84 can be invoked by the accused for nullifying the effect of the evidence adduced by the prosecution. He can do so by proving that he was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. But what is important is that the burden of bringing his/her case under Section 84 of the IPC lies squarely upon the person claiming the benefit of that provision.

24. Section 105 of the Evidence Act is in this regard relevant and may be extracted:

> **"105. Burden of proving that case of accused comes within exceptions.-When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860) or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."**

25. A careful reading of the above would show that not only is the burden to prove an exception cast upon the accused but the Court shall presume the absence of circumstances which may bring

his case within any of the general exceptions in the Indian Penal Code or within any special exception or provision contained in any part of the said Code or in law defining the offence. The following passage from the decision of this Court in Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, (1964) 7 SCR 361 may serve as a timely reminder of the principles governing burden of proof in cases where the accused pleads an exception:

> **"The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions:**
>
> **(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea, and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.**
>
> **(2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the accused may rebut it by placing before the court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings.**
>
> **(3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."**

26. The second aspect which we need to mention is that the standard of proof which the accused has to satisfy for the discharge of the burden cast upon him under Section 105 (supra) is not the same as is expected of the prosecution. A long line of decisions of this Court have authoritatively settled the legal proposition on the subject. Reference in this connection to the decision of this Court in State of U.P. v. Ram Swarup and Anr., (1974) 4 SCC 764 should suffice where this court observed:

> **"The burden which rests on the accused to prove the exception is not of the same rigour as the burden of the prosecution to prove the charge beyond a reasonable doubt. It is enough for the accused to show, as in a civil case, that the preponderance of probabilities is in his favour."**

To the same effect is the decision of this Court in Bhikari v. State of Uttar Pradesh (AIR 1966 SC 1)."

30. Their Lordships of the Hon'ble Supreme Court in ***Surendra Mishra*** vs. ***State of Jharkhand***, (2011) 11 SCC 495 have held that to discharge the onus under section 84, accused must prove his conduct prior to offence, at the time or immediately after offence, with reference to his medical condition. Whether accused knew that what he was doing was wrong or that it was contrary to law is of great importance and may attract culpability despite mental unsoundness having been established. Their Lordships have held as under:

> **"13. In law, the presumption is that every person is sane to the extent that he knows the natural consequences of his act. The burden of proof in the face of Section 105 of the Evidence Act is on**

the accused. Though the burden is on the accused but he is not required to prove the same beyond all reasonable doubt, but merely satisfy the preponderance of probabilities. The onus has to be discharged by producing evidence as to the conduct of the accused prior to the offence, his conduct at the time or immediately after the offence with reference to his medical condition by production of medical evidence and other relevant factors. Even if the accused establishes unsoundness of mind, Section 84 of the Indian Penal Code will not come to its rescue, in case it is found that the accused knew that what he was doing was wrong or that it was contrary to law. In order to ascertain that, it is imperative to take into consideration the circumstances and the behaviour preceding, attending and following the crime. Behaviour of an accused pertaining to a desire for concealment of the weapon of offence and conduct to avoid detection of crime go a long way to ascertain as to whether, he knew the consequences of the act done by him.

14. Reference in this connection can be made to a decision of this Court in the case of T.N. Lakshmaiah v. State of Karnataka, (2002) 1 SCC 219, in which it has been held as follows:

> **"9. Under the Evidence Act, the onus of proving any of the exceptions mentioned in the Chapter lies on the accused though the requisite standard of proof is not the same as expected from the prosecution. It is sufficient if an accused is able to bring his case within the ambit of any of the general exceptions by the standard of preponderance of probabilities, as a result of which he may succeed not because that he proves his case to the hilt but because the version given by him casts a doubt on the prosecution case.**
>
> **10. In State of M.P. v. Ahmadull,AIR 1961 SC 998, this Court held that the burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by the section, lies on the accused who claims the benefit of this exemption vide Section 105 of the Evidence Act [Illustration (a)]. The settled position of law is that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. Mere ipse dixit of the accused is not enough for availing of the benefit of the exceptions under Chapter IV.**
>
> **11. In a case where the exception under Section 84 of the Indian Penal Code is claimed, the court has to consider whether, at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. The entire conduct of the accused, from the time of the commission of the offence up to the time the sessions proceedings commenced, is relevant for the purpose of ascertaining as to whether plea raised was genuine, bona fide or an afterthought."**

31. Their Lordships of the Hon'ble Supreme Court in ***Mariappan*** vs. ***State of Tamil Nadu***, (2013) 12 SCC 270 have held that burden of proving the case of accused comes within exceptions under section 105 of the Evidence Act, 1872 lies on the accused. Their Lordships have held as under:

> **"13. The evidence of PWs 1 and 2 - the eye-witnesses, the evidence of PWs 3 and 4, who saw the accused running after the occurrence with Aruval (M.O.I) and the recovery of the weapon at the instance**

of the accused which was found to be stained with human blood of "O" group, as per the serologist report (Ex.P.12), tallied with the blood group of the deceased as the clothes of the deceased viz., M.O.s 1 to 4 were also stained with human blood "O" group clearly prove the case of the prosecution. Further, the medical evidence through PW-9-the Doctor, who conducted the post-mortem and issued the report (Ex.P-3) strengthened the version of PWs 1 and 2.

14. From the materials analyzed, discussed and concluded by the trial Court and the High Court, it clearly establishes that it was the accused-appellant who committed the murder."

32. Learned trial court has correctly appreciated the evidence while convicting the accused. We need not interfere with the well reasoned judgment rendered by the trial court.

33. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed.

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

State of Himachal Pradesh .....Appellant.
Vs.
Siri Ram .....Respondent.

Cr. Appeal No. 343 of 2008.
Reserved on: October 31, 2014.
Decided on: November 04, 2014.

NDPS Act, 1985- Section 20- Accused was found in possession of 400 grams of charas- independent witness had turned hostile - I.O admitted in his cross- examination that school, shop, panchyat ghar and houses of independent persons were situated near the place of incident- no person was called from the shop or school, but independent witnesses were called from a far off place- held, that in these circumstances, prosecution version could not be relied upon- acquittal of the accused was justified. (Para- 13 to 17)

For the appellant: Mr. Ashok Chaudhary, Addl. Advocate General.
For the respondent: Mr. Raj Kumar Negi, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The State has come up in appeal against the judgment rendered by the learned Sessions Judge, Solan, H.P. in case No. 6-S/7 of 2007 dated 19.2.2008, whereby the respondent-accused (hereinafter referred to as the accused) who was charged with and tried for offence under Section 20 (b)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985, was acquitted.

2. The case of the prosecution, in a nut shell, is that on 17.1.2007, Deep Ram S.I/S.H.O. Police Station, Kasauli alongwith other police officials had come to Bhoguri. At about 6:00 PM, they were present at Bhoguri Chowk. The accused was also there. The accused, on seeing the police party tried to run away. He was apprehended. He disclosed his name. The S.H.O. then sent Constable Jaswant Singh to call for the independent witnesses. He brought

Chint Ram and Ram Dass and in their presence, the packet which the accused was carrying in his hand was checked. It was found to be containing charas. The same was weighed. It weighed 400 gms. He took two samples of 25 gms each out of the recovered substance and put in two cigarette packets and sealed in two cloth parcels. The identification memo was prepared and NCB forms were filled in. The bulk substance was taken into possession in the presence of the independent witnesses. *'Rukka'* was prepared by the S.H.O. and sent to the Police Station through Constable Jaswant Singh, on the basis of which FIR was registered. The spot map was prepared. The contraband was sent to FSL. The challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 11 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 allegations of charas recovery from him. He examined DW-1 Ram Lal as defence witness. The learned Trial Court acquitted the accused, as stated hereinabove. Hence, the present appeal at the instance of the State.

4. Mr. Ashok Chaudhary, Addl. Advocate General, has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Raj Kumar Negi, Advocate, has supported the judgment dated 19.2.2008, of the learned Sessions Judge, Solan.

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

6. PW-1, ASI Ram Asra, deposed that on 17.1.2007 he was accompanying S.H.O. Deep Ram, P.S. Kasauli alongwith other police officials. Accused was found standing at Bhaugari Chowk at 6:00 PM. He tired to run away. He was apprehended. He disclosed his name. Two independent witnesses were brought namely, Chint Ram and Ram Dass by Constable Jaswant Singh. S.H.O. checked the packet which was being carried by the accused. It contained black substance. It was found to be charas. It weighed 400 gms. Two samples of 25 gms each were taken from it. The remaining charas was sealed alongwith the packets in separate cloth parcels. All the parcels were sealed with seal 'T'. The sample parcel was Ext. P-1 and bulk parcel was Ext. P-2. The NCB forms were also filled in. In his cross-examination, he admitted that there was one shop of Tarun Gupta at the Chowk. The school from the Chowk was about 70 meters. The house of Amar Lal was at a distance of 25-30 meters. He also admitted that besides Bhaugri Chowk, they also went to Banalgi and Bandh, which comes on the way.

7. PW-2 Tarun Gupta, deposed that the police officials had taken weights and scale from him.

8. PW-3 Chint Ram, deposed that he was called to Bhaugari chowk. The accused was with the police. His search was effected and a substance in the form of wicks was recovered from him. It was weighed. It weighed 400 gms. The sampling process was completed. The substance was taken into possession vide seizure memo Ext. PW-1/B. It was signed by him and Ram Dass as well as the accused. In his cross-examination, he specifically deposed that the police did not recover the packet from the accused in his presence and when he reached the spot, the packet was lying on the ground which was stated to have been recovered from the accused. His signatures were also obtained on the spot.

9. PW-4 Constable Jaswant Singh, deposed that he was sent by S.H.O. to bring independent witnesses. He called Chint Ram and Ram Dass to the spot. After their arrival, checking of the accused was done. The bag which the accused was carrying was examined. It was found to be containing charas in the form of wicks. It was weighed. It weighed 400 gms. '*Rukka'* was handed over to MHC by him. Then he returned to the spot. In his cross-examination,

he admitted that there were shops on both sides near the spot. He did not know there is also a bus stop but there was School and Panchayat Ghar. No person except the accused had run away on seeing them. No person was called from the shop or School. He returned to the spot with the witnesses in half an hour time. He did not remember as to who brought the weights and scale.

10. PW-5 HC Ved Parkash, deposed that on 18.1.2007, S.H.O. Deep Ram deposited one parcel containing 350 gms of charas sealed with four seal impressions 'T'. NCB forms, sample impressions of seal used were entered by him in the *Malkhana* register at Sr. No. 255. He sent one sample parcel, NCB form, copy of seizure memo, copy of FIR and sample impression to CFSL, Chandigarh through Constable HHC Jai Kishan vide RC No. 1/07. He also proved the copy of the *Malkhana* register Ext. PW-5/A. He admitted in his cross-examination that there is no entry in the *Malkhana* register about deposit of NCB form. According to him, there were two sample seal impressions, one with the sample and another with the bulk parcel. Only one sample impression was sent to CFSL, Chandigarh. He also admitted that he did not enter the sample and documents received by separate entry. He made endorsement against the original entry.

11. Statements of PW-6 HC Yoginder Dutt, PW-7 ASI Gita Ram, PW-8 Bharat Ram and PW-9 Constable Madan Kishore are formal in nature.

12. PW-10 Dr. Sidharth Vats, has examined ASI Ram Asra and HHC Ramesh Chand. He issued MLCs Ext. PW-10/A and Ext. PW-10/B.

13. PW-11 SI Deep Ram, has carried out the investigation of the case. He deposed the manner in which the accused was apprehended, sampling and seizure process was completed. According to him, in the presence of the police officials and independent witnesses, the accused was questioned. The bag in his hand was searched in the presence of police personnel and independent witnesses. The charas was taken into possession vide memo Ext. PW-1/B. FIR was registered on the basis of *'Rukka'* Ext. PW-11/B. In his cross-examination, he admitted that the School, Shop, Panchayat Ghar and house of Amar Nath was near the place from where the accused was apprehended. The accused had also sustained injuries. The bag was having polythene packet. It contained nothing but charas.

14. The independent witness PW-3 Chint Ram has not supported the case of the prosecution. In his cross-examination, he specifically deposed that the police did not recover the packet from the accused in his presence and when he reached the spot, the packet was lying on the ground which was stated to have been recovered from the accused. According to PW-1 ASI Ram Asra and PW-11 Deep Ram, the accused on seeing the police tried to run away. He jumped down. He was apprehended. He was carrying charas in his hands. It is not believable that accused who had run away after seeing the police would carry contraband in his hand. His first natural reaction would have been to throw away the contraband.

15. The prosecution has associated PW-3 Chint Ram and one Ram Dass as independent witnesses during the investigation. Ram Dass has not been produced by the police. According to PW-1 Ram Asra, the S.H.O.had sent Constable Jaswant Singh to bring independent witnesses. He brought Chint Ram (PW-3) and one Ram Dass and in their presence S.H.O. checked the packet which was carried in his hands. It has come in the statement of PW-4 Constable Jaswant Singh that there were shops besides School near the spot and no person was called from the shops or School. He returned with the witnesses after about half an hour. PW-11 SHO Deep Ram, has also admitted that there was School, shops and Panchayat Ghar near the place where the accused was apprehended. When the independent witnesses were readily

available from the shop as well as the School, there was no occasion to bring two independent witnesses from a far off place.

16. PW-4 Constable Jaswant Singh came back with independent witnesses after half an hour. According to him also after their arrival, checking of the accused was done and the packet was examined. However, as noticed by us hereinabove, PW-3 Chint Ram has deposed that the police did not recover the packet from the accused in his presence. There is no entry in the *malkhana* register about the deposit of NCB forms as per the statement of PW-5 Ved Parkash.

17. The prosecution has failed to prove that the contraband was recovered from the exclusive and conscious possession of the accused. The learned trial Court has correctly appreciated the evidence on record and acquitted the accused. There is no justification for us to interfere with the well reasoned judgment passed by the learned trial Court.

18. Accordingly, there is no merit in this appeal, the same is dismissed.

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

Amit Sood & ors. .....Petitioners.
Versus
Sandala & ors. .....Respondents.

CMPMO No. 207 of 2014.
Decided on: 05.11.2014.

Code of Civil Procedure, 1908- Order 1 Rule 10- An application was moved for impleadment as defendants by the petitioners which was dismissed- held, that the application was filed belatedly and allowing the application for impleadment would amount to relegating the parties to 2004 position- presence of the petitioners is not necessary to adjudicate upon the real controversy between the parties. (Para-3 and 4)

Case referred:
Kasturi vs. Iyyamperumal reported in (2005(6) SCC 733

For the petitioners: Mr. Dheeraj K. Vashista, Advocate.
For the respondents: Mr. Rakesh Kumar Thakur, Advocate for respondents No. 3 to 7.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J. (oral)

This petition is instituted against the order passed by the learned Civil Judge (Sr. Divn.) Court No. 1, Amb, Distt. Una, in case No. 33 of 2006 passed on 3.3.2014.

2. Key facts, necessary for the adjudication of this petition are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs for convenience sake) have filed a civil suit for issuance of permanent injunction restraining the respondents-defendants No. 3 to 7 (hereinafter referred to as the defendants) from raising any sort of construction, changing the nature and dismantling or damaging any room/building existing over the land measuring 1409-33 sq.

decimeters, comprised in *Khewat* No. 257 *Khatoni* No. 397, *Khasra* Nos. 1914/1718, 1916/1719, 1848, 1849, 1850, 1851, 1852 and 1853, as per *jamabandi* for the year 1999-2000, situated in *Up-Mohal* Dev Nagar, *Mauja* Gagret, Tehsil Amb, District Una, H.P. Defendants No. 3 to 7 have also filed a suit against the plaintiffs, namely, Sandla Devi and Shivi Sud for separate possession by partition of the share of *abadi* site measuring 1409-33 sq. decimeters bearing *Khewat* No. 257 min, *Khatoni* No. 397, *Khasra* Nos. 1914/1718, 1916/1719, 1848, 1849, 1850, 1851, 1852 and 1853, as per *jamabandi* for the year 1999-2000. The petitioners have also filed suit for declaration against the plaintiffs as well as the defendants.

3. The suit has been instituted by the plaintiffs against defendants No. 3 to 7 in the year 2004. The petitioners have moved an application under Order 1 Rule 10 CPC for impleadment as defendants. The application was resisted and contested by the plaintiffs as well as defendants by filing replies. The Court has already noticed that the Civil Suit No. 145 of 2004 was filed by the plaintiffs for permanent injunction restraining the defendants No. 3 to 7 from raising any sort of construction, changing the nature and dismantling or damaging any room/building existing over the land denoted in the plaint. Defendants No. 3 to 7 have also filed the suit against the plaintiffs for partition. These two suits have been clubbed. The petitioners have filed the suit No. 33 of 2007 for declaration of their title on the suit land by challenging right, title or interest of plaintiffs and defendants. Infact, the petitioners are challenging the title of the plaintiffs as well as the defendants over the suit land. The learned Civil Judge (Sr. Divn.), Court No. 1, Amb has rightly come to the conclusion that even after the partition of the suit land between the plaintiffs and defendants, they would be bound by the judgment and decree in Civil Suit No. 33 of 2007 filed by the petitioners. Mr. Dheeraj K. Vashista, Advocate, has failed to convince the Court as to what prejudice would be caused to the petitioners if they are not permitted to participate in the suit for injunction and partition filed by the plaintiffs and defendants against each other. The application has been filed under Order 1 Rule 10 CPC belatedly. The act of allowing the application filed by the petitioners, at this belated stage for impleadment, would amount to relegate the parties to 2004 position.

4. The presence of petitioners is not necessary to adjudicate upon the real controversy *inter se* the parties. The considerable prejudice would be caused to the existing parties if the petitioners are ordered to be added as new party.

5. Their lordships of the Hon'ble Supreme Court in the case of ***Kasturi vs Iyyamperumal*** reported in ***(2005(6) SCC 733,*** have laid down the following test for impleadment under Order 1 Rule 10 CPC:

> "11. As noted herein earlier, two tests are required to be satisfied to determine the question who is a necessary party, let us now consider who is a proper party in a suit for specific performance of a contract for sale. For deciding the question who is a proper party in a suit for specific performance the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit for specific performance of the contract for sale. Thus, the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all. Lord Chancellor Cottenham in Tasker v. Small, 1834 (40) English Report 848 made the following observations:

> "It is not disputed that, generally, to a bill for a specific performance of a contract for sale, the parties to the contract only are the proper parties: and, when the ground of the jurisdiction of Courts of Equity in suits of that kind is considered it could not properly be otherwise. The Court assumes jurisdiction in such cases, because a Court of law, giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. But, in equity, as well as in law, the contract constitutes the right and regulates the liabilities of the parties: and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it. are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it."

15. As discussed herein earlier, whether respondent Nos. 1 and 4 to 11 were proper parties or not the governing principle for deciding the question would be that the presence of respondent Nos. 1 and 4 to 11 before the Court would be necessary to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. As noted hereinearlier, in a suit for specific performance of a contract for sale, the issue to be decided is the enforce-ability of the contract entered into between the appellant and the respondent Nos. 2 and 3 and whether contract was executed by the appellant and the respondent Nos. 2 and 3 for sale of the contracted property, whether the plaintiffs were ready and willing to perform their part of the contract and whether the appellant is entitled to a decree for specific performance of a contract for sale against the respondent Nos. 2 and 3. It is an admitted position that the respondent Nos. 1 and 4 to 11 did not seek their addition in the suit on the strength of the contract in respect of which the suit for specific performance of the contract for sale has been filed. Admittedly, they based their claim on independent title and possession of the contracted property. It is, therefore, obvious as noted hereinearlier that in the event, the respondent Nos. 1 and 4 to 11 are added or impleaded in the suit, the scope of the suit for specific performance of the contract for sale shall be enlarged from the suit for specific performance to a suit for title and possession which is not permissible in law. In the case of Vijay Pratap & others v. Sambhu Saran Sinha & others reported, in 1996(10) SCC 53, this Court had taken the same view which is being taken by us in this judgment as discussed above. This Court in that decision clearly held that to decide the right, title and interest in the suit property of the stranger to the contract is beyond the scope of the suit for specific performance of the contract and the same cannot be turned into a regular title suit. Therefore, in our view, a third party or a stranger to the contract cannot be added so as to convert a suit of one character into a suit of different character. As discussed above, in the event any decree is passed against the respondent Nos. 2 and 3 and in favour of the appellant for specific performance of the contract for sale in respect of the contracted property, the decree that would be passed in the said suit, obviously, cannot bind the respondent Nos. 1 and 4 to 11. It may also be observed that in the event, the appellant obtains a decree for specific performance of the contracted property against the respondent Nos. 2 and 3, then, the Court shall direct execution of deed of sale in favour of the appellant in the event respondent Nos. 2 and 3 refusing to execute the deed of sale and to obtain possession of the contracted property he has to put the decree in execution. As noted hereinearlier, since the respondent Nos. 1 and 4 to 11 were not parties in the suit for specific performance of

a contract for sale of the contracted, property, a decree passed in such a suit shall not bind them and in that case, the respondent Nos. 1 and 4 to 11 would be at liberty either to obstruct execution in order to protect their possession by taking recourse to the relevant provisions of the CPC, if they are available to them, or to file an independent suit for declaration of title and possession against the appellant or respondent No.3. On the other hand, if the decree is passed in favour of the appellant and sale deed is executed, the stranger to the contract being the respondent Nos. 1 and 4 to 11 have to be sued for taking possession if they are in possession of the decretal property.

16. That apart, from a plain reading of the expression used in sub-rule (2), Order 1, Rule 10 of the CPC "all the questions involved in the suit" it is abundantly clear that the legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies which may arise between the plaintiff/ appellant and the defendants inter se or questions between the parties to the suit and a third party. In our view, therefore, the court cannot allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title between the plaintiff/appellant on one hand and Respondent Nos. 2 & 3 and Respondent Nos. 1 and 4 to 11 on the other. This addition, if allowed, would lead to a complicated litigation by which the trial and decision of serious questions which are totally outside the scope of the suit would have to be gone into. As the decree of a suit for specific performance of the contract for sale, if passed, cannot, at all, affect the right, title and interest of the respondent Nos. 1 and 4 to 11 in respect of the contracted property and in view of the detailed discussion made hereinearlier, the respondent Nos. 1 and 4 to 11 would, not, at all, be necessary to be added in the instant suit for specific performance of the contract for sale.

17. It is difficult to conceive that while deciding the question as to who is in possession of the contracted property, it would not be open to the Court to decide the question of possession of a third party/ or a stranger as first the lis to be decided is the enforceability of the contract entered into between the appellant and the respondent No.3 and whether contract was executed by the appellant and the respondent Nos. 2 and 3 for sale of the contracted property, whether the plaintiffs were ready and willing to perform their part of the contract and whether the appellant is entitled to a decree for specific performance of a contract for sale against the respondent Nos. 2 and 3. Secondly in that case, whoever asserts his independent possession of the contracted property has to be added in the suit, then this process may continue without a final decision of the suit. Apart from that, the intervener must be directly and legally interested in the answers to the controversies involved in the suit for specific performance of the contract for sale. In Amol v. Rasheed Tuck and Sons Ltd. (1956(1) All Eng. Reporter, 273) it has been held that a person is legally interested in the answers to the controversies only if he can satisfy the Court that it may lead to a result that will effect him legally.

19. The learned counsel appearing for the respondent Nos. 1 and 4 to 11, however, contended that since the respondent Nos. 1 and 4 to 11 claimed to be in possession of the suit property on the basis of their independent title to the same, and as the appellant had also claimed the relief of possession in the plaint, the issue with regard to possession is common to the parties including respondent Nos. 1 and 4 to 11, therefore, the same can be settled in the present suit itself. Accordingly, it was submitted that the presence of respondent Nos. 1 and 4 to 11 would be necessary for proper adjudication of such dispute. This argument

which also weighed with the two courts below although at the first blush appeared to be of substance but on careful consideration of all the aspects as indicated hereinearlier, including the scope of the suit, we are of the view that it lacks merit. Merely, in order to find out who is in possession of the contracted property, a third party or a stranger to the contract cannot be added in a suit for specific performance of the contract for sale because the respondent Nos. 1 and 4 to 11 are not necessary parties as there was no semblance of right to some relief against the respondent No.3 to the contract. In our view, the third party to the agreement for sale without challenging the title of the respondent No.3, even assuming they are in possession of the contracted property, cannot protect their possession without filing a separate suit for title and possession against the vendor. It is well settled that in a suit for specific performance of a contract for sale the lis between the appellant and the respondent Nos. 2 and 3 shall only be gone into and it is also not open to the Court to decide whether the respondent Nos. 1 and 4 to 11 have acquired any title and possession of the contracted property as that would not be germane for decision in the suit for specific performance of the contract for sale, that is to say in a suit for specific performance of the contract for sale the controversy to be decided raised by the appellant against respondent Nos. 2 and 3 can only be adjudicated upon, and in such a lis the Court cannot decide the question of title and possession of the respondent Nos. 1 and 4 to 11 relating to the contracted property."

6. There is no illegality or perversity in the order passed by the learned Civil Judge (Sr. Divn.), Court No. 1, Amb dated 3.3.2014. Accordingly, the petition is dismissed.

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

Deepak Verma .....Petitioner.
Versus
State of H.P. & ors. .....Respondents.

CWP No.8020 of 2014.
Decided on: 5.11.2014.

Constitution of India, 1950- Article 226- Respondent No. 3 had issued an advertisement on 13.12.2011 for filling up the post of PGT (Informatics Practices) - petitioner was called for viva-voce - petitioner stated that he had answered question No. 155 correctly- respondent had changed the answer from A to C - dictionary showed that answer to question 155 was A- respondent directed to revise the list and to recommend the name of the petitioner in case he was found eligible. (Para-4)

For the petitioner: Mr.Sanjeev Bhushan, Advocate.
For the respondents: Mr. M.A.Khan, Addl. AG, for the respondent-State.
Ms. Archna Dutt, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Short reply not filed. The right to file reply is closed.

2. Respondent No. 3 issued an advertisement on 13.12.2011 for filling up the post of PGT (Informatics Practices). The petitioner also participated in the selection process. He appeared in the written test on 5.8.2012. The petitioner was called for viva-voce on 26.6.2013. According to the petitioner, he has answered question No. 155 by giving option 'A' correctly. Question No. 155 reads as under:

> "155. Choose the correct spellings from the alternative A, B, C & D each of the following questions:
>
> (A) Supersede (B) Superseed
>
> (C) Supercede (D) Superceed."

3. We have gone through Annexure P-5, Answer-key. The petitioner has opted for 'A', however, in the revised answer key, the answer has been changed from 'A' to 'C'. The standard spelling is 'supersede' rather than 'supercede'. The action of the respondents of revising the key answer from 'A' to 'C' was palpably wrong.

4. Accordingly, the writ petition is allowed. The answer to question No. 155 in revised answer key Annexure P-6, i.e. from 'A' to 'C' is quashed and set aside. It is declared that the correct answer was 'A' as per Annexure P-5. Respondent No. 3 is directed to revise the result within a period of two weeks from today and thereafter to recommend the name of the petitioner for the post of PGT (Informatics Practices), within one week thereafter. The appointment letter shall be issued by respondent-State within one week after the receipt of the recommendation from respondent No. 3, if necessary, by creating supernumerary post.

5. Pending application(s), if any shall also stand disposed of.

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

Giano Devi and others. ...Appellants.

Versus

Bishan Singh and others. ...Respondents.

RSA No. 513 of 2014

Decided on: 5.11.2014

H.P. Land Revenue Act, 1954- Section 129 read with 171- Plaintiff had raised question of the title before the Revenue Officer- Revenue Officer observed that relief can be sought from an appropriate Civil Court- held, that Revenue Officer should have decided the question by converting himself into civil court or he should have relegated the parties to approach the civil court -he should not have proceeded with the matter, thus, order passed by Revenue Officer was not in accordance with law. (Para-19 and 22)

Case referred:

Leetho vs. Chamelo and others, 2001 (2) S.L.C. 238

For the Appellants: Mr. V.D. Khidtta, Advocate.

For the Respondents: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral).

This Regular Second Appeal is directed against the judgment and decree dated 13.6.2014 rendered by the Additional District Judge, Sirmaur District at Nahan in Civil Appeal No. 30-N/13 of 2014/12.

2. "Key facts" necessary for the adjudication of this Regular Second Appeal are that respondent-plaintiff (hereinafter referred to as the "plaintiff" for convenience sake) has filed a suit for declaration to the effect that he alongwith proforma defendants No. 4 to 13 were only co-owners in possession of land comprised in Khasra No. 15 measuring 12-18 bighas and Khasra No. 62 measuring 2-12 bighas, kita 2 total land measuring 15-10 bighas situated in Mauza Shyampur-Gorkhuwala, Tehsil Paonta Sahib, District Sirmaur (hereinafter referred to as the "suit land" for brevity sake) and the appellants-defendants (hereinafter referred to as 'defendants' for convenience sake) have no right, title and interest in the property of late Sh. Mehru. Earlier Mangta son of Kharku was owner in possession of the suit land and after his death, suit land was inherited by plaintiff and proforma defendants No.4 to 9 vide mutation No. 208. Mehru son of Mangta was unmarried who died issueless. Defendants in connivance with the revenue staff got recorded themselves as legal heirs of Mehru, whereas they were the legal heirs of Tultu resident of village Sataun. Defendants were not related with the plaintiff and proforma defendants. Defendant Daulat Ram sold his land of village Sataun to Sh. Uday Ram son of Layak Ram, resident of village Poka vide sale deeds dated 13.2.1997 and 26.12.1998. Giano Devi had relinquished her share in favour of defendant Daulat Ram vide release deed dated 12.3.1996. In these documents defendants have been shown son and daughter of Tultu resident of village Sataun. In the year 2002, contesting defendant filed an application for partition before the Assistant Collector 1st Grade, Paonta Sahib. Plaintiff and proforma defendants being illiterate could not engage any counsel and their statements were recorded to partition the land. When the plaintiff and proforma defendants came to know about the land under partition and status of defendants, they engaged the counsel and came to know that defendants were claiming the share of late Sh. Mehru by showing themselves to be the legal heirs of late Sh. Mehru. Plaintiff and proforma defendants filed objections before the Assistant Collector 1st Grade, Paonta Sahib that defendants were not the legal heirs of late Sh. Mehru. However, the objections were rejected in an illegal manner by the Assistant Collector 1st Grade, Paonta Sahib vide order dated 13.10.2003 and 20.10.2003. He sanctioned the partition vide order dated 27.12.2003. Cause of action had arisen to the plaintiff on 12.8.2004 when defendants tried to dispossess the plaintiff and proforma defendants from the suit land. Defendant Daulat during the pendency of the suit has alienated his share in the suit land through registered sale deed No. 1416 dated 1.12.2007 to Naresh Kumar son of Ram Darshan, resident of Gorkhuwala, Tehsil Paonta Sahib. Defendants Giano Devi and Nirmala Devi have alienated their shares in the suit land through registered sale deed No. 1195 dated 11.10.2007 to Rajender Singh son of Gian Chand, resident of Mehal Dhabon, Tehsil Nahan, District Sirmaur. According to the plaintiff, defendants were sons and daughter of late Sh. Tultu son of Nandu, resident of village Sataun, Tehsil Paonta Sahib. The succession of Mehru of his land in favour of defendants and subsequent sale of the suit land by defendants No.1 to 3 to defendants No.13 and 14 through registered sale deeds No.1406 and 1195 dated 1.12.2007 and 11.10.2007 were illegal and fraudulent.

3. Defendants No.2 and 3, namely, Giano Devi and Nirmala Devi have filed written statement. They have taken plea under section 11 of the Code of Civil Procedure. According to them, Revenue Officer has already decided all the questions involved in the suit in the partition case No. 71/2002. Mode of partition was framed by the Assistant Collector 1st Grade. After framing of the mode of partition, the Assistant Collector 1st Grade ordered the lower Revenue Staff to partition the land in accordance with the share, kind and quality of the land and on the basis of the order of Revenue Officer, partition of the suit land was effected on the spot. Khatauni alongwith tatimas of the land allotted to each of the co-sharer of the Khata were prepared by the revenue staff. All the co-sharers were present before Revenue Officer. They made their statements of the correctness of the partition on the spot. Bishan Singh, Durga Ram,

Shakuntla filed objections about the non-acceptance of the partition. Their objections were dismissed on 20.10.2003. Thereafter, instrument of partition was ordered on 27.12.2003. According to them, instrument of partition was framed. Plaintiff and proforma defendants did not file any appeal against the order of Revenue Officer nor challenged the order before District Judge. It was stated that Mehru son of Mangta was married with Smt. Jamni .Defendants No.1 to 3 were born from the loin of Mehru son of Mangta and after the death of Mehru son of Mangta, mutation No. 1083 dated 2.12.1989 was attested in favour of defendants No.1 to 3 and Smt. Jamni Devi, being son, daughters and widow of late Sh. Mehru. Revenue entries incorporated in the revenue record in favour of defendants No.1 to 3 were legal and correct. It was admitted that defendant No.2 had relinquished her share in favour of defendant No.1. It was further stated that Jamni Devi, mother of defendants No.1 to 3 was married to one Tultu resident of village Sataun and after his death, she married to Mehru son of Mangta, father of answering defendants.

4. Defendants No.4 and 7 to 9 have also filed written statement. They have admitted paras 1 to 9 of the plaint.

5. Proforma defendants No.10 to 12 have also filed separate written statement. According to them, they became owners by registered sale deed executed by Bishan Singh, plaintiff and his brother, namely, Ranjeet Singh on 17.7.1997 and sale deeds dated 21.1.1996, 11.4.1996 and 24.10.2003. They were in exclusive possession as per their share of land sold by plaintiff and his brother Ranjeet Singh.

6. Defendant No.5 has also filed written statement stating therein that after the death of Mehru son of Mangta, plaintiff Durga Ram and answering defendant were cultivating their shares separately. Defendants No.1 to 3 have no right, title and interest in the suit land and their names as legal heirs of deceased Mehru have wrongly been entered in the revenue record.

7. Plaintiff has filed replication to the written statement filed by defendants. Issues were framed by the Civil Judge (Senior Division) on 19.1.2007 and 11.9.2009. Learned Civil Judge (Senior Division) decreed the suit vide judgment and decree dated 31.1.2012. Defendants filed an appeal before the District Judge, Sirmaur District at Nahan. He dismissed the same on 13.6.2014. Hence, the present Regular Second Appeal.

8. Mr. V.D. Khidtta, learned counsel for the appellants, on the basis of substantial questions of law framed, has vehemently argued that jurisdiction of civil court was barred under section 171 of the Himachal Pradesh Land Revenue Act, 1954. He has also contended that both the courts below have not correctly appreciated the documents Ex.PW-1/A, Ex.PW-2/B and Ex.PW-2/E. He has also referred to documents Ex.DW-1/A to Ex.DW-1/P and Ex.DW-2/B to Ex.DW-2/E. According to him, defendants were legal heirs of Mehru.

9. I have heard the learned counsel for the parties and have gone through the judgments passed by both the courts below.

10. Since all the substantial questions of law are interconnected and interlinked, the same are taken together for determination to avoid repetition of discussion of evidence.

11. According to Ex.PW-2/C, Jamabandi for the year 1962-1963, mutation of inheritance of the property of Mangta bearing No.208 was attested on 3.6.1967 in favour of Mehru, Rania, Durga Ram, Bishan Singh, Phool Singh and daughter Smt. Shakuntla Devi and Narda Devi. They have inherited the property of Mangta after his death.

12. PW-1 Ramesh Kumar has brought the summoned record and copy of certificate Ex.PW-1/A.

13. PW-2 Bishan Singh, plaintiff, has tendered his evidence by way of affidavit Ex.PW-2/A. He came to know that Daulat Ram sold his land to Naresh and Giano Devi and Nirmala sold the land to Rajender. They could not sell the land because they were not the owners of the land. He and Durga Ram were the owners. Defendants were sons of Tultu. He has proved copy of sale deed Ex.PW-2/K vide which Daulat Ram has sold land to Naresh Kumar and copy of sale deed Ex.PW-2/L vide which Giano Devi and Nirmala Devi have sold their land to Rajinder Singh. He has admitted that Giano Devi and Nirmala Devi had filed an application before Tehsildar for partition of land. He has denied that on 7.8.2002, he appeared before the Tehsildar and deposed that he has no objection with regard to partition.

14. DW-1 Deep Chand Sharma, Senior Assistant from Tehsil Office has brought the summoned record and certified copies were Ex.DW-1/A to Ex.DW-1/P. He has admitted that he has seen the objections filed by Bishan Singh in the summoned file vide Ex.PW-2/J.

15. DW-2 Giano Devi has led her evidence by way of affidavit Ex.DW-2/A. She has furnished documents Ex.DW-2/B to Ex.DW-2/E. She has denied that Jamni was the wife of Tultu. She has denied that from the loin of Jamni and Tultu, Daulat, Ginao and Nirmala were born. She has denied that Tultu died in the year 1972. Volunteered that he died about 45 years back. She did not know that after the death of Tultu, mutation of his property was attested in favour of Sundlu, Daulat Ram, Kamla, Satya and Giano and her mother Jamni on 8.3.1972. She has admitted that the land of Tultu was inherited by her. She by preparing relinquish deed on 12.3.1996 has given this land to her brother Daulat Ram.

16. DW-3 Naresh Kumar has purchased 18 biswas of land from Daulat Ram situated in Mauza Shyampur Gorkhuwala for consideration of Rs.1,00,000/- through sale deed Ex.PW-2/K. According to him, the land was inherited by Daulat Ram from his father Mehar Singh. In his cross-examination, he has admitted that Mehar Singh belonged to Shyampur-Gorkhuwala and name of his father was Mangta. He has also admitted that name of mother of Daulat Ram was Jamni. He has denied that Jamni was the wife of Tultu. Volunteered that she was the wife of Mehru. He did not know when Tultu died and the mutation of inheritance of his property was attested in favour of his sons Sundlu, Daulat Ram, daughters Kamla, Satya and Giano Devi and his wife Jamni Devi dated 8.3.1972 vide mutation No. 598.

17. DW-4 Daulat Ram has deposed that his mother's name was Jamni Devi. She was married with Tultu. After the death of Tultu, Jamni was married with Mehar Singh. His mother Jamni Devi was having two children from loin with Tultu such as Sundlu and Satya Devi. His mother was having three children from Mehar Singh such as Giano Devi, Nirmala Devi and he himself. His father Mehar Singh was working in P.W.D. He died on 13.10.1989. He performed the last rites of his father. After the death of his father, all benefits were taken by his mother Jamni and he took the job at the place of his father. Case of partition was filed in the court of Tehsildar, Paonta Sahib. He received 18 biswas of land by way of partition. He has sold the land to Naresh Kumar by way of registered sale deed for consideration of Rs. 1,00,000/-. He has delivered the possession of the land to Naresh Kumar. He has no relation with Tultu. He was born on 15.11.1967. He has denied that Tultu died in the year 1971. Volunteered that he died prior to 1965. He did not know whether mutation of inheritance of property of Tultu was attested on 14.2.1972. He has admitted that Giano Devi vide relinquishment deed Ex.PW-2/G relinquished her share in his favour of the land.

18. PW-5 Ramesh Kumar has proved copy of Pariwar register Ex.PW-5/A. He has admitted in his cross-examination that Jamni Devi was recorded the wife of Mehar Singh after his death. He has prepared Ex.PW-1/A.

19. The core issue involved in this Regular Second Appeal is whether the defendants are sons and daughter of Mehar Singh or they are sons and daughter of Tultu. According to Sajra Nasab Ex.PW-2/E, Tultu was having sons and daughters Daulat Ram, Sundlu, Kamla, Satya, Giano Devi and his wife was Jamni Devi. According to copy of Pariwar Register of Tultu of Gram Panchayat Sataun Ex.PW-1/A, Jamni Devi was the wife of Tultu and Kamla, Sundlu, Satya and Daulat Ram were shown sons and daughters. In sale deed Ex.PW-2/F, qua the land of Tultu in favour of Uday Ram, Daulat Ram has written his parentage in the name of Tultu. Similarly, Giano Devi has also relinquished her share received by her of the land of Tultu in favour of her brother Daulat Ram vide release deed Ex.PW-2/G in the year 1996. It also shows Giano Devi as the daughter of Tultu. In her examination-in-chief, DW-2 Giano Devi has deposed that she did not know Tultu. However, in her cross-examination, she has admitted that the property of Tultu which she received has been released by her in favour of Daulat Ram on 12.3.1996. Defendants have produced copy of Pariwar register Ex.DW-5/A wherein Jamni Devi has been shown as wife of Mehar Singh vide resolution No.4 dated 6.11.1989. However, Mehar Singh has been shown as dead on 13.10.1989. This document also reflects that Jamni Devi in the first column was wife of Tultu. PW-1 Ramesh Kumar did not know how Mehar Singh's name was recorded in Ex.DW-5/A and how Jamni Devi was shown as wife of Mehar Singh when he has died on 13.10.1989. According to Ex.DW-2/D, land of Tultu was inherited by Jamni Devi as his wife, vide mutation No.598. Mutation was attested on 8.3.1972. Defendants have not produced any documents on the basis of which Jamni Devi is proved to be married to Mehar Singh vide Ex.DW-5/A. Plaintiff and proforma defendants have appeared before the Assistant Collector 1st Grade and raised the question of title and despite that Assistant Collector 1st Grade has passed the order of partition. It is evident from section 129 of the Himachal Pradesh Land Revenue Act, 1954 when there is a question as to title in any of the property of which partition is sought, the Revenue Officer may decline to grant the application for partition until the question has been determined by a competent court or he may himself proceed to determine the question as though he were such a court. The Assistant Collector 1st Grade has not converted himself to civil court after the question of title was raised. According to section 171 (2) (xvii) of the Himachal Pradesh Land Revenue Act, 1954 any claim for partition of an estate, holding or tenancy or any question connection with or arising out of proceedings for partition not being a question as to title in any of the property of which partition is sought. In the instant case, since question of title was raised, jurisdiction of civil court would not be ousted as per section 171 (2) (xvii) of the Himachal Pradesh Land Revenue Act, 1954. According to document Ex.PW-2/H, Ex.DW-1/B, Ex.DW-1/C, Ex.DW-1/D and Ex.DW-1/E, Bishan Singh, Durga Ram etc. had preferred objections before the Assistant Collector 1st Grade stating that contesting defendants were legal heirs of Tultu and not of Mehar Singh. However, surprisingly, Assistant Grade 1st Grade in his order vide Ex.DW-1/N and Ex.DW-2/H has observed that relief could be sought from the appropriate competent civil court. He should have decided the question by converting himself into civil court when the question of title was raised or in the alternate he should not have proceeded with the matter and should have relegated the parties to approach the civil court before passing order. Thus, order passed by Assistant Collector 1st Grade dated 13.10.2003, 20.10.2003 and 27.12.2003 were bad in law.

20. This Court in ***Leetho*** vs. ***Chamelo and others***, 2001 (2) S.L.C. 238 has held as under:

> **"11. Therefore, in the light of settled legal position this Court has no hesitation to hold that in the facts and circumstances of the present case the Civil Court had the jurisdiction, as question of title was raised by the plaintiff by making; allegations that the land in dispute stood partitioned long back, as a result of which he was**

holding the land comprised of four Khasra numbers (1632/ 406, 1636/407, 425 and 1646/472) allotted to him, to the exclusion of other co-sharers. There was additional reason for invoking the jurisdiction of the Civil Court on the allegations that the impugned order dated 21.9.1983 partitioning the land in dispute was passed ex parte without proper service on the plaintiff; in violation of the principles of natural justice and without following the procedure laid down under H.P. Land Revenue Act. In this view of the matter, the findings of the first appellate Court that the Civil Court had no jurisdiction to entertain the suit of the plaintiff are set aside and substantial question of law No. 1 is answered accordingly."

21. According to Ex.DW-2/D, Jamabandi for the year 1970-71 and mutation No. 598, the property of Tultu was inherited by Jamni Devi as wife, his sons Sandlu, Daulat Ram and daughters Kamla and Satya. The mutation was attested on 8.3.1972. Defendant Daulat Ram while appearing as DW-4 has stated that the land of Tultu Ram was sold by him to Uday Ram through registered sale deed Ex.PW-1/F. Defendant Daulat Ram during the pendency of the suit has alienated his share vide Ex.PW-2/K. Defendants No.2 and 3 have alienated the land through registered sale deed Ex.PW-2/L. They have not sought permission of the Court before selling their respective shares to defendant Nos. 13 and 14. Thus, sale deed Nos. 1416 and 1195 dated 1.12.2007 and 11.10.2007, i.e. Ex.PW-2/K and Ex.PW-2/L have rightly been declared illegal and void by both the courts below. Accordingly, it is held that the civil court had jurisdiction to decide the suit.

22. Order of partition and subsequent preparation of instruction of partition were illegal since Assistant Collector 1st Grade has not decided the issue in accordance with law either by converting himself as civil court or asking the parties to approach the civil court.

23. Both the courts below have correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgments passed by both the courts below.

24. Accordingly, in view of the analysis and discussion made hereinabove, no question of law much less to say substantial of law is involved in the Regular Second Appeal and the same is dismissed. Pending application, if any, also stands disposed of. No costs.

****

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

State of Himachal Pradesh & others .....Petitioners.

Versus

Sh. Inder Singh .....Respondent.

CWP No. 2648 of 2013.
Reserved on: 31st October, 2014.
Date of Decision :5th November, 2014.

Industrial Dispute Act, 1947- Section 25(f)- petitioner was engaged as a daily wage workman - he was retrenched and made a reference to Labour Court-cum-Industrial Tribunal, which held that the retrenchment was bad and was liable to be set aside- held, that if workman had completed 240 days of service with or without interruptions, it constitutes completion of 240 days of service and the employer is under an obligation to comply with Section 25(f) of Industrial Dispute Act. (Para-5)

Industrial Dispute Act, 1947- Section 25- Delay- State contended that claimant had made a reference before the Industrial Tribunal which was barred by limitation- held, that question of limitation is to be decided by an appropriate Govt. - once a reference was not questioned on the ground of delay, award passed on such reference cannot be questioned on the ground of delay. (Para-8)

Cases referred:

Surendranagar District Panchayat versus Dahyabhai Amarsinh (2005)8 SCC 750

General Manager, Harayana Roadways Vs. Rudhan Singh (2005)5 SCC 591

Karan Singh versus Executive Engineer, Haryana State Marketing Board, (2007)14 SCC 291

For the Petitioners: Mr. Vivek Singh Attri, Deputy Advocate General.
For the respondent: Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The respondent in the writ petition was engaged as a daily waged workman by the petitioners herein. He claimed that though, he had rendered "continuous service" under the petitioners herein for not less than one year, yet he was retrenched in blatant transgression of the mandate of Section 25-F(a) of the Industrial Disputes Act, 1947 envisaging therein an enshrined mandatory obligation upon the employer to, preceding retrenchment of the workman, as also, to render it valid, serve one month's notice in writing upon him indicating therein the reasons for retrenchment or the employer defraying to him in lieu of notice, wages for the period of notice, besides in case one month's notice in writing has come to be served upon the workman, a valid retrenchment/disengagement would occur only when the period of notice has expired. Therefore, he contends that his retrenchment/disengagement at the instance of the petitioners is non est and is liable to be quashed and set aside. The grievance aforesaid of the respondent constrained the "appropriate government" to formulate a reference for adjudication by the Labour Court-com-Industrial Tribunal, Dharamshala. The reference which was to be adjudicated upon by the Labour Court-cum-Industrial Tribunal Dharamshala was couched in the hereinafter extracted phraseology:-

> "Whether termination of the services of Sh. Inder Singh s/o Shri Jagat Ram by the Executive Engineer, HPPWD Division No.-II, Kullu, District Kullu, H.P. w.e.f. 30.10.19099 without following the provisions of the Industrial Disputes Act, 1947 as alleged by the workman is proper and justified? If not, what relief of service benefits including seniority and compensation the above workman is entitled to?"

2. The learned Labour Court-cum-Industrial Tribunal, on a consideration of the material as it was seized with comprised in the mandays chart divulging the period of service rendered by the workman/respondent herein with the petitioners herein/his employers, inasmuch as its displaying that he had in the year preceding to his retrenchment rendered 240 days of service under the petitioners/his employers, was constrained to conclude that despite his having rendered the requisite period of "continuous service" within the ambit of Section 25-F of the Industrial Dispute Act, his retrenchment having not been preceded by compliance by the petitioners/his employers with the mandatory obligation envisaged under Section 25-F(a) of the Industrial Disputes Act, rendered his disengagement/retrenchment to be liable to be quashed and

set aside. The relevant provisions of Section 25-F of the Industrial Disputes Act read as under:

> "S.25-F. Conditions precedent to retrenchment of workmen- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-
>
> (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
>
> (b).....
>
> (c)....."

3. The import of the phraseology "continuous service" existing in Section 25-F of the Industrial Dispute Act has to be fathomed as well as grasped, as comprehension of its signification would facilitate this Court to render a determination qua the factum of the respondent having or having not rendered "continuous service" within the ambit of the phrase "continuous service" existing in Section 25-F of the Industrial Disputes Act so as to then concomitantly make it incumbent upon the employers/the petitioners herein, to further for rendering his disengagement to be valid, comply with the provisions of Section 25-F of the Industrial Disputes Act.

4. The definition of the phrase "continuous service" exists in Section 25-B of the Industrial Disputes Act which provisions are extracted hereinbelow:-

> "**25-B. Definition of continuous service**:- For the purpose of this chapter,-
>
> (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
>
> (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
>
> (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
>
> (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
>
> (ii) two hundred and forty days, in any other case;
>
> ....."

5. The learned Deputy Advocate General contends on the strength of the definition of "continuous service" existing in Section 25-B(1) of the Industrial Disputes Act, that when the provisions thereof define "continuous service" to be a period of continuous service uncircumscribed qua its duration/time, rather with sub section (1) of Section 25-B of the Industrial Disputes Act, treating and construing "continuous service" to be only a period of uninterrupted service and interruptions in "continuous service" of a workman under his employers sequeled by sickness, authorized leave or an accident or a strike or a lock out or a cessation of work which is not due to any fault on the part of the workman, not constituting any break or cessation in the continuity in service of a workman under his employer, the mandate therein is to be imported into the definition of "continuous service" existing in sub section

(2) of Section 25-B of the Industrial Disputes Act, besides he contends that both sub sections (1) and (2) of Section 25-B of the Industrial Disputes Act have to be read in harmony or conjunctively. In the above manner in which he reads the provisions of Section 25-B of the Industrial Disputes Act, he contends that though it is displayed by the mandays chart of the respondent herein comprised in Annexure P-2, that he in the year preceding his retrenchment had rendered 240 days of service, nonetheless, when as also disclosed therein of his in the months of October, 1998 and July, 1999, having omitted to perform duty under the petitioners/his employers and when such interruption in his "continuous service" under the respondents is not sequeled by proof of existence of the prescribed statutory reasons engrafted in sub section (1) of Section 25-B of the Industrial Disputes Act, such breaks in his continuity of service or such interruptions in his continuity of service under the petitioners herein being, hence, statutorily uncondonable, do not render his service under his employers to be constituting "continuous service", within the ambit of Section 25-F of the Industrial disputes Act, even if, otherwise the respondent herein has rendered 240 days of service under the petitioners herein/his employers. In fathoming the vigour of the contention of the learned Deputy Advocate General, it is necessary initially to dwell upon the factum whether sub section (1) and sub section (2) of Section 25-B of the Industrial Disputes Act ought to be read in harmony or in conjunction or the provisions aforesaid stand in mutual exclusion to each other and as such they are to be construed disconjunctively. Only on this Court construing that both sub sections (1) and (2) of Section 25-B of the Industrial Disputes Act stand in mutual exclusion to each other or are to be read disconjunctively, that the contention of the learned Deputy Advocate General would stand dispelled. The fact that both sub sections (1) and (2) of Section 25-B of the Industrial Disputes Act stand in mutual exclusivity to each other, is apparent on a plain reading of the two provisions which exist in contradistinct sub sections. On a plain literal construction of sub section (1) of Section 25-B of the Industrial Disputes Act, it is apparent that it is mandatorily enjoined therein that "continuous service" as envisaged therein is for a period un-fettered in duration, yet it prescribes conditions or valid statutory grounds which when proved, do not, even if, they occur during the period of service of a workman/employee, sequel a break in the "continuous service" of a workman under his employer. However, when sub section 2 commences with the phraseology that where a workman is not in "continuous service" within the meaning of sub section (1), yet by a statutory fiction shall be deemed to be in "continuous service" under his employer in case during the 12 calendar months preceding the date with reference to which calculation is to be made, he has rendered 190 days in case of a workman employed below ground in a mine and 240 days in any other case, as is the case of the petitioner, his not being employed below the ground in a mine, as such it procreates a provisions direly contradistinct to the provision existing in the preceding sub section or hence it constitutes exception to the definition of "continuous service" existing in the prior sub section. When on a plain reading of sub section (1) and sub section (2) of Section 25-F of the Industrial Dispute Act defining "continuous service" it is neither apparent nor clear that the provisions therein either envisage or contemplate a harmonious reading of sub section (1) and sub section (2), so as to accept the submission of the learned Deputy Advocate General, rather when qua a workman not falling in the category of a workman qua whom 'continuous" service is to be reckoned in a distinct manner as enshrined in sub section (1), rather the reckoning of rendition of "continuous service" qua such workman is to be made in a starkly distinct manner and fashion exclusively defined in sub section (2). Cumulatively, besides when workmen falling in the category qua whom computation of "continuous service" is to be made in the specific manner enshrined in sub section (1) of Section 25-B of the Industrial Disputes Act, comprise a category distinct from the category of workmen falling in the category qua whom reckoning of "continuous service" is to be made in a distinct fashion, as enunciated in sub section (2) of Section 25-B of the Industrial

Disputes Act, in sequel, both sub sections (1) and (2) of Section 25-B of the Industrial Disputes Act stand in exclusion to each other, especially when they mandate the reckoning of "continuous service" qua distinctly spelt categories of workmen in a distinctly enunciated manner. Consequently, for reiteration when, hence, sub section (2) is in exclusion to sub section (1), the provisions of sub section (2) are to be read independently to the provisions of sub section (1). As a concomitant then for the reckoning of the period of "continuous service" qua the respondent herein, inasmuch as qua the factum of computation of his having rendered 240 days of 'continuous service" under his employer for his, hence, being entitled to the protection as envisaged under the provisions of Section 25-F(a) of the Industrial Disputes Act, there is no necessity of any interruptions or cessations, if any, in his service of 240 days under his employer in the year preceding his retrenchment being enjoined to be proven to be validated by the statutory prescriptions enunciated in Section 25-B(1) of the Industrial Disputes Act. Rather, when it is suffice that in case his mandays chart reflect his having rendered 240 days of service under his employers, even if, with or without interruptions or with or without breaks, it constitutes completion of 240 days of service under his employers, so as to then entail upon the obligation to comply with the mandate of Section 25-F(a) of the Industrial Disputes Act. Consequently, the submission made by the learned Deputy Advocate General that when the interruptions in his service under his employer is not on account of proven/existence of statutory prescriptions occurring in sub section (1) of Section 25-B of the Industrial Disputes Act, hence, even if, he rendered 240 days of service under his employers before his retrenchment, it does not constitute "continuous service" under his employers for the purpose of giving him the protection of Section 25-F(a) of the Industrial Dispute Act is rendered rudderless. At this stage, it is apt to cite a judgment of the Hon'ble Apex Court reported in ***Surendranagar District Panchayat versus Dahyabhai Amarsinh (2005)8 SCC 750***, the relevant paragraph No.8 of which is extracted hereinafter, which sustains and gives succor to the interpretation rendered by this Court on sub sections (1) and (2) of Section 25-B of the Industrial Disputes Act defining "continuous service", as also, gives fillip to the conclusion formed by this Court that the import of "continuous service" as existing in sub Section 2 of Section 25-B of the Industrial Disputes Act qua workmen of the category to which the respondent herein belongs, is of his having rendered at least 240 days period of work under his employers, irrespective of whether he has not worked throughout the year under his employer and irrespective of the fact that his breaks or interruptions in service are proven to be validly authorized by the statutory prescriptions enshrined in sub section (1) of Section 25-B of the Industrial Disputes Act. Relevant paragraph No.8 of the judgment reads as under:-

> "8. To attract the provisions of Section 25F, one of the condition required is that the workman is employed in any industry for a continuous period which would not be not less than one year. Section 25B of the Act defines continuous service for the purposes of Chapter V-A "Lay-off and Retrenchment". The purport of this Section is that if a workman has put in an uninterrupted service of the establishment, including the service which may be interrupted on account of sickness, authorized leave, an accident, a strike which is not illegal, a lock-out or cessation of work, that is not due to any fault on the part of the workman, shall be said to be a continuous service, for that period. Thus the workmen shall be said to be in continuous service for one year i.e., 12 months irrespective of the number of days he has actually worked with interrupted service, permissible under Section 25B. However, the workmen must have been in service during the period, i.e., not only on the date when he actually worked but also on the days he could not work under the circumstances set out in Sub-Section (1). The workmen must be in the employment of the employer concerned on the days he

has actually worked but also on the days on which he has not worked. The import of Sub Section(1) of Section 25B is that the workmen should be in the employment of the employer for the continuous, uninterrupted period for one year except the period the absence is permissible as mentioned hereinabove. Sub-section (2) of Section 25B introduces the fiction to the effect that even if the workman is not in continuous service within the meaning of Clause (i) of Section 25-B for the period of one year or six months he shall be deemed to be in continuous service for that period under an employer if he has actually worked for the days specified in clause (a) and (b) of Sub-s(2). By the legal fiction of Sub-s2(a)(i), the workmen shall be deemed to be in continuous service for one year if he is employed underground in a mine for 190 days or 240 days in any other case. Provisions of the Section postulate that if the workmen has put in at least 240 days with his employer, immediately prior to the date of retrenchment, he shall be deemed to have served with the employer for a period of one year to get the benefit of Section 25F."

6. Further fortification to the view aforesaid is lent by the mandate of the Hon'ble Supreme Court enshrined in ***General Manager, Harayana Roadways Vs. Rudhan Singh (2005)5 SCC 591,*** the relevant paragraph No.5 is extracted hereinbelow:-

"5. Learned counsel for the appellant has next submitted that according to the own case of the respondent he was appointed on 16.3.1988 and his services were terminated on 28.2.1989 and thus he had not worked for one year and consequently Section 25-F of the Act would not apply to his case. In support of this submission reliance has been placed on Sur Enamel and Stamping Works Ltd. vs. The Workmen [AIR 1963 SC 1914], wherein it was held that under Section 25-F of the Act only a workman, who has been in continuous service for not less than one year under an employer, is entitled to its benefit. Before a workman can be considered to have completed one year of continuous service in an industry it must be shown first that he was employed for a period of not less than 12 calendar months and next that during those 12 calendar months he had worked for not less than 240 days. It was further held that a workman, who has not at all been employed for a period of 12 months, would not satisfy the requirements of Section 25-B of the Act and would not be entitled to the benefit under Section 25-F of the Act. It is important to note that Section 25-B of the Act, which contains the definition of 'continuous service' was amended by Act No. 36 of 1964 and the relevant part thereof reads as under: -

"25-B. Definition of continuous service.- For the purpose of this Chapter, -

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation. - (omitted as not relevant for the present case)"

This amended provision has been considered in Surendra Kumar Verma vs. The Central Government Industrial Tribunal-cum- Labour Court [AIR 1981 SC 422], where after noticing the ratio of Sur Enamel and Stamping Works Ltd. vs. The Workmen (AIR 1963 SC 1914), it was held as under: -

> "Act 36 of 1964 has drastically changed the position. S. 2(eee) has been repealed and S. 25-B(2) now begins with the clause "where a workman is not in continuous service ..... for a period of one year". These changes brought about by Act 36 of 1964 appear to be clearly designed to provide that a workman who has actually worked under the employer for not less than 240 days during a period of twelve months shall be deemed to have been in continuous service for a period of one year whether or not he has in fact been in such continuous service for a period of one year. It is enough that he has worked for 240 days in a period of 12 months; it is not necessary that he should have been in the service of the employer for one whole year. ....."

In view of this authoritative pronouncement the requirements of Section 25-F of the Act would be satisfied if a workman has worked for 240 days in a period of 12 months and it is not necessary that he should have been in the service of employer for complete one year. The Industrial Tribunal-cum-Labour Court has recorded a finding that the respondent has worked for 264 days and this finding has not been challenged before the High Court. In this view of the matter the provisions of Section 25-F of the Act are clearly applicable and as neither any notice or wages in lieu of the period of notice nor any retrenchment compensation was paid to the respondent, his termination of service has to be held to be invalid."

7. In aftermath it is invincibly concluded that the findings and conclusions arrived at by the learned Labour Court-cum-Industrial Tribunal, Dharmshala qua the factum of the respondent herein having rendered 240 days of continuous service under the petitioner herein/his employers is sustainable, also as a corollary the submission of the learned Deputy Advocate General stands discountenanced.

8. The learned Deputy Advocate General has concerted to also contend that given the factum that the respondent stood retrenched from service in the year 1999, his having raised an industrial dispute qua his illegal retrenchment in the year 2010, consequently, the reference was stale and ought to have entailed dismissal. The above submission does not warrant acceptance in the face of the fact that the "appropriate government" had while formulating the reference couched/framed in the hereinabefore extracted phraseology had transmitted it to the Labour Court-cum-Industrial Tribunal, Dharamshala for adjudication thereon by the latter. It was for the "appropriate government" before making the reference to consider the fact whether the dispute raised by the workman/respondent herein constituted a stale claim or the claim was barred by delay and laches, hence, was un-referable. However, though the "appropriate government" applied its mind to the dispute as raised by the respondent herein, but it appears to have overlooked the factum of the purported staleness of the claim as raised by the workman. As a natural

corollary, when it then, hence, overlooked the fact of the purported staleness of the claim as raised by the workman, as such, it is to be construed to have, hence, abandoned the factum of the purported staleness of the claim raised by the workman and its having vitiated the impugned award. As a corollary when the petitioners herein constitute a part of the "appropriate government" are estopped from concerting or agitating before this Court that the claim raised by the workman is stale and necessitates dismissal. Besides, the petitioners herein are estopped from forestalling an adjudication by the learned Labour Court-cum-Industrial Tribunal, Dharamshala on the reference formulated in the phraseology extracted hereinabove. The natural inference which ensues is that dehors the factum of the purported staleness of the claim as raised by the workman, it having been omitted to be gone into rather having been overlooked as well as abandoned, the mere factum of delay, if any, does not constitute a valid ground for this Court to interfere with the adjudication by the Labour Court-cum-Industrial Tribunal on the reference made to it by the "appropriate government" especially when given the reference of the dispute to it by the "appropriate government, it was vested with the jurisdiction to decide it. Even if, the petitioners herein were aggrieved by the factum of the formulation of the reference comprising the industrial dispute formulated by the "appropriate government" carrying the stench of vitiation, inasmuch as its having omitted to apply its mind to the factum of the demand as raised by the workman being stale, hence, the demand or claim raised by the workman being un-referable for adjudication, the appropriate remedy was then available with the petitioners herein to approach the Writ Court for setting aside the reference. The petitioners having omitted to approach the writ Court for quashing of the reference on the ground of its comprising a stale claim, are now estopped from seeking relief from this Court that the award of the learned Labour Court-cum-Industrial Tribunal is permeated with a vice, inasmuch as it has adjudicated upon a reference which was unreferable being barred by time. In coming to the above conclusion, I am supported by the judgment of the Hon'ble Apex Court reported in **Karan Singh versus Executive Engineer, Haryana State Marketing Board, (2007)14 SCC 291**, the relevant paragraphs No.13 to 15 of which are extracted hereinbelow:-

> "13. In the present case, the Industrial Tribunal has held that the employer has violated Section 25F. If so, the order of termination is bad in law. It has to be struck down. In the present case, it has been struck down. However, the Tribunal had refused to grant any relief on the ground of delay. The Tribunal has no authority to invalidate the reference, particularly when it has found that the order of termination violates Section 25F of the Industrial Disputes Act, 1947.
>
> 14. In Sapan Kumar Pandit v. U.P. State Electricity Board and Ors., {(2001) 6 SCC 222}, it has been held, vide para 15, as follows: (SCC p.228)
>
>> "There are cases in which lapse of time had caused fading or even eclipse of the dispute. If nobody had kept the dispute alive during the long interval, it is reasonably possible to conclude in a particular case that the dispute ceased to exist after some time. But when the dispute remained alive though not galvanized by the workmen or the Union on account of other justified reasons, it does not cause the dispute to wane into total eclipse. In this case, when the Government have chosen to refer the dispute for adjudication under Section 4-K of the U.P. Act the High Court should not have quashed the reference merely on the ground of delay. Of course, the long delay for making the adjudication could be considered by the adjudicating authorities while moulding its reliefs. That is a different matter altogether. The High Court has obviously gone wrong in axing down the order of reference made

> by the Government for adjudication. Let the adjudicatory process reach its legal culmination."

15. “10. So far as delay in seeking the reference is concerned, no formula of universal application can be laid down. It would depend on facts of each individual case.

11. However, certain observations made by this Court need to be noted. In Nedungadi Bank Ltd. v. K.P. Madhavankutty and Ors. {2000 (2) SCC 455} it was noted at para 6 as follows: (SCC pp.459-60)

> "6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of the order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising an industrial dispute was ex-facie bad and incompetent."

12. In S.M. Nilajkar and Ors. v. Telecom District Manager, Karnataka (2003 (4) SCC 27) the position was reiterated as follows: (SCC pp.39-40, para 17)

> "17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree. It is true, as held in M/s. Shalimar Works Ltd. v. Their Workmen (supra) (AIR 1959 SC 1217), that merely because the Industrial Disputes Act does not provide for a limitation for raising the dispute it does not mean that the dispute can be raised at any time and without regard to the delay and reasons therefor. There is no limitation prescribed for reference of disputes to an industrial tribunal, even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed particularly so when disputes relate to discharge of workmen wholesale. A delay of 4 years in raising the dispute after even reemployment of the most of the old workmen was held to be fatal in M/s. Shalimar Works Limited v. Their Workmen (supra) (AIR 1959 SC 1217), In Nedungadi Bank Ltd. v. K.P. Madhavankutty and others (supra) AIR 2000 SC 839, a delay of 7 years was held to be fatal and disentitled to workmen to any relief. In Ratan Chandra Sammanta and others v. Union of India and others (supra) (1993 Supp (4) SCC 67), it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself, lapse of time results in losing the remedy and the

right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief. Although the High Court has opined that there was a delay of 7 to 9 years in raising the dispute before the Tribunal but we find the High Court factually not correct. The employment of the appellants was terminated sometime in 1985-86 or 1986-87. Pursuant to the judgment in Daily Rated Casual Employees Under P&T Department v. Union of India (supra) (AIR 1987 SC 2342), the department was formulating a scheme to accommodate casual labourers and the appellants were justified in awaiting the outcome thereof. On 16-1-1990 they were refused to be accommodated in the scheme. On 28-12-1990 they initiated the proceedings under the Industrial Disputes Act followed by conciliation proceedings and then the dispute was referred to the Industrial Tribunal cum-Labour Court. We do not think that the appellants deserve to be non suited on the ground of delay."

The above position was highlighted recently in Sudamdih Colliery of Bharat Coking Coal Ltd. v. Workmen, { (2006)2 SCC 329}, SCC pp.334-36, paras 10-12 and Chief Engineer, Ranjit Sagar Dam v. Sham Lal, {(2006)9 SCC 124}"

9. For the foregoing reasons, there is no merit in this petition which is accordingly dismissed and the impugned award of the learned Labour Court-cum-Industrial Tribunal Dharamshala is affirmed and maintained. No costs.

10. The pending application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

RSA Nos. 193 & 254 of 2014.
Decided on: 12th November, 2014

1. RSA No. 193 of 2014.

Sadhu Singh & Others .....Appellants.
Versus
Mohinder Singh & Others ...Respondents.

2. RSA No. 254 of 2014.

Sadhu Singh & Others .....Appellants.
Versus
Surjit Singh & Others ...Respondents.

Code of Civil Procedure, 1908- Order 43 Rule 1- Trial Court held that it had no jurisdiction to hear and entertain the matter and ordered the return of plaint for presentation before an appropriate Court- appeal was preferred under Order 43 Rule 1(a) of CPC which was treated as a Civil Appeal- held, that it was not permissible for the Court to treat an appeal under Order 43 Rule 1 (a) as a Civil Appeal - only an appeal under Order 43 Rule 1 (a) lies against the order returning the plaint - matter remanded with the direction to decide the same as appeal under Order 43 Rule 1(a). (Para-6 to 9)

For the appellants : Mr. Jyotsna Rewal Dua, Advocate.

For the respondents : Mr. R.K. Gautam, Senior Advocate with Mr. Gaurav Gautam, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

This judgment shall dispose of the present appeal and also connected one involving similar questions of law and facts for adjudication.

2. As a matter of fact, it is the plaintiffs, who are in second appeal before this Court in these appeals. Plaintiffs are common; however, the defendants are different in both the appeals.

3. In this appeal (RSA No. 193 of 2014) the subject matter of dispute is land entered in Khata Khatauni No. 25/118, Khasra No.300, measuring 1045 square meters, situated at Mauza Shubkhera, Tehsil Paonta Sahib, District Sirmaur, H.P. Plaintiffs claim themselves to be owners-in-possession of the suit land. Similarly, in the connected appeal (RSA No. 254 of 2014), they claim themselves to be the owners-in-possession of the land entered in Khata Khatauni No. 25/117, Khasra No.299, measuring 892.95 square meters, situated at Mauza Shubkhera, Tehsil Paonta Sahib, District Sirmaur, H.P. The predecessors of the plaintiffs had family relations with one Gita Ram S/o Shri Chuni Lal, a rich and influential person having business at Paonta Sahib, therefore, their predecessors had given land, the subject matter of dispute in both suits, to said Shri Gita Ram, on license basis. Said Shri Gita Ram started cultivation of the suit land through S/Shri Sohan Singh and Arjun Singh. They managed the entries of the suit land in their names irrespective of having no right, title and interest therein and are now cultivating the suit land.

4. Learned trial Court on the completion of the pleadings of the parties and holding full trial after framing issues, ordered to return the plaint to the plaintiffs for want of jurisdiction with a direction to adjudicate the matter before competent authority i.e. Assistant Collector 1st Grade-cum-Land Reforms Officer, Paonta Sahib vide judgment dated 24.7.2012. The plaintiffs instead of opting to submit to the jurisdiction of Assistant Collector 1st Grade-cum-Land Reforms Officer Paonta Sahib, had assailed the judgment passed by the trial Court in appeal under Order 43 Rule 1(a) CPC. The same before learned lower appellate Court was initially registered as Civil Misc. Appeals, however, subsequently were re-registered as civil appeal Nos.3-N/13 of 2014/12 and 2-N/13 of 2014/12.

5. Learned Lower appellate Court on reappraisal of the judgment passed by the trial Court has partly decreed the suit and also drawn the decree sheet accordingly. This has led in filing these appeals under Section 100 of the Code of Civil Procedure for quashing the same.

6. On behalf of the respondents question of maintainability of these appeals has been raised at the very outset. Learned counsel representing the appellants-plaintiffs is fair enough in conceding that against an order of return of plaint, the only remedy available is to have filed a Civil Misc. Appeal under Order 43 Rule 1(a) of the Code of Civil Procedure. Not only this, according to her, the plaintiffs even preferred appeals under Order 43 Rule 1(a) CPC against the judgment passed by the trial Court qua return of the plaint in the lower appellate Court, which, however, were entertained and registered as civil appeals and decided vide judgment and decree under challenge in these appeals. Learned counsel is again fair enough in conceding that the second appeal is not maintainable, however, she had to file these appeals only on account of lower appellate Court having entertained the appeals preferred before it as civil appeals and drawn decree sheet also.

7. Mr. R.K. Gautam, learned Senior Advocate, representing the respondents-defendants does not dispute the submissions so made on behalf of the appellants-plaintiffs and rightly so because against the judgment whereby the trial Court has ordered to return the plaint to the plaintiffs for agitating the matter in issue before appropriate authority, appeal under Order 43 Rule 1(a) was only maintainable and not an appeal under Section 96 of the Code of Civil Procedure as there was no decree drawn by learned trial Court being not required for the reason that the suit was neither decreed nor dismissed and rather plaint was ordered to be returned to the plaintiffs.

8. In view of what has been said hereinabove and also that irrespective of the appeals preferred under Order 43 Rule 1(a) CPC and even initially registered also as Civil Misc. Appeals could have not been entertained as civil appeals under Section 96 CPC nor any decree passed. Learned lower appellate Court has, therefore, not only committed irregularity but illegality also while entertaining the appeals preferred against the judgment passed by trial Court as Civil Appeals and drawn decree sheet also. The appropriate course available to the lower appellate Court would have been to entertain and treat the appeals as Civil Misc. Appeals and in the event of the order passed by the trial Court qua return of the plaint having been found not legally sustainable, to have remanded the cases for decision, in accordance with law. Decreeing the suit vide judgment and decree under challenge in these appeals, the lower appellate Court has deprived the parties on both sides from their valuable right of filing first appeal before learned lower appellate Court.

9. The judgment and decree under challenge in both appeals are thus not legally and factually sustainable. The same are hereby quashed and set aside and the case remanded to learned lower appellate Court to treat the appeals preferred by the plaintiffs against the order of return of plaint passed by the trial Court in both suits, under Order 43 Rule 1(a) CPC as Civil Misc. Appeals and decide the same afresh, in accordance with law, as expeditiously as possible, but not later than the quarter ending March 31, 2015. Parties through learned counsel representing them are directed to appear before the lower appellate Court on ***29th November, 2014***. The record be sent back forthwith so as to reach in the lower appellate Court well before the date fixed. Both the appeals are accordingly allowed and finally disposed of. Pending applications, if any shall also stand disposed of.

10. No order so as to costs.

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

Dalip Singh Thakur .....Petitioner.
Vs.
The National Bank for Agriculture & Rural Development & Ors.
...Respondents.

CWP No.2722 of 2014.
Reserved on:31.10.2014.
Decided on: 13.11.2014.

Constitution Constitution of India, 1950- Article 226 - Loan/financial assistance was sanctioned in favour of the petitioner for the construction of agricultural go-down- 33.33% subsidy was to be given by the respondent under the scheme of Government of India- petitioner stated that he had spent Rs. 5 lacs for the construction of go-down but the respondent recalled the amount and the financial assistance after joint

inspection - respondent contended that petitioner had not utilized the sanctioned amount - held, that the joint inspection report showed that the petitioner had constructed a house instead of a go-down- therefore, he was not entitled for the benefit of subsidy-petition dismissed.
(Para-3)

For the Petitioner: Mr.Adarsh K.Vashishta, Advocate.
For the respondents: Mr.Sanjay Dalmia, Advocate for respondents No.1 & 2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The facts necessary for rendering a decision on this petition are of respondent No.1 having sanctioned loan/financial assistance in favour of the petitioner for construction of agricultural go-down at village Shamna (Dungi), Tehsil Sangrah, District Sirmour, H.P. At the time contemporaneous to the sanctioning of financial assistance/loan to the petitioner by the respondent for the purpose aforesaid, a scheme floated by the Government of India, Ministry of Agriculture, Department of Agriculture and Co-operation, Krishi Bhawan, New Delhi was in vogue. The scheme envisaged 33.33% subsidy of the capital cost up to a maximum limit of Rs.50,00,000/-. Before completion of the project, a sum of Rs.68,000/- was released by the respondents in favour of the petitioner as first installment of subsidy. The petitioner avers that he had spent an amount of Rs.5 lacs for completion or the construction of the agricultural go-down. However, on a joint inspection of his purported go-down having been carried out by the respondents, the respondents not only withdrew the first installment of subsidy of Rs.68,000/- as advanced to him but also refused to afford him the balance of the subsidy releasable to him in proportion to the cost incurred by him for the construction of the agricultural go-down. A prayer is made in the writ petition that the action of the respondents in withdrawing the release of the first installment of the subsidy in the sum of Rs.68,000/- be set aside, besides directions are sought against the respondents that the subsidy amount in the per centum as now releasable to him be ordered to be released in his favour.

2. The respondents in the reply have tersely urged that the release of the subsidy on completion of the project is subject to eligibility and the coverage of the project under the scheme, besides on assessment of the project on its completion, in case it does not fall within the prescribed norms as also does not fulfill the contemplated terms and conditions, hence, it is within the domain of the respondents to reject the claim of the petitioner for the release of the subsidy.

3. Now for testing whether the petitioner had utilized the financial assistance advanced to him by the respondents for the purpose for which he had obtained it, inasmuch as whether he had utilized it for construction of an agricultural go-down and as such had complied with the terms and conditions for his seeking a direction from this Court to the respondent that not only the order of recalling of advance subsidy to him by the respondents is untenable, besides his being also entitled to the release of the balance amount of subsidy, it is necessary to advert to the joint inspection report appended with the reply of the respondents comprised in Annexure R-3. A perusal of Annexure R-3 as also, a perusal of the photographs appended to it which uncontrovertedly are of the purported agricultural go-down as raised/constructed by the petitioner from the financial assistance afforded to him by the respondents, forthrightly disclose that the petitioner has utilized the financial assistance for constructing a dwelling house for himself. Consequently, when the financial assistance, as advanced to him by the respondents, was for construction of agricultural

storage/go-down by him, besides when he could tenably claim release of the subsidy in his favour by the respondents only in case he had been eligible to seek its disbursement in his favour, inasmuch as his having utilized the financial assistance for construction of a go-down. However, when uncontrovertedly, the inspection report as also the photographs appended to it portray that he has contrary to the terms and conditions of the scheme raised/constructed a dwelling house for himself. Consequently, when the terms and conditions, governing the release of subsidy in his favour, stand contravened, hence, the petitioner does not acquire any legal leverage to claim a direction from this Court that the respondents be directed to release the balance subsidy in his favour nor also he can claim a direction from this Court that the respondents be directed to withdraw the order calling upon him to reimburse the first installment of subsidy in the sum of Rs.68,000/-.

4. For the foregoing reasons, there is no merit in this petition which is accordingly dismissed. All pending applications, if any, also stand disposed of. No costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Salim .....Appellant
Versus
Shashi Kala & another .....Respondents

FAO No.73 of 2014
Date of decision: 13.11.2014

Motor Vehicle Act, 1988- Section 149- Driving license was renewed at Nalagarh at least six times- insurer had examined the witness of the licencing authority who proved the renewal of licence - held, that it is for the insurer to plead and prove that insured had committed willful breach of the terms and conditions of the Insurance policy- insured is not supposed to verify the licence- in these circumstances, insurer was rightly held liable. (Para-8)

Cases referred:

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

Pepsu Road Transport Corporation versus National Insurance Company, reported in (2013) 10 Supreme Court Cases 21

For the appellant: Mr. Neeraj Gupta, Advocate.
For the respondents: Mr. Malay Kaushal, Advocate, for respondent No.1.
Ms. Devyani Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Challenge in this appeal is to the award dated 18th December, 2013, passed by the Motor Accident Claims Tribunal, Bilaspur, H.P. (for short, "the Tribunal") in M.A.C. No.24 of 2010, titled Shashi Kala vs. Salim & another, whereby compensation to the tune of Rs.4,75,000/- alongwith interest at the rate of 7.5% per annum came to be awarded in favour of the claimants and against the owner-insured (for short "the impugned award").

2. The owner-insured has questioned the impugned award on the ground that the Tribunal has fallen in error in discharging the insurer and saddling the owner with the liability. The driver, claimant and the insurer have not questioned the impugned award on any ground and thus, it has attained finality so far it relates to them.

3. The only question, which is to be determined in this appeal is, whether the Tribunal has rightly discharged the insurer and saddled the owner with the liability? The answer is in the negative for the following reasons.

4. Admittedly, the driver, namely, Prem Sagar Basi, of truck bearing registration No.HP-64-7486 was having valid driving licence to drive the heavy motor vehicle, renewed at Nalagarh at least six times. The insurer has examined the witnesses of the concerned Licensing Authority and proved that the licence was issued in favour of the driver renewed at least six times..

5. The owner/appellant engaged the driver who was having the driving lincence duly renewed by the authority concerned. The renewal is not in dispute. Thus, it cannot be held that the driver was not having valid driving licence.

6. It was for the insurer to plead and prove that the owner has committed willful breach, which it failed to do so. The Apex Court in ***National Insurance Co. Ltd. versus Swaran Singh & others, reported in AIR 2004 Supreme Court 1531***, held that it is for the insurer to prove and plead that the insured-owner has committed willful breach in terms of Section 149 of the Motor Vehicles Act, 1988 (for short "the M.V. Act") read with the terms and conditions of the insurance policy and driver was not having the valid and effective driving licence. It is apt to reproduce relevant portion of para 105(iii) of the judgment hereinbelow:

> *"105. (iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time".*

7. The Apex Court in ***Pepsu Road Transport Corporation versus National Insurance Company***, reported in ***(2013) 10 Supreme Court Cases 21*** held that the insurer has to prove that the insured has committed willful breach of the insurance policy and it is not for the insured to move here and there. It is apt to reproduce para 10 of the judgment:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver.*

However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

8. Having said so, the Tribunal has fallen in error in saddling the insured-owner with the liability. Accordingly, the appeal is allowed and the impugned award is modified by providing that the insurer has to satisfy the impugned award. The insurer is directed to deposit the awarded amount within eight weeks from today before the Registry of this Court. On deposition, the Registry is directed to release the awarded amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award, through payee's account cheque, after proper identification. Thereafter, the amount deposited by the owner/appellant be released in his favour alongwith interest through payee's account cheque, after proper identification.

9. Send down the record.

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

Tara Chand Verma .....Petitioner.

Vs.

Himachal Pradesh State Transport Corporation & another ...Respondents.

CWP No.5561 of 2014.
Reserved on:03.11.2014.
Decided on: 13.11.2014.

Constitution of India, 1950- Article 226- Petitioner was regularized as a conductor and was asked to discharge the duty as clerk/typist - petitioner sought change of designation for appointment as clerk with retrospective effect- respondent had not denied the fact that petitioner was discharging the duty as a typist- respondent asserted that there was no post of clerk but they had a discretion to take the work of any nature from the petitioner- held, that when the petitioner is discharging the duty of clerk, he is entitled for the wages and appointment as a clerk.

(Para- 2 and 3)

For the Petitioner:	Ms.Veena Sharma, Advocate and Ms.Nevadita Sharma, Advocate.
For Respondent No.1:	Mr.B.N. Sharma, Advocate.
For Respondent No.2:	Mr.Anup Rattan, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

In the instant writ petition, the petitioner prays for rendering direction to the respondents to consider his case by change of designation for appointment as clerk with retrospective effect from the date he was rendering/performing duties in the aforesaid capacity in the respondent

department. The petitioner was regularized against the post of conductor by the respondent-Corporation on 8.1.1983. However, under office memo No.EO 98-1084/87 (O), the petitioner was directed to be placed in the Regional Office, Rampur for the purpose of discharging the duties of a clerk/typist as he was found efficient as a typist. The protracted correspondence at the instance of the petitioner having been taken up with the respondent-corporation and the recommendation sent by the Regional Manager, HRTC Rampur Bushahar to the Managing Director, HRTC, Shimla under letter No. HRTC-(RMP)-1-1-Estt.(207) 189-90-9206 for considering the case of the petitioner for regularization against the post of clerk/typist, proved abortive as no provision exists under the R & P Rules of the respondent-Corporation for vindicating the claim of the petitioner. Even a representation in the year 2001 by the petitioner to the Managing Director, HRTC, Shimla containing therein the grievances para-materia to the grievances earlier ventilated by the petitioner, bore no fruitful results. Lastly, on 21.4.2008, the respondent-Corporation issued a Work Order directing the petitioner to join duties at Regional Office, Recongpeo and perform the duties of typist.

2. Even the respondents in the reply have not controverted the factum of the petitioner not being asked to perform the duties of a Clerk/Typist. Rather, they vindicate their office orders wherein the petitioner was directed to perform the duties of Clerk/Typist on the score that a discretion vested in them to take work of any nature from any employee. The contended relief of the petitioner for appointment as Clerk or Typist by change of designation is contended to be not available to be afforded to the petitioner in the face of non-existence of any apposite provision in the R & P Rules. However, the imminent fact which emerges from the reply of the respondents is of their being no repudiation or denial by the respondents to the factum of the petitioner having as averred by him in the writ petition work rendered or performed the duties of Clerk or Typist even though he was regularized as a Conductor. Consequently, when the respondents acquiesce to the said averment in the writ petition, obviously then the respondents are required to be not only defraying wages to the petitioner in tandem with the nature of work and duties performed by him, besides even if no provision exists in the R & P Rules qua change of designation, nonetheless, even in absence thereof the respondents are directed to consider the case of the petitioner especially when given the protracted period for which he is performing the duties of Clerk/Typist under them, for his appointment in the capacity, aforesaid by change of designation.

3. Consequently, the writ petition is allowed the respondents are directed to defray to the petitioner wages equivalent to the one drawn by Clerk/Typist from the date he was rendering the duties in the said capacity under the respondents. Also the respondents are directed to consider the case of the petitioner for appointment as Clerk/Typist by change of designation. All the pending applications, if any, also stand disposed of. No costs.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs No.110 and 111 of 2010
Decided on: November 13, 2014.

1. FAO No.110 of 2010.

United India Insurance Company Ltd. ...Appellant.

VERSUS

Lalit Chauhan and another. ...Respondents.

1. FAO No.111 of 2010.

Lalit Chauhan. ...Appellant.

VERSUS

Kewal Singh and another. ...Respondents.

Motor Vehicle Act, 1988- Section 166- When the injured is seeking compensation for the injury sustained by him, no amount is to be deducted towards his personal expenses. (Para- 24)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Kavita versus Deepak and others, 2012 AIR SCW 4771

Raj Kumar versus Ajay Kumar and another, (2011) 1 Supreme Court Cases 343

For the Appellant(s):	Mr. Ashwani K. Sharma, Advocate, for the appellant in FAO No.110 of 2010 and Mr. B.M. Chauhan, Advocate, for the appellant in FAO No.111 of 2010.
For the Respondents:	Mr. B.M. Chauhan, Advocate, for respondent No.1 in FAO No.110 of 2010 and Mr. Ashwani K. Sharma, Advocate, for respondent No.2 in FAO No.111 of 2010.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

By means of FAO No.110 of 2010, the appellant/insurer has challenged the award, dated 30.12.2009, passed by Motor Accident Claims Tribunal, Shimla, Himachal Pradesh, in Claim Petition No.10-S/2 of 2007, titled as Lalit Chauhan vs. Kewal Singh and another, whereby compensation to the tune of 23.00 lacs, with interest at the rate of 9% per annum from the date of filing of petition till its deposit was awarded in favour of the claimant and against the appellant/insurer, (for short, 'the impugned award').

2. The claimant has also challenged the impugned award by the medium of FAO No.111 of 2010, on the ground of adequacy of compensation.

3. Thus, both the appeals are being disposed of by this common judgment.

Brief Facts

4. The claimant, namely, Lalit Chauhan, became victim of a vehicular accident on 12th September, 2006, while he was traveling in Truck No.HP-38-6065 as owner of 217 apple boxes. The said vehicle was being driven by the driver, namely, Kewal Singh rashly and negligently and caused the accident near Victory Petrol Pump, Solan. The claimant sustained injuries, was taken to Government Hospital, Solan, fromwhere he was referred to Indira Gandhi Medical College, Shimla and was thereafter taken to Indian Spinal Injuries Centre, Delhi. As a result of the injuries, the clamant became permanently disabled. The petitioner is undergoing physiotherapy at Indian Spinal Injuries Centre, Delhi regularly. The claimant filed the claim petition claiming compensation to the tune of Rs.30.00 lacs, as per the break-ups given in the claim petition.

5. Notice was issued to the driver and the insurer. The driver opted not to contest the Claim Petition, while the insurer resisted the same.

6. On the pleadings of the parties, following issues were framed by the Tribunal:

"i). Whether the petitioner/claimant sustained injuries on account of the rash and negligent driving of truck No.HP-38-6065 by respondent No.1, as alleged? OPP.

ii). Whether the petitioner/claimant is entitled to compensation, if so, to which amount and from which of the respondents? OPP.

iii). Whether the petition is not maintainable? OPR.

iv). Whether the vehicle in question was being driven in violation of the terms and conditions of the Insurance Policy, as alleged? OPR.

v). Whether the petitioner was an unauthorized passenger traveling in the vehicle at the time of accident? OPR.

vi). Whether the driver of the vehicle was not having valid and effective driving licence at the time of accident, as alleged? OPR.

vii). Relief."

7. In order to prove his claim, the claimant examined Madan Singh, Rakesh Kumar, Dr. Akshay Kumar, Ramesh Sharma, Jatinder Singh, Dr. Brij Bhan Singh, Sandeep Chauhan, Karan, Dr. Varun Rana,. Rakesh Chauhan, Sushil Kumar, Smt. Giribala Chauhan, Dr. B.L. Thakur, Ranvir Singh and Dr. Ravinder Mokta, as PWs-1 to 3 and 5 to 16, respectively. The claimant has also stepped into the witness box as PW-4. On the other hand, the insurer has not led any evidence. Thus, the evidence led by the claimant has remained un-rebutted.

8. The claimant has also produced on record the documents i.e. copies of the medical treatment, receipt of taxi/ambulance charges, copy of the challan, copy of the FIR and other documents and particularly, the disability certificate Ext.PW-16/A.

9. The Tribunal after scanning the entire evidence awarded compensation to the tune of Rs.23.00 lacs.

10. The insurer has questioned the impugned award on the ground that the same is excessive and the claimant has questioned the same on the ground of adequacy of compensation. The owner/driver has not questioned the impugned award on any ground.

11. The moot question in these appeals is – whether the amount awarded by the Tribunal is just and adequate.

12. The findings recorded by the Tribunal under issue No.1 are not in dispute. Accordingly, issue No.1 is decided in favour of the claimant.

13. Before issue No.2 is taken up, I deem it proper to deal with the other issues.

14. As far as issue No.3 is concerned, the onus to prove the same was on the insurer, which has not been discharged by it. Accordingly, the findings recorded on this issue are upheld.

15. The insurer-appellant has not questioned the findings recorded by the Tribunal under issues No.4, 5 and 6. Accordingly, the same are upheld.

Issue No.2

16. Coming to issue No.2, it is apt to reproduce the statement of PW-16 Dr. Ravinder Mokta, in toto, hereunder:

"Stated that I am posted as Orthopedics Surgeon in D.D.U. Hospital, Shimla for the last 12 years. On 30.6.2009 a Medical Board was constituted to assess the disability of Lalit Chuahn the petitioner who had suffered injuries in a motor vehicle accident. Dr. P.K. Sharma Medical Superintendent of D.D.U Hospital Shimla was the Chairman of the Board, whereas, myself along with Dr. P.C. Machhan were its members. On examination of the petitioner the Board found that he had suffered fracture D-12 vertibra with paraphlazia with bladder bowel involvement. We had also gone through the contents of discharge certificate of the injured. On his medical examination we found that the petitioner has suffered permanent 100% disability incurable. In view of the nature of disability suffered by the petitioner, the petitioner requires the services of one attendant throughout his life. He is required to undergo regular physiotherapy throughout life and is also to take hyprotaneous diet. He can move only on the wheel chair not otherwise. The copy of disability certificate is Ext.PW-16/A (earlier marked as Z) which is true and correct as per the original seen by me today in the Court. The original bears my signatures as well as signatures of Chairman and other member of the Board.

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(By Shri Sanjay Karol, Advocate, for respondent No.2).

It is correct that today I have not brought the record of the case because no record is maintained in our office while assessing disability of the injured and issuing disability certificate. It is incorrect that with the passage of time the disability suffered by the petitioner is likely to be cured."

17. PW-16 Dr.Ravinder Mokta has proved how the injury has shattered the physical frame of the claimant and has become burden for his family forever. Dr. Akshay Kumar, Dr.Brij Bhan Singh, Dr. Varun Rana and Dr. B.L. Thakur have proved that the claimant has undertaken treatment from them, has undergone and has to undergo physiotherapy, and cannot live without an attendant. PW-10 Dr.Varun Rana has specifically stated in his statement that there is no chance of recovery of the claimant. The evidence does disclose that the claimant has lost all charm and amenity in life and even also lost matrimonial life.

18. The Apex Court in case titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** had discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads in the cases where permanent disability is suffered by the victim of a vehicular accident. It is apt to reproduce paras 9 to 14 of the judgment hereinbelow:

"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of

amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.

10. It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.

11. In the case Ward v. James, 1965 (1) All ER 563, it was said:

> *"Although you cannot give a man so gravely injured much for his "lost years", you can, however, compensate him for his loss during his shortened span, that is, during his expected "years of survival". You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and Juries have to do the best they can and give him what they think is fair. No wonder they find it well-nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The Judges have worked out a pattern, and they keep it in line with the changes in the value of money."*

12. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

13. This Court in the case of C.K. Subramonia Iyer v. T. Kunhikuttan Nair, AIR 1970 SC 376, in connection with the Fatal Accidents Act has observed (at p. 380):

> *"In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable."*

14. In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :-

> *"Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award. The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."*

19. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085,** while granting compensation in such a case. It is apt to reproduce paragraph 7 of the judgment hereinbelow:

> *"7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."*

20. The Apex Court in case titled as **Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787,** also laid down guidelines for granting compensation. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

> *"8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.*
>
> *9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to*

perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."

21. The Apex Court in case titled as **Kavita versus Deepak and others, 2012 AIR SCW 4771,** also discussed the entire law and laid down the guidelines how to grant compensation. It is apt to reproduce paras 16 & 18 of the judgment hereinbelow:

"16. In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:

"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. The heads under which compensation is awarded in personal injury cases are the following:

"Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

17. .....

18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

22. The Tribunal after scanning the entire evidence has rightly determined the compensation under various heads in paragraph 27 of the impugned award, after making discussions in paragraphs 23, 24 and 26. It is apt to reproduce paragraph 27 of the impugned award:

"27. In view of the evidence discussed above and findings recorded, in the opinion of this Tribunal, the petitioner is entitled to get compensation under the following heads and extent:-

i)	Expenses on medical treatment already incurred.	Rs.5,17,000/-
ii)	Boarding and Lodging	Rs.1,07,800/-
iii)	Conveyance charges	Rs. 14,300/-
iv)	Loss of future income	Rs.9,60,000/-
v)	Compensation on account of mental and physical pain and suffering and loss of amenities.	Rs.4,00,000/-
vi)	Compensation on account of future treatment and attendance etc.	Rs.3,00,000/-
	Total	Rs.22,99,100/-."

23. Having said so, I am of the considered view that the amount awarded by the Tribunal is just and proper.

24. During the course of hearing, the argument advanced by Mr.Ashwani K. Sharma, learned counsel for the insurer, that 1/3rd amount was to be deducted from the income of the claimant is devoid of any force for the reason that in the present case, the injured himself is seeking compensation and 1/3rd of the income is to be deducted only in those cases where the claimants have lost their earning hand. In the present case, the claimant has lost his own earning capacity, thus 1/3rd amount cannot be deducted towards his personal expenses.

25. My this view is fortified by the decision of the Apex Court in **Raj Kumar versus Ajay Kumar and another, (2011) 1 Supreme Court Cases 343**. It is apt to reproduce paragraph 27 of the said decision hereunder:

> "27. In the case of an injured claimant with a disability, what is calculated is the future loss of earning of the claimant, payable to claimant, (as contrasted from loss of dependency calculated in a fatal accident, where the dependent family members of the deceased are the claimants). Therefore there is no need to deduct one-third or any other percentage from out of the income, towards the personal and living expenses."

26. Keeping in view the law settled by the Apex Court, I am of the opinion that the compensation awarded by the Tribunal is just and proper. However, the Tribunal has awarded compensation under the heads 'loss of future income' and 'compensation on account of future treatment and attendance etc.' with interest at the rate of 9% per annum from the date of filing of the claim petition till realization, which is not as per the law occupying the field. Therefore, I deem it proper to reduce the rate of interest on the whole award amount from 9% per annum to 7.5% per annum from the date of filing of the claim petition till realization. The impugned award stands modified accordingly.

27. Consequently, the appeal filed by the insurer (FAO No.110 of 2010) is partly allowed as indicated above and the appeal filed by the claimant (FAO No.111 of 2010) is dismissed.

28. The Registry is directed to release the award amount strictly in view of the conditions contained in the impugned award. Excess amount, if any, deposited be released in favour of the insurer through payees account cheque.

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

Anuradhika .....Petitioner.
Versus
State of H.P. & ors. .....Respondents.

CWP No. 1152 of 2014.
Reserved on: 12.11.2014.
Decided on: 14.11.2014.

Constitution of India, 1950- Article 226-Petitioner belongs to OBC category- she married in forward/advance caste- her candidature was rejected on the ground that she could not produce latest OBC Certificate- State contended that in view of her marriage in advance caste, she is not entitled to OBC certificate- held, that a person born in OBC caste does not lose her status by marrying in forward caste- issuance of OBC Certificate was wrongly declined by the respondent- petitioner had qualified in the examination- her candidature was rejected merely for non-production of OBC Certificate- hence, respondent directed to appoint the petitioner as clerk from the due date. (Para 4 to 5)

For the petitioner: Mr. Sunny Dhatwalia, Advocate.
For the respondents: Mr. M.A.Khan, Addl. AG, for the respondent-State.
Ms. Archna Dutt, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Advertisement was issued by respondent No. 3 for filling up posts of Clerks on 15.9.2012. The petitioner belongs to *'Jhiwar'* caste of the OBC

category. She has obtained the OBC certificate on 9.8.2010. The petitioner qualified the written test held on 22.7.2013. She was called for interview on 29.1.2014. Her candidature was rejected vide annexure P-9 dated 20.2.2014 only on the ground that she could not produce the latest OBC certificate. The fact of the matter is that the petitioner belongs to OBC category. She married in forward/advanced class. She submitted an application for issuance of OBC certificate to respondent No. 4. Respondent No. 4 returned the application.

2. The reply stands filed. The principal stand of the respondents is that the petitioner has failed to produce the OBC certificate at the time of interview and once she has married to a forward/advanced class, she could not be issued OBC certificate. The fact of the matter is that the petitioner was born in OBC family. She has suffered all the handicaps of person belonging to OBC category. She obtained OBC certificate on 9.8.2010. It expired on 8.8.2012. The brother of the petitioner has also been issued OBC certificate. The legal question involved in this petition is whether a person who is having OBC status by birth, can her right as OBC be taken away because of her marriage in the advanced family?

3. The question raised in this Writ petition is no more *res integra* in view of the definitive law laid down by this Court in CWP No. 5744 of 2010, titled as Meena Devi versus Himachal Pradesh State Subordinate Services Selection Board, decided on 9.8.2011 and CWP No. 3139 of 2009 titled as Smt. Neetu versus The State of H.P. & ors, decided on 19.6.2014.

4. The Division Bench of this Court in the case of ***Meena Devi vrs. Himachal Pradesh State Subordinate Services Selection Board,*** decided on ***9.8.2011,*** has held as under:

> "3. Having thus analyzed the basic principles,we may refer to the facts of this case. Dispute arising for consideration in this case is whether a person born in a backward class and later married to a Scheduled Caste would acquire the status of Scheduled Caste.
>
> 4. The petitioner was born in District Hamirpur in 'Tarkhan'caste which is a community belonging to Other Backward Classes in the State of HimachalPradesh. She was married to one Sh. Rakesh Dhiman, who is a resident of village Mehan in District Bilaspur. Sh. Rakesh Dhiman belongs to 'Luhar'caste, which is a Scheduled Caste in the State of Himachal Pradesh. The petitioner belongs to below the poverty line family. She graduated from Himachal Pradesh University and has also obtained diploma and degree in Bachelor of Library Sciences. She has also obtained M. Phil. Degree in Library Sciences. Applications were invited by the H.P. Subordinate Services Selection Board, Hamirpur for appointment to the post of Assistant Librarian in the State of Himachal Pradesh. She had been issued a certificate by the Executive Magistrate, Sadar, District Bilaspur, showing that she belongs to Scheduled Caste community and therefore, she applied for the post against the quota reserved for scheduled caste. That Certificate is dated 29.10.2002 which is marked as Annexure 'X' in the writ petition. However, at the time of interview, she was directed to produce a contemporaneous certificate and when applied for, the Tehsildar Sadar, District Bilaspur, issued Annexure P-2, Certificate, dated 27.8.2010, which showed that the petitioner, wife of Rakesh Kumar, resident of Village Mehan, District Bilaspur, belongs to OBC in Himachal Pradesh and that she does not belong to creamy layer. Since Annexure P-2, Certificate shows only the marital status, the petitioner was asked to produce Certificate on parental basis. The Certificate on parental basis is Annexure P-1, which certifies that the petitioner daughter of Gian Chand and resident of Hamirpur District belongs to 'Tarkhan' community, which is an OBC. In

view of the apparent confusions, as above, the petitioner was not selected and hence the writ petition.

5. In short, on the basis of one Certificate issued by the competent authority showing that the petitioner belongs to SC community, having been married to Sh. Rakesh Kumar (Rakesh Dhiman) belonging to SC community, she applied for the post of Assistant Librarian against the quota reserved for Scheduled Caste. But the respondent-Board insisted for a Certificate on parental basis. The Certificate on parental basis would show that the petitioner belongs to OBC. The petitioner now rests her claim for a seat reserved for OBC only, she being an OBC by birth. Based on the interim order dated 15.9.2010, passed by this Court, the petitioner was provisionally interviewed. Subsequently, by the interim order dated 15.10.2010, it was directed to take further steps in the matter of appointment, subject to the result of the writ petition.

8. The petitioner is born in 'Tarkhan'caste, which is OBC in Himachal Pradesh. By marriage only she was transplanted into 'Luhar'community which is a Scheduled Caste. By that marriage, the petitioner does not undergo any change in her original caste. Unto death, she is a member of 'Tarkhan'caste which is OBC. In the above circumstances, there will be a direction to the respondent-Board to treat the petitioner as OBC candidate for all purposes and regularize her appointment accordingly."

5. Similarly, in the case of ***Smt. Neetu versus The State of H.P. & ors. CWP No. 3139 of 2009,*** decided on 19.6.2014, the Division Bench of this Court has held as under:

"7. The question is – whether a person, who is having a status by birth can be denied that status because of subsequent developments, i.e. because of adoption in an upper class or because of marriage in upper class?

8. We deem it proper to only discuss and return the findings on the issue – whether in the given circumstances, a person, who is having OBC status by birth and has gone through various social disadvantages and did not have the facilities for development and growth, suffered all odds, can her right as OBC be taken away from her because of her marriage? The answer is in negative.

9. Admittedly, she was belonging to OBC category, was

born in the family, which hails from OBC category, lived with them, undergone all disadvantages, suffered all social stigmas and other painful, ugly situations. She had obtained the OBC certificate, applied for the test, qualified, called for interview but her selection was withheld by respondent No. 3 on the ground that she had to produce latest OBC certificate, which was not required for the reason that marriage in an upper class or adoption in an upper class is not a substitute for the sufferings and other disadvantages, which she has suffered and is no ground to take away the status which a person is having by birth. Had the case being reverse, i.e. had she belonged to upper class and married in a lower class, in that eventuality, that may be a case for not giving benefit because of adoption or because of marriage for the reason that she might have enjoyed all advantageous position right from birth till marriage and had not suffered any disadvantageous position, cannot now be allowed to reap the fruits of a backward class/category due to adoption, after enjoying everything in life.

15. Applying the test to the present case, the facts are admitted that the petitioner before marriage was belonging to a reserve class, i.e. OBC, was having OBC certificate, appeared and selected in the examination, was not given her right and was asked to obtain a latest OBC certificate,

which was not granted to her. The respondents have virtually committed fraud on Constitution and have made the life of the writ petitioner hell and now, she may be thinking, rather cursing, why she was born in a disadvantageous family, i.e. reserved category and why she has married in an upper class, is an eye opener for the respondents, who are implementing the Constitutional laws and the other laws applicable and who are the custodians of the rights and the duties guaranteed by the Constitution to the citizens of India as per the mandate of Fundamental Rights, the Directive Principles of State Policy and the Fundamental Duties contained in Parts III and IV of the Constitution of India.

16. Learned Advocate General argued that the petitioner was not having an OBC certificate at the relevant point of time, and even if she has obtained the same during the pendency of the writ petition, that cannot be a ground to make her eligible, is devoid of any force.

17. As discussed hereinabove, the writ petitioner was having the OBC certificate at the relevant point of time but was asked to furnish latest one, which was not issued by respondent No. 4 at the relevant point of time, thus failed to discharge his duties and rather misused his official position. Thereafter, the latest OBC certificate, dated 16th January, 2014, was issued in favour of the writ petitioner.

20. It is worthwhile to record herein that the respondents have illegally taken away the rights of the writ petitioner and have drawn her to the lis and made her to suffer. The writ petitioner has sought quashment of the instructions, dated 15th March, 2003 (Annexure P-8), are not instructions but just a communication. The said letter/communication, on the face of it, has been issued in violation of the Constitutional provisions, as discussed hereinabove, is bad in the eyes of law, as per the communication, dated 2nd December,2011, (supra).

26. The question arises – from which date the appointment is to be given effect? As discussed hereinabove, the writ petitioner has participated in the examination, was declared successful, was called for interview but was refused the appointment only for the non-availability of the latest OBC certificate."

6. The petitioner has appeared in the written test held on 22.7.2013. She was called for interview on 29.1.2014. Her candidature has been rejected vide communication dated 20.2.2014 only on the ground that she could not produce the latest OBC certificate. The fact of the matter is that the petitioner was in the possession of OBC certificate on 9.8.2010. It expired on 8.8.2012. She applied for the renewal of the certificate which was arbitrarily declined by the respondent No. 4. Respondent No. 4 ought to have renewed the OBC certificate.

7. Accordingly, the Writ Petition is allowed. Annexure P-9, dated 20.2.2014, is quashed and set aside. The petitioner would be deemed to have been appointed as Clerk from the due date pursuant to advertisement dated 15.9.2010. The petitioner would only be entitled to notional seniority. The codal formalities including issuance of appointment letter to the petitioner be completed within two weeks from today.

8. Pending application(s), if any, shall stand disposed of.

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

Ashok Kumar .....Petitioner.
Vs.
State of H.P. & ors. .....Respondents.

CWP No. 9888 of 2013.
Reserved on: 5.11.2014.
Decided on: 14.11.2014.

Constitution of India, 1950- Article 226- Petitioner appeared in the examination for the post of Assistant District Attorney, Class-I (Gazetted)- he contended that the answer of question No. 5(b) was not evaluated- examiner had given three marks to the petitioner for question 5 (a) and 3 marks to the petitioner for question 5 (c)- no marks were given for question 5 (b)- examiner explained that answer given by the candidate was too brief and the candidate had failed to mention basic sections in question No. 5 (b), therefore, he did not deserve any marks- reply of the respondent was not satisfactory, therefore, respondent directed to get the answer-sheet evaluated from an independent examiner. (Para- 2 to 5)

For the petitioner: Mr. B.C.Negi, Advocate.
For the respondents: Mr. Shrawan Dogra, AG with Mr. M.A.Khan, Addl. AG, for the respondent-State.
Mr. D.K.Khanna, Advocate, for respondent No. 2.
Mr. Dilip Sharma, Sr. Advocate, with Mr. Manish Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Ten posts of Assistant District Attorney, Class-I (Gazetted) were advertised vide advertisement No. III-2012 dated 01.09.2012. Last date of receipt of applications was 1.10.2012. 892 candidates submitted their applications. The petitioner also participated in the selection process. Screening test was held on 8.12.2012. The petitioner was successful in the screening test. He was called for interview on 24.4.2013. The result was declared in the month of May, 2013. The petitioner and respondent No. 3 have scored equal marks in screening test and viva-voce examination. However, as per the H.P. Public Service Commission (Procedure & Transaction of Business and Procedure for conduct of Examinations, Screening Tests & Interviews Etc.) Rules, 2007, respondent No. 3 being older in age, was recommended for the post in question. The relevant portion whereof reads as under:

> "Where selection is to be made on the basis of performance of the candidates having qualified the screening test, before the interview board, a candidate scoring more marks in the interview shall be placed above the candidates scoring lesser marks in the interview. If the candidates will score equal marks in an interview, then a candidate securing more marks in the screening test will be placed above the candidate securing lesser marks in the screening test. In case the marks of screening test are equal then the candidate who is senior in age will be placed above the candidate junior in age. Where selection is to be made purely on the basis of performance of the candidates before the interview

> board, a candidate scoring more marks in the interview shall be placed above the candidates scoring lesser marks in the interview. If the candidates will score equal marks in an interview, then a candidate who is senior in age will be placed above the candidate junior in age."

2. The case of the petitioner, precisely, is that his answer to question No. 5(b) has not been evaluated. In order to ascertain this fact, we have directed respondent No. 2 to produce the answer sheet of the petitioner. The answer sheet of the petitioner has been produced in the sealed cover. We have gone through the answer sheet. The fact of the matter is that the examiner has not evaluated question No. 5(b). He has given 3 marks to the petitioner for attempting question No. 5(a) and 3 marks for attempting question No. 5(c). The comments of the experts were also called for by this Court vide order dated 2.5.2014. The comments of the experts read as under:

> "I have gone through the evaluated copy and found the marks awarded to candidate in question no. 5 are 6 marks out of 20 as a whole because the answer given by the candidate is too brief and language is vague and the candidate has also been failed to mention basic Sections 204 and 107 in question No. 5(b) of Cr.P.C. Therefore, the candidate does not deserve for excessive award."

3. We are not at all satisfied with the comments given by the examiner. He was bound to evaluate/examine question No. 5(b). There is no merit, whatsoever, in the contention that he had given 6 marks to the petitioner as a whole. He has specifically given 3 marks for question No. 5(a) and 3 marks for question No. 5(c). There was every possibility of the petitioner securing march over respondent No. 3 if the question No. 5(b) had been evaluated by the examiner since both of them have scored equal marks in screening test as well as in viva-voce examination. The petitioner has a right to be considered for appointment. In normal circumstances, we would have directed respondent No. 2 to get the question No. 5(b) evaluated/examined from the same examiner. However, since we are not at all satisfied with the comments given by the examiner, which we have already reproduced hereinabove, we are of the considered opinion that question No. 5(b) is required to be examined/evaluated by an independent examiner to do complete justice. We are prima-facie of the view that the petitioner was entitled to get marks for question No. 5(b) but we would not express any final opinion and would leave question No. 5(b) to be evaluated by the independent examiner.

4. Mr. Shrawan Dogra, learned Advocate General has also brought to the notice of this Court that infact new selection process has begun on the basis of Notification dated 11.10.2013. However, the fact of the matter is that the Court is still seized of the matter.

5. Accordingly, the present writ petition is allowed. Respondent No. 2 is directed to get question No. 5(b) of the answer sheet evaluated from an examiner other than the examiner who had earlier examined the answer-sheet. The answer sheet shall be sent to the examiner within one week from today for evaluation of question No. 5(b). In case the petitioner is awarded marks for attempting question No. 5(b), in that eventuality, the name of the petitioner shall be recommended to the State Government by respondent No. 2 for the post in question within two weeks after the receipt of the result. One post from the new advertisement dated 11.10.2013 would be reduced to balance the equities between the petitioner and respondent No. 3.

6. Pending application(s), if any shall also stand disposed of.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.

FAO (MVA) No.385 of 2007 and 388 of 2007.
Date of decision: 14th November, 2014.

1.	***FAO No. 385/2007.***	
	Smt. Bhowmick Arti and anr.	*.....Appellants.*
	Versus	
	Smt. Shiksha Rani and others	*...Respondents*
2.	***FAO No. 388/2007.***	
	Oriental Insurance Co. Ltd..	*.....Appellant.*
	Versus	
	Smt. Bhowmick Arti and others	*...Respondents*

Motor Vehicle Act, 1988- Section 149- Insurer pleaded that driver did not have a valid driving license to drive transport vehicle – he was driving a vehicle whose unladen weight was 1690 kgs. and gross vehicle weight was 2820 kgs- held, that there was no necessity to have the endorsement of transport vehicle on the license in such a situation- further, insurer had not pleaded and proved that owner had committed any willful breach of the terms and conditions of the policy- appeal dismissed.

(Para-6 to 10)

Cases referred:

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

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

For the appellant:	Mr. Naveen K. Bhardwaj, Advocate, for the appellant in FAO No. 385/2007 and Mr. Ashwani K. Sharma, Advocate, for the appellant in FAO No. 388/2007.
For the respondents:	Mr.Naveen K. Bhardwaj, Advocate, for respondents No.1 & 2 in FAO No. 388 of 2008. Mr. Rajiv Rai, Advocate, for respondent No.2 in FAO No. 385/2007 Mr.Ashwani K. Sharma, Advocate, for respondent No. 3 in FAO No. 385/2007. Mr. Onkar Jairath, Advocate, for respondent No. 3 in FAO No. 388/2007. Mr. Rajiv Rai, Advocate, for respondent No. 4 in FAO No. 388 of 2007.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award dated 29.6.2007, made by the Motor Accident Claims Tribunal, Kullu in Cl. petition No. 61 of 2006, titled *Smt. Bhowmick and another vs. Smt. Shiksha Rani and others,* whereby a sum of Rs.1,05,000/- came to be awarded in favour of the claimant, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claimants had invoked the jurisdiction of the Tribunal for the grant of compensation to the tune of Rs.10 lacs, as per break-ups given in the claim petition.

3. The respondents contested and resisted the claim petition by filing reply.

4. The Tribunal on the pleadings of the parties framed the following issues:

(i) *Whether deceased Navneet has died in the accident of vehicle Tata 207 bearing regn. No.HP-66-0586, due to rash and negligent driving on the part of respondent No. 2, as alleged? OPP*

(ii) If issue-1 is held in affirmative, to what amount of compensation the petitioners are entitled and from whom? OPP.

(iii) Whether respondent -2 was not holding valid and effective driving license and the vehicle involved in the accident was being plied without valid documents. If so, to what effect? OPR-3.

(iv) Relief.

5. The Tribunal, after examining the evidence on record, awarded a sum of Rs.1,05,000/- in favour of the claimants.

6. The insurer, by the medium of FAO No. 388 of 2007, has questioned impugned award only on the ground that driver of the vehicle was not having a valid and effective driving licence thus, the owner has committed willful breach. This argument has been rightly dealt with by the Tribunal in para 17 of the impugned award. It is apt to reproduce para 17 of the impugned judgment herein:

> *"17.The Ld. counsel for respondent No. 3 contended that since the driver was not having a valid driving licence to drive transport vehicle, the insurance company is not liable to pay the compensation. However, this contention of the Ld. counsel for respondent No. 3 deserves to be rejected as the perusal of the R.C. Ex. RW-1/A of the offending vehicle shows that its unladen weight was 1690 kgs. and gross vehicle weight was 2820 kgs. As per the definition clause in Section 2 (2) of the Motor Vehicles Act, 1988, "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either or which or a motor car of tractor or road roller the unladen weight of any of which does not exceed 7500 kilograms:"*

7. I have also delivered judgment in ***FAO No. 54 of 2012*** titled ***Mahesh Kumar and another vs. Smt. Piaro Devi and others*** decided on 25th July, 2014. It is apt to reproduce paras 10 to 19 of the said judgment herein:

> *"10. I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:*
>
> *"2. .....*
>
> *(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.*
>
> *xxx xxx xxx*

21. "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.

xxx xxx xxx

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.

xxx xxx xxx

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

11. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

12. At the cost of repetition, definition of "light motor vehicle" includes the words "transport vehicle" also. Thus, the definition, as given, mandates the "light motor vehicle" is itself a "transport vehicle", whereas the definitions of other vehicles are contained in Sections 2(14), 2 (16), 2 (17), 2 (18), 2 (22), 2 (23) 2 (24), 2 (25), 2 (26), 2 (27), 2 (28) and 2 (29) of the MV Act. In these definitions, the words "transport vehicle" are neither used nor included and that is the reason, the definition of "transport vehicle" is given in Section 2 (47) of the MV Act.

13. In this backdrop, we have to go through Section 3 and Section 10 of the MV Act. It is apt to reproduce Section 3 of the Act herein:

"3. Necessity for driving licence. *- (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.*

(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."

14. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the

MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

15. My this view is supported by Section 10 of the MV Act, which reads as under:

*"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

16. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, which was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stand deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

*17. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:*

"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgement hereunder:-

> *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State*

Rules. In other words, the requirement of the State Rules stood satisfied.

.....

17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."

18. The purpose of mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as ***Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,*** *reported in* ***2013 AIR SCW 2791,*** *and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:*

"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. .....

21. .....

22. .....

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to

prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

19. The Apex Court in another case titled as ***National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,*** *reported in* ***2008 AIR SCW 906,*** *has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:*

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. .....

10. .....

11. .....

12. .....

13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

8. Having said so, the driver was having a valid and effective driving licence. The insurer has not pleaded and proved that the owner has committed any willful breach which it was supposed to prove in terms of Section 149 of the Motor Vehicles Act. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

9. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified

and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

10. The claimants have also questioned the impugned award by the medium of FAO No.385/2007, on the ground of adequacy of compensation. The deceased was 60 years old at the time of the accident. The Tribunal has rightly awarded the compensation in favour of the claimants. The amount of compensation is just and appropriate and cannot be said to be inadequate in any way.

11. Having said so, both the appeals are dismissed and the impugned award is upheld. The amount deposited in the Registry be released in favour of the claimants, after proper verification, through payee's cheque account.

12. Accordingly, both the appeals stand disposed of alongwith pending applications. Send down the record, forthwith.

****

HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C. J.

FAOs No.222 and 223 of 2007
Decided on: November 14, 2014.

FAO No.222 of 2007.

Dhiraj Sharma alias Vipin Kumar. ...Appellant.

VERSUS

Bhagat Ram and others. ...Respondents.

FAO No.223 of 2007.

Dhiraj Sharma alias Vipin Kumar. ...Appellant.

VERSUS

Dola Mani and others. ...Respondents.

Motor Vehicle Act, 1988- Section 149- MACT had held after placing reliance on the FIR that driver was charge-sheeted for the commission of offence punishable under Section 185 of M.V. Act and the insured had committed the breach of the terms and conditions of the insurance policy- however, driver was acquitted of the commission punishable under Section 185 after the trial- held, that the insured had not committed any breach of the terms and conditions of the policy and the Insurance Company was wrongly granted the right of recovery.

(Para- 7 and 8)

For the Appellant(s): Mr. Lalit Sehgal, Advocate.

For the Respondents: Mr. Dibender Ghosh, Advocate, for respondents No.1 & 2 in FAO No.222 of 2007 and for respondents No.1 to 3 in FAO No.223 of 2007.
Mr. Deepak Bhasin, Advocate, for respondent No.3 in FAO No.222 of 2007 and for respondent No.4 in FAO No.223 of 2007.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

These appeals are the outcome of one accident, allegedly caused by Dhiraj Kumar on 22.6.2004, at about 11.15 P.M., while driving the offending vehicle i.e. Mahindra Max Jeep No.HP-01A-3068 rashly and negligently, as a result of which Bal Raj Kaushal and Om Parkash died on the spot. FIR No.50 of 2004, dated 23rd June, 2004 was registered at Police Station, Nirmand. The dependants of Bal Raj Kaushal preferred Claim Petition No.46 of 2004 under Section 166 of the Motor Vehicles Act (for short the Act), for grant of compensation to the tune of Rs.20.00 lacs, while the dependants of deceased Om Parkash preferred Claim Petition No.43 of 2004, for grant of compensation to the tune of Rs.7.00 lacs, as per the break-ups given in the Claim Petitions.

2. The Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, (for short, the Tribunal), in terms of Award, dated 9th May, 2007, awarded a sum of Rs.7,85,000/- as compensation in favour of the claimants in Claim Petition No.46 of 2004 and the Tribunal, vide Award, dated 8th May, 2005, passed in Claim Petition No.43 of 2004, awarded Rs.4,24,000/- as compensation in favour of the claimants, and the insurer was saddled with the liability, with right of recovery from the owner of the offending vehicle. The award amount in both the claim petitions was to carry interest at the rate of 9% per annum from the date of institution of the Claim Petitions till realization.

3. Feeling aggrieved, the insured/owner has questioned the impugned awards, on the grounds taken in the memo of appeals.

4. The claimants and the insurer have not questioned the impugned awards on any ground. Accordingly, the same have attained finality qua them.

5. The only question to be determined in these two appeals is - whether the Tribunal has rightly granted right of recovery to the insurer. The answer is in the negative for the following reasons.

6. It appears that in regard to the accident in question, FIR No.50 of 2004, dated 23rd June, 2004, was registered in Police Station, Nirmand, under Sections 279, 337, 304AA of the Indian Penal Code (for short, IPC), and Section 185 of the Act against appellant Dhiraj Kumar. The Tribunal, after noticing the said FIR and the fact that the driver was charge sheeted under Section 185 of the Act, held that the insured had committed breach of terms of the insurance policy and accordingly, saddled the insurer with the liability at the first instance and granted right of recovery.

7. During the course of hearing, the learned counsel for the appellant has placed on record a copy of the judgment, dated 30th June, 2008, passed by Sessions Judge, Kinnaur at Rampur Bushahr in Sessions Trial No.14 of 2005, titled State of Himachal Pradesh vs. Dheeraj Kumar alias Vipin Kumar, resulting out of FIR No.50 of 2004. A perusal of the said judgment shows that the prosecution case came to be dismissed and the accused, i.e. the appellant in both the appeals, came to be acquitted. Thus, the said judgment is the conclusive proof of the fact that the charge under Section 185 of the Act has not been proved. The said judgment shall form part of this order.

8. In view of the above discussion, I am of the considered view that the Tribunal has wrongly granted right of recovery to the insurer. Accordingly,

the impugned awards are modified to the extent that the insurer is saddled with the liability, without any right of recovery.

9. Both the appeals stand allowed and disposed of accordingly.

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

Jai Singh son of Shri Daya Ram ....Petitioner
Versus
State of H.P. and others ....Respondents

Review Petition No. 125 of 2014
Date of Order 14th November, 2014

Code of Civil Procedure, 1908- Order 47 Rule 1- Petitioners claimed that they are entitled for appointment as Beldar on regular basis as per Recruitment and Promotion Rules- held, that Court had specifically held that prayer of the petitioners that they be appointed as DDT Beldars or upon any post of Class IV employee was declined- Review petition is not maintainable in relation to an order wherein, relief sought has already been negated - Review petition dismissed. (Para-5)

Cases referred:
Smt. Krajoy Mog Choudhury and others vs. The State of Tripura and another AIR 2014 33 (Tripura)
Kamlesh Verma vs. Mayawati and others, AIR 2013 SC 3301
Sow Chandra Kanta and another vs. Sheik Habib,AIR 1975 SC 1500

For the Petitioner: Mr. G.R. Palsara, Advocate.
For the Respondents: Mr. M.L. Chauhan, Additional Advocate General, and Mr. J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

This order will dispose of civil review petition filed under order 47 Rule 1 read with Section 114 of Code of Civil Procedure for reviewing the order dated 10.9.2014 passed by this Court in CWP No. 8728 of 2012 titled Jai Singh vs. State of H.P. and others.

2. Petitioner Jai Singh has filed review petition pleaded therein that relief be granted to the petitioner to the effect that petitioner is also entitled for the appointment of Beldar on regular basis and Class IV employee as per Recruitment and Promotion Rules in addition to the relief already granted by the Hon'ble High Court.

3. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the respondents and Court also perused order dated 10.9.2014 passed in CWP No. 8728 of 2012 carefully.

4. Following points arise for determination in this civil review petition:-

3. Whether civil review petition is liable to be accepted as mentioned in memorandum of grounds of review petition?

4. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing on behalf of the petitioner that order dated 10.9.2014 passed in CWP No. 8728 of 2012 be reviewed to the effect that petitioner shall be entitled for the appointment of Beldar on regular basis or Class IV employee as per Recruitment and Promotion Rules in addition to relief granted by the High Court is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the entire order passed in CWP No. 8728 of 2012. Court has also carefully perused grounds of civil review petition. Court has specifically mentioned in para 7 in sub clause (4) that prayer of the petitioner that petitioner be appointed as DDT Beldar or upon any post of Class IV employee on regular basis is declined in view of the fact that all appointments on public post are governed by Recruitment and Promotions Rules. It is well settled law that every employee is legally entitled for appointment on regular basis as per Recruitment and Promotion Rules by competent authority after recommendation by Selection Committee in accordance with law. It is well settled law that party cannot direct the Court to pass the order in the manner party likes. It was held in case reported in ***AIR 2014 33 (Tripura) titled Smt. Krajoy Mog Choudhury and others vs. The State of Tripura and another*** that review petition is not maintainable in relation to an order wherein relief sought has already been negated. ***(See AIR 2013 SC 3301 titled Kamlesh Verma vs. Mayawati and others, AIR 1975 SC 1500 titled Sow Chandra Kanta and another vs. Sheik Habib)*** There is no negative direction in the order dated 10.9.2014 passed in CWP No. 8728 of 2012 that petitioner will not be appointed as Beldar on regular basis or Class IV employee as per Recruitment and Promotion Rules. It is held that review petition is devoid of any force in view of no negative direction mentioned above. Point No. 1 is answered in negative.

Final Order

6. In view of my above findings on point No.1 civil review petition filed by petitioner is dismissed *in limine*. Parties are left to bear their own costs. Civil review petition is disposed of.

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

Jeet Ram son of Shri Mani Ram & another ....Petitioners
Versus
State of H.P. and others ....Respondents

Review Petition No. 126 of 2014
Date of Order 14th November,2014

Code of Civil Procedure, 1908- Order 47 Rule 1- Petitioners claimed that they are entitled for appointment as Beldar on regular basis as per Recruitment and Promotion Rules- held, that Court had specifically held that prayer of the petitioners that they be appointed as DDT Beldars or Class IV employee was declined- Review petition is not maintainable in relation to an order wherein, relief sought has already been negated - Review petition dismissed. (Para-5)

Cases referred:

Smt. Krajoy Mog Choudhury and others vs. The State of Tripura and another AIR 2014 33 (Tripura)

Kamlesh Verma vs. Mayawati and others, AIR 2013 SC 3301
Sow Chandra Kanta and another vs. Sheik Habib AIR 1975 SC 1500

For the Petitioner: Mr. G.R. Palsara, Advocate.
For the Respondents: Mr. M.L. Chauhan, Additional Advocate General, and Mr. J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

This order will dispose of civil review petition filed under order 47 Rule 1 read with Section 114 of Code of Civil Procedure for reviewing the order dated 10.9.2014 passed by this Court in CWP No. 3006 of 2012 titled Jeet Ram and another vs. State of H.P. and others.

2. Petitioners have filed review petition pleaded therein that relief be granted to the petitioners to the effect that petitioners are also entitled for the appointment of Beldars on regular basis and Class IV employee as per Recruitment and Promotion Rules in addition to the relief already granted by the Hon'ble High Court.

3. Court heard learned Advocate appearing on behalf of the petitioners and learned Additional Advocate General appearing on behalf of the respondents and Court also perused order dated 10.9.2014 passed in CWP No. 3006 of 2012 carefully.

4. Following points arise for determination in this civil review petition:-

1. Whether civil review petition is liable to be accepted as mentioned in memorandum of grounds of review petition?
2. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing on behalf of the petitioners that order dated 10.9.2014 passed in CWP No. 3006 of 2012 be reviewed to the effect that petitioners shall be entitled for the appointment of Beldars on regular basis or Class IV employee as per Recruitment and Promotion Rules in addition to relief granted by the High Court is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the entire order passed in CWP No. 3006 of 2012. Court has also carefully perused grounds of civil review petition. Court has specifically mentioned in para 7 in sub clause (4) that prayer of the petitioners that petitioners be appointed as DDT Beldars or upon any post of Class IV employee on regular basis is declined in view of the fact that all appointments on public post are governed by Recruitment and Promotions Rules. It is well settled law that every employee is legally entitled for appointment on regular basis as per Recruitment and Promotion Rules by competent authority after recommendation by Selection Committee in accordance with law. It is well settled law that party cannot direct the Court to pass the order in the manner party likes. It was held in case reported in ***AIR 2014 33 (Tripura) titled Smt. Krajoy Mog Choudhury and others vs. The State of Tripura and another*** that review petition is not maintainable in relation to an order wherein relief sought has already been negated. ***(See AIR 2013 SC 3301 titled Kamlesh Verma vs. Mayawati and others, AIR 1975 SC 1500 titled Sow Chandra Kanta and another vs. Sheik Habib)*** There is no negative direction in the order dated 10.9.2014 passed in CWP No. 3006 of 2012 that petitioners will not be appointed as Beldars on regular basis or Class IV employees as per Recruitment and Promotion Rules. It

is held that review petition is devoid of any force in view of no negative direction mentioned above. Point No. 1 is answered in negative.

Final Order

6. In view of my above findings on point No.1 civil review petition filed by petitioners is dismissed *in limine*. Parties are left to bear their own costs. Civil review petition is disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.

National Insurance Company Ltd. .....Appellant
Versus
Maya Devi & others ..... Respondents

FAO No.343 of 2007
Date of decision: 14.11.2014

Motor Vehicle Act, 1988- Section 166- Deceased was driving a scooter and was hit by a Tractor which was suddenly stopped by the driver at the place of the accident- held, that evidence of the claimant duly proved that driver of the tractor was driving the tractor rashly and negligently- there was no evidence regarding the negligence of the driver of the scooter- hence, driver and owner of the tractor were rightly held liable to pay the compensation. (Para- 9 and 10)

For the appellant: Mr. Sandeep Sharma, Senior Advocate with Mr. Parshant Sharma, Advocate.

For the respondents: Mr. Ramakant Sharma, Advocate, for respondents No.1 to 4.
Mr. Vijay Bhatia, Advocate, for respondents No. 5 to 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Short controversy involved in this appeal is whether the Tribunal has rightly saddled the insurer with liability while making the award dated 8th May, 2007 passed by the Motor Accident Claims Tribunal, Hamirpur (for short "the Tribunal") in Claim Petition No.63 of 2005, titled Maya Devi & others vs. Anant Ram and others, whereby a sum of Rs.4,88,425/-alongwith interest at the rate of 9% per annum came to be awarded as compensation in favour of the claimants and against the insurer (for short the "impugned award").

2. Deceased Bahadur Singh became the victim of vehicular accident, which was alleged to have been caused by the driver of the tractor bearing registration No.HP-33-1670 being driven rashly and negligently on 14.4.2005 at Jahu Kalan (Talai), District Hamirpur at about 8.30 p.m. The deceased sustained injuries and later on succumbed to the same.

3. Precisely, the case of the claimants is that the deceased was driving Scooter bearing registration No.HP-22-1201, was hit by the tractor, which was suddenly stopped by the driver at the place of accident, the tractor hit the scooter, the deceased sustained injuries and lateron succumbed to the same on 16.4.2005. The pillion rider escaped unhurt. FIR was lodged. Claim petition was filed for grant of compensation to the tune of Rs.5 lacs as per the break-ups given in the claim petition.

4. The insurer, owner and the driver contested the claim petition.

5. The Tribunal framed the following issues:-

1. Whether Shri Bahadur Singh had died on account of rash and negligent driving of respondent No.2 of Tractor No. HP-33-1670?

2. If issue No.1 is proved, to what amount of compensation and from whom are the petitioners entitled to? OPP.

3. Whether respondent No.2 had not been in possession of a valid and effective driving licence at the time of the accident, if not with what effect? OPR-3

4. Whether Shri Bahadur Singh had contributed to the accident as alleged, if so, with what effect? OPR-3.

5. Relief."

6. The parties led evidence. The Tribunal after scanning the evidence held that the claimants are entitled to compensation to the tune of Rs.4,88,425/-.

7. PW-2 Basudev was a pillion rider. He has given details how the accident had occurred. Virtually, he has stated that he was a pillion rider on the scooter and the tractor was being driven by the driver, which was suddenly stopped by the driver in order to alight a person and hit the scooter, deceased Bahadur Singh sustained injuries and succumbed to the same lateron. He is the only eye witness to the accident and has supported the claim of the claimants.

8. The respondents have also led evidence. RW-2 has stated that the tractor was stationary, enabling Amar Singh to alight. Thus, his statement also supported the case of the claimants.

9. The insurer and owner of the tractor have not examined any other person in order to prove that the deceased was driving the scooter rashly and negligently.

10. Having said so, prima facie, it appears that the driver of the tractor was driving the tractor rashly and negligently at the relevant point of time. The Tribunal has rightly decided issue No.1 against the respondents and in favour of the claimants.

11. The other issues are not in dispute. Thus, the findings returned by the Tribunal on those issues are also upheld.

12. Viewed thus, no case is made out for interference and the appeal merits to be dismissed. Dismissed as such.

13. The Registry is directed to release the awarded amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award through payee's account cheque, after proper identification.

14. Send down the record.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.

Oriental Insurance Company Ltd. .....Appellant

Versus

Sardaru & others ..... Respondents

FAO No.260 of 2007

Date of decision: 14.11.2014

Motor Vehicle Act, 1988- Section 149- Tribunal had directed the insurer to satisfy the award and to recover the amount from the owner- held that the claimants fall within the purview of third party and the insurer is liable to satisfy the award with the right of the recovery.

(Para-3)

For the appellant: Mr. G.D. Sharma, Advocate.

For the respondents: Mr. Surender Verma, Advocate, for respondents No.1 and 2.
Mr. Surinder Saklani, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award dated 13th April, 2007, passed by the Motor Accident Claims Tribunal, Mandi (for short "the Tribunal") in Claim Petition No.72 of 2003, titled Sardaru & another vs. Oriental Insurance Company Ltd. & others, whereby a sum of Rs.1,64,000/- alongwith interest at the rate of 7.5% per annum came to be awarded as compensation in favour of the claimants and against the insurer with right of recovery from the insured-owner (for short the "impugned award").

2. The claimants, insured and the driver have not questioned the impugned award on any ground and thus, it has attained finality so far it relates to them.

3. The appellant/insurer has questioned the impugned award on the ground that the Tribunal has fallen in error in directing the insurer to satisfy the impugned award and recover the same from the owner. The averment is misconceived for the simple reason that the claimants are third party and it is beaten law of land that the insurer has to satisfy the award at the first instance with right of recovery.

4. Accordingly, there is no merit in the appeal. Hence dismissed.

4. The Registry is directed to release the awarded amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award through payee's account cheque, after proper identification. Learned counsel for the appellant/insurer is at liberty to lay a motion before the Tribunal to recover the awarded amount from the owner.

5. Send down the record.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Surinder Kumar ...Petitioner
Versus
Parkash Chand ...Respondent

Cr.MMO No. 184 of 2014
Date of decision: 14.11.2014

Code of Criminal Procedure, 1973- Section 482- There was a family dispute between two brothers- complaint was made before the Gram Panchayat, which was settled- in view of compromise, decision passed by Gram Panchayat as affirmed by Judicial Magistrate is set aside.

(Para-3)

Indian Evidence Act, 1872- Section 114- Magistrate relied upon Section 114 to draw an inference that the petitioner had caused disturbance in the proceedings of the Panchayat- he relied upon the facts that proceeding was conducted before Gram Panchayat, there was no allegation of ill-will against the respondent and the appellant had not led any evidence to prove that he had not caused any interruption- held, that the Court hearing an appeal has to record the findings duly supported by reason on all points and there has to be a conscious application of mind - support could not have been drawn from Section 114 of Indian Evidence Act. (Para-5)

Case referred:
Sunka Ram Vs. Gram Panchyat Patta and another, 1984 Shimla Law Cases, 230

For the Petitioner: Mr.Sanjeev Bhushan, Advocate.

For the Respondent: Mr.Virender Thakur, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (Oral).

This petition under Section 482 of Cr.P.C. is directed against the order dated 28.7.2014 passed by learned Judicial Magistrate, IInd Class, Court No. IV, Hamirpur, H.P., whereby appeal filed by the petitioner was dismissed and the order passed by Gram Panchayat Badehar, Tehsil Bhoranj is affirmed.

2. It appears that there was a family dispute between the two brothers and on the instigation of one of the brothers, their father made a complaint before the Gram Panchayat against the present petitioner. However, during the pendency of these proceedings, the petitioner and his father have amicably settled the dispute, as stated by the learned counsel representing the father, who is respondent herein.

3. In this view of the matter, the orders passed by the Gram Panchayat, Badehar dated 24.7.2012 and affirmed by the learned Judicial Magistrate on 28.7.2014 are quashed and set aside.

4. Normally this Court would have left the case at this stage, but it cannot ignore the manner in which the learned Magistrate below has decided the present case and it leaves much to be desired. He has simply relied upon Section 114 of the Evidence Act and then affirmed the order passed by the Gram Panchayat, as would be clear from the following observations:-

> "6. During oral arguments learned counsel for appellant has reiterated his version made in the appeal by submitting that the Panchayat has not followed the procedure prescribed.
>
> 7. The appellant has filed the appeal to set aside the impugned order on the ground that the same is against law, fact and procedure, but he has not lead any evidence in proof of the said fact. The other contention of the appellant is that the impugned order has been passed against the principle of natural justice on the ground that the impugned order was passed behind the back of the appellant, but perusal of the Panchayat record reveals that a notice was duly served upon the appellant and thereafter the appellant has put his appearance before the concerned Gram Panchayat and during the proceedings before the Gram Panchayat, he caused interruption in the proceedings. Even

appellant not disputed his appearance before Gram Panchayat Bedehar on dated 24.07.2012.

8. As per Section 114 of the Indian Evidence Act, court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

9. In the present case, I have no hesitation to raise presumption under Section 114 of the Indian Evidence Act that appellant caused interruption in the proceedings in light of following effects:-

i) that proceeding was conducted before the Gram Panchayat.

ii) there is no allegation regarding any ill-will of the respondent against the appellant.

iii) appellant has not lead evidence to prove that he had not caused any interruption.

10. Thus, in the present case, the contention of the appellant that the order was against principle of natural justice, has no substance as the Gram Panchayat concerned gave opportunity to appellant being heard, but he caused interruption in the proceedings of the Gram Panchayat.

11. The other contention of the appellant that the Gram Panchayat has decided the case without going into the matter, also got no substance as no evidence was lead by the appellant. It is settled law that pleadings of a party do not prove the case and the case is required to be proved by leading cogent evidence. In the present case, appellant failed to lead any evidence in support of his pleadings.

12. In view of the above discussion, point No. 1 is answered in the negative and decided against the appellant."

5. Even while affirming the order passed by the Gram Panchayat, there had to be a conscious application of mind and the findings had to be supported by reasons on all points which had to be put forth and pressed by the parties and in no event support could have been drawn from Section 114 of the Indian Evidence Act.

6. More than three decades back this Court in **Sunka Ram Vs. Gram Panchyat Patta and another, 1984 Shimla Law Cases, 230** had held the imposition of recurring penalty of Rs.1/- per day till the breach continues to be bad in law, but despite this authoritative pronouncement, the Panchayats continue to impose such penalties and such orders invariably are upheld in appeal by the Courts. The point is not that a Court or Panchayat cannot impose a recurring fine for a continuance breach of an order of this kind, but that it cannot do so on the first conviction of the offender for breach, since by doing so, it would tantamount to imposing fine for an offence not yet committed, which cannot be done. In other words, after a conviction for disobedience of an order of this kind, whether passed by Panchayat or any other authority, the recurring fine can only be imposed after the continuance of breach has taken place and as long as the breach continues, the Panchayat or Court must call the offender and impose the recurring fine on him from time to time as it becomes due.

This petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Co. Ltd. .....Appellant.
Versus
Akash Babu and others ...Respondents

FAO (MVA) No.383 of 2007.
Date of decision: 14th November, 2014.

Motor Vehicle Act, 1988- Section 149- Driving License of the driver was fake but it was renewed from time to time- held, that the insured is not supposed to take any steps to verify the license from the licensing authority to determine the validity- hence, insurer cannot be absolved from the liability on the ground that driving license was fake.
(Para-4 and 5)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh & others, reported in AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, reported in (2013) 10 Supreme Court Cases 217

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr.Onkar Jairath, Advocate, for respondent No. 1 & 2.
Ms. Kiran Lata Sharma, Advocate, for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award dated 30.6.2007, made by the Motor Accident Claims Tribunal, Una in MAC petition No. 3 of 2005, titled *Akash Babu vs. Raj Kumar and others,* whereby a sum of Rs.1,50,000/- came to be awarded in favour of the claimant, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claimant, driver and owner have not questioned the impugned award on any ground, thus, it has attained finality so far as it relates to them.

3. The insurer has questioned the impugned award on the ground that the Tribunal has fallen in error in saddling the insurer with the liability.

4. The learned counsel or the insurer/appellant argued that the driver was having a fake driving licence but stands renewed. There is evidence on the file that driving licence was renewed by Licencing Authority from time to time, as such it cannot be said that the owner has committed any willful breach. It was for the insurer to plead and prove that the insured has committed willful breach which the insurer has failed to prove. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

5. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If

despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

6. The impugned award is very meager, I wonder why the insurer has filed the appeal.

7. Having said so, the appeal is dismissed and the impugned award is upheld. The amount deposited in the Registry be released in favour of the claimant, after proper verification, through payee's cheque account.

8. Accordingly, the appeal stands disposed of alongwith pending applications. Send down the record, forthwith.

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

Dalbir Singh. ...Appellant.
Versus
State of Himachal Pradesh. ...Respondent.

Cr.A.No. 237 of 2011
Reserved on: 12.11.2104
Decided on: 17.11.2014

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3 kg 800 grams charas concealed in a bag under his left arm pit- no independent witness was associated during the search, seizure and sampling process- prosecution witnesses admitted that police party had checked 20-25 vehicles and the place where the accused was apprehended was a national highway- they further admitted that there were 4-5 hotel and restaurants between the police Station and the place of incident, therefore, place of the incident was not an isolated place where no independent witness was available- police had not made any efforts to associate independent witness- there were contradictions in the testimonies of eye-witnesses regarding the time of sending ruqqa and the time spent in taking photographs- held that in these circumstances, prosecution case was doubtful- accused acquitted. (Para- 23)

For the Appellant: Mr. Ravinder Thakur, Advocate.
For the Respondent: Mr. Ramesh Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 28.4.2011 rendered by the Special Judge-II, Solan in Sessions Trial No. 4-S/7 of 2010, whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offence punishable under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, he was further ordered to undergo imprisonment for a period of six months. Hence, the present appeal.

2. Case of the prosecution, in a nutshell, is that on 24.11.2009 police party was on Nakka duty at place near Deli. Accused was noticed coming on foot from the side of Timber Trail Resort at 3.15 A.M. on 25.11.2009. Accused tried to escape. He was apprehended. He was taken to a place where Nakka was laid. Accused had concealed bag under his left arm pit. Police had suspicion of some incriminating substance, hence, accused was apprised about his right to be searched before Magistrate or Gazetted Officer vide memo Ex.PW-1/A. Accused consented to be searched by the police party vide memo Ex.PW-1/E. The members of police party afforded their personal search to the accused vide memo Ex.PW-1/C. The bag of accused was searched. It was found to be containing charas in the shape of balls and sticks. Weights and scale were brought by PW-3 HC Baggi Ram. The charas so recovered was weighed. It was found to be 3 kgs 800 grams. The charas was sealed in a parcel with seal 'H'. The woolen shawl of accused was also sealed in another parcel with seal 'H'. Seizure memo Ex.PW-1/G was prepared. NCB forms in triplicate were filled in. Columns No.1 to 8 were filled in by the Investigating Officer. The Investigating Officer prepared rukka Ex.PW-4/A and the same was sent to Police Station through PW-4 Constable Rajesh Kumar. FIR Ex.PW-6/A was registered. Photographs Ex.PW-3/A to Ex.PW-3/J were taken on the spot. The Investigating Officer prepared the spot map. He handed over the parcel containing charas and other documents to S.H.O. PW-6 Govind Ram. He resealed the property with seal 'N'. PW-6 Govind Ram filled in columns No. 9 to 11 of NCB form. Special report Ex.PW-5/A was prepared by PW-6 Govind Ram. It was sent to the Superintendent of Police, Solan through PW-5 Constable Kuldeep Singh. The contraband was sent to F.S.L., Junga. The report of F.S.L. Ex.PW-6/G was received. Police investigated the case and the challan was put up in the court after completing all the codal formalities.

3. Prosecution examined as many as 11 witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He has denied the case of the prosecution in entirety. He has produced 4 DWs in support of his defence. Learned trial Court convicted and sentenced the accused, as noticed hereinabove.

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

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

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

7. PW-1 Ashok Kumar has deposed that he alongwith ASI Ram Lal, Constable Desh Raj, Constable Rajesh Kumar, Constable Gurcharan Singh were on patrolling duty on the intervening night of 24/25.11.2009 at about 3.15 A.M. They were present near village Deli on National Highway-22. In the meantime, a person emerged from the side of Timber Trail Resort. He turned back after noticing the police party. He tried to escape. He was nabbed. He was apprised about his right to be searched either before a Gazetted Officer or a Magistrate or a police party vide Ex.PW-1/A. Accused gave his consent vide Ex.PW-1/B. All the members of the police party afforded their personal search to the accused. Nothing incriminating was recovered from them. Personal search of the accused was conducted. He was carrying a saffron coloured bag under his left arm. It was checked. This bag further contained another bag having zip. The zip was opened. It contained blue coloured bag. This bag further contained a grey coloured plastic bag which was contained a black coloured substance in the shape of balls and sticks. It was found to be charas. Memo Ex.PW-1/D was prepared. ASI Ram Pal gave information through his mobile phone to the Police Station and summoned the weights and scale from the Police Station. H.C. Bagi

Rath brought weights and scale on a motorcycle. It weighed 3 kgs 800 grams. The charas was kept in the bag. Thereafter, all the bags were kept in the same manner as found during search. It was sealed with seal 'H' at five places. The sample of seal was also drawn on three pieces of cloth, one of which was Ex.PW-1/E. The woolen shawl was also sealed in a separate cloth parcel with seal 'H'. NCB form in triplicate was filled in. Photographs of the proceedings were also taken on the spot by H.C. Bhagi Rath vide marks A to H and J. In his cross-examination, he has deposed that he alongwith four other police officials started from Police Station, Parwanoo at about 11.00 P.M. for laying Nakka. The Timber Trail Resort was not visible from Deli. They checked 20-25 vehicles on that day up till 3.00 A.M. No other passenger was apprehended on the relevant day. He has admitted that it was a busy road being National Highway. According to him, there was no shop on the spot where they had laid Nakka. However, there were some shops towards Parwanoo side after about two curves. The shops of market committee were at a distance of about 40-50 meters. The accused was seen from a distance of 15-20 meters. Neither any vehicle was stopped nor any efforts were made to stop the vehicle passing on the road. The accused was apprehended at a distance of about 50 meters away from the spot of Nakka on National Highway. The rukka was prepared after the recovery of contraband. The rukka was taken by Rajesh Kumar to the Police Station, Parwanoo. He did not remember the exact date. Photographs of the proceedings were taken on the spot. Photographs were taken before preparation of seizure memo and photographs of proceedings of seizure were also taken. Photographs were taken as per proceedings on the spot and not simultaneously.

8. PW-2 Desh Raj has also deposed the manner in which accused was apprehended, his personal search was carried out, the contraband was recovered and the sampling process was completed on the spot. In his cross-examination, he has admitted that there were 5-6 shops at Deli. They had checked 3-4 buses on that day on the spot. He has also admitted that there were 4-5 hotels or restaurants in between Police Station, Parwanoo and Timber Trail Resort. The accused was apprehended at a distance of 30-40 steps from police Nakka. The proceedings were conducted with the help of search light and head light of the Government vehicle. The rukka was sent through Constable Rajesh Kumar at about 4.45 A.M. He came back from Police Station within 30-45 minutes.

9. PW-3 H.C. Baggi Ram has deposed that MHC Prem Singh informed him that he has to deliver weights and scale to ASI Ram Lal at place near Deli on National Highway-22. He carried weights and scale to the spot. He delivered the same to ASI Ram Lal. He also clicked the photographs marks A to J (Ex.PW-3/A to Ex.PW-3/J). He has admitted in his cross-examination that there were residential houses near Deli shops. The distance between place of Nakka and Timber Trail Resort was 100 meters. The Timber Trail Resort was not visible from the place of Nakka since there was a curve. He has admitted that so many buses passed on National Highway when they were conducting proceedings on the spot. No efforts were made to stop these vehicles. The gap between first photograph and the last photograph taken by him was about 10 minutes. First photograph was taken at 3.55 A.M. He had not brought the camera since it was already with ASI Ram Lal.

10. PW-4 Rajesh Kumar has also deposed the manner in which the accused was apprehended, search and sampling process was completed. In his cross-examination, he has deposed that he proceeded to Police Station from the spot alongwith rukka at 4.45 A.M. and returned back after 45 minutes. They checked 8-9 vehicles on that day, including 3-4 buses. They left the spot of Nakka at about 9.15 A.M. after the proceedings were over. They checked one bus of Chandigarh Transport. He did not remember the registration number of the vehicle. The bus was full. It was checked at about 12 -1.00 A.M.

11. Statement of PW-5 Kuldeep Singh is formal in nature.

12. PW-6 Inspector Govind Ram has deposed that on 25.11.2009 Rukka Ex.PW-4/A was prepared and the same was received in the Police Station through Constable Rajesh Kumar. He recorded FIR Ex.PW-6/A. The case file was sent to ASI Ram Lal for further investigation. ASI Ram Lal handed over to him a parcel duly sealed with five seal impression 'H' at 9.35 A.M. stated to be containing 3 kgs 800 grams charas alongwith NCB form in triplicate, sample of seal and other documents. He re-sealed the parcels in a separate cloth parcel with seal 'N' at five places. He filled in columns No. 9 to 11 of NCB form. The parcel alongwith NCB form was handed over to MHC for safe custody. On 25.11.2009, he also prepared the special report in duplicate and sent the same to the Superintendent of Police, Solan through constable Kuldeep. In his cross-examination, he has admitted that rukka was received by him at about 3.15 A.M. on 25.11.2009. ASI Ram Lal deposited case property with him at 9.35 A.M. He has also admitted that Kalka-Shimla road is a busy road and vehicles frequently pass on it during day and night. He has also admitted that there were shops in Deli Bazaar. Parwanoo Bazaar was at a distance of 2 KMs from Deli Bazaar.

13. PW-7 H.C. Prem Singh has deposed that on 25.11.2009 S.H.O. Govind Ram deposited with him a parcel duly sealed with seal 'N' at five places stated to be containing charas. He made entry at Sr. No.425 of the Malkhana register. ASI Ram Lal deposited with him another parcel duly sealed with seal 'H' at three places stated to be containing a woolen shawl. The contraband was sent to F.S.L. Junga through Constable Santosh Kumar.

14. Statement of PW-8 H.C. Yadav Chand is formal in nature.

15. PW-9 Santosh has deposed that MHC Prem Singh handed over to him a parcel duly sealed with five seal impressions of seal 'N' alongwith sample of seal 'H' and NCB form, copy of FIR and recovery memo vide RC No.87/09. He deposited the same at F.S.L. Junga. As long as the parcel remained with him, it remained safe and intact.

16. PW-10 Sri Chand in his cross-examination has admitted that there were some shops in Deli and residential houses. He has admitted that on both the sides of road from Deli to Parwanoo, there were shops and habitation.

17. PW-11 Ram Lal has deposed the manner in which the accused was apprehended, search, seizure and sampling process was completed on the spot. He filled in columns No. 1 to 8 of NCB form. He prepared rukka Ex.PW-4/A and the same was sent to Police Station through Constable Rajesh Kumar, which led to registration of FIR Ex.PW-6/A. Photographs of the proceedings were also taken. He prepared spot map Ex.PW-11/A. He handed over the contraband to S.H.O. Govind Ram, who re-sealed the same with seal 'N' and also filled in NCB form and issued Ex.PW-6/E. In his cross-examination, he has deposed that they checked 100-150 vehicles approximately on that night upto 3.00 A.M. The Nakka was laid near Dharam Kanta on National Highway. They had noticed the accused coming from T.T.R. side from a distance of approximately 14-15 meters. The time gap between first photograph and the last photograph was about one hour. There were shops in Deli. There were shops on both the sides of road from Deli to Patwanoo. He has admitted that there was vehicular traffic on National Highway. Volunteered that the traffic was less as compared to day time. He has denied the suggestion that accused was travelling in a C.T.U. bus.

18. The accused has also examined four DWs. DW-1 Rishi Pal was driver of C.T.U. bus No. CH-01G-8871. The bus left from Shimla. They stopped for dinner near Dharampur at Sanwara. They reached at Parwanoo around 1-1.30 A.M. Conductor No. 826 of Depot No.1 was accompanying him as a conductor. The bus was full. The accused was travelling in the bus. The accused was apprehended by the police from the bus. Their signatures were

obtained on some papers by the police at Parwanoo. In his cross-examination, he has admitted that he was posted at Bus Stand Sector-17 for the last one year. Before this posting, he remained posted in workshop as supervisor.

19. DW-2 Surjeet Singh was working as conductor in Chandigarh Transport Undertaking. He has deposed that at about 10.30 P.M. on 24.11.2009, they started journey from Shimla to Chandigarh. DW-1 Rishi Pal was driving the bus. The police officials checked the bus at Parwanoo and accused was taken away by them.

20. DW-3 Sandeep Kumar was also traveling in the C.T.U bus. He has deposed that the bus left Shimla at about 10.45 P.M. Accused was also travelling in the bus from Shimla. DW-1 Rishi Pal was driver and DW-2 Surjeet Singh was conductor of the bus. He has denied the suggestion that accused was not travelling in the bus and he was not apprehended by the police at Parwanoo.

21. DW-4 Harminder Singh has deposed that as per yard control register, bus No. CH-01G-8871 left Chandigarh for Shimla on 24.11.2009 at 5 p.m. The bus left Shimla for Chandigarah at about 11 : 30 p.m. on the same day. It reached at Chandigarh on 25.11.2009 at 3 p.m. The entries qua departure and arrival were recorded in the register. In his cross-examination, he has admitted that as per record, the complete registration of the vehicle is not mentioned. The names of drivers and conductors were not entered and only their numbers were mentioned.

22. According to PW-1 Ashok Kumar, Rukka was prepared after the recovery of contraband and it was taken by Constable Rajesh Kumar to Police Station, Parwanoo. PW-2 Constable Desh Raj had deposed that Ruqua was sent with Rajesh Kumar at about 4:45 a.m. He came back from Police Station within 30-45 minutes. They remained on the spot upto 9 a.m. approximately. PW-4 Rajesh Kumar has deposed that he proceeded to Police Station from the spot at 4:45 a.m. and came back after 45 minutes. PW-11 Ram Lal has also deposed that rukka was prepared by him vide Ext. PW4/A and the same was sent to the Police Station through Rajesh Kumar. According to statements of PW-2 Desh Raj and PW-4 Rajesh Kumar, Rukka was carried to the Police Station at 4:45 a.m. PW-6 Govind Ram, in his cross-examination, has specifically admitted that rukka was received by him at 3:15 a.m. on 25.11.2009. If the rukka itself has been sent at 4:45 a.m. through PW-4 Rajesh Kumar how it could be received by PW-6 Govind Ram at 3:15 a.m. It demolishes the entire case of the prosecution.

23. Admittedly, no independent witness has been associated by the Police during nabbing, seizure and sampling process on the spot. PW-1 Ashok Kumar, in his cross-examination, has admitted that there were one or two factories and some godowns near market committee's shops. He has also deposed that they had checked 20-25 vehicles on that day till 3 a.m. He has also admitted that it is a busy road being a national highway. PW-2 Desh Raj has also admitted that there were 4-5 hotels or restaurants in between Police Station, Parwanoo and Timber Trail Resort. They had checked 3-4 buses on that day on the spot. PW-3 Baggi Ram has also deposed that so many buses passed on the national highway when they were conducting the proceedings on the spot. No efforts were made to stop those vehicles by the Investigating Officer. He has also admitted that there were residential houses near Deli shops. The distance between Timber Trail Resort and the place where the nakka was laid was 100 mtrs. PW-11 Ram Lal has deposed that there was regular traffic on the national highway. However, despite the residential houses and shops being available near the place where the accused was apprehended, no efforts were made to associate the independent witnesses. The nakka was laid on the national highway. According to PW-11 Ram Lal himself, approximately 100-150 vehicles were checked by him upto 3 a.m. PW-7 Prem Singh has deposed that 20-25 vehicles were checked on the nakka. Drivers/conductors or passengers of

the buses could be associated as independent witnesses. It cannot, thus, be termed as an isolated place where the availability of independent witness was remote. The police has not made any effort whatsoever to associate independent witnesses. It is not the case of the prosecution that the efforts were made and independent witnesses were not available on the spot. PW-3 Baggi Ram has photographed the spot. According to him, the photographs were taken as per the proceedings conducted on the spot. The gap between first photograph and the last photograph was about 10 minutes. The first photograph was taken at 3:55 p.m. PW-11 Ram Lal has deposed that the time gap between first photograph and the last photograph was about 1 hour. It also casts doubt on the prosecution version the manner in which photographs were taken on the spot. Thus, the prosecution has failed to prove that contraband was recovered from exclusive and conscious possession of the accused by not associating independent witnesses. We have already noticed that Rukka as per statement of PW-2 Desh Raj and PW-4 Rajesh Kumar was taken to Police Station at 4:45 a.m. PW-6 S.H.O. Govind Ram has testified that Rukka was received at 3:15 a.m. FIR was registered on the basis of Rukka.

24. Consequently, in view of analysis and discussion made hereinabove, the prosecution has failed to prove the case for offence under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 beyond reasonable doubt against the accused.

25. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 28.4.2011 rendered in Sessions Trial No. 4-S/7 of 2010 is set aside. Accused is acquitted of the charge framed against him by giving him benefit of doubt. Fine amount, if already deposited, be refunded to the accused. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Harcharan Singh alias Charan Singh ...Petitioner

Versus

Krishan Chand and another ...Respondents

Cr.MMO No. 163 of 2014
Reserved on 13.11.2014
Date of decision: 17.11.2014

Code of Criminal Procedure, 1973- Section 245- Complaint was filed by the complainant for the commission of offence punishable under Sections 379, 467, 471 read with Section 34 IPC and cognizance was taken- complainant did not step into witness-box while leading pre-charge evidence- the Court drew an adverse inference and discharged the accused- held, that petitioner was the best witness to depose about the entire case but he had not stepped into witness box- evidence led by the complainant at the time of taking cognizance cannot be used for framing of charge- therefore, discharge of the accused was justified. .

(Para- 5 and 6)

Case referred:

Sunil Mehta and another Vs. State of Gujarat and another (2013) 9 SCC 209

For the Petitioner: Mr.S.K. Sood, Advocate.
For the Respondents: Mr.Dheeraj K. Vashisht, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The petitioner has moved this Court under Section 482 of Cr.P.C. for quashing order dated 3.6.2014 passed by the learned Additional Chief Judicial Magistrate (I), Amb, whereby the respondents/accused were ordered to be discharged.

2. The petitioner had preferred a complaint on the allegations that he was a co-sharer in joint possession of land comprised in Khewat No. 251 min, Khatauni No. 361, Khasra Nos. 1, 2, 3 and 14, measuring 2-25-43 hectares situated in Village Hamboli, Tehsil Amb, District Una. Upon this land there were many valuable trees like Khair, Kikkar, Sheesham etc. and the respondents had cut number of trees from the aforesaid land without prior consent of the complainant or the other co-sharers and without any proper sanction of the competent authority. The petitioner lead his preliminary evidence in support of his case, upon which cognizance against the accused persons for commission of offence punishable under Sections 379, 467, 471 read with Section 34 IPC was taken. Thereafter the complainant led pre-charge evidence, in which he examined four witnesses. The petitioner did not step into the witness box in the pre-charge evidence, resulting in an adverse inference being drawn by the learned trial Magistrate, consequently leading to discharge of the respondents. It is this order of the Magistrate below, which has been impugned in this proceeding, on the ground that there was sufficient material available with the Court below to frame the charge.

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

4. While leading pre-charge evidence, petitioner-claimant examined CW-1, Sh. Janam Singh, Range Officer, Amb and proved copy of affidavit of the complainant Ex.CW-5/A. But a close scrutiny of this affidavit shows that the same does not pertains to the land in dispute, but pertains to land comprised in Khata No. 180, Khatoni No. 300, Khasra Nos. 448, 449, 467, 484, 485, 486 and 487. Though the petitioner had claimed this affidavit to be a forged document, but then he himself did not appear in the witness box to depose about the same. CW-2, Harbans Lal and CW-3 Amar Nath had claimed that one of the respondents Krishan Chand had felled trees standing over the land in dispute. However, there is nothing on record to suggest that they had obtained any demarcation to show felling of trees from the land in question. The tone and tenor of the cross-examination of these witnesses clearly suggest that there in fact is a dispute regarding share in consideration for felling of these trees with some society, but then there is nothing to show that there is some nexus or connection of any of the accused with such society. CW-3 Amar Nath had infact categorically deposed that he has no dispute with the accused person, as the land had not yet been demarcated and therefore, it was not ascertainable as to whether trees which were felled were in fact standing upon the land in question or some other land. In so far as testimony of CW-4, Chaman Lal is concerned, the same leads nowhere. Therefore, in this background, it was the petitioner alone, who was the best witness and could have depose about the entire case, but unfortunately he did not choose to step into the witness box.

5. The petitioner at this stage has though made a reference to the judgment of the Hon'ble Supreme Court in **Sunil Mehta and another Vs. State of Gujarat and another (2013) 9 SCC 209** to contend that the order of the Magistrate should be set aside and the matter be remanded back with a

direction to proceed in accordance with the provisions of Sections 244 to 247 of the Code. But I fail to understand as to how the ratio of the aforesaid judgment can help the petitioner. Rather, it has been clearly held in this judgment that the deposition of the complainant and his witnesses recorded by the Magistrate under Chapter XV at the stage of taking cognizance of an offence when the accused does not appear, cannot be considered as evidence for framing charge under Chapter XIX of the Code, as would be clear from the following observations:-

"7. Chapter XV of the Code of Criminal Procedure, 1973 deals with complaints made to Magistrates. Section 200 which appears in the said Chapter inter alia provides that the Magistrate taking cognizance of an offence on a complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and signed by the complainant and the witnesses, as also the Magistrate. An exception to that general rule is, however, made in terms of the proviso to Section 200 in cases where the complaint is made by a public servant acting or purporting to act in the discharge of his official duties, or where a Court has made the complaint, or the Magistrate makes over the case for enquiry or trial by another Magistrate under Section 192 of the Cr.P.C.

8. Section 201 deals with the procedure which a Magistrate not competent to take cognizance of the case is required to follow. Section 202 empowers the Magistrate to postpone the issue of process against the accused either to inquire into the case himself or direct an investigation to be made by a police officer for the purpose of deciding whether or not there is sufficient ground for proceeding. Sub-section (2) of Section 202 empowers the Magistrate to take evidence of witnesses on oath in an inquiry under sub-section (1) thereof. Section 203, which is the only other provision appearing in Chapter XV, empowers the Magistrate to dismiss the complaint if he is of the opinion that no sufficient ground for proceeding with the same is made out.

9. There is no gainsaying that a Magistrate while taking cognizance of an offence under Section 200, whether such cognizance is on the basis of the statement of the complainant and the witnesses present or on the basis of an inquiry or investigation in terms of Section 202, is not required to notify the accused to show cause why cognizance should not be taken and process issued against him or to provide an opportunity to him to cross- examine the complainant or his witnesses at that stage.

10. In contra distinction, Chapter XIX of the Code regulates trial of warrant cases by Magistrates. While Part A of that Chapter deals with cases instituted on a police report, Part B deals with cases instituted otherwise than on a police report. Section 244 that appears in Part B of Chapter XIX requires the Magistrate to "proceed to hear the prosecution" and "take all such evidence as may be produced in support of the prosecution" once the accused appears or is brought before him. Section 245 empowers the Magistrate to discharge the accused upon taking all the evidence referred to in Section 244, if he considers that no case against the accused has been made out which if unrebutted would warrant his conviction. Sub-section (2) of Section 245 empowers the Magistrate to discharge an accused even "at any previous stage" if for reasons to be recorded by such Magistrate the charges are considered to be "groundless". In cases where the accused is not discharged, the Magistrate is required to follow the procedure under Section 246 of the Code.

11. That provision may at this stage be extracted:

> **"246. Procedure where accused is not discharged** - (1) If, when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.
>
> (2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty or has any defence to make.
>
> (3) If the accused pleads guilty, the Magistrate shall record the plea, and may, in his discretion, convict him thereon.
>
> (4) If the accused refuses to plead, or does not plead or claims to be tried or if the accused is not convicted under sub-section (3), he shall be required to state, at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken.
>
> (5) If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged.
>
> (6) The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and re- examination (if any), they shall also be discharged."

A simple reading of the above would show that the Magistrate is required to frame in writing a charge against the accused "when such evidence has been taken" and there is ground for presuming that the accused has committed an offence triable under this Chapter which such Magistrate is competent to try and adequately punish.

12. Sections 244 to 246 leave no manner of doubt that once the accused appears or is brought before the Magistrate the prosecution has to be heard and all such evidence as is brought in support of its case recorded. The power to discharge is also under Section 245 exercisable only upon taking all of the evidence that is referred to in Section 244, so also the power to frame charges in terms of Section 246 has to be exercised on the basis of the evidence recorded under Section 244. The expression "when such evidence has been taken" appearing in Section 246 is significant and refers to the evidence that the prosecution is required to produce in terms of Section 244(1) of the Code. There is nothing either in the provisions of Sections 244, 245 and 246 or any other provision of the Code for that matter to even remotely suggest that evidence which the Magistrate may have recorded at the stage of taking of cognizance and issuing of process against the accused under Chapter XV tantamounts to evidence that can be used by the Magistrate for purposes of framing of charges against the accused persons under Section 246 thereof without the same being produced under Section 244 of the Code. The scheme of the two Chapters is totally different. While Chapter XV deals with the filing of complaints, examination of the complainant and the witnesses and taking of cognizance on the basis thereof with or without investigation and inquiry, Chapter XIX Part B deals with trial of warrant cases instituted otherwise than on a police report. The trial of an accused under Chapter XIX and the evidence relevant to the same has no nexus proximate or otherwise with the evidence adduced at the initial stage where the Magistrate records depositions and examines the evidence for purposes of deciding whether a case for proceeding further has been made out. All that may be said is that evidence that was adduced before

a Magistrate at the stage of taking cognizance and summoning of the accused may often be the same as is adduced before the Court once the accused appears pursuant to the summons. There is, however, a qualitative difference between the approach that the Court adopts and the evidence adduced at the stage of taking cognizance and summoning the accused and that recorded at the trial. The difference lies in the fact that while the former is a process that is conducted in the absence of the accused, the latter is undertaken in his presence with an opportunity to him to cross-examine the witnesses produced by the prosecution.

14. There is, in our opinion, no merit in that contention which needs to be noticed only to be rejected. We say so for reasons more than one. In the first place, the expression "Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution" appearing in Section 244 refers to evidence within the meaning of Section 3 of the Indian Evidence Act, 1872. Section 3 reads as under:

"3. Interpretation clause - In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-

* * *

'Evidence'.-'Evidence' means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence."

16. It is trite that evidence within the meaning of the Evidence Act and so also within the meaning of Section 244 of the Cr.P.C. is what is recorded in the manner stipulated under Section 138 in the case of oral evidence. Documentary evidence would similarly be evidence only if the documents are proved in the manner recognised and provided for under the Evidence Act unless of course a statutory provision makes the document admissible as evidence without any formal proof thereof.

17. Suffice it to say that evidence referred to in Sections 244, 245 and 246 must, on a plain reading of the said provisions and the provisions of the Evidence Act, be admissible only if the same is produced and, in the case of documents, proved in accordance with the procedure established under the Evidence Act which includes the rights of the parties against whom this evidence is produced to cross-examine the witnesses concerned.

18. Secondly, because evidence under Chapter XIX (B) has to be recorded in the presence of the accused and if a right of cross-examination was not available to him, he would be no more than an idle spectator in the entire process. The whole object underlying recording of evidence under Section 244 after the accused has appeared is to ensure that not only does the accused have the opportunity to hear the evidence adduced against him, but also to defend himself by cross-examining the witnesses with a view to showing that the witness is either unreliable or that a statement made by him does not have any evidentiary value or that it does not incriminate him. Section 245 of the Code, as noticed earlier, empowers the Magistrate to discharge the accused if, upon taking of all the evidence referred to in Section 244, he considers that no case against the accused has been made out which may warrant his conviction.

Whether or not a case is made out against him, can be decided only when the accused is allowed to cross- examine the witnesses for otherwise he may not be in a position to demonstrate that no case is made out against him and thereby claim a discharge under Section 245 of the Code. It is elementary that the ultimate quest in any judicial determination is to arrive at the truth, which is not possible unless the deposition of witnesses goes through the fire of cross-examination. In a criminal case, using a statement of a witness at the trial, without affording to the accused an opportunity to cross-examine, is tantamount to condemning him unheard. Life and liberty of an individual recognised as the most valuable rights cannot be jeopardised leave alone taken away without conceding to the accused the right to question those deposing against him from the witness box.

19. Thirdly, because the right of cross-examination granted to an accused under Sections 244 to 246 even before framing of the charges does not, in the least, cause any prejudice to the complainant or result in any failure of justice, while denial of such a right is likely and indeed bound to prejudice the accused in his defence. The fact that after the Court has found a case justifying framing of charges against the accused, the accused has a right to cross-examine the prosecution witnesses under Section 246(4) does not necessarily mean that such a right cannot be conceded to the accused before the charges are framed or that the Parliament intended to take away any such right at the pre-charge stage.

21. This Court further clarified that the expression “or at any previous stage of the case” appearing in Section 246(1) did not imply that a Magistrate can frame charges against an accused even before any evidence was led under Section 24. This Court approved the decision of the High Court of Bombay in Sambhaji Nagu Koli v. State of Maharashtra 1979 Cri LJ 390 (Bom), where the High Court has explained the purport of the expression “at any previous stage of the case”. The said expression, declared this Court, only meant that the Magistrate could frame a charge against the accused even before all the evidence which the prosecution proposed to adduce under Section 244(1) was recorded and nothing more. This Court observed:

“44. In Section 246 Cr.P.C. also, the phraseology is "if, when such evidence has been taken", meaning thereby, a clear reference is made to Section 244 Cr.P.C. The Bombay High Court came to the conclusion that the phraseology would, at the most, mean that the Magistrate may prefer to frame a charge, even before all the evidence is completed. The Bombay High Court, after considering the phraseology, came to the conclusion that the typical clause did not permit the Magistrate to frame a charge, unless there was some evidence on record. For this, the Learned Single Judge in that matter relied on the ruling in Abdul Nabi v. Gulam Murthuza Khan 1968 Cri LJ 303 (AP).”

22. More importantly, this Court recognised the right of cross- examination as a salutary right to be exercised by the accused when witnesses are offered by the prosecution at the stage of Section 244(1) of the Code and observed:

“51. The right of cross-examination is a very salutary right and the accused would have to be given an opportunity to cross- examine the witnesses, who have been offered at the stage of Section 244(1) Cr.P.C. The accused can show, by way of the cross- examination, that there is no justifiable ground against him for facing the trial and for that purpose, the prosecution would have to offer some evidence. While interpreting

this Section, the prejudice likely to be caused to the accused in his losing an opportunity to show to the Court that he is not liable to face the trial on account of there being no evidence against him, cannot be ignored."

6. The findings reproduced above rather support the case of the respondents. Therefore, taking into consideration all the aforesaid facts, as also the exposition of law in Sunil Mehta's case supra, this Court find no infirmity or illegality in the order passed by the learned Magistrate below. Consequently, the petition being devoid of any merits is dismissed, leaving the parties to bear their own 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
Rajesh Kumar & others .....Respondents.

Cr. Appeal No. 214 of 2013.
Reserved on: 03.11.2014.
Date of Decision :17.11.2014.

N.D.P.S. Act, 1985- Section 20- Accused was driving the Tata Sumo- accused S was occupying front seat while other accused were occupying the rear seats- search of the vehicle and the persons of the accused were conducted leading to the recovery of the charas- held, that the testimonies of the prosecution contradicted each other regarding the time of their arrival at the place of incident- regarding the manner of taking the accused to the police station- no independent witness was associated- link evidence was not established, therefore, in these circumstances, acquittal of the accused was justified.

For the Appellant: Mr. Ramesh Thakur, Assistant Advocate General.
For the Respondents: Mr. H.S. Rangra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the State of H.P. against the impugned judgment rendered on 1.12.2012 by the learned Special Judge (Fast Track Court), Mandi in Sessions trial No. 42 of 2009, whereby, the learned trial Court acquitted the accused/respondents of theirs having allegedly committed the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act).

2. Brief facts of the case are that on 10.01.2009, Inspector/Incharge SIU Mandi along with HHC Padam Singh, H.C. Prem Lal, left the office in Government vehicle No.HP-33-6202 being driven by Lalman and on a motor cycle No.HP-33B-0199 in connection with Nakabandi and were present at Dyodh Mod near Pandoh dam. The police party intercepted a Tata Sumo bearing registration No. HP-33E-0508 being driven by accused Rajesh Kumar and accused Sanjay Kumar was occupying the front seat by the side of the driver and accused Satish Kumar was occupying the seat on the back of the driver. Accused Rajesh Kumar, Sanjay Kumar and Satish Kumar were apprised of their legal rights to be searched either before Magistrate or Gazetted Officer vide memo Ex.PW4/A, Ex.PW4/B and Ex.PW4/C in the presence of the witnesses

and the accused persons gave in writing that they are willing to be searched by the police. The photographs of the vehicle and of the accused were also taken by the Investigating Officer through official camera. The police party checked the vehicle and one packet was recovered from the right side of the dash board and two packets were recovered from the left side of the dash board of the vehicle which were wrapped with khaki tape and the three packets which were found in the possession of Rajesh Kumar accused . 1 kg 400 grams charas was recovered and two samples of 25-25 grams were drawn from these packets which were separately packed and sealed with 7 seals of 'D' and the bulk charas of one Kg 350 grams was also sealed with 7 seals of 'D', whereas on the personal search of accused Sanjay Kumar, two packets were found to be tied on his left leg and two packets were found to be tied on his right leg. These packets were opened and they were found to be containing black colour material in the shape of sticks and balls and on weighment, it was found to be 2 kgs out of which two samples of 25 grams each were drawn which were separately packed and sealed and the bulk charas 1 kg 950 grams were also sealed with seal 'D' at 7 places. On search of the black and green colour bag which was kept by accused Satish Kumar on left side of the seat, three packets wrapped with khakhi colour tape were recovered, which were opened and found containing black colour charas in the shape of sticks and balls. On weighment, it was found to be containing 2 kgs charas. Two samples of 25 grams each were drawn from the recovered charas and the samples of charas separately packed and sealed with seal 'D' at 7 places. NCB forms in triplicate were filled in by Sh. Jaishi Ram, Investigating Officer upon which seal impression "D' was embossed and sample seal was taken on cloth. The vehicle was also taken into possession. Ruqua was scribed and sent to police station through HHC Padam Singh for registration of FIR and the Investigating Officer prepared site plan, recorded statements of the witnesses and has given notice of arrest of the accused and information of the arrest was given to the persons as desired by the accused. On coming to the police station the case property was handed over along with NCB forms to the then SHO Haripal Saini for resealing, who resealed the case property with seal 'N' by affixing three seals on each parcel and prepared the reseal memo Ex.PW1/C and the specimen of seal also affixed on NCB forms and deposited the case property with MHC Nand Lal and he made the entry in the Malkhana register. On 12.1.2009, the case property was sent through PW-6 Nikka Ram for depositing in the office of FSL, Junga, who deposited the case property and handed over the receipt to the MHC. As per the report of the FSL Junga, Ex. P-6, the entire mass of the exhibit marked as A-1, B-1 and C-1 is a mixture of cannabis and the sample 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 were charged for theirs having committed an offence punishable under Section 20 of the NDPS Act by the learned trial Court to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined twelve witnesses. On closure of prosecution evidence, the statement of accused, under Section 313 of the Code of Criminal Procedure was recorded in which they pleaded innocence and chose to lead no evidence in defence.

6. On appraisal of the evidence on record, the learned trial Court, returned findings of acquittal against the accused/respondents.

7. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Assistant Advocate General has concertedly and vigorously contended that the findings of acquittal recorded by the learned trial Court are not based on a proper appreciation of evidence on record, rather, they are sequelled by gross mis-appreciation of the material on

record. Hence, he contends that the findings of acquittal be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

8. On the other hand, the learned counsel appearing for the accused/respondents has with considerable force and vigour, contended that the findings of acquittal recorded by the Court below are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

9. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

10. The first witness, who, stepped into the witness box in proof of the prosecution case is PW-1 Inspector Hari Paul Saini, who in his deposition deposes that on 10.1.2009 on receiving ruka Ex.PW1/A through HHC Padam Singh in Police Station, Sadar Mandi, recorded FIR Ex.PW1/B which bears his signatures. He further deposes that on the evening of 10.1.2009, Inspector Jaishi Ram handed over the case property to him which was resealed by him with seal bearing impression 'N' . He proceed to depose that he prepared memo Ex.PW1/C qua the factum of resealing of the case property. He deposes that facsimile of seal was also affixed on NCB forms and also filled in the relevant columns of these forms. He further deposes that he deposited the case property along with NCB form and other relevant documents with MHC. NCB forms have been deposed by this witness to be Ex.PW1/D to Ex.PW1/F. He further deposes that on receipt of report of FSL, Ex.PX, he prepared the challan in this case and presented the same in the Court. In his cross-examination, he deposes that only samples were sent to the laboratory and bulk parcels have not been sent to the laboratory.

11. PW-2 H.C. Ramesh Chand deposes that on 12.1.2009 at about 10.45 a.m., he handed over the special report of this case to the then Addl. S.P., Mandi Sh. Mandan Lal.

12. PW-3 HHC Padam Singh in his deposition has deposed a version which is in square tandem with the genesis of the prosecution version as referred to hereinabove. In his cross-examination he deposes that after leaving the police station they first set up naka at Bindrabani and stayed there till 3.30 p.m. He further deposes that they left police station at about 9.00 a.m and remained at Bindrabani from 9.00 a.m. till 3.30 p.m. He proceeds to depose that after leaving Bindrabandi, they straightway had gone to the place of Naka at Dyodh-Mod. He deposes that distance of place of naka from Pandoh dam is about 3-4 kilometers.

13. PW-4 HC Prem Pal in his deposition has deposed a version which in square tandem with the genesis of the prosecution version as also in corroboration to the deposition of PW-3. In his cross-examination he deposes that they left police station at 9.00 a.m. They reached at Dyodh mod at 4.15 p.m. Distance of Dyodh from police station is about 20 kilometers. He further deposes that pandoh dam is at a distance of 2 kilometers from the place of Naka. He further deposes that he does not know whether the parcels were already stitched or they were prepared by the IO, on the spot. He further deposes that during the carrying out of the proceedings, the accused remained outside the vehicle and they were sitting on the parapet under the supervision of the police. He proceeds to depose that the entire proceedings were carried out by sitting on parapet. He further deposes that the driver was called on the spot to bring the vehicle of the accused to the police station but he does not remember the name of that driver. He further deposes that the accused were brought to the police station in the police van and the policy party came in the

vehicle of the accused but he does not remember the name of the police officials who came to the police station in the vehicle of the accused.

14. PW-5 H.C. Hoshiar Singh deposes that the vehicle No. HR-33E-0508 was handed over to Pawan Kumar along with R.C. and key on supurdari vide memo Ex.PW5/A in his presence.

15. PW-6 H.C. Nikka Ram deposes that on 12.1.2009, MHC Nand Lal handed over to him three parcels sealed with 7 seals of "D" and three seals of "N" each stated to be containing 25 grams cannabis each vide R.C. No.386/08-09 along with documents i.e NCB form in triplicate and samples of seals D & N, copy of FIR and seizure memo for being taken to FSL, Junga. He further deposes that on that date, he deposited the above case property in the laboratory and obtained receipt on the R.C. which he handed over to MHC on his return.

16. PW-7 H.C. Lachhman Dass deposes that on 12.1.2009, the then Addl. S.P. Madan Lal handed over to him special report of case FIR No.11/09, P.S. Sadar Mandi for being kept in the record and he made entry in the special report register at serial No.2. Abstract of special report register has been deposed by this witness to be Ex.PW7/A. Copy of special report has been deposed by this witness to be Ex.PW7/B.

17. PW-8 HHC Manoj Kumar and PW-9 HHC Yakub Khan have proved the copies of rapat No.3, dated 10.1.2009, Ex.PW8/A and rapat No.45, 10.01.2009, Ex.PW9/A respectively.

18. PW-10 HHC Nand Lal deposes that on 10.01.2009, Inspector/SHO Hari Pal Saini deposited with him sample parcels and parcels of bulk charas sealed with seals N and D along with NCB forms, samples of seals and other documents. He deposes that on 12.01.2009, sample parcels marked as Mark A-1, B-1 and C-1 were forwarded to the laboratory through HHC Nikka Ram along with NCB form, samples seals D and N and seizure memo vide R.C. No.386/08/09, who after depositing the parcels returned the R.C., alongwith receipt to him. Copy of R.C. has been deposed by this witness to be Ex.PW10/B. He proceeds to depose that on 26.06.2009, the remaining case property was forwarded to the laboratory through HHC Thakur Singh vide R.C. No.97/09, who after depositing the case property in the laboratory returned the R.C. to him. Copy of the R.C. and abstract of Malkhana register have been deposed by this witness to be Ex.PW10/C and Ex.PW10/D respectively.

19. PW-11 SI Rishi Raj deposes that in pursuant to the identification of the spot by accused Sanjay Kumar on 12.01.2009, he prepared site plan Ex.PW11/A. He further deposes that he recorded the statement, Ex.PW11/B of Nikka Ram.

20. PW-12 Jaisi Ram in his deposition has deposed a version which is in square tandem with the genesis of the prosecution version as referred to hereinabove as also in corroboration with the depositions of PW-3 and PW-4. In his cross-examination he deposes that they started from SIU Office at 9.00 a.m., and reached at Dyodh mod directly. He further deposes that forest check post Bindrawani falls in between their office and Dyodh Mod. He further deposes that Dyodh mod is at a distance of two kilometers from Pandoh Dam. They reached at Dyodh mod at 10.00 a.m. He further deposes that there is an office of the security at Pandoh dam where persons remain 24 hours. He admitted the suggestion that ahead of Pandoh dam there are 3-4 shops. He further deposes that rukka was given to H.C. Padam Singh at 6.30 p.m. and Padam Singh went in private vehicle to police station and he did not use the official motor cycle and car. He proceeds to depose that while carrying out the proceedings, some of the accused were in their own vehicle and some were in police vehicle. He further deposes that accused Rajesh and Sanjay were sitting in their own vehicle whereas accused Satish was in the police vehicle. He proceeds to depose that

accused Sanjay and Rajesh were brought in their vehicle which was being driven by their driver Lalman, whereas their vehicle was being driven by HHC Ramesh Kumar, accused Satish was brought in that vehicle.

21. The alleged occurrence took place on 10.01.2009 at Dyodh Mod. At the place aforesaid, the police intercepted a tata sumo bearing No. HP-33E-0508. The vehicle aforesaid, at the relevant time was driven by accused Rajesh Kumar, whereas, accused Sanjay Kumar was occupying the front seat adjoining the driver seat and accused Satish Kumar was occupying the seat on the rear of the driver. The prosecution on the strength of the credible testimonies of the police witnesses which while, hence, inspiring confidence, as also, being trustworthy concerts to attain success. However, reinforced credibility would be imputed to the testimonies of the prosecution witnesses in case they are bereft of any stark or dire inter se or intra se contradictions. However, in case their testimonies suffer from the blemish or vice of inter se or intra se contradictions, the testimonies of the official witnesses would acquire the taint of prevarication, as such, sequeling a jolt to the prosecution case.

22. For determining, whether the prosecution witnesses have deposed in harmony with each other and, as such, their testimonies are to be construed to be both trustworthy as well as inspiring, it is necessary to advert to certain pre-eminent facts as unfolded in the depositions of PW-12, PW-3 and PW-4. An advertence to the un-foldment by the prosecution witnesses aforesaid rather conveys the existence of dire and blatant intra se contradictions in their testimonies which contradictions, hence, erode the efficacy of the prosecution case. The unfoldment by PW-12 Jaishi Ram in his deposition of the police party having started from SIU office at 9 a.m., and having reached the site of occurrence at 10 a.m., stands contradicted by the testimony of PW-3 HHC Padam Singh, who deposed that the police party had departed from the police station at 9 a.m., however, they prior to their arriving at the site of occurrence, had till 3.30 p.m. laid a naka at Bindribani. The deposition of PW-3 stands corroborated by PW-4 H.C. Prem Pal. However, both PW-3 Padam Singh and PW-4 Prem Pal, hence, blatantly contradict the deposition of PW-12 Jaishi Ram qua the time of arrival of the police at the site of occurrence, inasmuch as though PW-12 Jaishi Ram deposes that the police party had reached at the site of occurrence at 10 a.m., whereas PW-3 and PW4 have deposed that they had arrived at the site of occurrence in the later hours of the afternoon. This contradiction qua the time of arrival of the police party at the site of occurrence existing in the testimonies of PW-12, PW-3 and PW-4 underscores the factum of the proceedings relating to search, seizure and recovery of contraband from the alleged exclusive and conscious possession of the accused having been effected at a time when, hence, all PWs were not simultaneously present at the site of occurrence. In other words, it dispels the factum of the simultaneous presence of PWs at the site of occurrence. As a concomitant, it also erodes and undermines the efficacy of the prosecution version of the entire proceedings having commenced at the site of occurrence at 9.00 a.m., as a corollary then the inevitable conclusion which is filliped is that the proceedings relating to search, seizure and recovery of contraband from the purported exclusive and conscious possession of the accused were effected at a place other than as propounded by the prosecution. The learned trial Court in having imputed significance to the factum of the existence of the aforesaid contradictions and it having concluded that they constituted major contradictions rendering, hence, the prosecution version to be unbelievable cannot be obviously concluded to have mis-appreciated their significance thereto or having committed a legal mis-demeanor. Moreover, the further unfoldment of stark intra se contradictions in the testimonies of PW-12 and PW-4, inasmuch as PW-4 having deposed that the accused was brought to the police station in the police van, whereas the police party traveled in the vehicle of the accused, whereas PW-12 in his cross-examination having deposed that both accused Sanjay Kumar and Rajesh Kumar were brought in their vehicle i.e. tata sumo which was driven by the

police driver Lalman and accused Satish Kumar was brought in the police vehicle driven by HHC Ramesh Kumar, devolves upon the factum of the manner of accused having been brought to the police station. The contradictory manner in which both PW-12 and PW-4 have deposed qua the manner in which the accused were brought to the police station obviously begets an inference that both PW-4 and PW-12 were not simultaneously present at the site of occurrence, besides it also boost an inference that the accused were not simultaneously nabbed by the police as propounded by the prosecution.

23. It is in the face of the existence of stark contradictions in the testimonies of PWs as highlighted hereinabove that the necessity or significance qua association of independent witnesses by the police, arises. However, fatality to the prosecution for non association of independent witnesses would occur only in the event of palpable evidence existing on record displaying or marking the factum of availability of independent witnesses in the vicinity of the site of occurrence. Only in the face of imminent evidence existing on record marking the factum of availability of independent witnesses that lack of concert by the Investigating Officer or lack of efforts on his part to associate them in the proceedings relating to search, seizure and recovery would fasten prevarication to the prosecution case. For determining whether evidence exists on record displaying the availability of independent witnesses in the vicinity of the site of occurrence, an advertence to the testimony of PW-12 Jaishi Ram is apt. The witness aforesaid in his testimony has voiced the factum of existence of office of security at Pandoh Dam situated within two kilometers from the site of occurrence. Now given the uncontroverted fact of the existence of the office of security at Pandoh Dam at a distance of two kilometers from the site of occurrence as also when the said fact entwined with the fact of availability of vehicle with the police to travel to solicit the joining of the personnel manning the security office, the palpable absence of concerted efforts on the part of the Investigating Officer to solicit the joining of the personnel manning the security office at Pandoh Dam, located at a distance of two kilometers from the site of occurrence, personifies that their association was not solicited by the Investigating Officer, despite theirs being available as he intended to smother the truth qua the genesis of the prosecution case. Therefore, in the face of the conclusion drawn hereinabove by this Court that the testimonies of the official witnesses do not for existence of intra se contradictions in their respective testimonies inspire the confidence of this Court, the palpable inertia as well as indolence on the part of the Investigating Officer despite availability to associate independent witnesses at the site of occurrence, assumes importance, inasmuch as their non association aggravates the magnitude of the prevarication resorted to by the Investigating Officer or portrays that the Investigating Officer omitted to associate them as he was carrying out a slanted or tainted investigation. Therefore, the slanted and tainted investigating as carried out by the Investigating Officer fastens fatality to the prosecution case, rendering it unbelievable.

24. Furthermore, PW-10 HHC Nand Lal, the then MHC with whom the case property was deposited by the Investigating Officer has deposed that on 12.1.2009 sample parcels marked as Mark A1, B1 and C1 were forwarded to the Laboratory through PW-6 Nikka Ram along with NCB form, sample seals 'D' and 'N' and seizure memo vide R.C. No.386/08/09, besides PW-10 has also proceeded to depose that on 26.6.2009, the remaining case property was forwarded to the laboratory through HHC Thakur Singh vide R.C. No.97/09 who after depositing the case property in the laboratory concerned returned the R.C. However, HHC Thakur Singh, who carried the remaining case property to the laboratory for analysis subsequent to the prior dispatch of the sample parcels, has remained not associated by the Investigating Officer in the investigation carried out by him. Obviously, HHC Tahkur Singh also did not step into the witness box to support the prosecution case qua the factum as deposed by PW-10 of his having handed over to the former on 26.6.2009 the remaining bulk

parcel for rendition of an opinion by the Chemical Analyst. His non association by the Investigating Officer in the investigation carried out by him, as also, his not stepping into the witnesses box would have obviated an inference of tampering with the case property, as a corollary, his then having remained omitted to be associated in the investigation by the Investigating Officer and consequently when he omitted to step into the witness box, aggravates an inference that the case property as carried out by him to the laboratory concerned may have been tampered with or was some case property other than one attributed to the accused. With the formation of the inference aforesaid, the sequeling effect is that, hence, even the samples sent for rendition of an opinion to the Chemical Analyst may have not been extracted from the bulk sent through HHC Thakur Singh for analysis to the Chemical Analyst, rather may have been extracted from some other case property. In aftermath, the deduction which ensues is that the opinion rendered by the Chemical Analyst on samples sent to it for analysis may not be, hence, relatable to the bulk as recovered at the site of occurrence from the purported conscious and exclusive possession of the accused.

25. On an incisive and thorough scanning of the evidence on record comprised in the testimonies of the official witnesses which suffer from the taint of stark and blatant intra se contradictions, the prosecution case, hence, suffers a jolt. Moreover, the factum of non association of the independent witnesses by the Investigating Officer in the investigation despite their availability especially when the depositions of the prosecution witnesses suffer erosion for the reasons aforesaid, dispels the truth of the genesis of the prosecution case, 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.

26. For the foregoing reasons, the appeal is dismissed and the judgment of the learned trial Court is affirmed and maintained. Records be sent back forthwith.

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

ITA No. 28 of 2009 a/w ITA Nos 30, 48 of 2009, 35 of 2010 and 16 and 21 of 2012.
Judgment reserved on: 10.11.2014.
Date of decision: November 18, 2014.

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1. **ITA No. 28 of 2009**

Commissioner of Income tax, Shimla .....Appellant.
Vs.
M/s. Indus Cosmeceuticals ..... Respondent

2. **ITA No. 30 of 2009**

Commissioner of Income tax, Shimla .....Appellant.
Vs.
M/s. Indus Cosmeceuticals .....Respondent.

3. **ITA No. 48 of 2009**

Commissioner of Income tax, Shimla .....Appellant.
Vs.
M/s Indus Cosmeceuticals .....Respondent.

4. **ITA No. 35 of 2010**
Commissioner of Income tax, Shimla ..... Appellant.
Vs.
M/s Indus Cosmeceuticals .....Respondent.

5. **ITA No. 16 of 2012**
Commissioner of Income tax, Shimla ..... Appellant.
Vs.
Sh. Mela Ram, Prop. Deewal Gramudyog Sansthan .....Respondent.

6. **ITA No. 21 of 2012**
Commissioner of Income tax, Shimla ..... Appellant.
Vs.
Sh. Mela Ram, Prop. Deewal Gramudyog Sansthan .....Respondent.

Income Tax Act, 1961- Section 80 (IB)2- Assessing Officer conducted a status inquiry and found that the assessee had employed 13 person who had worked for 3-4 months except for the two employees - he further found that most of the employees had left the job and only three workers were working with the assessee- he held that the requirement of 10 workers was not fulfilled and, therefore, deduction was not permissible to the assessee- held, that when the employees were not employed during the substantial part of the year, assessee is not entitled to the deduction. (Para- 7 and 8)

Income Tax Act, 1961- Section 80 (IB)iv- Assessee was converting henna leaves into herbal powder by the process of mixing and grinding - raw material was first collected, dried with the use of mixture of various acids and thereafter ground by putting the definite quantity (in percentage) and the end product was the result of many transformations carried out with the help of various materials, manpower and machines and was commercially a different item- henna leaves only constitute about 40% of the raw material, -held that the activity of the assessee would fall within the definition of manufacture and the assessee is entitled to the benefit of Section 80(IB)iv. (Para-12 to 17)

Cases referred:

Commissioner of Income Tax vs. Pawan Aggarwal 2014 (3) Him.L.R. 1981
Commissioner of Income-Tax vs. Sacs Eagles Chicory [2000] 241 I.T.R. 319
Sacs Eagles Chicory vs. Commissioner of Income Tax [2002] 255 I.T.R. 178

For the Appellant(s) : Mr. Vinay Kuthiala, Senior Advocate, with Ms. Vandana Kuthiala, Advocate.
For the respondent(s) : Mr. Sunil Kumar Mukhi, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan,Judge

All these appeals have been admitted on the following common substantial question of law:-

> Whether the conversion of heena leaves into herbal heena powder by a process of mixing and grinding amounted to manufacture and consequently whether the profits derived from such activity

were eligible for deduction under section 80IB(4) of the Income Tax Act?

2. While an additional substantial question of law was framed in ITA No. 28 of 2009, which is as follows:-

Whether the condition specified in section 80IB(2)(iv) requiring employment of ten or more workers in the process carried out could be said to have been complied with, when most of the workers had not actually worked for more than four months during the year?

3. Before proceeding to the common question of law, we propose to deal with question No. 2 separately framed in ITA No. 28 of 2009.

4. Section 80IB(2) of Income Tax Act, 1961 (for short, the Act) reads as follows:-

"80IB(2): This section applies to any industrial undertaking which fulfils all the following conditions, namely :—

(i) it is not formed by splitting up, or the reconstruction, of a business already in existence :

Provided that this condition shall not apply in respect of an industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose;

(iii) it manufactures or produces any article or thing, not being any article or thing specified in the list in the Eleventh Schedule, or operates one or more cold storage plant or plants, in any part of India:

Provided that the condition in this clause shall, in relation to a small scale industrial undertaking or an industrial undertaking referred to in sub-section (4) shall apply as if the words "not being any article or thing specified in the list in the Eleventh Schedule" had been omitted.

Explanation 1.—For the purposes of clause (ii), any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely:-

(a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India;

(b) such machinery or plant is imported into India from any country outside India; and

(c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of the machinery or plant by the assessee.

Explanation 2.—Where in the case of an industrial undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value

of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with;

(iv) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power."

5. A bare perusal of the aforesaid section shows that for claiming deduction under this section the sine qua non is that an industrial undertaking is required to employ ten or more workers in a manufacturing process carried on with the aid of power. The Income Tax Officer (for short: A.O.) held a detailed discreet inquiry and on examination of attendance register, it was noticed that the assessee had employed 13 employees/ workers i.e. 1) Sonia Chemist who worked for 27 days, 2) Hani, who worked for 86 days, 3) Ayodhya Bhatia, who worked for 207 days, 4) Anita Rohal, who worked for 75 days, 5) Roshani, who worked for 99 ½ days, 6) Anil, who worked for 83 ½ days, 7) Nirmala, who worked for 81 ¼ days, 8) Lata, who worked for 100 ¼ days, 9) Om Parkash, who worked for 96 days, 10) Chaman, who worked for 95 days, 11) Manju, who worked for 79 days, 12) Urmila, who worked for 101 days and 13) Ram Uger, who worked for 216 ½ days only. On the basis of such inquiry, he concluded that most of the workers had only worked for three to four months during the entire financial year 2002-03 except the two employees/ workers i.e. Ayodhya Bhatia and Ram Uger. During the course of assessment proceeding, the A.O. had asked the assessee to produce these employees for verification and in response, it was informed that most of the employees/ workers had left the job and only three workers were still working with the assessee firm. The assessee had produced for verification all the three employees, namely; Urmila Shandil, Ayodhya and Manjna Parihar, whose statements were recorded. As per the statement of these employees, the maximum number of employees/ workers employed by the assessee during the financial year 2002-03 was eight. Based upon such inquiry, the A.O. held that the essential condition for claiming deduction under section 80IB by the assessee was not fulfilled and therefore, the deductions under this section were not admissible to the assessee.

6. This finding was affirmed in appeal by the CIT (Appeals). The assessee thereafter filed an appeal before the ITAT, who returned the findings in favour of assessee by according the following reasons:-

"As far as the employment of number of workers is concerned, the assessee has claimed 13 workers whereas the requirement of law is that there must be minimum 10 Nos. of workers. The stand of the department is that insufficient salary has been paid to the workers and skilled persons cannot be employed in such a meager salary. The claim of the assessee is that both husband and wife are trained/qualified persons who themselves are looking after the technical aspect. Even otherwise there is a finding in the order that in the attendance register there are 13 employees, therefore, in view of the settled position of law that there must be substantial compliance and workers deployed on all process must be counted, therefore, the following cases can be relied upon:

CIT vs. Sawyers Asia Ltd. (122 ITR 259) (Bom)

CIT vs. Harjit Synthetic Fabric Pvt. Ltd. (162 ITR 640) (Bom)

CIT vs. Taluja Enterprises Pvt. Ltd. (250 ITR 675) (Del)

CIT vs. Sultan and Sons Rice Mills (272 ITR 181) (All)

CIT vs. Hanuman Rice Mills (275 ITR 79) (All)."

7. We are surprised and wonder how the ITAT could have given such findings without there being any material placed before it. It was never the case of the assessee either before the A.O. or before the CIT that the workers include the assessee, who are husband and wife and trained and qualified persons and therefore should be counted as workers. Further even the finding that there was substantial compliance when there were 13 employees entered in the attendance register is absolutely erroneous in teeth of the findings recorded by A.O. against which findings there was no contradiction or rebuttal on behalf of the assessee.

8. In **M/s Amrit Rubber Industries** vs. **Commissioner of Income Tax, ITA Nos. 32 of 2004 and 33 of 2004 decided on 30.9.2010,** this court was dealing with the interpretation of section **80IA(2) (v),** which reads as follows:-

> *"(v) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power."*

Therein, in one of the appeals, the assessee had employed ten or more workers only for two months, while in the other case only for six months and this court held that this could not be deemed to fulfill the requirements of section as the employment had to be for a substantial part of a year. It was held as follows:-

> *"3. It is not disputed before us that in one of the appeal, ten or more workers were employed only for two months and in the other, only for six months. This cannot be deemed to fulfill the requirements of the aforesaid clause of Section 80-IA. The employment has to be for a substantial part of a year and employment for two months and six months cannot be termed to be employment for a substantial part of the year.*
>
> *4. In this regard, we may make reference to the judgment of Delhi High Court in Commissioner of Income Tax versus Taluja Enterprises (P.) Ltd., (2001) 250 ITR 675 , wherein the Division Bench held as follows:*
>
> > *"In order to qualify for relief under section 80J (4) (iv) of the Income Tax Act, 1961, substantial compliance with the requirement that the new industrial undertaking must have employed in the manufacturing process carried on with the aid of power ten or more workers, is all that is required. The undertaking must have employed ten or more workers substantially during the period for which relief is claimed. There can be no hard and fast rule by which one can determine whether there has been substantial compliance. It is for the authority or the court to so decide based upon the facts before it."*
>
> *5. <u>It may be true that substantial part does not mean the entire year, but employment for 1/6th of the year or half of the year can under no circumstance be termed to be employment for a substantial part of the year</u>. "*

Since the assessee has not employed ten or more workers during the substantial part of the year, therefore, this question is answered in favour of the revenue and against the assessee.

Substanaial question of law No.1:

9. At the outset, it may be observed that both the A.O. and CIT (Appeals) have denied deductions to the assessee under section 80IB of the Act on the ground that the activity of the assessee did not amount to 'manufacture'. Now what is "manufacture" has been dealt in detail by this Bench in appeal in **ITA No. 17 of 2010 and other connected cases** titled **Commissioner of Income Tax** vs. **Pawan Aggarwal 2014 (3) Him.L.R. 1981,** wherein this court held as follows:-

> "12. Now, what would appear from the aforesaid facts is that this Court is required to consider as to what would constitute 'manufacture' and 'production' under the Act. Indisputably, the word 'manufacture' was not defined under the Act, uptil the insertion of Section 2 (29BA) of the Finance (No.2) Act, 2009 introduced w.e.f. 1.4.2009, which reads as follows:
>
> ***"29BA – "manufacture", with its grammatical variations, means a change in a non-living physical object or article or thing, -***
>
> ***(a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or***
>
> ***(b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure."***
>
> Though, it may be noted here that this insertion has been made with effect from 1.4.2009, while we are dealing with the assessments prior to 1.4.2009.
>
> 13. The expression 'manufacture' as well as 'production' has come up repeatedly for interpretation and consideration not only before the various High Courts but even before the Hon'ble Supreme Court. The Hon'ble Supreme Court in ***India Cine Agencies vs. Commissioner of Income Tax (2009) 308 ITR 98*** considered the word 'manufacture' as also 'production' in the following manner:
>
> > ***"3. In Black's Law Dictionary, (5th Edition), the word `manufacture' has been defined as, "the process or operation of making goods or any material produced by hand, by machinery or by other agency; by the hand, by machinery, or by art. The production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, whether by hand labour or machine". Thus by process of manufacture something is produced and brought into existence which is different from that, out of which it is made in the sense that the thing produced is by itself a commercial commodity capable of being sold or supplied. The material from which the thing or product is manufactured may necessarily lose its identity or may become transformed into the basic or essential properties. (See Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. M/s. Coco Fibres (1992 Supp. (1) SCC 290).***
> >
> > ***4. Manufacture implies a change but every change is not manufacture, yet every change of an article is the***

result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. But it is only when the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. Process in manufacture or in relation to manufacture implies not only the production but also various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to that the manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture. (See Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works, Deedwana, Rajasthan (1991 (4) SCC 473).

5. `Manufacture' is a transformation of an article, which is commercially different from the one, which is converted. The essence of manufacture is the change of one object to another for the purpose of making it marketable. The essential point thus is that, in manufacture something is brought into existence, which is different from that, which originally existed in the sense that the thing produced is by itself a commercially different commodity whereas in the case of processing it is not necessary to produce a commercially different article. (See M/s. Saraswati Sugar Mills and others v. Haryana State Board and others (1992 (1) SCC 418).

6. The prevalent and generally accepted test to ascertain that there is `manufacture' is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognized as a distinct and new article that has emerged as a result of the process. There might be borderline cases where either conclusion with equal justification can be reached. Insistence on any sharp or intrinsic distinction between `processing and manufacture', results in an oversimplification of both

and tends to blur their interdependence. (See Ujagar Prints v. Union of India (1989 (3) SCC 488).

7. To put it differently, the test to determine whether a particular activity amounts to `manufacture' or not is: Does a new and different good emerge having distinctive name, use and character. The moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whether be it the result of one process or several processes `manufacture' takes place and liability to duty is attracted. Etymologically the word `manufacture' properly construed would doubtless cover the transformation. It is the transformation of a matter into something else and that something else is a question of degree, whether that something else is a different commercial commodity having its distinct character, use and name and commercially known as such from that point of view, is a question depending upon the facts and circumstances of the case. (See Empire Industries Ltd. v. Union of India (1985 (3) SCC 314).

8. The aforesaid aspects were highlighted in Kores India Ltd., Chennai v. Commissioner of Central Excise, Chennai (2005 (1) SCC 385) in the background of Central Excise Act, 1944 (in short the `Excise Act') and Central Excise Rules, 1944 (in short the `Excise Rules') and Central Excise Tariff Act, 1985 (in short the `Tariff Act'). The stand of the revenue was that it amounted to "manufacture", contrary to what has been pleaded in these cases. This Court held that it amounted to manufacture.

9. The matter can be looked at from another angle. In Commissioner of Income Tax v. Sesa Goa Ltd. (2004 (271) ITR 331) this Court considered the meaning of word `production'. The issue in that case was whether the extraction and processing of iron ore amounted to manufacture or not in view of the various processes involved and the various processes would involve production within the meaning of Section 32A of the Act. It was inter alia observed as under:

> ***"There is no dispute that the plant in respect of which the assessee claimed deduction was owned by it and was installed after March 31, 1976, in the assessee's industrial undertaking for excavating, mining and processing mineral ore. Mineral ore is not excluded by the Eleventh Schedule. The only question is whether such business is one of manufacture or production of ore. -The issue had arisen before different High Courts over a period of time. The High Courts have held that the activity amounted to "production" and answered the issue in question in favour of the assessee. The High Court of Andhra Pradesh did so in CIT v. Singareni Collieries Co. Ltd.***

[1996) 221 ITR 48, the Calcutta High Court in Khalsa Brothers v. CIT [1996] 217 TTR 185 and CIT v. Mercantile Construction Co. [1994] 74 Taxman 41 (Cal) and the Delhi High Court in CIT v. Univmine (P.) Ltd, [1993] 202 ITR 825. The Revenue has not questioned any of these decisions, at least not successfully, and the position of law, therefore, was taken as settled.

The reasoning given by the High Court, in the decisions noted by us earlier, is, in our opinion, unimpeachable. This court had, as early as in 1961, in Chrestian Mica Industries Ltd. v. State of Bihar [1961] 12 STC 150, defined the word "Production", albeit, in connection with the Bihar Sales Tax Act, 1947. The definition was adopted from the meaning ascribed to the word in the Oxford English Dictionary as meaning "amongst other things that which is produced; a thing that results from any action, process or effort, a product; a product of human activity or effort". From the wide definition of the word "production", it has to follow that mining activity for the purpose of production of mineral ores would come within the ambit of the word "production" since ore is "a thing", which is the result of human activity or effort. It has also been held by this court in CIT v. N.C. Budharaja and Co. [1993] 204 ITR 412 that the word "production" is much wider than the word "manufacture". It was said (page 423) :

The word `production' has a wider connotation than the word `manufacture'. While every manufacture can be characterised as production, every production need not amount to manufacture .....

The word 'production' or 'produce' when used in juxtaposition with the word 'manufacture' takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and reside rodeos which emerge in the course of manufacture of goods."

10. In "Words and Phrases" 2nd Edn. by Justice R. P. Sethi the expressions `produce' and `production' are described as under:

"In Webster's New International Dictionary, the word "produce" means something that is brought forth either naturally or as a result of effort and work; a result produced. In Black's Law Dictionary, the meaning of the word `produce' is to `bring into view or notice; to bring to surface'. A reading of the aforesaid dictionary meanings of the word `produce' does indicate that if a living creature is brought forth, it can be said that it is produced. (See Commissioner of Income Tax v. Venkateswara Hatcheries (P) Ltd. (1999 (3) SCC 632), Commissioner

of Income Tax, Orissa and Ors. v. M/s N.C. Budharaja and Company and Ors. (1994 Supp 1 SCC 280).

Production or produce- The word `production' or `produce' when used in juxtaposition with the word `manufacture' takes in bringing into existence new goods by a process, which may or may not amount to manufacture. It also takes in all the byproducts, intermediate products and residual products, which emerge in the course of manufacture of goods. The expressions manufacture' and `produce' are normally associated with movables articles and goods, big and small but they are never employed to denote the construction activity of the nature involved in the construction of a dam or for that matter a bridge, a road and a building. (See Moti Laminates Pvt. Ltd. and Anr. v. Collector of Central Excise, Ahmedabad (1995 (3) SCC 23).

11. In Advanced Law Lexicon, 3rd Edn. by P. Ramanatha Aiyar, the expressions `production' and `manufacture' are described as under:

"'Production' with its grammatical variations and cognate expressions; includes-

(i) packing, labeling, relabelling of containers.

(ii) re-packing from bulk packages to retail packages, and

(iii) the adoption of any other method to render the product marketable.

`Production' in relation to a feature film, includes any of the activities in respect of the making thereof. (Cine Workers and Cinema Theatre Workers (Regulations of Employment) Act (50 of 1981) S.2(i).)

The word `production' may designate as well a thing produced as the operation of producing; (as) production of commodities or the production of a witness.

`Manufacture' includes any art, process or manner of producing, preparing or making an article and also any article prepared or produced by manufacture. (Patent and Designs Act (2 of 1911), S.2(10).

`Manufacture' includes any process-

(i) incidental or ancillary to the completion of a manufactured product; and

(ii) which is specified in relation to any goods in the section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture, or, and the word `manufacturer' shall be constructed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods but also any person who engages in their production or manufacturer on his own account.

(iii) which is specified in relation to any goods by the Central Government by notification in the Official Gazette as amounting to manufacture. (Central Excise Act (1 of 1944) S.2(f)).”

14. At this stage, it may be worthwhile to note that the ITAT in the order impugned before us has taken note of number of judicial pronouncements of not only the various High Courts but also of the Hon’ble Supreme Court and proceeded to determine the issue in the following manner:

“***9.1. Now, we may refer to some of the judicial precedents on the issue. The Hon'ble J & K High Court in the matter of CIT v. Abdul Ahad Najar, 248 ITR 744 (J&K) considered the question, whether the undertaking of a n assessee engaged in extraction of timber from forest and conversion of same into logs, planks, etc. constituted an industrial undertaking within the meaning of section 80J(4) of the Act or not ? In this case, the assessee claimed that it was engaged in the manufacture and production of articles. The case of the assessee was that the planks sawn out of logs and, articles produced therefrom were different in shape from the logs and the trees. However, the Assessing Officer did not accept the contention of the assessee as according to him the assessee did not manufacture or produce any article. According to the Assessing Officer, the process of converting trees into logs did not involve much sawing operations as after felling the trees, it had been cut into logs and sold as such. The Revenue also contended that the process of sawing of logs into planks also did not involve any manufacture of articles and that manufacturing process could not be carried out by bare hands without the aid of machinery. The claim of the assessee was, however accepted by the Appellate Commissioner, who held that the use of machinery was not indispensible to a manufacturing process and even for the conversion of the standing trees into logs, labour was required as something is converted into something else viz. logs. He was of the view that the logs could be said to be a new product emerging out of manufacturing process. He accordingly held that the assessee was entitled to deduction under section 80J of the Income-tax Act, which was confirmed by the Tribunal. The matter was considered by the Hon'ble High Court on the above facts. The Hon'ble High Court was of the view that in order to claim relief under section 80J, an industrial undertaking must manufacture or produce articles and it was a condition precedent. The Hon'ble High Court observed that the assessee cut trees in the forest, converted them not only into logs but also into planks and other articles for the purpose of sale. As a forest lessee, the assessee's business was to cut standing trees and to extract timber and convert the same into form of logs, planks, etc. f or the purpose of sale. It was observed that the logs and planks could never be known as trees ; that the two are undoubtedly different from the standing trees. The***

Hon'ble High Court accordingly upheld the stand of the assessee. It is clear from the above that the activity of the forest lessees of extraction of timber from the forest and conversion of the same into logs, planks, etc. is understood to be a manufacturing process. The Hon'ble High Court on the question of manufacturing further held as under:-

"Otherwise also, it is clear that the activity undertaken by the assessee clearly amounts to manufacture and production of articles. The expressions 'manufacture' and 'produce' have not been defined in the Income-tax Act. The dictionary meaning of 'manufacture' is 'transform or fashion new materials into a changed form for use'. In common parlance, manufacture means production of articles from raw or prepared materials by giving these materials new forms, qualities, properties or combinations, whether by hand labour-or by mechanical process. In other words, it means making of articles or materials commercially different from the basic components by physical labour or mechanical process, In its ordinary connotation, manufacture signifies emergence of new and different goods as understood in relevant commercial circles. So far as the meaning of the word 'produce' is concerned, though the word 'produce' has a wider connotation than the word 'manufacture', when used in juxtaposition with the word 'manufacture', it takes in bringing into existence new goods by a process which may not amount to manufacture. The activity of extraction of wood by the assessee from the forest by felling the trees and converting the same into logs, planks, sleepers and other articles, undoubtedly, falls within the definition of 'manufacture'."

9.2. The Hon'ble Supreme Court in the matter of CIT v. N.C. Budharaja & Co. [1993] 204 ITR 412 (S.C) considering a similar point of law held, "The test for determining whether manufacture can be said to have taken place is whether the commodity which is subjected to the process of manufacture can no longer be regarded as the original commodity but is recognised in the trade as a new and distinct commodity."

9.3. The Hon'ble Supreme Court in the case of CIT v. Sesa Goa Ltd. reported i n 27 1 IT R 331 while considering the question under section 32A(2)(b)(iii) for grant of investment allowance dealt with the question of 'production' in a case where the assessee's industrial undertaking was engaged in the business of excavating, mining and processing mineral ore. Mineral ore was not excluded by the Eleventh Schedule. The only question was whether such business was one of manufacture or production of ore. The Hon'ble Supreme Court noted that the issue was dealt with by different High Courts over a period of time, and it was held that the activity amounted to "production" and answered the issue in question in

favour of the assessee. The Hon'ble Supreme Court held as under :-

"The reasoning given by the High Court, in the decisions noted by us earlier, is, in our opinion, unimpeachable. This court had, as early as in 1961, in Chrestian Mica Industries Ltd. v. State of Bihar [1961] 12 STC 150, defined the word 'production', albeit, in connection with the Bihar Sales Tax Act, 1947. The definition was adopted from the meaning ascribed to the word in the Oxford English Dictionary as meaning 'amongst other things that which is produced; a thing that results from any action, process or effort; a product; a product of human activity or effort'. From the wide definition of the word 'production', it has to follow that mining activity for the purpose of production of mineral ores would come within the ambit of the word 'production' since ore is 'a thing', which is the result of human activity or effort ...

It is, therefore, not necessary, as has been sought to be contended by learned counsel for the Revenue, that the mined ore must be a commercially new product ...

Learned counsel appearing on behalf of the assessee, correctly submitted that the other provisions of the Act, particularly section 33(1)(b)(B) read with Item No. 3 of the Fifth Schedule to the Act, would show that mining of ore is treated as 'production'. Section 35E also speaks of production in the context of mining activity. The language of these sections is similar to the language of section 32A(2). There is no reason for us to assume that the word 'production' was used in a different sense in section 32A." [underlined for emphasis by us]

9.4. Thus, having regard to the proposition as discussed above, particularly in view of the decision in Sesa Goa Ltd (supra) it is evident that, that the word "production" has been used in a very wide sense to mean-to bring out a new product, albeit not a commercially new product. Infact, it may be relevant to state here that, in the aforesaid judgment, The Hon'ble Supreme Court affirmed the judgment of the Hon'ble Karnataka High Court in the case of CIT v. Mysore Minerals Ltd. 250 ITR 725 (Kar.) wherein activity of cutting granite blocks into slabs and sizes and polishing them was held to be manufacturing or production of goods. It was held therein as under:

" Section 80-I also refers to profits and gains in respect of an industrial undertaking. In view of the decision given in the case of the assessee, we are of the view that the Appellate Tribunal is right in law in coming to the conclusion that the original assessment which granted the relief under sections 32A and 80-I to the assessee was not erroneous and the inference of the Commissioner of Income-tax under section 263 was not proper. The Tribunal is also right in law in holding that extracting granite from quarry and cutting it to various sizes and polishing should be

considered as manufacture or production of any article or thing and the assessee's business activity must be considered as an industrial undertaking for the purpose of granting reliefs under sections 32A and 80-I of the Income-tax Act, 1961."

9.5. Further, following the judgements in the case of Sesa Goa Ltd. (supra), Mysore Minerals Ltd (supra) and, another judgement of the Hon'ble Supreme Court in the case of Kores India Ltd v CCE reported in 174 ELT 7 (2004), the Hon'ble Rajasthan High Court in the case of Arihant Tiles and Marbles Ltd v ITO 295 ITR 148 (Raj) held as under:

> ***"Apparently, the principle applied by the Supreme Court was that <u>if without applying the process a thing in its raw form cannot be usable and it is made usable for particular purpose, it amounts to manufacture.</u>***

The court approved the principle enunciated in Saraswati Sugar Mills v . Haryana State Board [1992] 1 SCC 418 that essence of manufacture is a change of one object to another for the purpose of making it marketable.

On this principle, the court accepted the contention that by cutting jumbo rolls into smaller sizes, a different commodity has come into existence and the commodity which was already in existence serves no purpose and no commercial use, after the process. A new name and character has come into existence. The original commodity after processing does not possess original identity. Obviously, so far as physical characteristic of jumbo rolls and its shorter version in the form of typewriter and telex roll may have the same physical properties, none the less on the basis of their different use as a marketable commodity and after being cut, the same cannot be used for the purpose for which it could be used in original shape, the activity was held to be manufacture.

The principle aptly applies to the present case. <u>Here also, the original commodity, namely, marble block could not be used for building purposes as such until it is cut into different sizes to be used as building material. It is only by the process of cutting the marble block into slabs and tiles that it is made marketable.</u> The marble block cannot be used for the same purpose as the marble slab or tile can be used and after the marble block has been cut into different sizes, the end product by putting it simultaneously cannot be used as a block. The principle in Kores India Ltd.'s case [2004] 3 RC 613 (SC) supports the contention of appellant." [underlined for Emphasis by us]

9.6. Also, the aforesaid view has been followed by the Hon'ble Bombay High Court in the case of CIT v Fateh Granite (P) Ltd 314 ITR 32 (Bom.) and, the Hon'ble Delhi High Court in the case of CIT v

Sophisticated Granite Marble Industries reported 225 CTR 410 (Del) and, it was held that, process of purchasing marble slabs and then converting these into tiles by applying various processes like cutting, sizing, polishing so as to produce marketable tiles constitutes "manufacturing" an article.

10. Now, we may revert back to the facts of the captioned appeals. On consideration of the principles stated above and, the different steps of manufacturing through which the raw materials i.e. wire rods are processed, we are of the considered opinion that, wire so manufactured can no longer be regarded as the original commodity. Infact, the final product is recognized in the trade as a new and distinct commodity. Ostensibly, the wire rod having undergone various mechanized and chemical based processes like annealing, galvanizing etc. results into manufacture of wire with distinct name, character and use. The name of the raw material, originally is wire rod before processing and after processing, it becomes wire of different types, say paper/enamel insulated wires or strips or barbed wire, GSS/Stay Earth wire, chainlink, etc. Therefore, it is commercially distinct commodity with a distinct name. The wires so produced are used for power cables, industrial control cables, electric motors, transformers, etc. but wire rod as a raw material cannot be used as such. Therefore, a new and distinct commodity is manufactured and produced by the assessee namely wire. Infact, in Union of India and Others v. J.G. Glass Industries Ltd. and Others (1998) 2 SCC 32, the Hon'ble Supreme Court had laid down a two-fold test for determining whether a particular process amounts to 'manufacture' or not ? First, whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist. Secondly, whether the commodity which was already in existence would not serve the desired purpose but for the said process. Applying this two-fold test to the fact situation of the appellants, it is irresistible to hold that the process undertaken by the appellants amount to manufacture.

11. Infact, Hon'ble Madras High Court's decision in the case of Tamil Nadu Heat Treatment & Fetting Services (P) Ltd. (supra) supports the case of the appellant. In this case, the assessee was receiving un-treated crankshafts, forgings and castings from its clients and was subjecting them to heat treatment to toughen them up for being used as automobile spare parts. The said activity was held to be a manufacturing activity by the Hon'ble High Court. The Hon'ble Madras High Court held as under:

> ***"12. In the backdrop and setting of the principles, as enunciated by the Supreme Court and various High Courts as relatable to the activity of "manufacture" of "processing of goods" and in the light of the various literature***

and books of foreign authors, relatable to the qualitative change having been brought about by well termed process, as referred to above, we may now proceed to consider and decide the moot question as to whether the activities carried on by the assessee namely, receiving untreated crankshafts and forgings and castings from its clients and subjecting them to heat treatment to toughen them up for being used as automobile spare parts can ever the construed as activities relatable to manufacture and, consequently enable it to claim investment allowance under s. 32A of the IT Act."

"13. We have to take note of the fact that the process of heat treatment to crankshaft, etc. were absolutely essential for rendering in marketable. Automobile parts as crankshafts, need to be subjected to heat treatment to increase the wear and tear resistance to remove the inordinate stress and increase tensile strength. The raw untreated crankshafts and the like can never by used in an automobile industry. Thus, in the crankshafts subjected to the process of heat treatment etc., a qualitative change is effected, to be fit for use in automobiles, although there is no physical change in them. In such state of affairs, it cannot at all the stated that the crankshafts, subjected to heat treatment, etc. cannot at all change the status of new products of different quality for a different quality for a different purpose altogether. In this view of the matter, we are of the view that the activities of the assessee in relation to raw or untreated crankshafts being subjected to heat treatment, etc., is definitely a "manufacturing activity" entitling it to claim "investment allowance" under s. 32A of the I. T. Act. We answer questions No. 2 and 3 according." [underlined for emphasis by us]

12. From perusal of the said judgement, it is evident that even qualitative changes effected in the raw material through heating, also amounts to a 'manufacturing activity'. The aforesaid view has also been followed by the Ahmedabad Bench of the Tribunal in the case of Anil Steel Traders (supra) to hold that the activity of annealing of steel rods and coils as per the customer specifications, amounts to 'manufacture'. Thus, in light of the aforesaid judgements alone, we do not find any justification in the stand of the Revenue that the assessee did not carry out any activity of manufacturing. Undoubtedly, the process undertaken by the assessee results in qualitative change in the inputs initially use d in the process of manufacturing. The argument of the Revenue, as manifested in the assessment orders, is that, the activity does not bestow any

physical change in the article to which the heat treatment was given by the assessee. In our vie w, considered in the light of the judgement of the Hon'ble Madras High C ourt, which again has referred to various case laws on the issue, the aforesaid argument of the Revenue is not sustained.

13. Further, even if the test of marketability is applied to the facts of the case of the appellants, the process carried out by them constitutes manufacture, as enunciated by the Hon'ble Rajasthan High Court in the case of Arihant Tiles and Marbles (P) Lt d v I TO (supra) following the judgement of the Hon'ble Supreme Court i n t he case of Sesa Goa Ltd. (supra) and, Kores India (supra), since the original commodity, namely, wire rod could not be used for transformers, power cables, etc. as such, until it is drawn into enameled/insulated wires. It is only by this process that, input is made marketable as a distinct commodity and, therefore we hold, in the facts and, circumstances of the case, the process undertaken by the appellants amounts to manufacture of thing or article within the meaning of section 80IC of the Act.

14. In any case, the process amounts to production, as interpreted by the Hon'ble Supreme Court in the case of Sesa Goa Ltd. (supra) wherein it has been held that, the word "production" has been used in a very wide sense to mean to bring out a new product, may be not a commercially new product. In this case, undisputedly and, irrefutably new product has been produced as a result of the various processes undertaken by the appellant and, as such, even on this ground, the appellants are eligible for claim of deduction u/s 80IC of the Act."

15. In ***CIT vs. M/s Doon Valley Rubber Industries ITA No. 2 of 2009*** decided on 6.11.2013 this Court has taken into consideration all the relevant judgments to hold that the rubber crumb produced by the assessee therein was commercially different from its raw material and further held that it was commercially known to be different in the market. This Court proceeded to hold as under:

"5. The question as to what amounts to manufacture is no more resintegra. The three Judges Bench of the Apex Court in the case of Aspinwall and Co. Ltd. v. Commissioner of Income Tax, 2001 (251) ITR 323, has expounded thus:

....."The word "manufacture" has not been defined in the Act. In the absence of a definition of the word "manufacture" it has to be given a meaning as is understood in common parlance. It is to be understood as meaning the production of articles for use from raw or prepared materials by giving such materials new forms, qualities or combinations whether by hand labour or machines. If the change made in the article results in a new and different article then it would amount to a manufacturing activity."

> ***6. In the latest decision of the Apex court in the case of Income Tax Officer vrs. Arihant Tiles and Marbles P. Ltd., (2010) 320 ITR 79 (SC) after analyzing its earlier decisions and including in the case of Aman Marble Industries P. Ltd. vrs. Collector of Central Excise, (2003) 157 ELT 393 (SC) it has been noted that the expression used in Section 80IA - which is analogous to the expression used in Section 801B, which uses words manufactures or produces, as applicable to the present case – mandates the Court to consider not only word "manufacture" but also the connotation of word "production". Having noted this position, the Court went on to observe that the said expressions have wider meaning as compared to the word "manufacture". Further, the word "production", means manufacture plus something in addition thereto. The Court also noticed the exposition in CIT vrs. Sesa Goa Ltd.(2004) 271 ITR 331 (SC) wherein it has been held that while every manufacture can constitute production, every production did not amount to manufacture. Further, the test for determining whether manufacture can be said to have taken place is whether the commodity, which is subjected to a process, can no longer be regarded as original commodity, but is recognized in trade as a new and distinct commodity. Further, the word "production", when used in juxtaposition with the word "manufacture" takes in bringing into existence new goods by a process which may or may not amount to manufacture. The word "production" takes in all the by-products, intermediate products and residual products, which emerge in the course of manufacture of goods."***

16. The word 'manufacture' and 'processing' came up for consideration before the Hon'ble Supreme Court in its recent judgment in ***Mamta Surgical Cotton Industries, Rajasthan vs. Assistant Commissioner (Anti-Evasion), Bhilwara, Rajasthan (2014) 4 SCC 87***. Though in that case the Hon'ble Supreme Court was dealing with an entirely different Act and the word 'manufacture' therein was in no manner pari materia with the term 'manufacture', now introduced in the Income Tax Act, how even the judgment assumes importance as it has dealt with the word 'manufacture' and 'processing' in detail alongwith relevant case law and held as under:

> ***"13. It is, therefore, relevant to notice the definition of 'manufacture' as defined in the dictionary clause of the Act. Section 2(27) of the Act defines the expression 'manufacture' as under:***
>
> > ***"2.(27) "manufacture" includes every processing of goods which bring into existence a commercially different and distinct commodity but shall not include such processing as may be notified by the State Government."***
>
> ***The definition aforesaid is an inclusive definition and therefore would encompass all processing of goods which would produce new commodity which is commercially different and distinctly identifiable***

from the original goods. The definition however excludes all such mechanisms of processing of goods which have been notified by the State Government to the said effect. Admittedly, no such exclusion in respect of the process in analysis for surgical cotton has been notified by the State Government. Therefore, the process of transformation has to be tested on the anvil of proposition whether surgical cotton is processed such that it is commercially different and distinctly identifiable than cotton.

14. The essential test for determining whether a process is manufacture or not has been the analysis of the end product of such process in contradistinction with the original raw material. In 1906, Darling, J. had subtly explained the quintessence of the expression "manufacture" in McNichol and Anor v. Pinch, [1906] 2 KB 352 as under:

"...I think the essence of making or of manufacturing is that what is made shall be a different thing from that out of which it is made."

15. In order to understand the finer connotation of the expression 'manufacture', it may be useful to refer to the decision of this Court in the case of Empire Industries Limited and Ors. v. Union of India and Ors.,(1985) 2 SCC 314, wherein this Court after exhaustively noticing the views of the Indian Courts, Privy Council and this Court had stated as under: (SCC p.329, para 24)

> ***"24. .....'14. .....'Manufacture" implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use. '*"***

(CCE v. Osnar Chemical (P) Ltd., (2012) 2 SCC 282; Jai Bhagwan Oil & Flour Mills v. Union of India, (2009) 14 SCC 63; Crane Betel Nut Powder Works v. Commr. of Customs & Central Excise, (2007) 4 SCC 155; CIT v. Tara Agencies, (2007) 6 SCC 429; Ujagar Prints (II) v. Union of India, 1986 Supp SCC 652; Saraswati Sugar Mills v. Haryana State Board, (1992) 1 SCC 418; Gramophone Co. of India Ltd. v. Collector of Customs, (2000) 1 SCC 549; CCE v. Rajasthan State Chemical Works, (1991) 4 SCC 473; CCE v. Technoweld Industries, (2003) 11 SCC 798; Metlex (I) (P) Ltd. v. CCE, (2005) 1 SCC 271; Aman Marble Industries (P) Ltd. v. CCE, (2005) 1 SCC 279; Shyam Oil Cake Ltd. v. CCE, (2005) 1 SCC 264; South Bihar Sugar Mills Ltd. v. Union of India, (1968) 3 SCR 21; Laminated Packings (P) Ltd. v. CCE, (1990) 4 SCC 51; Dy. CST v. Coco Fibres, 1992 Supp (1) SCC 290; CST v. Jagannath Cotton Co., (1995) 5 SCC 527; Ashirwad Ispat Udyog v. State Level Committee, (1998) 8 SCC 85; State of Maharashtra v. Mahalaxmi Stores, (2003)

1 SCC 70; Aspinwall & Co. Ltd. v. CIT, (2001) 7 SCC 525; J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. STO, (1965) 1 SCR 900; CCE v. Kiran Spg. Mills, (1988) 2 SCC 348 and Park Leather Industry (P) Ltd. v. State of U.P., (2001) 3 SCC 135).

16. The following observations by the Constitution Bench of this Court in Union of India v. Delhi Cloth & General Mills Co. Ltd., 1963 Supp (1) SCR 586 where the change in the character of raw oil after being refined fell for consideration are also quite apposite: (AIR p.794, para 14)

> ***"14. ... The word 'manufacture' used as a verb is generally understood to mean as 'bringing into existence a new substance' and does not mean merely 'to produce some change in a substance.'....."***

17. For determining whether a process is "manufacture" or not, this Court in Union of India v. J.G. Glass Industries Ltd., (1998) 2 SCC 32 has laid down a two-pronged test. Firstly, whether by such process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist and secondly, whether the commodity which was already in existence would serve no purpose but for the said process. In light of the said test it was held that printing on bottles does not amount to manufacture.

18. A Constitution Bench of this Court in Devi Das Gopal Krishnan v. State of Punjab, (1967) 3 SCR 557 observed that if by a process a different identity comes into existence then it can be said to be "manufacture" and therefore, when oil is produced out of the seeds the process certainly transforms raw material into different article for use.

19. In CCE v. S.R. Tissues (P) Ltd., (2005) 6 SCC 310, the issue for consideration was whether the process of unwinding, cutting and slitting to sizes of jumbo rolls into toilet rolls, napkins and facial tissue papers amounted to manufacture. While holding that the said process did not amount to manufacture this Court inter alia, held as under: (SCC p.317, para 12)

> ***"12. ... However, the end use of the tissue paper in the jumbo rolls and the end use of the toilet rolls, the table napkins and the facial tissues remains the same, namely, for household or sanitary use. The predominant test in such a case is whether the characteristics of the tissue paper in the jumbo roll enumerated above is different from the characteristics of the tissue paper in the form of table napkin, toilet roll and facial tissue. In the present case, the Tribunal was right in holding that the characteristics of the tissue paper in the jumbo roll are not different from the characteristics of the tissue paper,***

> ***after slitting and cutting, in the table napkins, in the toilet rolls and in the facial tissues."***

20. At this stage the discussion of difference between "processing" and "manufacture" holds much relevance to well appreciate the contention canvassed by Shri Giri that the transformation of cotton into surgical cotton would be mere processing and not manufacture.

21. According to Oxford English Dictionary one of the meanings of the word "process" is "a continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result". In Chambers 21st Century Dictionary, the term "process" has been defined as "Process.- (1) a series of operations performed during manufacture, etc. (2) a series of stages which a product, etc. passes through, resulting in the development or transformation of it."

22. In East Texas Motor Freight Lines v. Frozen Food Express, 351 US 49 the Supreme Court of United States of America has held that the processing of chicken in order to make them marketable but without changing their substantial identity did not turn chicken from agriculture commodities into manufactured commodities.

23. A three-Judge Bench of this Court in Pio Food Packers case (supra) has dealt with the distinction between "manufacture" and "processing". Therein the appeals were filed against the order of the Kerala High Court holding that the turnover of pineapple fruits purchased for preparing pineapple slices for sale in sealed cans is not covered by Section 5- A(1)(a) of the Kerala General Sales Tax Act, 1963. This Court while deciding whether such conversion of pineapple fruit into pineapple slices for sale in sealed cans amounted to manufacture or not has observed as follows: (SCC p. 176, para 5)

> ***"5. ..... Commonly, manufacture is the end result of one [or] more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place. Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has***

undergone a degree of processing, it must be regarded as still retaining its original identity." (emphasis supplied)

This Court held that when the pineapple fruit is processed into pineapple slices for the purpose of being sold in sealed cans, there is no consumption of the original pineapple fruit for the purpose of manufacture. Pineapple retains its character as fruit and whether canned or fresh, it could be put to the same use and utilized in similar fashion.

24. In Sterling Foods case (supra) this Court has observed that processed and frozen shrimps, prawns and lobsters cannot be regarded as commercially distinct commodity from raw shrimps, prawns and lobsters. The aforesaid view has further been adopted and applied by this Court in Shyam Oil Cake Ltd. case (supra) wherein the classification of refined edible oil after refining was under consideration and on similar lines it was held that the process of refining of raw edible vegetable oil did not amount to manufacture.

25. In Aman Marble Industries case (supra), this Court has held that the cutting of marble blocks into smaller pieces would not be a process of manufacture for the reason that no new and distinct commercial product came into existence as the end product still remained the same and thus its original identity continued.

26. This Court in Crane Betel Nut Powder Works case (supra) citing the earlier decision in Brakes India Ltd. v. Supdt. of Central Excise, (1997) 10 SCC 717 wherein the process of drilling, trimming and chamfering was said to amount to "manufacture", has reiterated that if by a process, a change is effected in a product and new characteristic is introduced which facilitates the utility of the new product for which it is meant, then the process is not a simple process, but a process incidental or ancillary to the completion of a manufactured product.

27. In Kores India Ltd. v. CCE, (2005) 1 SCC 385 the cutting of duty-paid typewriter/telex ribbons in jumbo rolls into standard predetermined lengths was considered by this Court and it was held that such cutting brought into existence a commercial product having distinct name, character and use and amounted to "manufacture" and attracted the liability to duty. In Standard Fireworks Industries v. Collector of Central Excise, (1987) 1 SCC 600 this Court held that cutting of steel wires and the treatment of paper is a process for the manufacture of goods in question.

28. In Lal Kunwa Stone Crusher case (supra), the decision relied upon by Shri Giri, this Court has considered that whether on crushing stone boulders into gitti, stone chips and dust different commercial

> ***goods emerge so as to amount to manufacture as per the definition of "manufacture" under Section 2(e-1) of the U.P. Sales Tax Act, 1948 and observed that even if gitti, kankar, stone ballast, etc. may all be looked upon as separate in commercial character from stone boulders offered for sale in the market, "stone" as under the relevant Entry is wide enough to include the various forms such as gitti, kankar, stone ballast. It is in this light, that the Court had opined that stone gitti, chips, etc. continue to be identifiable with the stone boulders.***

After taking into consideration the entire law on the subject, the Hon'ble Supreme Court has finally concluded as under:

> ***35. It is trite to state that "manufacture" can be said to have taken place only when there is transformation of raw materials into a new and different article having a different identity, characteristic and use. While mere improvement in quality does not amount to manufacture, when the change or a series of changes transform the commodity such that commercially it can no longer be regarded as the original commodity but recognised as a new and distinct article. "***

10. Reverting to the facts of the present case, it would be seen that the assessee had been manufacturing herbal henna powder and for this purpose he had purchased the following plant and machinery:-

S.No.	***Name of the Machinery***	***Date of Purchase/ installation***
1.	Wet Grinder	17.4.2002
2.	Milan Magnetic Floor Mill	11.6.2002
3.	Electronic weighing scale	1.8.2002
4.	Pouch sealing machine	1.8.2002
5.	Ribbon	1.8.2002
6.	Mixer	1.8.2002
7.	Grinder	1.8.2002
8.	Dehumidifier with humidistate	5.8.2002
9.	Automatic form fill & seal machine	12.8.2002
10.	Rabid-o-seal plastic stamping machine	31.8.2002

11.	Plastic tube sealing machine	29.10.2002

11. The herbal heena powder was being manufactured by using the following ingredients:-

Name of the raw material	***Percentage***
Heena	40
Barium	25
PPD	10
Citric Acid	10
Amla, Shikakai, plantago, barhmi, rose petals, PAP, Manganese Carbonate & Sodium Suylphite.	15

12. There is nothing on record to suggest that the assessee was merely grinding and mixing the raw material rather it has come on record that the raw material was first collected, dried with the use of mixture of various acids and thereafter grinding by putting the definite quantity (in percentage) with the help of various specialized persons. In case any item was mixed in disproportionate manner, then the end product could be harmful and it was possible that the same could not be used for the purpose for which it was produced. The end product was the result of many transformations carried out with the help of various materials, manpower and machines and was commercially a different item.

13. The learned counsel for the revenue would still argue that even after undergoing various process like drying, mixing, grinding etc., the same does not bring about a new or distinct produce. Therefore, these activities do not amount to manufacture and the assessee is therefore not entitle to the benefit of provisions of section 80IB of the Act. In support of its contention he has relied upon judgement of Madras High Court in **Commissioner of Income-Tax** vs. **Sacs Eagles Chicory [2000] 241 I.T.R. 319** as affirmed by the Hon'ble Supreme Court vide judgement reported in **[2002] 255 I.T.R. 178** titled **Sacs Eagles Chicory** vs. **Commissioner of Income Tax** and a judgement of this Court in **ITA No. 27 of 2005** titled **Mrs. Poonam Arora** vs. **Income Tax Officer and others decided on 14.10.2009.**

14. In **Sacs Eagles Chicory** case (supra), the Madras High Court was dealing with the case, wherein chicory roots were being converted into chicory powder by simply grinding them and on such basis it was held that there was no manufacturing activity. Notably the judgement of the Madras High Court was challenged by the assessee before the Hon'ble Supreme Court in case reported as **Sacs Eagles Chicory** (supra), wherein the Hon'ble Supreme Court observed as under:-

> *" The question to be considered reads thus (see [2000] 241 ITR 319, 320):*
>
> > *Whether, on the facts and in the circumstances of the case, the assessee- firm is an industrial undertaking eligible for deduction under Sections 80HH, 80-I and 80-J of the Income Tax Act, 1961? "*
>
> *All that is on record in regard to the "process " that the assessee carries on is stated in the order of the Appellate Assistant Commissioner of Income Tax thus:*
>
> > *"But if an analysis of the activity of making powder from the chicory roots is made, it will be found out that*

there are only two processes in making the powder from chicory roots: (i) roots are roasted, and (ii) after that they are powdered. "

We have asked learned counsel for the assessee whether there is anything else that describes the process. There is apparently nothing else. If that is the only process, it does not satisfy the test laid down by this Court in Aspinwall and Co. Ltd. v. CIT [2001] 251 ITR 323."

15. The aforesaid observations leave no manner of doubt that no manufacturing was involved in this case, as there were only two processes involved in making of powder from chicory roots, namely the roots were firstly roasted and thereafter powdered.

16. In so far as **Poonam Arora** case (supra) is concerned, this court had categorically come to the conclusion that mere process of roasting of raw groundnut seeds into groundnut did not amount to manufacture as no new and distinct product came into existence.

17. Therefore, none of the aforesaid judgements are applicable to the facts of the present case because as noticed above in order to manufacture heena powder, heena leaves only constitute about 40% of the raw material which is dried with other raw-materials by using various acids and thereafter these raw materials are grinded by putting a definite quantity of mixture to get the resultant product, which is commercially known differently. The end product so manufactured has a different name and is identified by the buyer and seller as a different produce and is distinct in its form from the original raw-material.

In view of aforesaid discussion, we have no hesitation in concluding that the conversion of heena leaves into herbal heena powder by process of missing and grinding amounts to manufacture and therefore the profits derived from such activity are liable for deduction under section 80IB(iv) of the Act, accordingly this question is answered against the revenue and in favour of the assessee.

18. Resultantly, all the aforesaid appeals save and except ITA No. 28 of 2009 are dismissed, while in ITA No. 28 of 2009 though the assessee is eligible for benefit under section 80IB(iv), however, the said benefit cannot be extended to it as it has not complied with the conditions specified in section 80IB(2)(iv).

19. Accordingly, all the appeals are disposed of in the aforesaid terms.

****

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

Hari Chand and others .....Appellants.
Versus
Land Acquisition Collector, Hamirpur .....Respondent.

RFA No. 429 of 2004.
Reserved on: 12th November, 2014.
Date of Decision :18th November, 2014.

Land Acquisition Act, 1894- Section 18- Land of the claimant was acquired for the construction of road- he relied upon the sale deed for determination of the market value of the land- held, that sale deed relied upon by the claimants was for the construction of the colonies for housing people which had a profit motive - the land of the claimants was acquired for constructing the road which had no

profit motive - asking the State to pay higher compensation would defeat the purpose of acquisition - given the distinction in the purpose of acquisition of the land, sale deed could not be relied upon to determine the compensation.

(Para-5)

Land Acquisition Act, 1894- Section 18- Possession of the land was taken in the year 1964 whereas the land was acquired in the year 1998- held, that when the possession has been taken prior to the acquisition of the land- land owners are not entitled to compensation from the date of possession but from the date of acquisition- claimants are entitled to file a civil suit for damages. (Para-6)

Cases referred:

A. Natesam Pillai versus Special Tehsildar, Land Acquisition, Tiruchy, (2010)9 SCC 118

Haridwar Development Authority versus Raghubir Singh and others (2010)11 SCC 581

R.L. Jain vs. D.D.A., Civil Appeal No. 5515 of 1997, decided on 12.3.2004

For the Appellants:	Mr. Suneet Goel, Advocate.
For the respondent:	Mr. R.S. Thakur, Addl. A.G. and Mr. Tarun Pathak, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The lands of the appellants/claimants were brought under acquisition vide notification issued under Section 4 of the Act published on 9.6.98. The Land Acquisition Officer, HPPWD, Harmpur vide award No.60 dated 12.12.2000 ordered the payment of total compensation of Rs.68,982/- to the claimants/appellants.

2. The claimants/appellants, who were not satisfied with the award of the Land Acquisition Collector, filed Land Reference Petition before the learned District Judge, Hamirpur, under Section 18 of the Land Acquisition Act. The learned District Judge when seized of the reference petition dismissed the reference petition preferred by the appellants/claimants and held that proper compensation as per market price stood assessed by the Collector and the petitioners/appellants are not entitled for enhanced compensation.

3. The claimants/appellants are aggrieved by the dismissal of their reference petition by the learned District Judge, hence, have preferred the instant appeal before this Court.

4. The learned counsel appearing for the appellants is aggrieved by the learned District Judge in his impugned award having not reckoned and taken into consideration the sale transaction comprised in Ex.PA whereby land measuring one marla was sold for a sale consideration of Rs.50,000/-. The learned counsel appearing for the appellants vehemently canvassed before this Court that in the face of the aforesaid exhibit pronouncing upon the factum of a bonafide sale transactions having been entered into inter se a willing buyer and a willing seller, besides when evidence exists on record manifesting the fact of the lands comprised in the sale deed aforesaid being located in close proximity to the land subjected to acquisition, the sale consideration as explicitly pronounced therein constituted a valid parameter to on its strength goad the learned District Judge to compute/reckon the market value of the land subjected to acquisition. He further contends that the reason as advanced by the learned District Judge in overlooking and benumbing the probative worth of

the exhibit aforesaid, inasmuch, as its comprising a sale exemplar of a sale transaction of a small tract of land, whereas the land subjected to acquisition was of a large expanse, hence, the sale instance pertaining to a small tract of land being un-reckonable for on its strength assessing and reckoning the market value of the land subjected to acquisition, is too tenuous a reason and falters in the face of a pronouncement rendered in **A. Natesam Pillai versus Special Tehsildar, Land Acquisition, Tiruchy, (2010)9 SCC 118** wherein in paragraph No.18, which is extracted hereinafter, the Hon'ble Apex Court has held that a sale transaction of small tracts of land can be a valuable guide or of immense assistance to, on its strength assessing compensation for large expanses of land.

> *"18. the small area of land measuring 1710 sq. ft was sold for Rs.20,000/- as per Ext. A-3 dated 15.7.1992 which works out to a value of Rs.11 per square foot. A comparison of the two plots, namely, land in Ext. A-3 and the acquired land shows that they are not identical. While the land in Ext.A-3 may not be an excellent guide it is still a better guide than any other document exhibited on record. The same could be used as a relevant yard stick to assess the just and reasonable compensation in the present case."*

He also relied upon a judgment of the ***Hon'ble Apex Court reported in Haridwar Development Authority versus Raghubir Singh and others (2010)11 SCC 581,*** the relevant paragraphs No. 9 & 10 are extracted hereinafter, which emphatically communicate the view that the sale instances of small tracts of land constitute evidence of probative worth, on strength whereto compensation can be determined for large tracts of land. However, while computing or assessing compensation for large expanses of land on the strength of sale consideration contracted for small tracts of land, deductions upto the permissible per centum are to be made. Relevant paragraphs No.9 and 10 read as under:-

> "9. The Collector has referred to several sale transactions but relied upon only one document, that is, sale deed dated 19.12.1990 relating to an extent of 11,550 sq. ft of land sold for Rs.4,04,250, which works out to a price of Rs.35 per square foot. The Collector deducted 25% from the said price, as the relied upon sale transaction related to a small extent of 11,550 sq. ft and the acquired area was a larger extent of 8,45,174 sq. ft. By making such deduction, he arrived at the rate as Rs.26.25 per square foot. The Reference Court and the High Court have also adopted the said sale transaction and valuation.
>
> 10. The claimants do not dispute the appropriateness of the said sale transaction taken as the basis for determination of compensation. Their grievance is that no deduction or cut should have been effected in the price disclosed by the sale deed for arriving at the market value in view of the following factors:-
>
> > (i) that the acquired lands were near to the main by-pass and had road access on two sides;
> >
> > (ii) that may residential houses had already come up in the surrounding areas, and the entire area was already fast developing; and
> >
> > (iii) that the acquired land had the potential to be used as an urban residential area.
>
> When the value of a large extent of agricultural land has to be determined with reference to the price fetched by sale of a small residential plot, it is with reference to the price fetched by sale of a

> small residential plot, it is necessary to make an appropriate deduction towards the development cost, to arrive at the value of the large tract of land. The deduction towards development cost may vary from 20% to 75% depending upon various factors {see Lal Chand v. Union of India, (2009)SCC 769, SCC p.790, para 22}. Even if the acquired lands have situational advantages, the minimum deduction from the market value of a small residential plot, to arrive at the market value of a larger agricultural land, in the usual course, will be in the rage of 20% to 25 %. In this case, the Collector ahs himself adopted a 25% deduction which has been affirmed by the Reference Court and the High Court. We therefore do not propose to alter it." (pp.584-585)

On the strength of the aforesaid pronouncement of the Hon'ble Apex Court, the learned counsel for the appellants urges that the sale instance comprised in Ex.PA constituted a valuable guide for the learned District Judge, as also, it constituted an admissible and relevant parameter while it enjoying probative vigour, for facilitating on its strength an assessment of compensation qua the land subjected to acquisition. His having omitted to rely upon it, as such, has been contended to have committed a legal misdemeanor.

5. The contentions aforesaid advanced by the learned counsel appearing for the appellants in dispelling the purported tenuous reason afforded by the learned District Judge for overwhelming the effect of Ex.PA are extremely shaky and are, for the reasons hereinafter, construed to be not having either sinew or strength. The reasons for so concluding is that in both the judgments relied upon by the counsel for the appellants the lands as subjected to acquisition were for the construction of colonies for housing people. Obviously, the authority/entity for whom the lands were acquired, had an inherent profiteering motive, inasmuch as the entity would after developing the lands acquired proceed to sell them at a profit to the public, therefore, the loss, if any, as it may be beset with in paying a hefty amount of compensation to the land owners would hence be off set by its selling lands on a phenomenal or escalated price to the public. Consequently, when the objective of acquisition in the cases relied upon by the learned counsel for the appellants was commercial, as a corollary, then the lands of the land owners as subjected to acquisition in the cases aforesaid perceivably commanded an inherent immense escalated potentiality which escalated potentiality as compatibly pronounced in the sale considerations qua small tracts of land, was construed to be a vindicable, tenable as well as a reckonable parameter for determining the market value of large tracts of lands as were subjected to acquisition. However, while determining compensation payable for large expanses of lands, on the strength of sale considerations of small tracts of land, deductions towards developmental costs were ordained to be made. However, in the instant case the marked distinction is that lands of the landowners were subjected to acquisition for a public purpose by a welfare estate, inasmuch as, the lands of the landowners have been acquired for the purpose of construction of a public road. The respondent-State subjected to acquisition the lands of the landowners for construction of a public road as a measure of providing public amenity to the public. Obviously, the respondent/State given the salutary purpose of the acquisition of the lands of the landowners has no inherent profiteering motive in subjecting the lands of the land owners to acquisition nor it would rear any commercial advantage from the acquisition of land of the landowners/appellants. As a corollary, encumbering it with the financial liability to defray to the landowners an exorbitant amount of compensation would defeat the very purpose for which the acquisition was made rather would put the public exchequer replenished by taxing the honest taxpayers to an unnecessary and avoidable heavy burden. Further salient palpable distinction vis-à-vis the case relied upon by the learned counsel for the appellant and the instant case is that the sale consideration pronounced in Ex.PA which is qua a small tract of

land is imminently defrayed to the vendor towards acquisition of land comprised in it not for raising a dwelling house or a homestead rather for carrying out of commercial activities. Naturally, when the vendor of Ex.PA seeks to develop the land purchased by him in it for commercial activities, the land comprised in obviously had to fetch a higher sale consideration than it would have fetched had it been acquired or purchased for raising a homestead or a dwelling house. Given the salient distinction in the purpose of acquisition of the land of the landowners/appellants vis-à-vis the land purchased under Ex.PA, inasmuch as the former has been acquired by the respondent/State for the salutary objective of constructing a road as a measure of providing an amenity to the public at large, whereas the land acquired by vendor under Ex.PA has been purchased or acquired for rearing commercial activities on it. Naturally then, on that score the sale consideration comprised in Ex.PA cannot provide a reasonable, fair and just parameter for determining on its strength compensation for the entire stretch of the vast expanse of land acquired by the respondent/State for providing a public amenity. Consequently, this Court is of the considered view that the judgments as relied upon by the learned counsel for the appellants are discardable. Naturally then the view as adopted by the learned District Judge in dispelling the effect of Ex.PA which pertains to small tracts of land, inasmuch as its not providing a valuable and reckonable parameter for determining on its strength compensation for an immense tract or a vast expanse of land, is a tenable view and ought not to be interfered with.

6. Furthermore, the learned counsel appearing for the appellant has vigorously strived to prevail upon this Court qua the illegality committed by the learned District Judge in omitting to award compensation to the appellants since 1964 when the respondent had taken possession of lands which were ultimately subjected to acquisition in the year 1998. The said argument wanes in the face of the authoritative pronouncement of the Hon'ble Apex Court in ***R.L. Jain vs. D.D.A., Civil Appeal No. 5515 of 1997***, ***decided on 12.3.2004*** wherein it has been mandated that even where the lands of the landowners have been subjected to utilization even prior to theirs having come to be ultimately subjected to acquisition in accordance with law, the landowners are not entitled to receive compensation from the date when their lands came to be subjected to utilization rather they are only entitled to compensation form the date their land is subjected to acquisition in accordance with law. Nonetheless, the judgment aforesaid expounds the view that the remedy, if any, of the land owners for their lands being utilized prior to theirs having come to be subjected to acquisition in accordance with law, is to institute a suit for damages. The view as explicitly pronounced in the judgment as relied upon by the learned District Judge having not been demonstrated by the learned counsel appearing for the appellants to have come to be overruled by a larger Bench of the Hon'ble Apex Court, consequently, when the view expressed in the judgment relied upon by the learned District Judge in declining to the appellants herein the relief of compensation from the date when their lands were subjected to utilization, is a tenable and reverrable view and it ought not to be interfered with. However, it is open to the appellants to institute a civil suit for damages against the respondent for their lands having come to be utilized by the respondent, even before they were subjected to acquisition in accordance with law.

7. For the fore going reasons, there is no merit in this appeal which is dismissed accordingly and the judgment of the learned District Judge is affirmed and maintained. All the pending applications also stand disposed of. No costs.

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

Ms. Inder Jyoti Chauhan ...Petitioner
Versus
Union of India and others. . ...Respondents.

CWP No. 7744 of 2010
Judgment reserved on: 3.11.2014
Date of Decision : November 18, 2014.

Constitution of India, 1950- Article 226- Petitioner had applied for the post of Lower Division Clerk as general category candidate - she applied for change of category from general to schedule caste on the ground that she could not submit her certificate earlier- application was allowed and it was decided that petitioner is entitled for the benefits of reservation from the date of joining but she shall not consume the reserved point for initial appointment in the recruitment roster - held, that petitioner had not taken any benefit at the time of recruitment by not declaring herself to be a member of Scheduled Caste- she had joined as general category without availing the benefit of the relaxed standard - since, she is scheduled caste by birth, therefore, she is entitled to all the benefits of scheduled caste. (Para-24)

Cases referred:

Kumari Nikita vs. Centralised Admission Coordination Committee and Others 2000 (3) Rajasthan L R 664

Sandeep Singh vs. Punjab University, Chandigarh, AIR 1997 (Punjab) 237

J & K Public Service Commission vs. Israr Ahmad and others (2005) 12 SCC 498

Ajit Singh and others vs. State of Punjab and others (2000) 1 SCC 430

Bimlesh Tanwar vs. State of Haryana and others (2003) 5 SCC 604

Union of India and another vs. S.K. Goel and others (2007) 14 SCC 641

H.S. Vankani and others vs. State of Gujarat and others (2010) 4 SCC 301

Ramesh Chand Sharma vs. Udhan Singh Kamal and others, (1999) 8 SCC 304

For the Petitioner: Ms. Shikha Chauhan and Mr. Jasbir Singh, Advocates.

For the respondents : Mr. Ashok Sharma, Assistant Solicitor General of India, for respondent No.1.
Mr. Rahul Mahajan, Advocate, for respondents No. 2 to 4.
Mr. Rajnish Maniktala, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner by medium of this writ petition has questioned the order passed by the learned Central Administrative Tribunal, Chandigarh Bench, Chandigarh on 12.11.2010 whereby it quashed the order dated 4.9.2006 whereunder the petitioner had been held entitled to the benefit of reservation from the date of joining with a condition that in the recruitment roster she would not be entitled to consume the reservation point for initial appointment.

2. It appears that the petitioner had applied for post of Lower Division Clerk as general category candidate and this fact was recorded in her service book. Some time later, the petitioner applied for change of category from general category to Scheduled Caste on the ground that she could not submit her certificate earlier as she had lost the same. The competent authority allowed the change of category (from General to Reserved) vide order dated 20.6.2004 and it was subsequently, vide letter dated 4.9.2006 that the competent authority held the petitioner "*is entitled to the benefits of reservation from the date of joining but in the recruitment roster she shall not consume the reserved point for initial appointment.*"

3. This order came to be challenged by 5th respondent, who preferred Original Application No. 1029-HP/09 before the learned Central Administrative Tribunal, Chandigarh. It was contended therein that he was appointed as Lower Division Clerk against the quota reserved for Scheduled Caste vide order dated 14.11.1990. He joined his duty on 22.11.1990, whereas the petitioner had been appointed as Lower Division Clerk on 6.1.1988 against the vacancy falling in the share of general category. Vide order dated 24.6.1993, 5th respondent was promoted as Upper Division Clerk. A provisional seniority list of Upper Division Clerks as on 31.8.1998 was drawn up and circulated which was followed by final seniority list in which the name of 5th respondent figured at serial No. 16 as an Scheduled Caste candidate whereas the name of the petitioner appeared at serial No. 15 as a general category candidate. The respondents further circulated the final seniority list of Upper Division Clerks as on 1.4.2002 wherein the name of 5th respondent appeared as reserved category candidate at serial No. 14, whereas the name of the petitioner appeared at serial No. 13 as a general category candidate. 5th respondent was promoted as Assistant in terms of the order dated 23.10.2002 and assumed the duty of that post on that very day. Later, he was promoted as Section Supervisor vide order dated 6.3.2003. The final seniority list of Section Supervisors as on 31.12.2006 was circulated vide order dated 2.3.2007 wherein the name of 5th respondent figured at serial No. 8 as an Scheduled Caste candidate, whereas the name of the petitioner did not figure in the list as by that time she had not been promoted to the post of Section Supervisor. Yet, another final seniority list of Section Supervisors was circulated vide letter dated 4.2.2008 wherein the name of 5th respondent appeared at serial No. 8 as an Scheduled Caste candidate, whereas the name of the petitioner again did not figure in this list as she had not been promoted as Section Supervisor by that time.

4. Notably the 5th respondent did not challenge the change of category before the Tribunal but was only aggrieved by the grant of benefit in favour of petitioner from "*the date of her entry into service*". He maintained that since the petitioner had been appointed as Lower Division Clerk in general/open category, she could not now take U-turn and claimed the benefit of reservation from the date of her appointment as she was estopped by own act and conduct. It was further claimed that in case such benefit is granted, the same would be unconstitutional being contrary to Articles 14 and 16 of the Constitution of India. It was also contended that granting of benefit to the petitioner after 20 years especially when 5th respondent had already been promoted several times would amount to take away the vested right already accrued in his favour. Lastly, it was contended that the petitioner had made a false declaration at the time of entry into service and, therefore, was not entitled to the benefit of reservation.

5. The official respondents filed reply and opposed the petition on the ground that under the provisions of Article 16 (4) (A) of the Constitution, there is a reservation in promotion for Scheduled Caste and Scheduled Tribe employees against the posts reserved for them in the roster as per rules and, therefore, 5th respondent could not seek any rights against the petitioner and such challenge was not only bad in law but was also not maintainable. It was

further averred that the official respondents had accepted the plea of the petitioner and thereafter treated her as a reserved candidate from the date of initial appointment. It was also contended that unintentional negligence which may occurred at the instance of an employee, if traced at a later stage, could be set right as the same was duly supported by rules and once this was done, then the consequential benefits flowing from the order could not be denied. 5th respondent had enjoyed the benefit of negligence of the petitioner so far by getting the promotion to the post of Section Supervisor and now no right of 5th respondent was taken away by the petitioner. Rather reserved community category employee's right was being protected as per the rules.

6. The petitioner also opposed the petition by filing a reply wherein it was claimed that 5th respondent was much junior to the petitioner and had been promoted as Upper Division Clerk later than the petitioner and, therefore, could not claim promotion prior to her to the post of Section Supervisor. The petitioner also took a specific ground regarding the non-maintainability of the Original Application on the ground of delay and laches. It was then contended that the petitioner at the time of initial appointment mistakenly could not give correct information regarding her caste but that did not mean that she did not belong to the Scheduled Caste category and, therefore, could be denied the benefit of reservation.

7. It is this order of the learned Tribunal, which has been challenged by the petitioner on various grounds as taken in the petition.

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

9. The petitioner has vehemently argued that she has acquired her caste by birth which could be only lost by death and, therefore, having suffered disadvantages of belonging to that caste, she is entitled to all the benefits of reservation and cannot be denied the benefit thereof. In support of such contention, the petitioner has relied upon the judgment of this Court in ***Meena Devi*** vs. ***Himachal Pradesh State Subordinate Services Selection Board, CWP No. 5744 of 2010 decided on 9.8.2011*** and a judgment of this Bench in ***Smt. Neetu*** vs. ***The State of H.P. and others, CWP No. 3139 of 2009, decided on 19.6.2014.***

10. We need not to go into this question because as already observed earlier, even 5th respondent had not challenged the change of category of the petitioner from general to schedule caste before the Tribunal but was only aggrieved by grant of benefit in her favour from the "*date of her entry into service*".

11. The petitioner would then contend that once it is undisputed that she belongs to Scheduled Caste, then she is not only legitimately but legally entitled to all the benefits as available to this category. She had already suffered much because even as per the office order dated 4.9.2006, she would be entitled to the benefit of reservation from the date of joining but then in the recruitment roster, she has been held not entitled to consume the reservation point from initial appointment.

12. On the other hand, 5th respondent would contend that the petitioner having opted under the general category could not be permitted to turn around and claim benefit of reservation that too to the disadvantage of 5th respondent. In support of his contention, he has relied upon the single Bench judgment of Rajasthan High Court in ***Kumari Nikita vs. Centralised Admission Coordination Committee and Others 2000 (3) Rajasthan L R 664,*** a Division Bench judgment of Punjab and Haryana High Court in ***Sandeep Singh vs. Punjab University, Chandigarh, AIR 1997 (Punjab) 237*** and lastly upon the judgment of Hon'ble Supreme Court in ***J & K Public Service Commission vs. Israr Ahmad and others (2005) 12 SCC 498.***

13. We have gone through the aforesaid judgments and find that all these judgments deal with the cases wherein the candidate had applied as a general category candidate, but after having failed to qualify or get selected in the general category had sought the change of category. The Courts in this background held that once a candidate had chosen to opt under general category, he could not be allowed the change of status and make fresh claim. However, this is not the fact situation obtaining in the present case. The petitioner had applied as a general category candidate and was selected as a general category candidate and joined the services. She did not even consume the roster point of the reserved category, it is only thereafter that the petitioner chose to opt the category to which she was entitled.

14. Learned counsel for 5th respondent would then contend that Article 16 (4) was only an enabling provision and it neither imposed any constitutional duty nor conferred any fundamental right for reservation and, therefore, the petitioner was not entitled to the benefits of reservation. In support of his submission, he has relied upon the judgment of the Hon'ble Supreme Court in ***Ajit Singh and others vs. State of Punjab and others (2000) 1 SCC 430.***

15. We have gone through the judgment and are of the firm opinion that the same does not in any manner support the claim of 5th respondent. 5th respondent has clearly unequivocally stated before the learned Tribunal that he did not dispute that the petitioner belongs to a Scheduled Caste category and had in fact not even challenged the validity of the change of category. He had only questioned the benefit given to her with effect from the date of her entry into service as would appear from paragraph 18 of the impugned judgment, which reads as under:

> *"18. In view of the fact that the applicant herein has not challenged the validity of the change of category as such, we would not go into the legal appropriateness thereof and would confine ourselves to the impugned order, Annexure A-1, vide which the grant of that benefit to her was ordered with effect from the date of her entry into service."*

16. 5th respondent has thereafter relied upon the judgment of the Hon'ble Supreme Court in ***Bimlesh Tanwar vs. State of Haryana and others (2003) 5 SCC 604, Union of India and another vs. S.K. Goel and others (2007) 14 SCC 641*** and ***H.S. Vankani and others vs. State of Gujarat and others (2010) 4 SCC 301*** to contend that the settled things cannot be unsettled after such a long lapse of time.

17. We have gone through the aforesaid judgments and are of the opinion that the same do not apply to the given facts and circumstances of the case. 5th respondent has sought to defeat the claim of the petitioner on the ground of delay and laches by claiming that in case her claim is allowed the settled things would be unsettled. At this stage, we may notice that 5th respondent had himself preferred the Original Application only on 15.12.2009 questioning an order which had been passed more than three years back on 4.9.2006. The petitioner in her reply had raised a specific objection regarding the Original Application being barred by limitation. However, the learned Tribunal brushed aside this objection by according the following reasons:

> *"13. The official respondents reiterated the correctness of the impugned order. It was averred that it is too late in the day for the applicant to raise a challenge thereto inasmuch as the impugned order had been granted in the year 2004, while the O.A. was filed only in the year 2009. This plea was also raised by the official respondents and also respondent No.5 in the course of the resistance offered to the plea raised by the applicant for condonation of delay in filing of the O.A. Respondent No.5 also averred*

that the plea for conversion of category had been rightly made by her and justly allowed by the competent authority."

18. This finding of the learned Tribunal cannot be countenanced and is not sustainable in teeth of the decision of the Hon'ble Supreme Court in ***Ramesh Chand Sharma*** *vs.* ***Udhan Singh Kamal and others, (1999) 8 SCC 304*** wherein the Hon'ble Supreme Court held as under:

"4. The respondent No. 1 Udham Singh Kamal on 2nd June, 1994 filed Original Application (O.A.) before the Himachal Pradesh Administrative Tribunal. This O.A. was admittedly beyond the prescribed period of limitation of three years as provided under Section 21 of the Administrative Tribunals Act, 1985. As regards the limitation in paragraph 5, the first respondent has stated as under :

> *"The applicant further declares that the application is within the limitation prescribed in Section 21 of the Administrative Tribunals Act, 1985."*

This averment clearly indicates that the first respondent was all along asserting that he had filed O.A. within limitation but it was not so. The appellants in both these appeals have raised a contention that the O.A. was beyond three years and, therefore, the same was barred by limitation under Section 21 of the Administrative Tribunals Act, 1985. Despite this objection raised by the appellants, the first respondent did not file any application for condonation of delay. Section 21 (3) of the Act gives power to the Tribunal to condone the delay if sufficient cause is shown.

5. Section 21 reads as under :

> *"21. Limitation - (1) A tribunal shall not admit an application,*
>
> *(a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of Section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;*
>
> *(b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of Section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.*
>
> *(2) xxxx xxxx xxxx xxxx*
>
> *(3) Notwithstanding anything contained in sub-section (1) or subsection (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section (2), if the applicant satisfies the Tribunal, that he had sufficient cause for not making the application within such period."*

Relying upon the aforesaid provisions, it was contended on behalf of the appellants that the O.A. filed by the first respondent Udham Singh Kamal was barred by limitation. No application for condonation of delay was filed. In the absence of any application under sub-Section (3) of Section 21 praying for condonation of delay, the Tribunal had no jurisdiction to admit and dispose of O.A. on merits. It was, therefore, contended that the Tribunal has totally overlooked the statutory provision contained in Section 21 of the Act and, therefore, impugned order be set aside.

7. On perusal of the materials on record and after hearing counsel for the parties, we are of the opinion that the explanation sought to be given before us cannot be entertained as no foundation thereof was laid before the Tribunal. It was open to the first respondent to make proper application under Section 21(3) of the Act for condonation of delay and having not

> *done so, he cannot be permitted to take up such contention at this late stage. In our opinion, the O.A. filed before the Tribunal after the expiry of three years could not have been admitted and disposed of on merits in view of the statutory provision contained in Section 21(1) of the Administrative Tribunals Act, 1985. The law in this behalf is now settled, see Secretary to Government of India and Others v. Shivam Mahadu Gaikwad, [1995] Supp. 3 SCC 231."*

19. Even in this case as regards the limitation, 5th respondent in paragraph 3 has stated as under:

> *"That the applicant declare that the Original Application is within limitation, however in the facts and circumstances as mentioned in the application under Section 21 of the Administrative Tribunal Act, the delay, if any, may be condoned in terms of the application."*

The averments clearly indicates that 5th respondent was all along asserting that he had filed the Original Application within limitation, but it was not so. The petitioner on the other hand had raised a specific plea that the Original Application was barred by limitation as would be clear from the reply to this para, which reads thus:

> *"That the contents of this para of original application are vehemently denied being wrong and misconceived. The decision to grant the benefit of reservation to the answering respondent was taken as back as on 20.7.2004 and applicant has approached this Hon'ble Tribunal in December, 2009 and therefore, present original application badly suffers from delay and laches on the part of applicant. Therefore, present original application is liable to be dismissed on this score alone."*

20. Despite this objection raised by the petitioner, 5th respondent did not file an application for condonation of delay under Section 21 (3) of the Act, which gives power to the Tribunal to condone the delay, if sufficient cause is shown.

21. Once the question of limitation had been raised, it was incumbent upon the learned Tribunal to have answered the same. Now, in case the Original Application preferred by 5th respondent is seen, the same is ex-facie barred under the provisions of Section 21 of the Administrative Tribunals Act as the Original Application was preferred on 15.12.2009 whereby challenge had been laid to an order dated 4.9.2006 i.e. an order passed more than three years prior to filing of the petition.

22. Learned counsel for 5th respondent would then contend that in the Original Application it was not only the order dated 4.9.2006 which was under challenge, but he had also challenged the order dated 26.10.2009 and, therefore, the Original Application was within time. In so far as the laying challenge to the order dated 26.10.2009 is concerned, the said order was only consequential as it only implemented the earlier order dated 4.9.2006. Even if this order is quashed, the same would be of no avail since the basic order dated 4.9.2006 would still remain operative.

23. Lastly, it would be noticed that the Tribunal below has allowed the petition only on the ground that an opportunity of hearing ought to have been afforded to 5th respondent before granting the benefit of reservation to the petitioner and then on this ground alone it has quashed the order dated 4.9.2006. We are afraid that such approach on the part of the Tribunal is not legal or even justified because at best the Tribunal could have directed the official respondents to afford an opportunity of hearing to 5th respondent before giving effect to the order dated 4.9.2006 but then in no event could the petition have been allowed in a manner as has been done in this case.

24. We cannot be unmindful of the fact that the petitioner had not taken any undue benefit at the time of recruitment by not declaring herself to be belonging to Scheduled Caste. She had applied and joined as a general category candidate without availing the benefits of the relaxed standards. She had not even consumed the roster point of Scheduled Caste candidate. It is the birth alone which is a criteria for deciding as to whether the persons belong to the Scheduled Caste or not. Since the petitioner is a Scheduled Caste by birth and this fact was not even disputed by 5th respondent, therefore, she is entitled to all the benefits as are available to the Scheduled Caste. Moreover, 5th respondent admittedly was appointed much after the petitioner and the mere fact that he had availed the benefits of reservation by itself cannot create a right in his favour that too over and above the petitioner. Therefore, it can safely be held that while granting benefit to the petitioner in terms of the order dated 4.9.2006, no rights of 5th respondent had been infringed so as to entitle him to prefer a claim before the Tribunal.

25. In view of the aforesaid discussion, we find merit in this petition and the same is accordingly allowed and the order dated 12.11.2010 passed by the learned Central Administrative Tribunal Chandigarh Bench, Chandigarh in O.A. No. 1029-HP/09 titled Janki Nand Kashyap vs. Union of India and others is quashed and set-aside and the petitioner is held entitled to all the benefits as per order dated 4.9.2006. The parties are left to bear their own costs. The pending application(s), if any, stands disposed of.

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

Mohd. Ali ....Appellant.
Versus
The State of Himachal Pradesh and others .....Respondents.

LPA No.209 of 2011.
Judgment reserved on : 04.11.2014.
Date of decision: 18 November, 2014.

Industrial Disputes Act, 1947- Section 25-B (2) read with Section 25-F- Workman was appointed in the year 1980 and his services were dispensed with in the year 1990- he had worked for 240 days in calendar years 1980, 1981, 1982 and 1986 to 1989 and he had not completed 240 days of services in the year of his retrenchment - held, that workman is entitled to the benefit of Section 25-B(1) if he had worked continuously or uninterruptedly for a period of 12 consecutive months and it is not necessary that he should have worked continuously or uninterruptedly from January to December in a particular year - if a workman has worked for more than 240 days during the period of 10 months prior to his retrenchment, he would be deemed to be in continuous service for a year. (Para- 16 and 17)

Cases referred:

Suraj Pal Singh and others versus P.O., Labour Court No.111 and another 2002-III-LLJ 885

Suraj Pal Singh versus The Presiding Officer and Anr. 2006 (4) SLR 191

Sur Enamel and Stamping Works Ltd. v. The Workmen (1964) 3 SCR 616

Surendra Kumar Verma etc. versus The Central Government Industrial Tribunal-cum-Labour Court, New Delhi and another AIR 1981 SC 422

Mohan Lal versus The Management of M/s Bharat Electronics Limited AIR 1981 SC 1253

For the Appellant : Mr.A.K. Gupta, Advocate.
For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr.V.S.Chauhan, Additional Advocate General and Mr.J.K.Verma & Mr.Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Whether the period of 240 days as specified under Section 25-B (2) read with Section 25-F of the Industrial Disputes Act, 1947, (for short 'the Act') is restricted to immediately preceding calendar year or the said provisions would be attracted even in cases where a workman has worked for 240 days in any calendar year preceding his termination, is the moot question involved in the present appeal?

2. Undisputedly, the appellant had been appointed in 1980 and his services have been dispensed with in the year 1990. He had worked for 240 days in calendar years 1980, 1981, 1982 and 1986 to 1989 and when his services were retrenched in the year 1991, he had not completed 240 days of service. The appellant approached the Labour Court, who set aside the order of retrenchment and ordered his reinstatement in service along with seniority and continuity in service, however back wages in service were denied.

3. Aggrieved by the order passed by the Tribunal, the respondent preferred writ petition before this Court which was allowed by the learned writ Court by concluding that the respondent had not been in continuous service for one year within the meaning of sub-section (1) of Section 25-B of the Act nor he had actually worked for 240 days under the employer during the period of 12 months, preceding the date of his retrenchment within the meaning of sub-section (2) of Section 25-B of the Act, therefore Section 25-F of the Act was not attracted in this case.

4. Before we proceed any further, it will be relevant to make note of the relevant provisions of the Act as attracted to the facts of the present case. Sections 2 (oo), 25-B and 25-F of the Act read thus:-

> *"[Sec.2(oo)"retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-*
>
> *(a) voluntary retirement of the workman; or*
>
> *(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or*
>
> *[(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]*
>
> *(c) termination of the service of a workman on the ground of continued ill-health;]"*
>
> *"[**25B. Definition of continuous service.**- For the purposes of this Chapter,-*
>
> *(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;*

(2) where a workman is not in continuous service within the meaning of clause(1) for a period of one year or six months, he shall be deemed to be in continuous service under the employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation.- For the purposes of clause(2), the number of days on which a workman has actually worked under an employer shall include the days on which-

(i) He has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under the Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.]"

*"**25F. Conditions precedent to retrenchment of workmen.**- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-*

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

[***]

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government [or such authority as may be specified by the appropriate Government by notification in the Official Gazette]."

5. The learned counsel for the appellant has vehemently argued that the learned writ Court has misinterpreted the provisions of Section 25-B as also Section 25-F of the Act because Section 25-B had to be read in conjunction with Section 25-F of the Act which provides that for each completed year of service the workman would be paid retrenchment compensation and the continuous service has been defined to be 240

days service in a calendar year and, therefore, it is not necessary that the workman should have completed the said service during the period of preceding 12 months.

6. In support of his contention, the learned counsel for the appellant has placed reliance upon decision of the learned single Judge of the Delhi High Court in ***Suraj Pal Singh and others*** *versus* ***P.O., Labour Court No.111 and another 2002-III-LLJ 885*** wherein the learned single Judge held that the period under Section 25-B read with Section 25-F of the Act cannot be restricted to immediately preceding calendar year and, therefore, the workman could not be denied the benefit on that ground as long as an employee had worked for 240 days in a calendar year preceding his termination, the employee would be entitled to the benefit, as would be clear from the following observations:-

> ***"16. I am thus of the considered view that period under Section 25-B read with Section 25-F of the Act cannot be restricted to immediately preceding calendar year and thus the petitioners cannot be denied the benefit on that ground. As long as an employee has worked for 240 days in any calendar year preceding his termination, the employee would be entitled to the benefit."***

7. No doubt, the aforesaid observations support the contention of the appellant, but then it is worthwhile to notice that this judgment was questioned in Letters Patent Appeal in ***Suraj Pal Singh*** *versus* ***The Presiding Officer and Anr. 2006 (4) SLR 191*** wherein the Division Bench did not agree with the aforesaid view of the learned single Judge.

8. While dealing with the expression "continuous uninterrupted service" and also interpretation of the word "year" in Section 25B (1), the Division Bench observed as under:-

> ***"21. In view of the above judgments, the expression "continuous" or "uninterrupted service" means and refers to the days during which the workman was employed and continued to be in service of the employer. It may be stated that absence on account of sickness, authorised leave, accident or strike, which is not illegal or lock-out is to be regarded as a period during which a workman has continued in uninterrupted service of the employer. It may also be noted here that any artificial breaks given malafidely by an employer should not be recognised and a workman should be treated to be in continuous service. (Refer Yogendra Singh Rawat v. Hemwati Nandan Bahuguna Garhwal University, (1998) 3 SCC 704: [1998 (1) SLR 712 (SC)] and Bhagwati Prasad v. Delhi State Mineral Development Corporation, reported in (1990) 1 SCC 361 : 1990 Lab IC 126 : [1992 (8) SLR 784 (SC)]. Courts and Tribunals will therefore always have power, while applying Section 25B(1) to examine whether the cessation of work was due to any fault on the part of the workman. They can ignore any artificial breaks malafidely given by an employer.***
>
> ***Interpretation of the word "year":***
>
> ***22. The words used in Section 25B(1) is "one year" but the said term has not been defined in the Act. The word "year" has been defined in the General Clauses Act, 1897. Section 3(66) of the aforesaid Act defines the term `year' to mean a period reckoned according to the British Calendar i.e. a period of 12 months from January to December. For the sake of convenience, Section 3(66) of the General Clauses Act, 1897 is reproduced below:-***
>
> ***"Year" shall mean an order reckoned according to the British calendar."***
>
> ***23. However, we do not think that the aforesaid definition as given in the General Clauses Act, 1897 is applicable and should be applied, while interpreting Section 25B(1) of the Act. If definition given in Section 3(66) of the General Clauses Act, 1897 is accepted, any workman who joins***

employment after 1st January, will be denied benefit of Section 25B(1) in the first year of employment. This will be extremely unjust and unfair and such interpretation should not be accepted as we are dealing with a social welfare and a beneficial legislation.

24. The Supreme Court in the case of Aspoinwall and Company v. Lalitha Padugady (1995) 5 SCC 642 : AIR 1996 SC 580 : [1995(5) SLR 213 (SC)] had examined the provisions of Payment of Gratuity Act, 1972 and Sections 2 and 4 thereof. The expression "continuous service for not less than 5 years" came up for consideration before the Supreme Court in the said case. After examining the said Sections the Supreme Court came to the conclusion that complete or continuous service has to be calculated with reference to the date on which an employee gets employment. It was held that this is the stage, which is starting point and thereafter the period has to be calculated. Thus, the period of continuous service is to be reckoned from the date of joining of the employment. The Supreme Court rejected the contention that this period of continuous service has to be reckoned with reference to a calendar year as defined in the General Clauses Act,1897.

25. We feel that in view of the fact that the present legislation is social, beneficial and a welfare legislation, workman should be given benefit under Section 25B(1), if he has worked for a continuously or uninterruptedly for a period of 12 consecutive months anytime during the course of his employment. It is not necessary that a worker should have continuously or uninterruptedly worked from January to December in a particular calendar year. Thus, continuous or un-interrupted employment for period of 12 consecutive months will satisfy requirement of Section 25B(1) of the Act. Whether 240 days is equal to "one year" under Section 25B(1)?

26. Section 25B(1) uses the word "one year", which in common parlance means period of 12 months or 365 days. Can we while interpreting Section 25B(1) reduce this period to 240 days?

27. Sections 25B(1) of the Act being beneficial and welfare provision has to be liberally and broadly interpreted, yet at the same time we cannot amend and modify a statutory provision by incorporating and adding words. Our role is to interpret the law as it exists and not to add and subtract words already used by the legislature or usurp the role of the legislature. The legislature in Section 25B(2) has referred to period of "240 days in the preceding year" following the date of termination as the criteria to determine and decide whether a workman has been in continuous service for a period of one year. The legislature, however, has deliberately not mentioned the period of 240 days during the period of one year as the criteria in Section 25B(1) of the Act. Section 25B(1) nowhere specifies that if a workman has worked for a period of 240 days in a period of "one year", he is deemed to be in uninterrupted service for "one year". The period of 240 days specified in Section 25B(2), cannot be legislated and read into sub-section (1). We cannot, therefore, legislate and incorporate the words "240 days" into Section 25B(1) of the Act. Our judicial pen cannot write these words into the aforesaid sub-section and read them in Section 25B(1), when the legislature has consciously and deliberately not used these words. The requirement of legislature, as far as Section 25B(1) of the Act is concerned, is clear and unambiguous. It refers to "continuous" or "uninterrupted" service for a period of one year i.e., 12 consecutive months. We cannot by judicial interpretation decrease this period of 365 days to 240 days. Of course the period of one year should be interpreted liberally as has been done in the present judgment. The two judgments, in the case of Moti Ceramic Industries (supra) and Metal Powder Co. Ltd. (supra) support and have similarly interpreted

Section 25B(1) and (2) of the Act. Bombay High Court in the case of New Great Eastern Spinning and Weaving Co. Ltd. v. Vasant Mahadeo Bidia, 2005 (1) Cur LR 50 has also taken a similar view.

28. We wish to further clarify that the above interpretation is not against workmen. The legislature has been careful and cautious to include certain periods like authorised leave, legal strikes, lock outs, periods during which the employer illegally refuses to permit the workman to do work, etc., as a period during which the workman is deemed to be in continuous or uninterrupted service. Therefore in a given case, a workman may have worked for in fact less than 240 days, but after including the specified periods mentioned in section 25B(1), his continuous or uninterrupted service might be for a period of 12 consecutive months. Accordingly, we hold that period of 240 days is not relevant as far as Section 25B(1) is concerned as the figure "240 days" is not mentioned in the said sub-section and is mentioned only in sub-section (2). It is not possible for this Court to legislate and add the words 240 days in Section 25B(1) of the Act.

Section 25B(2) of the Act:

29. Sub-section (2) of Section 25B also incorporates a deeming fiction. As per sub-section (2) to Section 25B, if a workman has worked for 240 days or 190 days (in case he is employed below ground in a mine) during the period of 12 calendar months preceding the date with reference to which calculation is to be made, he shall be deemed to be in continuous service for a period of one year. In case of a retrenchment, the reference date will be the date on which the retrenchment order is passed. Therefore, if a workman has worked for 240 days (190 days in case he has worked below ground in a mine) during the period of 12 calendar months preceding the date of his retrenchment, the said workman is deemed to have rendered continuous service for a period of one year. Section 25B(2) refers to a period of 12 months immediately preceding and counting backwards from the relevant date and not to any other period of employment. If a workman has worked for more than 240 days during this period of 12 months prior to his retrenchment, he is deemed to be in continuous service for a year. The words "preceding the date with reference to which calculation is to be made" are not redundant or otiose. The period of 12 months mentioned in Section 25B(2) is not therefore any period of 12 months but the immediately preceding 12 months with reference to which calculation is to be made.

The two Clauses 25B (1) and 25B (2) in operation:

30. Section 25B(2) as per the clause itself, comes into operation when a workman has not been in continuous service within the meaning of sub-section (1) for a period of one year. However, in practice and for all practical purposes, a workman will be entitled to protection under section 25F of the Act, if conditions mentioned in either of the two clauses are satisfied. The sub-sections are therefore in alternative. Requirement of Section 25B(1) is uninterrupted service for a period of one year and under sub-section (2) requirement is service for a period of 240 days (or 190 days in case worker is employed below ground in a mine) during the preceding 12 calendar months prior to the date of termination/retrenchment. By the deeming fiction in Section 25B(2), a workman who has worked for aforesaid period in the preceding 12 calendar months prior to the date of termination/retrenchment is deemed to have been in continuous service for not less than one year. The two provisions, namely, of Section 25B(1) and 25B(2) are separate and distinct. The requirements and conditions to be satisfied to some extent are also different."

"38.We have examined the claim statement filed by the appellant before the Labour Court. In the said claim statement, it is not mentioned and stated how and why the appellant-workman was "in continuous service for a period of one year" or more. In the affidavit filed by the appellant before the Labour Court, he has stated that he actually worked for 233 days in 1984, 258 days in 1985 and for 27 days in January, 1986. This statement does not appear to be correct as the appellant along with his writ petition had also filed a chart showing actual working days during the period of 1984-1986. As per the said chart, the appellant had worked for 223 days up to December, 1984 and 193 days between January, 1985 to December, 1985 and for 83 days from January, 1986 to September, 1986. "However, even in the affidavit filed by the appellant before the Labour Court, no attempt was made to establish and prove that the appellant was "in continuous or interrupted service for period of one year" as provided in Section 25B(1) of the Act and the conditions of the said Section were satisfied. The Labour Court also in its award has not referred to Section 25B(1) of the Act whatsoever and has only mentioned Section 25B(2) of the Act. It appears that the appellant did not claim that he is entitled to protection under Section 25B(1) of the Act. Before the learned single Judge also reliance was placed upon Section 25B(2) of the Act and the appellant herein relied upon the said provision and it was submitted that the conditions of the said provision will be satisfied if a workman has worked for period of 240 days in any year and it was not necessary that the workman should have worked for period of 240 days during the period of 12 months preceding the date of reference, i.e., date of termination. As stated above, we have rejected the contention of the appellant in this regard and have held that Section 25B(2) of the Act refers to period of 12 months from the date with reference to which calculation is to be made, which in the present case is the date of termination and not any period prior to 12 months."

9. Therefore, it is apparent from the aforesaid judgment of the Division Bench that the interpretation as given by the learned single Judge while construing provisions of Sections 25B and 25F of the Act did not find favour with the Division Bench.

10. At this stage, it will be relevant to take note of the fact that the Industrial Disputes Act, 1947 (for short, the 'ID Act'), Chapter V-A containing Sections 25A to 25J was inserted by the Industrial Disputes (Amendment) Act, 1953 (43 of 1953) w.e.f. 24th October, 1953. Section 25-B as it stood then was as under :

"25-B. Definition of one year of continuous service.- For the purposes of Sections 25-C and 25-F, a workman who, during a period of 12 calendar months, has actually worked in an industry for not less than two hundred and forty days shall be deemed to have completed one year of continuous service in the industry.

Explanation. - In computing the number of days on which a workman has actually worked in any industry, the days on which –

(a) he has been laid off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946, or under this Act or under any other law applicable to the industrial establishment, the largest number of days during which he has been so laid-off being taken into account for the purposes of this clause,

(b) he has been on leave with full wages, earned in the previous year, and

(c) in the case of a female, she has been on maternity leave; so however, that the total period of such maternity leave shall not exceed twelve weeks, shall be included."

11. The same Amending Act introduced the definition of 'continuous service' in Section 2 (eee) as under "

> ***"2.(eee) 'continuous service' means uninterrupted service, and includes service which may be interrupted merely on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;"***

12. Section 25-B was substituted by Industrial Disputes (Amendment) Act, 1964 (36 of 1964) w.e.f. 19-12-1964.

13. The Amending Act of 1964 deleted Section 2(eee), having incorporated in Section 25-B itself the definition of 'continuous service'. It also brought in the concept of preceding 12 calendar months. The earlier definition did not mention "preceding" with reference to period of twelve calendar months. It appears that the decision of the Hon'ble Supreme Court in ***Sur Enamel and Stamping Works Ltd. v. The Workmen (1964) 3 SCR 616*** interpreting Sections 2(eee) and 25-B led to the amendments made by Amending Act of 1964. In Sur Enamel, interpreting Sections 2(eee) and 25-B, it was held that twin conditions were required to be fulfilled before a workman can be considered to have completed one year of continuous service in an industry. It must be shown first that the workman was employed for a period of not less than 12 calendar months and next that during those 12 calendar months, he had worked for not less than 240 days. In that case, the workman had not been employed for a period of 12 calendar months. Therefore, the Hon'ble Supreme Court held that it was unnecessary to examine whether actual days of work were 240 or more for in any case the requirements of Section 25-B would not be satisfied by mere fact of number of working days being not less than 240 days. The effect was that if a workman completes actual 240 or more days of work in less than 12 calendar months, he would not be entitled to the benefit of beneficial legislation. This anomaly led to the amendment of the ID Act in the manner above stated.

14. It is, therefore, clear that the legislature had consciously used the word "preceding" in Section 25-B with reference to the period of 12 months.

15. The question posed before us is no longer *res integra* in view of Hon'ble three Judges' decision of the Hon'ble Supreme Court in ***Surendra Kumar Verma etc.*** *versus* ***The Central Government Industrial Tribunal-cum-Labour Court, New Delhi and another AIR 1981 SC 422*** which exposition of law was reiterated by the Hon'ble Supreme Court in ***Mohan Lal*** *versus* ***The Management of M/s Bharat Electronics Limited AIR 1981 SC 1253*** wherein it was held as under:-

> ***"10. It was, however, urged that Section 25F is not attracted in this case for an entirely different reason. Mr. Markenday contended that before Section 25F is invoked, the condition of eligibility for a workman to complain of invalid retrenchment must be satisfied. According to him unless the workman has put in continuous service for not less than one year his case would not be governed by Section 25F. That is substantially correct because the relevant provision of Section 25F provides as under :***
>
> ***"25F. No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until –***
>
> ***(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;***
>
> ***Provided that no such notice shall be necessary if the retrenchment is under an agreement which specifies a date for the termination of service;***

(b) the workman has been paid, at the time of retrenchment, compensation which, shall be equivalent of fifteen days' average pay (for every completed year of continuous service) or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government (or such authority as may be specified by the appropriate government by notification in the Official Gazette)."

Before a workman can complain of retrenchment being not in consonance with Section 25F, he has to show that he has been in continuous service for not less than one year under that employer who has retrenched him from service. Section 25B is the dictionary clause for the expression 'continuous service'. It reads as under :

> ***"25B. (1) a workman shall be said to be in continuous service for a period if he is for that period in uninterrupted service including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lockout or a cessation of work which is not due to any fault on the part of the workman;***
>
> ***(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-***
>
> > ***(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-***
> >
> > > ***(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and***
> > >
> > > ***(ii) two hundred and forty days, in any other case;***
> >
> > ***(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made has actually worked under the employer for not less than-***
> >
> > > ***(i) ninety-five days, in the case of a workman employed below ground in a mine; and***
> > >
> > > ***(ii) one hundred and twenty days, in any other case.***

Explanation - For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which-

> ***(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946,or under this Act or under any other law applicable to the industrial establishment :***
>
> ***(ii) he has been on leave with full wages, earned in the previous years;***
>
> ***(iii) he has been, absent due to temporary disablement caused by accident arising out of and in the course of his employment; and***
>
> ***(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.***

11. Mr. Markenday contended that clauses (1) and (2) of Section 25B provide for two different contingencies and that none of the clauses is satisfied by the appellant. He contended that subsection (1) provides for uninterrupted service and sub-section (2) comprehends a case where the workman is not in continuous service. The language employed in sub-sections (1) and (2) does not admit of this dichotomy. Sub-sections (1) and (2) introduce a deeming fiction as to in what circumstances a workman could be said to be in continuous service for the purposes of Chapter VA. Sub-section (1) provides a deeming fiction in that where a workman is in service for a certain period he shall be deemed to be in continuous service for that period even if service is interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal or a lockout or a cessation of work which is not due to any fault on the part of the workman. Situations such as sickness, authorised leave, an accident, a strike not illegal, a lockout or a cessation of work would ipso facto interrupt a service. These interruptions have to be ignored to treat the workman in uninterrupted service and such service interrupted on account of the aforementioned causes which would be deemed to be uninterrupted would be continuous service for the period for which the workman has been in service. In industrial employment or for that matter in any service, sickness, authorised leave, an accident, a strike which is not illegal, a lockout, and a cessation of work not due to any fault on the part of the workman, are known hazards and there are bound to be interruptions on that account. Sub-section (1) mandates that interruptions therein indicated are to be ignored meaning thereby that on account of such cessation an interrupted service shall be deemed to be uninterrupted and such uninterrupted service shall for the purposes of Chapter VA be deemed to be continuous service. That is only one part of the fiction.

12. Sub-section (2) incorporates another deeming fiction for an entirely different situation. It comprehends a situation where a workman is not in continuous service within the meaning of sub-section (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer for a period of one year or six months, as the case may be, if the workman during the period of 12 calendar months just preceding the date with reference to which calculation is to be made, has actually worked under that employer for not less than 240 days. Sub-section (2) specifically comprehends a situation where a workman is not in continuous service as per the deeming fiction indicated in sub-section (1) for a period of one year or six months. In such a case he is deemed to be in continuous service for a period of one year if he satisfies the conditions in clause (a) of sub-section (2). The conditions are that commencing the date with reference to which calculation is to be made, in case of retrenchment the date of retrenchment, if in a period of 12 calendar months just preceding such date the workman has rendered service for a period of 240 days, he shall be deemed to be in continuous service for a period of one year for the purposes of Chapter VA. It is not necessary for the purposes of sub-section (2) (a) that the workman should be in service for a period of one year. If he is in service for a period of one year and that if that service is continuous service within the meaning of sub-section (1) his case would be governed by sub-section (1) and his case need not be covered by sub-section (2). Sub-section (2) envisages a situation not governed by sub-section (1). And subsection (2) provides for a fiction to treat a workman in continuous service for a period of one year despite the fact that he has not rendered uninterrupted service for a period of one year but he has rendered service for a period of 240 days during the period of 12 calendar months counting backwards and just preceding the relevant date being the date of retrenchment. In other words, in order to invoke the fiction enacted in sub-section (2) (a) it is necessary to determine

first the relevant date, i.e. the date of termination of service which is complained of as retrenchment. After that date is ascertained, move backward to a period of 12 months just preceding the date of retrenchment and then ascertain whether within the period of 12 months, the workman has rendered service for a period of 240 days. If these three facts are affirmatively answered in favour of the workman pursuant to the deeming fiction enacted in sub-section (2) (a) it will have to be assumed that the workman is in continuous service for a period of one year and he will satisfy the eligibility qualification enacted in Section 25F. On a pure grammatical construction the contention that even for invoking sub-section (2) of Section 25B the workman must be shown to be in continuous service for a period of one year would render sub-section (2) otiose and socially beneficial legislation would receive a setback by this impermissible assumption. The contention must first be negatived on a pure grammatical construction of sub-section (2). And in any event, even if there be any such thing in favour of the construction, it must be negatived on the ground that it would render sub-section (2) otiose. The language of sub-section (2) is so clear and unambiguous that no precedent is necessary to justify the interpretation we have placed on it. But as Mr. Markenday referred to some authorities, we will briefly notice them.

13. In Sur-Enamel & Stamping Works (P) Ltd. v. Their Workmen. (1964) 3 SCR 616 : (AIR 1963 SC 1914) referring to Section 25B as it then stood read with Section 2 (eee) which defined continuous service, this court held as under (at p. 1917 of AIR) :

> ***"The position therefore is that during a period of employment for less than 11 calendar months these two persons worked for more than 240 days. In our opinion that would not satisfy the requirement of Section 25B. Before a workman can be considered to have completed one year of continuous service in an industry it must be shown first that he was employed for a Period of not less than 12 calendar months and, next that during those 12 calendar months had worked for not less than 240 days. Where, as in the present case, the workman have not at all been employed for a period of 12 calendar months it becomes unnecessary to examine whether the actual days of work numbered 240 days or more. For, in any case, the requirements of Section 25B would not be satisfied by the mere fact of the number of working days being not less than 240 days."***

If Section 25B had not been amended, the interpretation which it received in the aforementioned case would be binding on us. However, Section 25B and Section 2 (eee) have been the subject-matter of amendment by the Industrial Disputes (Amendment) Act, 1964. Section 2 (eee) deleted and Section 25B was amended. Prior to its amendment by the 1964 Amendment Act, S. 26B read as under :

> ***"For the purposes of Sections 25C and 25F a workman who during the period of 12 calendar months has actually worked in an industry for not less than 240 days, shall be deemed to have completed one year of continuous service in the industry."***

14. We have already extracted Section 25B since its amendment and the change in language is the legislative exposition of which note must be taken. In fact, we need not further dilate upon this aspect because in Surendra Kumar Verma v. Central Government Industrial-cum-Labour Court, New Delhi, (1980) 4 SCC 443 : (AIR 1981 SC 422) Chinnappa Reddy, J., after noticing the amendment and referring to the decision in Sur Enamel and Stamping Works (P) Ltd. case (AIR 1963 SC 1914) held as under (at p. 426 of AIR) :

> ***"These changes brought about by Act 36 of 1964 appear to be clearly designed to provide that a workman who has actually worked under the employer for not less than 240 days during a period of twelve months shall be deemed to have been in continuous service for a period of one year whether or not he has in fact been in such continuous service for a period of one year. It is enough that he has worked for 240 days in a period of 12 months, it is not necessary that he should have been in the service of the employer for one whole year."***
>
> ***In a concurring judgment Pathak J. agreed with this interpretation of Section 25B (2). Therefore, both on principle and on precedent it must be held that Section 25B (2) comprehends a situation where a workman is not in employment for period of 12 calendar months but has rendered service for a period of 240 days within the period of 12 calendar months commencing and counting backwards from the relevant date, i. e. the date of retrenchment. If he has. he would be deemed to be in continuous service for a period of one year for the purpose of Section 25B and Chapter VA."***

16. From the aforesaid exposition of law, the following legal position emerges:-

(i) Section 25B (1) and Section 25B (2) of the Act are separate and distinct and even requirements and conditions to be satisfied to some extent are different.

(ii) While insofar as Section 25B (1) is concerned, the workman could be given benefit under this Section if he had worked continuously or uninterruptedly for a period of 12 consecutive months any time during the course of his employment and it was not necessary that a worker should have continuously or uninterruptedly worked from January to December in a particular year. Therefore, continuous or uninterrupted employment for a period of 12 consecutive months would satisfy the requirement of Section 25B (1) of the Act.

(iii) The period of 240 days does not find mention in the provisions of Section 25B (1) and is only referred in Section 25B (2) and therefore cannot be read into Section 25B (2) and the Court had no power to legislate or incorporate the words "240 days" in Section 25B (1) of the Act.

(iv) Section 25B (2) of the Act only refers to a period of 12 months immediately preceding and counting backwards from the relevant date and not to any other period of employment. If a workman had worked for more than 240 days during this period of 12 months prior to his retrenchment, he would be deemed to be in continuous service for a year. The words "preceding the date with reference to which calculation is to be made" cannot be rendered redundant or otiose.

(v) The period of 12 months mentioned in Section 25B (2) of the Act is not therefore any period of 12 months but the immediately preceding 12 months with reference to which calculation is to be made.

17. Therefore, in view of what has been discussed above, it can safely be concluded that the provisions of Section 25-B (2) read with Section 25-F of the Industrial Disputes Act, 1947, are only applicable to workmen, who have worked for a period more than 240 days in the preceding calendar year from the date with reference to which calculation is to be made which in the present case is the date of termination and not to any other period prior to 12 months/calendar year.

18. Resultantly, there is no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their own costs.

****

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

Raj Kumar-II & others ...Petitioners.
VERSUS
The State of H.P. and others. ...Respondents.

CWP No. 3588 of 2012 a/w Ors.
Reserved on: 04.11.2014
Pronounced on:18th November, 2014.

Constitution of India, 1950- Article 226- Petitioners with the qualification of matriculation were promoted to the post of Superintendent Grade-II- they were entitled to be promoted to the post of B.D.O.- Government changed the rules on 7.10.2003 and restricted the quota of matriculate Superintendent Grade-II to 10%- quota was changed to 15% on 6.4.2012 and the qualification was changed to graduate- held, that amendment has deprived the petitioner of their right of promotion- some of the matriculate Superintendent are holding the post of BDO, this aspect was not taken into consideration while amending the rules - writ petitioners had experience and they had legal and legitimate expectation to get promotion- therefore, respondent directed to consider the case of petitioners for regularization.

(Para- 7 to 20)

Cases referred:

T.R. Kapur and others vs. State of Haryana and others 1986 (suppl.) SCC 584

T.N. Document Writers' Association vs. State of T.N. and another, 1995 (Suppl.) 4 SCC 415

A. Satyanarayana & ors. versus S.S. Purshotham & ors., reported in (2008) 5 SCC 416

B. N. Saxena versus New Delhi Municipal Committee and others reported in (1990) 4 SCC 205

Deepak Agarwal and anr. versus State of Uttar Pradesh and ors. (2011) 6 SCC 725

Rajni Sharma versus State of H.P. and another, reported in 2010 (2) Shim.L.C. 155

B. Manmad Reddy & ors versus Chandra Prakash Reddy & ors. (2010) 3 SCC 314

Re The Special Courts Bill, 1978 (1979) 1 SCC 380

A.S. Parmar and others vs. State of Haryana and others and connected matters 1984 (Suppl.) 1 SCC 1

Dr. (Mrs) Sushma Sharma and others vs. State of Rajasthan and others 1985 (Supl.) SCC 45

M.P. Singh, Deputy Superintendent of Police, C.B.I. and others vs. Union of India and others (1987) 1 SCC 592

Inder Singh and others vs. State of U.P. and others 1987 (Suppl.) SCC 257

Punjab Higher Qualified Teachers, Union vs. State of Punjab and others (1988) 2 SCC 407

Union of India and others vs. Anil Kumar and others (1999) 5 SCC 743

For the Petitioner(s): Mr. K.D. Shreedhar, Sr. Advocate with Y.S. Thakur, Advocate in CWP No. 3588/2012 Mr. Onkar Jairath, Advocate in CWP No.6232/2012 Mr.R.L Chaudhary, Advocate in CWP No.

	2839/2012 and Mr. Ranjan Sharma, Advocate in CWP No.402/2014.
For the Respondent(s):	Mr.Shrawan Dogra, Advocate General, with Mr. V.S. Chauhan, Mr. Romesh Verma, Addl. Advocate General with Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

In all these four writ petitions, the petitioner(s) have called in question Rule 11 (a) of the Recruitment and Promotion Rules, dated 6.4.2012, Annexure P4, so far the same relates to promotion to the post of Block Development Officer, on the grounds taken in the memo of writ petitions. Thus, we deem it proper to determine all these writ petitions by this common judgment.

2. Precisely, the case of the petitioner(s) is that they were appointed in terms of the Recruitment and Promotion Rules, as clerks having requisite qsualification of matriculate vide different orders of the different dates and were also designated as Senior Clerks and thereafter as Junior Assistants in the respondents department.

3. The Recruitment and Promotion Rules, hereafter referred to as "the Rules" for short, went through a sea change for the post of Superintendent Grade-II on 18.7.1996 vide Annexure P1 and promotion to the post(s) of Superintendent Grade-II was to be made by promotion from amongst Senior Assistants having 8 years regular service. The petitioner(s) came to be promoted against the said post on regular basis and that post is ladder cadre to the post of Block Development Officer Class-I Gazetted- by promotion.

4. On 7.10.2003, the Government issued Annexure P2, which contained that in terms of Rule 10, the post(s) of Block Development officer were to be filled up 50% by direct recruitment and 50% by promotion and in terms of the mandate of Rule 11 of the Rules, out of 50% promotion quota, 10% posts were to be filled up from amongst the Superintendents Grade-II, who were matriculate and who were possessed of 5 years of regular service or regular combined with continuous *ad hoc* service in the Grade. The petitioner(s) were expecting promotion against the 10% quota against the post of Block Development Officer and Seniority List was issued on 19th September, 2011, vide Annexure P3 and the petitioner(s) are figuring in the said list. The petitioners have completed the requisite service/experience but unfortunately, a notification was issued on 6.4.2012, Annexure P4 whereby the amendment to the Rules was made for the post of Block Development Officer. In terms of the said notification though, the quota of Superintendents Grade-II was increased from 10% to 15% but eligibility for promotion was restricted only for Superintendents Grade-II, who were Graduates, thereby taking away the right of the petitioner(s)-Superintendents Grade-II matriculate which is stated to be arbitrary, malafide, unjust, unfair and discriminatory. The Superintendents Grade-II Matriculate and Superintendents Grade-II Graduates are holding the same post(s) and are having the same experience but without any rationale, they have been made ineligible by providing that only Superintendents Grade-II Graduates can be promoted to the post(s) of Block Development Officer. It is also the case of the petitioner(s) that as on today, they are holding the posts of Block Development Officer(s) despite of Annexure P4, i.e., the notification dated 6.4.2012 whereby the Rules were amended.

5. The respondents have filed the reply and resisted the petitions on the ground that it is the discretion of the Government to prescribe the qualification for promotion quota and they are within their rights to make

amendments in order to have better experienced, qualified and expert officers. The respondents have given details why the amendment was made, in the preliminary objections of the reply filed by them.

6. We have gone through the documents produced by the writ petitioners and also by the respondents-State which do disclose that the writ petitioner(s) were not heard before making the amendment and it appears to have been made on the basis of notings and other things made by the interested persons, i.e., the Superintendents Grade-II Graduates. However, the amendment is made by the Government and the question is whether it can be called in question?

7. It is beaten law of the land that the amendment can be questioned provided it is shown that the same is *ultra vires* or is discriminatory.

8. While going through the record, it appears that petitioner(s) have failed to carve out a case for declaring the said amendment *ultra vires* but at the same time, they have been able to carve out a case that the amendment is discriminatory for the following reasons.

9. The petitioner(s) have given details how many officers are holding the post(s) of Superintendents Grade-II and are matriculate and how many officers are Graduates. Virtually, the amendment has deprived them from their right of promotion and it has taken their right of consideration for promotion for the post(s) of Block Development Officer. The fact that as on date, some of the Superintendents Grade-II Matriculates are holding the post(s) of Block Development Officer on *ad hoc* basis, has not been denied by the respondents-State. The petitioner(s) have placed on record AnnexureP7/1 to Annexure P7/4 in CWP No. 402 of 2014, showing that despite the amendment, some of the Superintendents Grade-II who are matriculates, are holding the post(s) of Block Development Officer and there is specific averment to this effect contained in para 12 (n) of the said petition which is also not denied by the respondents. It is apt to reproduce para 12 (n) of the said petition herein:

> *"That once even after the issuance of the amended rules of 2012 the Respondents have made the Matriculate Supdt Gr-II-alike the petitioner to perform the work of the promotional post of BDO vide Annexures P-7/1 to Annexure P-7/4 then, the impugned amendment ousting Matriculate Supdt Gr-II-petitioner from being given an equal opportunity to be considered for formal promotion as BDO is based on no classification, no rationale, is arbitrary, malafide, discriminatory and is violative of Articles 14, 16 and 21 of the Constitution of India."*

10. The learned counsel for the petitioner(s) have also argued that some of the Matriculates Superintendents Grade-II have improved their qualifications and otherwise, they can do it till the time they enters into the consideration room but the petitioners have been left high and dry for the reasons that they have no time to improve their qualifications because of pressure on their head. The learned counsel for the petitioner(s) have also cited judgment in support of their case in case titled **T.R. Kapur and others vs. State of Haryana and others 1986 (suppl.) SCC 584.** It is apt to reproduce paras 5 and 15 of the said judgment herein.

> *"5.Shri Shanti Bhushan, learned counsel for the petitioners has put forward a three-fold contention. First of these submissions is that the impugned notification which purported to amend Rule 6(b) of the Class I Rules with retrospective effect from July 10, 1964 making a degree in Engineering essential for promotion to the post of Executive Engineer in Class I service constitutes a variation in the conditions of service applicable to officers belonging to Class II service who are diploma holders like the petitioners prior to the*

appointed day i.e. November 1, 1966 to their disadvantage as it renders them ineligible for promotion to the post of Executive Engineer in Class I service and was ultra vires the State Government having been made without the previous approval of the Central Government as enjoined by the proviso to Section 82(6),of the Punjab Reorganisation Act, 1966. It is urged that any rule which affects the promotion of a person relates to his conditions of service, although mere chances of promotion may not be. The contention, in our opinion, must prevail. The second is that it was not permissible for the State Government to amend Rule 6(b) of the Class I Rules with retrospective effect under the proviso to Art. 309 of the Constitution so as to render ineligible for promotion to the post of Executive Engineer in Class I service, the members of Class II service who are diploma-holders although they satisfy the condition of eligibility of eight years' experience in that class of service. It is said that the unamended Rule 6(b) conferred a vested right on persons like the petitioners which could not be taken away by retrospective amendment of Rule 6(b). The third and the last submission is that the action of the State Government in issuing the impugned notification making retrospective amendment of Rule 6(b) of the Class I Rules was wholly arbitrary, irrational and mala fide and thus violative of Arts.14 and 16(1) of the Constitution. It is submitted that the impugned notification was calculated to circumvent the direction given by this Court in its order dated February 24, 1984 on the basis of the undertaking given by the learned Additional Solicitor General that the State Government would consider the cases of all eligible officers belonging to Class II service for promotion to the Class- I service.

6-14.....

15. More fundamental is the contention that the impugned notification issued by the State Government purporting to amend Rule 6(b) with retrospective effect from July 10,1964 which rendered members of Class II Service who are diploma holders like the petitioners ineligible for promotion to the post of Executive Engineer although they satisfied the condition of eligibility of 8 years' experience in that class of service was unreasonable, arbitrary and irrational and thus offended against Arts. 14 and 16(1) of the Constitution. It is urged that they were eligible for promotion under the unamended Rule 6(b) of the Class I Rules and had a right to be considered for promotion to the post of Executive Engineer, and a retrospective amendment of Rule 6(b) seeking to render them ineligible was constitutionally impermissible. It is said that the reason for this was obvious inasmuch as immediately prior to the reorganization of the State of Punjab i.e. prior to November 1, 1966 even a member of the Overseers Engineering Service, a Class III Service, having only a diploma was eligible for being promoted as Executive Engineer in Class I Service in due course since in the matter of promotion under the unamended Rule 6(b) it was not necessary to possess a degree in Engineering as held by this Court in A.S. Parmar's case. It follows therefore that every member of the Overseers Engineering Service was eligible for promotion first as Assistant Engineer or Sub-Divisional Officer in Class II Service and thereafter, in due course, to the post of Executive Engineer in Class I Service even without the educational qualification of a degree in Engineering. In substance, the submission is that a retrospective amendment of Rule 6(b) by the impugned notification which seeks to take away

the eligibility of members of Class II Service who are diploma-holders for purposes of promotion to the posts of Executive Engineers in Class I Service from a back date ranging over 20 years and thereby renders invalid the promotions already made is constitutionally impermissible.

11. It is apt to reproduce para 2 of the judgment in **T.N. Document Writers' Association vs. State of T.N. and another, 1995 (Suppl.) 4 SCC 415,** herein:

> *"2.It appears to us, however, that having regard to the sudden change in qualification prescribed by the Government, it is necessary and it will also be equitable on the part of the Government to give to the members of the Association, having their licences in earlier years, an adequate opportunity to qualify themselves as required by the amended rules. We, therefore, consider it reasonable to hold that the new rules should not be implemented in respect of persons who had been having licenses prior to August 4, 1989, unless they fail to qualify in the higher writing examination within such reasonable period not less than three years from today as the government may prescribe. We hope the Government will implement this by issuing orders to this effect immediate. The appeal is disposed of accordingly."*

12. The learned counsel for the petitioner(s) have also placed reliance on the judgment reported in **A. Satyanarayana & ors. versus S.S. Purshotham & ors.,** reported in **(2008) 5 SCC 416**. It is apt to reproduce paras 23, 28, 30 and 34 of the said judgment herein:

> *"23. We, however, are of the opinion that the validity or otherwise of a quota rule cannot be determined on surmises and conjectures. Whereas the power of the State to fix the quota keeping in view the fact situation obtaining in a given case must be conceded, the same, however, cannot be violative of the constitutional scheme of equality as contemplated under Articles 14 and 16 of the Constitution of India. There cannot be any doubt whatsoever that a policy decision and, in particular, legislative policy should not ordinarily be interfered with and the Superior Courts, while exercising their power of judicial review, shall not consider as to whether such policy decision has been taken mala fide or not. But where a policy decision as reflected in a statutory rule pertains to the field of subordinate legislation, indisputably, the same would be amenable to judicial review, inter alia, on the ground of being violative of Article 14 of the Constitution of India. {See Vasu Dev Singh & Ors. v. Union of India & Ors. [2006 (1) SCALE 108] and State of Kerala & Ors. v. Unni & Anr. [(2007) 2 SCC 365].*
>
> *24 to 27.....*
>
> *28. The Superior Courts, while exercising their power of judicial review, must determine the issue having regard to the effect of the subordinate legislation in question. There must exist a rational nexus between the impugned legislation and the object of promotion. Promotions are granted to a higher post to avoid stagnation as also frustration amongst the employees. This Court, in a large number of decisions, has emphasized the necessity of providing for promotional avenues. [See Food Corporation of India. v. Parashotam Das Bansal]. The State, keeping in view that object, having found itself unable to provide such promotional avenue, provided for the scheme of Accelerated Career Progress (ACP). The validity and effect of the impugned legislation must be judged keeping in view the object and*

purport thereof. This Court would apply such principle of interpretation of statute which would enable it to subserve the object in place of subverting the same.

29.....

30. Although mere chance of promotion is not a fundamental right, but right to be considered therefor is. In that view of the matter, any policy whereby all promotional avenues to be promoted in respect of a category of employees for all time to come cannot be nullified and the same would be hit by Article 16 of the Constitution of India.

31 to 33.....

34. A statutory rule, it is trite law, must be made in consonance with constitutional scheme. A rule must not be arbitrary. It must be reasonable, be it substantive or a subordinate legislation. The Legislature, it is presumed, would be a reasonable one. Indisputably, the subordinate legislation may reflect the experience of the Rule maker, but the same must be capable of being taken to a logical conclusion."

13. It appears that the Superintendents Grade-II Matriculates and Superintendents Grade-II Graduates are having the same experience and both are having sufficient experience and that is why the Superintendents Grade-II Matriculates are manning the post(s) of Block Development Officers despite the amendment, but this aspect has not been looked into while making the amendment, which is an important factor which leads in favour of the petitioner(s).

14. The apex Court in case titled **B. N. Saxena versus New Delhi Municipal Committee and others** reported in **(1990) 4 SCC 205** held that experience gained for a considerable length of time is itself a qualification. It is apt to reproduce paras 6 and 7 of the said judgment herein:

"6. The question is whether the petitioner possesses the prescribed qualification. The revised rules provide alternate qualifications for the post of Head Draftsman. The first part of the rule prescribes a diploma with a minimum of three years service as Senior Draftsman in the scale of Rs.250-400. The second limb of the revised rule refers to the service rendered by the candidate. It provides for six years of service as Senior and Junior Draftsman. The first part of the rule is almost similar to the qualification prescribed prior to the amended rules. The old rule provided:

> *"Matric with Diploma/ certificate in Draftsmanship from a recognized institution with 3 years experience in preparation of Engineering Drawings in an Electric supply undertaking or an engineering manufacturing organization."*

7. The second limb of the rule was evidently, to benefit all those persons who have gained sufficient experience as Senior and Junior Draftsmen without possessing any qualification. Experience gained for a considerable length of time is itself a qualification (See the observation in State of U.P. v. J. P. Chaurasia, 1989 (1) SCC 121 : (AIR 1989 SC 19). It would be unreasonable to hold that in addition to this considerable experience, one must also have the diploma qualification prescribed under the first part. It could not have been the intention of the rule making authority that persons who were designated as Senior Draftsmen, without any Diploma qualification should acquire such diploma qualification for further promotion. Such, a view would not be consistent and coherent with the revised rule and its object. We have no doubt that the second

limb of the revised rule is independent of the first. The High Court seems to have erred in this aspect of the matter."

15. Further reliance was placed on **Deepak Agarwal and anr. *versus* State of Uttar Pradesh and ors. (2011) 6 SCC 725** and it is apposite to reproduce paras 6 and 33 of the said judgment herein.

> *"6. In spite of the representation made by the appellants, the 1983 Rules were amended on 17th May, 1999. By the aforesaid amendment, the posts of Technical Officers and Statistical Officers have been excluded from the feeder cadre for promotion to the post of Deputy Excise Commissioner. This amendment came just two days before the DPC was scheduled to meet on 19th May, 1999. As a consequence of the amendment, the DPC did not consider the appellants for promotion. The justification given for the aforesaid amendment is that the State Government had taken a "conscious decision" to exclude the Technical Officers and Statistical Officers as they were not fit for the post of Deputy Excise Commissioner because of their peculiar qualifications, duties, responsibilities and work experience. However, to compensate for loss of promotion, the pay scale of these two posts has been upgraded to the level of Deputy Excise Commissioner.*
>
> *7. to 32.....*
>
> *33. It may be that the removal of the two posts from the feeder cadre would lead to some stagnation for the officers working on the two aforesaid posts. In fact, the Government seems to recognize such a situation. It is perhaps for this reason that the posts have been upgraded to the post of Deputy Excise Commissioner. However, mere upgradation of the post may not be sufficient compensation for the officers working on the two posts for loss of opportunity to be promoted on the post of Deputy Excise Commissioner. In such circumstances, the Government may be well advised to have a re-look at the promotion policy to provide some opportunity of further promotion to the officers working on these posts. With these observations, the impugned judgment is affirmed and the appeal is accordingly dismissed with no order as to costs."*

16. The same principles have been laid in case titled **Rajni Sharma versus State of H.P. and another,** reported in **2010 (2) Shim.L.C. 155**, that the experience gained for a considerable length of time is itself a qualification.

17. The reliance is placed on the judgment reported in case titled **B. Manmad Reddy & ors versus Chandra Prakash Reddy & ors. (2010) 3 SCC 314.** It is apt to reproduce paras 15, 18 and 19 of the said judgment herein.

> *"15. This Court in Triloki Nath case held that a classification must be truly founded on substantial differences that distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved. Having said so, this Court observed:*
>
> > *33. Judged from this point of view, it seems to us impossible to accept the respondents' submission that the classification of Assistant Engineers into degree-holders and diploma- holders rests on any unreal or unreasonable basis. The classification, according to the appellants, was made with a view to achieving administrative efficiency in the Engineering services. If this be the object, the classification is clearly co-related to it, for higher educational qualifications are at least presumptive evidence of a higher mental equipment. This is not to suggest that*

> *administrative efficiency can be achieved only through the medium of those possessing comparatively higher educational qualifications but that is beside the point. What is relevant is that the object to be achieved here is not a mere pretence for an indiscriminate imposition of inequalities and the classification cannot be characterized as arbitrary or absurd. That is the farthest that judicial scrutiny can extend."*

The Court also observed that the classification made on the basis of educational qualifications with a view to achieving administrative efficiency cannot be said to rest on any fortuitous circumstance and one has always to bear ion mind the facts and circumstances of the case in order to judge the validity of a classification."

16-17.....

18. That leaves us with the question whether any imbalance among those eligible for appointment against class II category 1 posts coming from different sources and categories would itself justify a classification like the one made in Note 6. Our answer is in the negative. There is no gainsaying that classification must rest on a reasonable and intelligible basis and the same must bear a nexus to the object sought to be achieved by the statute. By its very nature classification can and is often fraught with the danger of resulting in artificial inequalities which make it necessary to subject the power to classify to restraints lest the guarantee of equality becomes illusory on account of classifications being fanciful instead of fair, intelligible or reasonable.

19. We may gainfully extract the note of caution sounded by Krishna Iyer J. in his Lordship's separate but concurring judgment in Triloki Nath's case (supra):

> *"56.....The dilemma of democracy is as to how to avoid validating the abolition of the difference between the good and the bad in the name of equality and putting to sleep the constitutional command for expanding the areas of equal treatment for the weaker ones with the dope of "special qualifications" measured by expensive and exotic degrees. These are perhaps meta-judicial matters left to the other branches of Government, but the Court must hold the Executive within the leading strings of egalitarian constitutionalism and correct, by judicial review, episodes of subtle and shady classification grossly violative of equal justice. That is the heart of the matter. That is the note that rings through the first three fundamental rights the people have given to themselves."*

18. It is moot question whether the State has made the amendment on the foundation of substantial differences and it is also moot question whether the State has made this amendment and carved out substantial differences and has been able to distinguish persons grouped together from those left out of the group. Whether the State has taken into consideration that the classification made within the class is legally permissible.

19. The learned counsel for the petitioner(s) have also placed reliance on the judgments reported in **Re The Special Courts Bill, 1978 (1979) 1 SCC 380** *(Para 72),* **A.S. Parmar and others vs. State of Haryana and others and connected matters 1984 (Suppl.) 1 SCC 1** *(paras 9-10)* **Dr. (Mrs) Sushma Sharma and others vs. State of Rajasthan and others 1985 (Supl.) SCC 45**

(para 32) **M.P. Singh, Deputy Superintendent of Police, C.B.I. and others vs. Union of India and others (1987) 1 SCC 592** *(Paras 5, 11 and 12),* **Inder Singh and others vs. State of U.P. and others 1987 (Suppl.) SCC 257** *(Para 9),* **Punjab Higher Qualified Teachers, Union vs. State of Punjab and others (1988) 2 SCC 407** *(Paras 11-12)* and **Union of India and others vs. Anil Kumar and others (1999) 5 SCC 743** *(Para 26),* wherein same and similar principles of law have been laid down.

20. Keeping in view the aforesaid discussion, one comes to an inescapable conclusion that the writ petitioner(s) have experience and are under legal and legitimate expectation to get promotion to the post(s) of Block Development Officer read with the fact that there are some persons, who are still manning the post(s) of Block Development Officers, we deem it proper to direct the respondents-State to consider the case of the petitioner(s) for relaxation, including all those who are not in a position to seek reliefs for grant of promotion or for relaxation, so that, they may not meet with discrimination. It is also important factor which weigh with us that there is no time to improve qualification, but at the same time, by the amendment, they cannot be shown door at the whims of the State without any reasonable cause.

21. Accordingly the writ petition(s) are disposed of by directing the respondents to consider the case of the petitioner(s) for relaxation or making a provision for them, so that, they can be considered for promotion against the said post(s). The entire exercise be made within three months from today.

22. The pending application(s), if any, are also disposed of.

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

RFA No. 45 of 2009 along with RFA No. 46 of 2009, RFA No.47 of 2009, RFA No. 48 of 2009, RFA No.97 of 2009, Cross objection Nos. 369 of 2009, Cross objection No. 359 of 2009 and Cross Objection No.360 of 2009.
Reserved on: 10th November, 2014.
Date of Decision :18th November, 2014

1.	**RFA No. 45 of 2009.**	
	State of H.P. & others	.....Appellants.
	Versus	
	Hukmi Ram and others	.....Respondents.
2.	**RFA No.46 of 2009.**	
	State of H.P. & others	.....Appellants.
	Versus	
	Kewal Ram & others	.....Respondents.
3.	**RFA No. 47 of 2009**	
	State of H.P. & others	.....Appellants.
	Versus	
	Hem Singh & others	.....Respondents.
4.	**RFA No. 48 of 2009.**	
	State of H.P. & others	.....Appellants.
	Versus	
	Kali Ram & others	.....Respondents.
5.	**RFA No. 97 of 2009**	
	Kewal Ram & others	.....Appellants.
	Versus	
	State of H.P. & others	.....Respondents.

6. Cross Objections No. 369 of 2009 in RFA No. 45 of 2009.

State of H.P. & others .....Appellants.

Versus

Hukami Ram & ors .....Respondents/Cross objectors.

7. Cross Objections No. 360 of 2009 in RFA No. 48 of 2009.

State of H.P. & others .....Appellants.

Versus

Kali Ram & others .....Respondents/Cross- objectors.

8. Cross Objections No.359 of 2009 in RFA No. 47 of 2009.

State of H.P. & others .....Appellants.

Versus

Hem Singh & others .....Respondents/Cross Objectors.

Land Acquisition Act, 1894- Section 18- Land of the petitioner was acquired for construction of the Kayartu-Thaila road**-** A.D.J. relied upon the sale deed to determine the market value as on January, 2000 and thereafter provided a hike of 10% per annum to determine the market value- held, that in view of judgment of Hon'ble Supreme Court of India in **Ahsanul Hoda vs. State of Bihar, (2013)14 SCC 59-** it is permissible for land acquisition collector or court of law to provide a hike per year. (Para-3)

Land Acquisition Act, 1894- Section 18- District Judge had assessed different rates of compensation for different categories of land- land was acquired for construction of the road- held, that it is not permissible for the Court to apply the different rates and the Court has to assess uniform rates of compensation for different pieces of land. (Para-7)

Cases referred:

Ahsanul Hoda vs. State of Bihar, (2013)14 SCC 59

Haridwar Development Authority versus Raghubir Singh and others (2010)11 SCC 581

For the Appellants:	Mr. R.S. Thakur, Addl. Advocate General and Mr. Tarun Pathak, Dy. A.G. for the appellants in RFA Nos. 45, 46, 47, 48 of 2009. Mr. Mahesh Sharma, Advocate for appellants in RFA No. 97 of 2009.
For the respondents:	Mr. Mahesh Sharma, Advocate, for respondents/ Cross objectors in RFA No. 45, 47 and 48 of 2009 and for respondents in RFA Nos. 46. Mr. R.S. Thakur, Addl. A.G. and Mr. Tarun Pathak, Dy. A.G. for respondents in RFA No. 97 of 2009.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

All these appeals/cross objections are being disposed of by a common judgment as these pertain to acquisition of land acquired for construction of Kayartu-Thaila road by common notification issued under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act).

2. The lands of the petitioners/respondents/cross-objectors were subjected to acquisition for construction of Kayartu-Thaila road. The learned District Judge while assessing compensation qua the lands of the land owners as had come to be subjected to acquisition has assessed compensation for various categories of land at the rate hereinafter mentioned:-

Sr. No.	Kind of land	Rate per bigha
1.	Ghasni Land	Rs.66000/-
2.	Banjar Kadeem	Rs. 1,32,000/-
3.	Banjar Jadid	Rs.2,64,000/-
4.	Bhakal Deom	Rs.9,46,000/-
5.	Bhakal Awal	Rs.11,00,000/-

3. The learned Additional Advocate General contends with force before this Court that the learned District Judge while relying upon Ex.PW4/B which manifests the market value of the land existing therein as on January, 2000, had, qua the lands subjected to acquisition on 29.11.2003, untenably given the purported escalation in the market value since the reflection of the market value of the land in Ex. PW4/B prepared in January, 2000 till the land having come to be ultimately subjected to acquisition subsequently on 29.11.2003, deemed it fit in his wisdom to provide a hike of 10% over the market value of various categories of land comprised in Ex.PW4/B. The aforesaid argument addressed before this Court by the learned Additional Advocate General peels off or acquires no force in the face of the mandate of the Hon'ble Apex Court enshrined in the judgment reported in ***Ahsanul Hoda vs. State of Bihar, (2013)14 SCC 59*** where in the relevant paragraph No.17, which is extracted hereinafter, it has been mandated that where the market value as is pronounced in the reliable parameter of probative worth, pertains to years preceding the acquisition of land in accordance with law, it is permissible for the Land Acquisition Collector or Courts of law to proceed to record or provide a hike of a reasonable per centum over the market value of land displayed in the reckonable parameter of probative worth preceding the subsequent acquisition of land in accordance with law. Pragraph 17 of the judgment referred to hereinabove reads as under:-

> *"17. This Court in Saradar Jogendera Singh v. State of U.P. {(2008)17 SCC 133} (SCC p.135, para 13) noticed that the said case related to acquisition in the year 1979 and relying upon the award related on an acquisition of 1969 observed that the general increase between 1969-1979 can be taken to be around 8-10% per annum, if this increase is calculated cumulatively, the total increase in 10 years would be around 100%." (pp.63)*

The said view is anchored upon the exposition that given the acquisition of land in accordance with law subsequent to the reflection of its market value in the reckonable admissible parameter pertaining to the preceding years there is an obvious escalation in the price of land which escalation ought not to remain irrevered especially for obviating any financial hardship to the landowners whose lands are subsequently subjected to acquisition in accordance with law. Consequently given the fact that Ex.PW4/B was prepared in January, 2000, whereas, the lands of the land owners were subjected to acquisition ultimately in November, 2003, hence, when the reckonable reliable parameter of probative worth comprised in Ex.PW4/B pertains to years preceding the acquisition of the lands of the land owners in accordance with law, consequently, the hike as adjudged by the learned District Judge to the extent of 10 per centum over the market value of the land displayed in Ex.PW4/B is in tandem with the mandate enshrined in the judgment of the Hon'ble Apex Court, the relevant paragraph whereof has been extracted hereinabove. Furthermore, the hike for obviating financial hardship to the land owners, as also, is for not depriving them of the benefit of escalation in the price of the land since the preparation of Ex.PW4/B and the ultimate acquisition of their land subsequently. Consequently, the said argument is rejected.

4. The learned counsel appearing for the respondents/cross-objectors/land owners has contended with force that the learned District Judge while pronouncing the award had untenably discarded the probative worth of

Ex.PW5/B and Ex.PW5/C which unfold the factum of the lands comprised therein bearing a market value higher than the one as unfolded in Ex.PW4/B. However, the contention as addressed before this Court by the learned counsel appearing for the respondents/cross-objectors/land owners would stand vindication by this Court only in the event of it having been displayed by cogent evidence comprised in the best documentary evidence manifested by the Khaka dasti proved in accordance with law that the lands comprised in Ex.PW5/B and Ex.PW5/C located in village Nawar and Bhagoti, are situated in close proximity to the lands subjected to acquisition. However, though oral evidence exists on record revealing the factum of the lands of the respondents/petitioners/cross-objectors situated in Village Bhagoti and the lands situated in village Nawar being proximate in location which oral evidence is corroborated by khaka dasti, bearing Ex.RW2/A. Nonetheless, even then the sale exemplars comprised in Ex.PW5/B and Ex.PW5/C are not for reasons to be afforded hereinafter sacrosanct pieces of evidence to prod this Court to rely upon them. He also relied upon a judgment of the ***Hon'ble Apex Court reported in Haridwar Development Authority versus Raghubir Singh and others (2010)11 SCC 581,*** the relevant paragraphs No. 9 & 10 are extracted hereinafter, which emphatically communicate the view that the sale instances of small tracts of land constitute evidence of probative worth, on strength whereto compensation can be determined for large tracts of land. However, while computing or assessing compensation for large expanses of land on the strength of sale considerations contracted for small tracts of land, deductions upto the permissible per centum are to be made. Relevant paragraphs No.9 and 10 of the judgment aforesaid read as under:-

> "9. The Collector has referred to several sale transactions but relied upon only one document, that is, sale deed dated 19.12.1990 relating to an extent of 11,550 sq. ft of land sold for Rs.4,04,250, which works out to a price of Rs.35 per square foot. The Collector deducted 25% from the said price, as the relied upon sale transaction related to a small extent of 11,550 sq. ft and the acquired area was a larger extent of 8,45,174 sq. ft. By making such deduction, he arrived at the rate as Rs.26.25 per square foot. The Reference Court and the High Court have also adopted the said sale transaction and valuation.
>
> 10. The claimants do not dispute the appropriateness of the said sale transaction taken as the basis for determination of compensation. Their grievance is that no deduction or cut should have been effected in the price disclosed by the sale deed for arriving at the market value in view of the following factors:-
>
> > (i) that the acquired lands were near to the main by-pass and had road access on two sides;
> >
> > (ii) that may residential houses had already come up in the surrounding areas, and the entire area was already fast developing; and
> >
> > (iii) that the acquired land had the potential to be used as an urban residential area.
>
> When the value of a large extent of agricultural land has to be determined with reference to the price fetched by sale of a small residential plot, it is with reference to the price fetched by sale of a small residential plot, it is necessary to make an appropriate deduction towards the development cost, to arrive at the value of the large tract of land. The deduction towards development cost may vary from 20% to 75% depending upon various factors {see Lal Chand v. Union of India, (2009)SCC 769, SCC p.790, para 22}. Even if the acquired lands have situational advantages, the

> minimum deduction from the market value of a small residential plot, to arrive at the market value of a larger agricultural land, in the usual course, will be in the rage of 20% to 25 %. In this case, the Collector ahs himself adopted a 25% deduction which has been affirmed by the Reference Court and the High Court. We therefore do not propose to alter it." (pp.584-585)

On the strength of the aforesaid pronouncement of the Hon'ble Apex Court, the learned counsel for the landowners/cross-objectors urges that the sale instance comprised in Ex.PW5/B and Ex.PW5/C constituted a valuable guide for the learned District Judge, as also, it constituted an admissible and relevant parameter while it enjoying probative vigour for facilitating an assessment of compensation qua the land subjected to acquisition. His having omitted to rely upon them, as such, has been contended to have committed a legal misdemeanor.

5. The contentions aforesaid advanced by the learned counsel appearing for the respondents/landowners in dispelling the purported tenuous reason afforded by the learned District Judge for overwhelming the effect of Ex.PW5/A and Ex.PW5/B are extremely shaky and are, for the reasons hereinafter, construed to be not having either sinew or strength. The reasons for so concluding is that in the judgment relied upon by the counsel for the landowners/cross-objectors the lands as subjected to acquisition were for the construction of colonies for housing people. Obviously, the authority/entity for whom the lands were acquired, had an inherent profiteering motive, inasmuch as the entity would after developing the lands acquired proceed to sell them at a profit to the public, therefore, the loss, if any, as it may be beset with in paying a hefty amount of compensation to the land owners would hence be off set by its selling lands on a phenomenal or escalated price to the public. Consequently, when the objective of acquisition in the case relied upon by the learned counsel for the cross-objectors/landowners was commercial, as a corollary, then the lands of the land owners as subjected to acquisition in the cases aforesaid perceivably commanded an inherent immense escalated potentiality which escalated potentiality as compatibly pronounced in the sale considerations qua small tracts of land, was construed to be a vindicable, tenable as well as a reckonable parameter for determining the market value of large tracts of lands as were subjected to acquisition. However, while determining compensation payable for large expanses of lands on the strength of sale considerations of small tracts of land, deductions towards developmental costs were ordained to be made. However, in the instant case the marked distinction is that lands of the landowners were subjected to acquisition for a public purpose by a welfare estate, inasmuch as, the lands of the landowners have been acquired for the purpose of construction of a public road. The appellants-State subjected to acquisition the lands of the landowners for construction of a public road as a measure of providing public amenity to the public. Obviously, the appellants/State given the salutary purpose of acquisition of the lands of the landowners has no inherent profiteering motive in subjecting the lands of the land owners to acquisition nor it would rear any commercial advantage from the acquisition of land of the landowners/cross-objectors. As a corollary encumbering it with the financial liability to defray to the landowners an exorbitant amount of compensation would defeat the very purpose for which the acquisition was made rather it would put the public exchequer replenished by taxing the honest taxpayers to an unnecessary and avoidable heavy burden. Naturally then, on this score the sale consideration comprised in Ex.PW5/B and Ex.PW5/C cannot provide a reasonable, fair and just parameter for determining on their strength compensation for the entire stretch of the vast expanse of land acquired by the appellants/State for providing a public amenity. Consequently, this Court is of the considered view that the judgment as relied upon by the learned counsel for the cross-objectors/landowners is discardable. Naturally then the view as adopted by the learned District Judge in dispelling the effect of

Ex.PW5/B and Ex.PW5/C which pertain to small tracts of land, inasmuch as its not providing a valuable and reckonable parameter for determining on their strength compensation for an immense tract or a vast expanse of land, is a tenable view and ought not to be interfered with.

6. Consequently, otherwise when it has been per se displayed in Ex.PW4/B as relied upon by the learned District Judge while assessing compensation on its strength for the lands subjected to acquisition, that it comprises a reasonable as well as a tenable parameter for assessing and determining compensation for the lands of the land owners, hence, reliance upon it was appropriate. Besides when the enunciation in Ex.PW4/B has not been by adduction of cogent evidence to the contrary, falsified, as a corollary then the communications in Ex.PW4/B hold force. Therefore, reliance by the learned District Judge upon Ex.PW4/B which disclosed the average value of the land in village Nawar proved to be in contiguity as well as in close proximity to the location of village Bhagoti where the lands of the respondents/cross-objectors/petitioners are situated is reiteratedly not mis-placed, Moreover, to the contrary when otherwise, too the lands subjected to acquisition having not been convincingly proven to be in close proximity to lands whose market value is displayed in Ex.PW5/B and Ex.PW5/C, the reliance by the learned District Judge rather on Ex.PW4/B while it unfolds a proven and genuine market value of the lands comprised in it and theirs adjoining as well as situated in close proximity to the lands subjected to acquisition cannot be in any manner construed to be suffering from any taint or blemish of mis-appreciation of the evidence on record.

7. The learned District Judge while assessing compensation for the lands subjected to acquisition has assessed or determined varying/different rates of compensation for different categories of lands. However, uncontrovertedly when the lands bearing varying categories/classifications were acquired for a common purpose, hence, when it is settled law that when lands are subjected to acquisition for a common public purpose as the lands are in the instant case, theirs bearing distinct categorizations or varying classifications wanes, especially when in sequel to the completion of the purpose for which the lands were acquired, inasmuch as on completion of construction of the public road, their classifications and categorizations loses significance, rather they acquire a common/uniform potentiality, concomitantly, hence, necessitating assessment of uniform/common rates of compensation for each category of land. Obviously, then uniform rates of compensation ought to be assessed for different categories of lands or lands bearing different classifications. Since, in contravention of the settled legal position envisaging assessment of uniform rates of compensation qua lands bearing different categories/classifications, especially when lands bearing different classification were acquired for a common public purpose, the learned District Judge rather having assessed varying or distinct rates of compensation for lands bearing distinct categories or classifications, hence, has committed an impropriety. The said impropriety needs to be undone.

8. Consequently, the appeals preferred by the State bearing RFA Nos. 45, 46, 47, 48 of 2009 are dismissed and the cross objections Nos. 369 of 2009, 360 of 2009, 359 of 2009 and RFA No. 97 of 2009 preferred on behalf of the landowners are allowed and it is ordered that the rate of compensation for all categories of lands or the lands bearing different classifications shall be at the rate assessed qua Bhakal Awal i.e. Rs.11,00,000/- per bigha. The landowners in addition to the enhanced compensation are also entitled to (a) solatium at the rate of 30% on the enhanced compensation assessed hereinabove (b) interest at the rate of 9% per annum on the enhanced amount from the date of notification i.e.29.11.2003 for one year and (c) interest at the rate of 15% per annum on the enhanced amount from the date of expiry of the period of one year of the date of notification i.e. from 30.11.2004 till the date of

payment of the amount in the Court. All pending applications 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.

LPA Nos. 194 and 195 of 2014.
Reserved on: 05.11.2014
Pronounced on: 18th November, 2014

1. LPA No. 194/2014:
State of H.P. and others ...Appellants.
VERSUS
Sudesh Kumari ...Respondent.

2. LPA No. 195/2014:
State of H.P. ...Appellant.
VERSUS
Alpana ...Respondent.

Constitution of India, 1950- Article 226- Petitioner, a contractual employee, was granted 12 weeks (84 days) maternity leave, whereas female regular employee are entitled to 135 days of maternity leave - held, that there is no difference between female regular employee and contractual employee- there is no occasion for making discrimination between regular and contractual employee regarding grant of maternity leave - State directed to provide maternity leave at par with the regular employee. (Para-8 to 15)

Cases referred:
Municipal Corporation of Delhi v. Female Workers and anr. (2000) 3 SCC 224
Ms. Sonika Kohli & Anr. vs. Union of India reported in 2004 (3) SLJ 54 CAT
Rattan Lal and others vs. State of Haryana and others reported in 1985 (3) SLR 548
Tasneem Firdous vs. State and others reported in 2006 (II) S.L.J 699

For the appellant (s): Mr.Shrawan Dogra, Advocate General with Mr. V.S. Chauhan, Mr. Romesh Verma, Additional Advocate Generals with Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals.
For the Respondent(s): Mr. Naresh Verma and Mr. Rajiv Jiwan, Advocates.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Ms. Alpana writ petitioner in CWP No. 3363 of 2009 had invoked the jurisdiction of this Court for quashing Office Memorandum dated 31.7.2009, Annexure P3 and order dated 2.9.2009 Annexure P4, on the grounds taken in the memo of writ petition.

2. The case of the writ petitioner is that as per law and the Rules occupying the field, all the female contractual employees are entitled to maternity leave at par with the regular employees and that is why their maternity leaves were enhanced from 84 days to 135 days in terms of Annexure P3. The petitioner while working as Lecturer, on contract basis, had availed

maternity leave. The leave availed by her was duly sanctioned in her favour. Subsequently, vide Office Memorandum Annexure P3, appended with the writ petition as also letter dated 2nd September, 2009 Annexure P4, it was decided to grant only 12 weeks (84 days) maternity leave to the female employees working on contract basis and earlier instructions Annexure P2 were withdrawn by the respondent. Thus, the petitioner had sought writ of certiorari for quashing Annexures P3 and P4 commanding the respondents-State to provide all the female contractual employees 135 days materiality leave to which regular employees are entitled to. It is apt to reproduce reliefs claimed in the writ petitions filed by Ms. Alpana herein:

> "(a) *That the order dated 2.9.2009 (Annexure P-4) effecting recovery of alleged over payment made to the petitioner on account of availing Maternity leave of 135 days may kindly be quashed by way of issuance of writ in the nature of certiorari.*
>
> *(b) That the office Memorandum dated 31.7.2009 (Annexure P-3) may also be quashed."*

3. The Writ Court, after considering the case of the petitioner, quashed the impugned order restraining the State from effecting recovery from the petitioner.

4. Ms. Sudesh Kumari, writ petitioner in another writ petition, after noticing the judgment, also filed CWP No. 1617 of 2014 for the grant of same reliefs.

5. It is also apt to reproduce reliefs claimed by writ petitioner Sudesh Kumar in the writ petition herein:

> "1.*That the writ of certiorari to quash Annexure P1 dated 31st July, 2009 (office memorandum) and specially annexure P-4 by which Annexure P-3 office order of dated 10.3.2009 vide which the maternity leave to the contractual employees was enhanced from 85 days to 135 days on the ground that there cannot be any discrimination between the regular and contractual employees, has been withdrawn.*
>
> *2.Issue a writ of mandamus directing the respondent's authorities to extend the Maternity leave to present petitioner for 135 days."*

6. The said writ petition was also granted in favour of the petitioner, in terms of the judgment passed in Alpana's case in CWP No.3363/2009, supra.

7. The State has questioned both these judgments by the medium of these LPAs, on the grounds that the petitioners were not entitled to maternity leave at par with the regular employees and the judgments made by the Writ Courts are not legally sustainable. The argument advanced by the learned Advocate General is not tenable for the following reasons.

8. In law, there is no difference between a female regular employee and a contractual employee/ *ad hoc* employee because a female employee whether regular, temporary or *ad hoc,* is a female for all intents and purposes and she has a matrimonial home, matrimonial life, and after conception, she has to undergo the entire maternity period, same treatment, pains and other difficulties which a regular employee has to undergo. Thus, there is no occasion for making discrimination and if, less period of maternity leave is granted to a contractual employee, it will amount to discrimination, in terms of Article 14 of the Constitution of India.

9. The claim of maternity leave is founded on the grounds of fair play and social justice. There cannot be discrimination and if any discrimination is made, it is in breach of Articles 14 and 15 of the Constitution. Articles 41, 42,

and 43 deals with the subject and we deem it appropriate to reproduce the said Articles herein:

> ***"41.Right to work, to education and to public assistance in certain cases***.- *The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.*
>
> ***42***. ***Provision for just and humane conditions of work and maternity relief.***- *The State shall make provision for securing just and humane conditions of work and for maternity relief.*
>
> ***43***. ***Living wage, etc., for workers***.- *The State shall endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas."*

10. In case titled **Municipal Corporation of Delhi v. Female Workers and anr. (2000) 3 SCC 224,** it has been held as under:

> *"27. The provisions of the Act which have been set out above would indicate that they are wholly in consonance with the Directive Principles of State Policy, as set out in Article 39 and in other Articles, specially Article 42. A woman employee, at the time of advanced pregnancy cannot be compelled to undertake hard labour as it would be detrimental to her health and also to the health of the foetus. It is for this reason that it is provided in the Act that she would be entitled to maternity leave for certain periods prior to and after delivery. We have scanned the different provisions of the Act, but we do not find anything contained in the Act which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis or on muster roll on daily wage basis.*
>
> *28. The Industrial Tribunal, which has given an award in favour of the respondents, has noticed that women employees have been engaged by the Corporation on muster roll, that is to say, on daily wage basis for doing various kinds of works in projects like construction of buildings, digging of trenches, making of roads, etc., but have been denied the benefit of maternity leave. The Tribunal has found that though the women employees were on muster roll and had been working for the Corporation for more than 10 years, they were not regularized. The Tribunal, however, came to the conclusion that the provisions of the Maternity Benefit Act had not been applied to the Corporation and, therefore, it felt that there was a lacuna in the Act. It further felt that having regard to the activities of the Corporation, which had employed more than a thousand women employees, it should have been brought within the purview of the Act so that the maternity benefits contemplated by the Act could be extended to the women employees of the Corporation. It felt that this lacuna could be removed by the State Govt. by issuing the necessary notification under the Proviso to Section 2 of the Maternity Act. This Proviso lays down as under :*
>
> *"Provided that the State Government may, with the approval of the Central Government, after giving not less than two*

month's notice of its intention of so doing, by notification in the Official Gazette, declare that all or any of the provisions of this Act shall apply also to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise."

29……

30. We appreciate the efforts of the Industrial Tribunal in issuing the above directions so as to provide the benefit of the Act to the muster roll women employees of the Corporation. This direction is fully in consonance with the reference made to the Industrial Tribunal. The question referred for adjudication has already been reproduced in the earlier part of the judgment. It falls in two parts as under :

(i) Whether the female workers working on muster roll should be given any maternity benefit ?

(ii) If so, what directions are necessary in this regard.

31-32……..

33. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work; they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre or post-natal period."

11. In **Ms. Sonika Kohli & Anr. vs. Union of India** reported in **2004 (3) SLJ 54 CAT,** it has been held in paras 12 and 13, the relevant portion of which is quoted as under:

"12. An almost a new point of controversy has been raised with regard to the admissibility of maternity leave to female teachers. In some of the O.As. it has been prayed that the benefit of maternity leave, which has hitherto been denied by the respondent-Administration, be directed to be extended in accordance with the rules. Mr. R.P. Bali, learned Counsel for some of the applicants urged that the action of the respondents in denying the benefit of maternity leave like other regular employees is violative of the principles enshrined in Articles 14 and 15 of the Constitution of India as it denies the benefit of beneficial provisions of law to a female teacher. Mr. N.K. Bhardwaj, learned Counsel for the Administration urged that maternity leave is not admissible to contract employees as they are not covered by the Punjab CSR Vol.1, Part-1. According to him, the benefit of maternity leave with pay is payable to permanent/regular female employees and that the Administration is justified in carving out a distinction between the regular female teachers and the teachers appointed on part

time or contract basis, as is in the present case. Let us examine the respective contentions of the parties.

13. The claim for maternity leave is founded on grounds of fair play and social justice. Before the advent of the Constitution and for a sufficiently long time, thereafter it was customary or say traditional for women to stick to their homes but now they seek various jobs so as to attain economic independence by utilizing their talent, education, industry etc. Sometimes the jobs are taken up by them to overcome economic hardship. For a woman to become a mother is most natural phenomenon in her life. Whatever is needed to facilitate the birth of a child to a women who is in service, the employer has to be considerate and sympathetic towards her and must realize the physical difficulties which a working women would face in performing her duties at work place while carrying a baby in the womb or while bearing a child after birth. Our constitution which, in its preamble, promises social and economic justice, enshrines certain radical provisions in the form of Articles 42 and 43 which deal with the just and humane conditions of work and maternity relief as well as living wage conditions of work ensuring a decent standard of life, and full enjoyment of leisure and social and cultural opportunities. These principles are required to be followed by the State as enjoined by Article 39. In the background of these Articles, the Parliament has enacted Maternity Benefit Act, 1961 (Act No. 53 of 1961) with a view to regulate the employment of women in certain establishments for certain periods before and after child birth and to provide for maternity benefit and certain other benefits……"

12. It is also apt to reproduce para 3 of the judgment delivered in **Rattan Lal and others vs**. **State of Haryana and others** reported in **1985 (3) SLR 548** .

"3. We strongly deprecate the policy of the State Government under which 'ad hoc' teachers are denied the salary and allowances for the period of the summer vacation by resorting to the fictional breaks of the type referred to above. These 'ad hoc' teachers shall be paid salary and allowances for the period of summer vacation as long as they hold the office under this order. Those who are entitled to maternity or medical leave shall also be granted such leave in accordance with the rules."

13. The Jammu and Kashmir High Court in case titled **Tasneem Firdous vs. State and others** reported in **2006 (II) S.L.J 699**, held that the employees working on contractual basis are also entitled to maternity leave. The relevant portion of para 6 of the judgment is reproduced as under:

"6. In subjective context the matter assumes a larger dimensions because it overflows the contours of an individual case or a singular instance and almost borders on the rights of women and obligation of the State to protect and preserve them, to which, besides statutory constitutional considerations, the international covenants also bind the government. Reference in this behalf may be made to "Convention on the Elimination of all Forms of Discrimination against Women" adopted by Community of nations on 18.12.1979 to which government of India too is a signatory……"

14. In paras 6 and 37 of the judgment *in* **Municipal Corporation of Delhi v. Female Workers and anr. (2000) 3 SCC 224,** supra, while

considering the constitutional contours of the matter, the Hon'ble apex Court observed as under:

> *"6..... It is in this background that we have to look to our Constitution which, in its Preamble, promises social and economic justice. We may first look at the Fundamental Rights contained in Chapter III of the Constitution. Article 14 provides that the State shall not deny to any person equality before law or the equal protection of the laws within the territory of India. Dealing with this Article vis-a-vis the Labour Laws, this Court in Hindustan Antibiotics Ltd. v. Workmen, AIR 1967 SC 948 : 1967 (1) SCR 652, has held that labour to whichever sector it may belong in a particular region and in a particular industry will be treated on equal basis. Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (3) of this Article provides as under :-*
>
> *"(3) Nothing in this article shall prevent the State from making any special provision for women and children".*
>
> 7-36.....
>
> *37....."2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures :*
>
> > *(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;*
> >
> > *(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;*
> >
> > *(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;*
> >
> > *(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.*
> >
> > *3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary."*

15. Having said so, the office memorandum dated 31.7.2009 and circular dated 2.9.2009, made by the State are quashed and all female employees whether on contract, *ad hoc,* permanent and temporary are held entitled to materiality leave at par with the regular employees.

16. For the reasons discussed herein above, the LPAs are dismissed along with pending applications, if any.

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

Shri Balak Ram ...Appellant.
Versus
State of Himachal Pradesh & others ...Respondents.

LPA No. 170 of 2014
Reserved on: 11.11.2014
Decided on: 19.11.2014

Constitution of India, 1950- Article 226- Petitioner and private respondent appeared for the post of water carrier- petitioner was denied the appointment as water carrier and the private respondent was appointed as water carrier- petitioner filed an original application before the Administrative Tribunal which was allowed and the petitioner was directed to be appointed - he was not given seniority and other service benefits- held, that petitioner was denied appointment illegally - had the private respondent not been appointed- respondent would have been in the employment right from that date when he was denied the appointment illegally- he is deemed to be appointed from the same day - hence, petitioner held entitled to seniority notionally from the date of appointment of private respondent. (Para-7 to 10)

Cases referred:

Sanjay Dhar versus J & K Public Service Commission and another, reported in (2000) 8 Supreme Court Cases 182

Hem Chand versus State of H.P. & others, reported in 2014 (3) Him L.R. 1962

For the appellant:	Mr. Onkar Jairath, Advocate.
For the respondents:	Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. Anup Rattan, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for the respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Subject matter of this Letters Patent Appeal is judgment and order, dated 27th August, 2011, passed by the learned Single Judge in CWP No. 8200 of 2010, titled as Balak Ram versus State of Himachal Pradesh and others, whereby the writ petition filed by the appellant-writ petitioner was allowed and seniority of the appellant-writ petitioner was to be reckoned with effect from 28th October, 2006, as part time water carrier with all consequential benefits (hereinafter referred to as "the impugned judgment").

2. The grievance projected by the appellant-writ petitioner in this Letters Patent Appeal is that the appellant-writ petitioner was entitled to seniority and other consequential benefits right from the date he was denied the appointment with effect from 20th August, 1997.

3. Precisely, the case of the appellant-writ petitioner was that he was denied appointment as water carrier by showing favours upon one Smt. Kala Devi, who was appointed illegally, to which the appellant-writ petitioner was entitled to.

4. The appellant-writ petitioner challenged her appointment before the erstwhile H.P. State Administrative Tribunal, Camp at Mandi (hereinafter referred to as "the erstwhile Tribunal") by the medium of Original Application, being OA (M) No. 371 of 1997, titled as Balak Ram versus State of H.P. and others, which was allowed vide judgment and order, dated 12th October, 2006, whereby the appointment of Smt. Kala Devi was quashed and the appellant-writ petitioner was allowed to be appointed. It is apt to reproduce para 12 and 13 of the judgment herein:

> *"12. This conclusion is further strengthened by the contents of letter No. SNR/STN/W/G/97-8514 from S.D.O. (Civil) Sunder Nagar addressed to the Deputy Commissioner Mandi found at leaf No. 35 of the record produced by respondents No. 1 to 3 (a photo copy whereof has been ordered to be placed on the file of the original application) which clearly and unambiguously states that 15 marks ought to have been awarded to the applicant under the head 'IRDP/handicapped' and that there were a lot of cuttings in the preliminary list prepared by Distt. Primary Education Officer and BDO, Sundernagar which appeared to have been done by some one with mala fide intention as the requisite certificates of the applicant were found enclosed with the documents of the applicant. Therefore concludes the SDM that the applicant should be selected and respondent No. 4 be removed from service immediately and after the needful reply might be filed in the Tribunal accordingly.*
>
> *13. It is unfortunate that superior authorities did nothing in the matter despite the truthful, lawful, honest and fair submissions of the SDM and on the contrary the respondents filed a reply justifying the selection and appointment of respondent No. 4 by concealing the true facts despite the fact that the record justifying the submissions made by the SDO (C) was available with their department. What is more unfortunate, distressing and shocking is that by such concealment respondents apparently deprived the applicant a poor handicapped person of the job he deserved for a period of about 9 years. Certainly it is a case where exemplary costs must be awarded against respondents for dragging the applicant to an avoidable litigation and by concealment of facts gave life of about 9 years to such litigation."*

5. The said judgment has attained finality. The appellant-writ petitioner was allowed to join, but was not granted the seniority and other service benefits with effect from 20th August, 1997, constraining the appellant-writ petitioner to file CWP No. 8200 of 2010, with a prayer that the appellant-writ petitioner be granted seniority and also wages, on the grounds taken in the writ petition.

6. Learned Single Judge has passed one-page judgment without discussing the matrix of the case and directed the respondents to grant seniority to the appellant-writ petitioner with effect from 28th October, 2006, i.e. from the date on which he joined after making success in the Original Application before the erstwhile Tribunal and has not granted the relief, i.e. seniority right from the date Smt. Kala Devi was appointed.

7. It is admitted that the appellant-writ petitioner was denied his rights and Smt. Kala Devi was appointed illegally. Had the respondents not appointed Smt. Kala Devi illegally at the particular point of time, i.e. on 20th August, 1997, the appellant-writ petitioner would have been appointed and would have been in the employment right from that date, but he was deprived of his legitimate rights by making illegal appointment order.

8. The Apex Court in a case titled as **Sanjay Dhar versus J & K Public Service Commission and another,** reported in **(2000) 8 Supreme Court Cases 182,** has dealt with the issue and held that when a candidate is deprived of appointment illegally, he is deemed to have been appointed right from the same date. It is apt to reproduce paras 14 to 16 of the judgment herein:

> *"14. .....As the appellant participated in the process of selection protected by the interim orders of the High Court and was also successful having secured third position in the select list, he could not have been denied appointment. The appellant is, therefore, fully entitled to the relief of his appointment being calculated w.e.f. the same date from which the candidates finding their place in the order of appointments issued pursuant to the select list prepared by the J&K PSC for 1992-93 were appointed and deserves to be assigned notionally a place in seniority consistently with the order of merit assigned by the J&K PSC.*
>
> *22. We have already noticed the learned Single Judge having directed the appellant to be appointed on the post of Munsif in the event of his name finding place in the select list subject to the outcome of the writ petition which order was modified by the Division Bench in LPA staying the order of the learned Single Judge but at the same time directing one vacancy to be kept reserved. The High Court and the Government of J&K (Law Department) were not justified in bypassing the judicial order of the High Court and making appointments exhausting all available vacancies. The right of the appellant, if otherwise sustainable, cannot be allowed to be lost merely because of an appointment having been made wittingly or unwittingly in defiance of the judicial order of the High Court.*
>
> *16. For the foregoing reasons the appeal is allowed. The judgment under appeal is set aside. It is directed that the appellant shall be deemed to have been appointed along with other appointees under the appointment order dated 6-3-1995 and assigned a place of seniority consistently with his placement in the order of the merit in the select list prepared by J&K PSC and later forwarded to the Law Department. During the course of hearing the learned senior counsel for the appellant made a statement at the Bar that the appellant was interested only in having his seniority reckoned notionally in terms of this order and was not claiming any monetary benefit by way of emoluments for the period for which he would have served in case he would have been appointed by order dated 6-3-1995. We record that statement and direct that the appellant shall be entitled only to the benefit of notional seniority (and not monetary benefits) being given to him by implementing this order. The appeal is disposed of accordingly. The contesting respondents shall pay the appellant costs quantified at Rs. 5,000/-."*

9. A learned Single Judge of this Court in a case titled as **Hem Chand versus State of H.P. & others,** reported in **2014 (3) Him L.R. 1962,** has taken the same view. It is apt to reproduce paras 3 and 4 of the judgment herein:

> *"3. Admittedly, the appointment of the petitioner was delayed for no fault of his and came to be appointed only in the year 2009, that too after the intervention of this Court. The result of delayed appointment of the petitioner is that he has been paid less salary and denied the seniority over a long period of time. It has been consistently opined that in case a candidate is wrongly denied appointment for no fault on his part, he cannot be denied*

appointment from due date and consequential seniority. Reference in this regard can conveniently be made to ***1996 (8) SCC 637, Pilla sitaram Patrudu & others vs. Union of India and others, 2000 (8) SCC 182 Sanjay Dhar vs. J&K Public Service Commission & another, 1991 (6) Vol. 76, Services Law Reporter 753, Hawa Singh Sangwan vs. Union of India & others and 1996 (6) vol. 116, Services Law Reporter, 335, Hawa Singh and others vs. The Haryana State Electricity Board.*** *Moreover, it is not the case of the respondents that the petitioner was not recommended to be appointed on 26.6.2004 but the only ground taken is that it was the Pradhan, Gram Panchayat Sawindhar, Tehsil Karsog, who delayed the appointment of the petitioner. This is the precise reason that the petitioner is entitled for the seniority from the date of offer of appointment, as held by the Division Bench of this Court in similar circumstances, in case titled as* ***Chatter Singh vs. State of H.P. & others, CWP No. 188 of 2012-I:-***

> *"3. No doubt, the petitioner joined duty only on 13.5.2003. But in his favour admittedly there is an order by the Appointing Authority on 8.8.2002 to give appointment, as has been noted by the Tribunal in Annexure P-1, order. It is that order, which has been upheld by the Tribunal and the direction issued by the Tribunal is for implementing the said order. Therefore, for all purposes, the petitioner shall be deemed to be appointed on 8.8.2002, on the date admittedly the petitioner was directed to be appointed by the Sub Divisional Magistrate. However, taking note of the fact that the petitioner has joined duly on 13.5.2003 after the order was issued to him, the entitlement of the petitioner for actual monetary benefit shall be only from 13.5.2003. In order to avoid any ambiguity, it is made clear that the petitioner shall be deemed to be appointed in the post of Gramin Vidya Upasak on 8.8.2002 for all purposes; but from 8.8.2002 to 13.5.2003, the benefits shall only be notional and from 13.5.2003, the petitioner shall be entitled to all monetary benefits."*

4. In view of the exposition of the law referred to above, the petitioner is entitled to be treated as having been appointed as a Part Time Water Carrier at Government Primary School Alyas, Gram Panchayat, Sawindhar, Karsog-II, District Mandi from 30.6.2004, pursuant to the recommendation of the Government of H.P., as per order dated 26.6.2004 for the purpose of seniority. However, the entitlement of the petitioner for actual monetary benefits shall be only from 9.6.2009. In order to avoid any ambiguity, it is made clear that the petitioner shall be deemed to be appointed as Part Time Water Carrier from 30.6.2004 for all purposes, but from 30.6.2004 to 9.6.2009, the benefits shall only be notional and w.e.f. 9.6.2009, the petitioner shall be entitled to all monetary benefits."

10. Having said so, we are of the considered view that the impugned judgment needs to be modified by providing that the appellant-writ petitioner is entitled to seniority notionally (not monetary benefits) right from the date Smt. Kala Devi was appointed, i.e. 20th August, 1997.

11. Accordingly, the appeal is allowed and the impugned judgment is modified, as indicated hereinabove. Pending applications, if any, are also disposed of.

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

Sanjay Prashar & others. ....Appellants
versus
Subhash Chander & others. ....Respondents.

FAO No. 159 of 2014
Decided on: 19.11.2014

Code of Civil Procedure, 1908- Order 43 Rule 1(i)- Appeal under Order 22 Rule 10 read with Order 1 Rule 10 and Section 151 of CPC was filed before the Learned District Judge, which was disposed of by him in the capacity of Sessions Judge- held, that Sessions Judge cannot pass any order in civil proceedings- order should have been passed in the capacity of a District Judge- Order set aside and the case remanded to District Judge with the direction to decide the matter afresh.

For the appellants : Mr. Ajay Sharma, Advocate.
For the respondents : Mr. Prashant Chaudhary, Advocate, for respondent No.1.
Mr. R.K. Gautam, Sr. Advocate with Mr. Gaurav Gautam, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Appeal filed under Order 43 Rule 1 (i) of the CPC against the order dated 2.4.2014 passed in CMA No. 56 of 2014, Civil Appeal No. 42-D/XII/2013 pending before the learned District Judge, Kangra at Dharmshala. Heard. Court has perused the order dated 2.4.2014 passed by the learned First Appellate Court. It is proved on record that Civil Appeal No. 42-D/XII/2013 was relating to Civil Suit and it is also proved on record that learned First Appellate Court has passed the order in the capacity of Sessions Judge, Kangra at Dharmshala. It is well settled law that Sessions Judge cannot pass any order in civil proceedings. Court is of the opinion that learned First Appellate Court should have passed the order in the capacity of District Judge Kangra at Dharmshala. In view of the above stated facts order dated 2.4.2014 passed in application filed under Order 22 Rule 10 read with Order 1 Rule 10 and Section 151 CPC is set aside in the ends of justice and learned District Judge Kangra at Dharmshala is directed to dispose of the application filed under Order 22 Rule 10 read with Order 1 Rule 10 and Section 151 CPC afresh strictly in accordance with law after hearing both the parties. My observations in the order will not affect the merits of the case as well as application in any manner. Appeal is disposed of. Record of learned trial Court as well as learned First Appellate Court be transferred forthwith along with certified copy of this order. Parties are directed to appear before the learned District Judge Kangra at Dharmshala on **19.12.2014.** 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.

Amrit Lal. ...Petitioner.
Versus
Himachal Road Transport Corporation and others. ...Respondents.

CWP (T) No. 2 of 2014
Reserved on: 19.11.2014
Decided on: 20.11.2014

Central Civil Services (Classification, Control and Appeals) Rules, 1965 - Disciplinary proceedings were initiated against the petitioner- Inquiry Officer submitted his findings that the charges were not proved- Disciplinary Authority disagreed with the findings of the Inquiry Officer and imposed penalty of stoppage of two increments for two years with cumulative effect- held, that the Disciplinary Authority has to record the reason for disagreeing with the findings of the Inquiry Officer which reasons are required to be supplied to delinquent officer- since, the procedure was not followed, therefore, order was set aside. (Para- 2 to 5)

Case referred:
Punjab National Bank and others vs Kunj Behari Misra, (1998) 7 SCC 84

For the Petitioner: Mr. Onkar Jairath, Advocate.
For the Respondents: Mr. G.S. Rathore, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Disciplinary proceedings were initiated against the petitioner under rule 14 of the Central Civil Services (Classification, Control and Appeals) Rules, 1965 vide memo dated 17.7.1999. The Regional Manager (Inquiry) was appointed as the Inquiry Officer. The charges were framed against the petitioner on 28.10.1997. The Regional Manager (Inquiry) submitted his findings to the Disciplinary Authority vide report dated 28.4.2000. According to the report, Charges No.1 and 2 were not proved. The Disciplinary Authority, i.e. Deputy Divisional Manager disagreed with the findings of the Inquiry Officer and held the charges to be proved against the petitioner. The Disciplinary Authority has imposed penalty of stoppage of two increments for two years with cumulative effect vide office order dated 22.5.2000. The stoppage of two increments for two years with cumulative effect is a major penalty. The Disciplinary Authority has to record the tentative reasons for disagreeing with the inquiry report and thereafter the reasons are required to be supplied to the delinquent officer to represent against the same and only after receipt of the representation, the findings are to be recorded.

2. In the instant case, the Disciplinary Authority has disagreed with the inquiry report without recording tentative reasons. The well settled procedure has not been followed by the Disciplinary Authority. There is violation of principles of natural justice. In this case, the penalty has been imposed without following the procedure, discussed hereinabove.

3. Their Lordships of the Hon'ble Supreme Court in ***Punjab National Bank and others vs Kunj Behari Misra***, (1998) 7 SCC 84 have held that the Disciplinary Authority must record its tentative reasons for disagreement with the inquiry report and thereafter the reasons are required to be supplied to the delinquent officer to represent against the same and only after receipt of the representation, the findings are to be recorded. Their Lordships have held as under:

> **"19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7 (2). As a result thereof whenever the disciplinary authority disagrees with**

the inquiry authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the inquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the inquiry officer. The principles of natural justice, as we have already observed, require the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file representation before the disciplinary authority records its findings on the charges framed against the officer."

4. We have gone through office order dated 22.5.2000. Charge levelled against the petitioner was that though the fare was Rs. 3, however, he has issued tickets of Rs. 5/- denomination. It is not the case that petitioner has pocketed money by over-charging etc.

5. Accordingly, the petition is allowed. Annexure P-3 dated 22.5.2000 is quashed and set aside. In normal circumstances, we would have permitted the Disciplinary Authority to proceed with the matter by seeking comments of the petitioner; however, taking into consideration that the petitioner has already superannuated from service and the charge was trivial in nature, the proceedings are closed. 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.

LPA No.621 of 2011 & LPA No.9 of 2012.
Reserved on: November 13, 2014.
Pronounced on: November 20, 2014.

LPA No.621 of 2011:
H.P. State Electricity Board Limited and others .....Appellants.
versus
Jagmohan Singh .....Respondent.
LPA No.9 of 2012:
Jagmohan Singh .....Appellant.
versus
H.P. State Electricity Board Limited and others .....Respondents.

Constitution of India, 1950- Article 226- Petitioner claimed work charge status- his application before Administrative Tribunal was ordered to be treated as a representation- representation was rejected by the respondent- Learned Single Judge held that representation was wrongly rejected and directed the respondent to consider the case of the petitioner for conferring work charge status with all consequential benefits- held, that case of the petitioner was to be considered in accordance with judgment of Hon'ble Supreme Court of India in **Mool Raj Upadhyaya vs. State of H.P. and others, 1994 Supp. (2) SCC 316** the direction was rightly passed by Learned Judge- Appeal dismissed. (Para-4 to 12)

Case referred:
Mool Raj Upadhyaya vs. State of H.P. and others, 1994 Supp.(2) SCC 316

For the Appellants: Mr.N.K. Sood, Senior Advocate, with Mr.Satyan Vaidya, Advocate, in LPA No.621 of 2011
Mr.A.K. Gupta, Advocate, in LPA No.9 of 2012.
For the respondents: Mr.N.K. Sood, Senior Advocate, with Mr.Satyan Vaidya, Advocate, in LPA No.9 of 2012.
Mr.A.K. Gupta, Advocate, in LPA No.621 of 2011.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Both these appeals are the outcome of the judgment and order, dated 13th June, 2011, passed by a learned Single Judge of this Court, in CWP(T) No.4 of 2011, titled Jag Mohan Singh vs. The H.P. State Electricity Board and Ors., whereby it was held that the case of the writ petitioner (appellant in LPA No.9 of 2012) was covered by the decision of the Apex Court in **Mool Raj Upadhyaya vs. State of H.P. and others, 1994 Supp.(2) SCC 316** and the writ respondents (appellants in LPA No.621 of 2011) were directed to consider the case of the writ petitioner for grant of work charge status w.e.f. 1.1.1997, with all consequential benefits such as seniority and pay fixation.

2. Facts of the case necessary for the disposal of present appeals are thus. Initially, the writ petitioner, namely, Jag Mohan Singh filed an Original Application bearing No.165 of 2006 before the H.P. State Administrative Tribunal, which was granted by the Tribunal on 7th April, 2006 with a direction to the writ respondents to treat the said Original Application as representation and examine the same within three months. The said order is reproduced hereunder:

> *"The only grievance of the applicant in the instant case is that the applicants were working with the respondent/Board for the last ten years as T.mate on daily wage basis with 240 days in each calendar year, but their services were not brought on the work charged establishment from due date after the said span.*
>
> *At the request of learned counsel for the applicants and in the peculiar circumstances of the case the present original application itself is directed to be treated as representation to the Secretary, HPSEB with a direction to decide the same within a period of three months from the passing of this order. He is further directed to consider the case of the applicants for work charge status in view of the law laid down by the Hon'ble Apex Court in Mool Raj Upadhayay vs. State of H.P. 1994(2) SLR 377. The Division Bench of this Tribunal has also decided the similarly situated case titled as Jagdish Ram vs. State of H.P. OA-3/2004 on 6.12.2005."*

3. The writ respondents examined the said representation and rejected the case of the writ petitioner vide order, dated 30th May, 2006, constraining the writ petitioner to file another Original Application, bearing No.2511 of 2007 before the Tribunal, which, on abolition of the Tribunal, was transferred to this Court and was diarized as CWP(T) No.4 of 2011.

4. The learned Single Judge, after examining the material placed on the writ file, held that the representation was wrongly rejected by the writ respondents and that the case of the writ petitioner was covered in terms of paragraph 4(2) of the decision of the Apex Court in the case of **Mool Raj Upadhyaya (supra).** It is apt to reproduce paragraph 8 of the impugned judgment hereunder:

> *"8. The case of the petitioner is covered under Para-4(2) above for giving him work charged status. In view of facts which have come on record, the*

petitioner is entitled to work charged status with effect 01.01.1997 with all consequential benefits such as seniority and pay fixation. The Board has not properly considered the representation of the petitioner while rejecting the representation of petitioner on 30th May, 2006 and, therefore, order dated 30th May, 2006 is liable to be quashed."

5. The learned Single Judge directed the writ respondents to consider the case of the writ petitioner for conferring work charge status w.e.f. 1.1.1997, with all consequential benefits, such as, seniority and pay fixation.

6. The writ respondents resisted the claim of the writ petitioner on the ground that the judgment of the Apex Court in the case of **Mool Raj Upadhyaya (supra)** was not applicable in the case of the writ petitioner. The contention of the writ respondents is not tenable for the simple reason that the erstwhile Tribunal had directed the writ respondents to consider the case of the writ petitioner in light of the judgment in **Mool Raj Upadhyaya's** case (supra) and the writ respondents have accepted the judgment, have not questioned the same, thus, has attained finality. The writ respondents examined the claim of the writ petitioner in compliance to the said judgment, cannot make U-turn now.

7. The learned counsel for the writ respondents (appellants in LPA No.621 of 2011) has frankly conceded that the case of the writ petitioner was to be considered in terms of **Mool Raj Upadhyaya's** case (supra), in view of the earlier litigation. It was further submitted that it may not be treated as precedent.

8. On the other hand, the learned counsel for the writ petitioner argued that this Court, in **LPA No.490 of 2011, titled Himachal Pradesh Housing and Urban Development Authority and others vs. Baldev Chand**, decided on 15th May, 2012, has already held that the decision rendered in **Mool Raj Upadhyaya's** case (supra) is applicable to the employees of Corporations and other Government Institutions etc.

9. Having said so, the learned Single Judge has rightly passed the impugned judgment.

10. Learned counsel for the writ petitioner (appellant in LPA No.9 of 2012) also argued that the learned Single Judge has held the writ petitioner entitled to all consequential releifs such as seniority and pay fixation, that does not mean that the writ petitioner is not held entitled to actual back-wages.

11. The argument of the learned counsel for the petitioner is forceful for the reason that the learned Single Judge has held the writ petitioner entitled to all consequential reliefs such as seniority and pay fixation, which does not mean that the writ petitioner was denied back-wages. Therefore, it is held that writ petitioner is also entitled to back-wages.

12. With the above observations, the impugned judgment is upheld and the writ respondents are directed to consider the case of the writ petitioner in light of the decision in **Mool Raj Upadhyaya's** case (supra) and pass the consideration order in terms of the impugned judgment read with the observations made hereinabove within three weeks**.**

13. Both the appeals stand disposed of, as indicated above, with all pending CMPs, if any.

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

Krishan Chand .....Petitioner.
VERSUS
State of H.P. & Ors. .....Respondents.

CWP No.5055 of 2014.
Reserved on : 13.11.2014.
Decided on: 20.11.2014.

Constitution of India, 1950- Article 226- Respondent No. 3 submitted an application asserting that the land was recorded in the joint ownership of his mother and father of Respondent No. 4 in the jamabandi for the year 1954-55- mother of the respondent No. 3 was allotted the land to the extent of 4 kanals and 1 marla towards the western side and it was wrongly recorded in the map/tatima that the land was given towards eastern side- application was allowed and the land was allotted to respondent No. 3- appeals were preferred which were dismissed- held, that respondents No. 4 and 5 had admitted the case of the respondent No. 3 and, therefore, it is not permissible for the petitioner to assail the same. (Para-2)

For the Petitioner: Mr. Dushyant Dadwal, Advocate.
For the Respondents: Mr. Anup Rattan, Additional Advocate General with Mr. Ramesh Thakur, Asstt. Advocate General for respondents No. 1 and 2.
Ms. Chetna, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Per Justice Sureshwar Thakur, J.

Respondent No.3 submitted an application comprised in Annexure P-I before the Consolidation Officer, Hamirpur, averring therein that land comprised in Khasra No. 2121 is recorded in the joint ownership of his mother Fulan and in the name of the father of respondent No.4, as divulged by Jamabandi for the years 1954-55, which pertains to the pre-consolidation year. He continued to aver therein that during the course of consolidation operations as were carried out in the Ilaqua/Mauja where the suit land is situated, the mother of respondent No.3 was allotted land to the extent of 4 kanals and one 1 marla towards the western side of the field. However, while preparing map and carving out Tatima the respondent No.3 and his mother have been untenably depicted to have been given land towards Eastern side wherefrom new Khasra Nos. 862 and 863 have been carved out. On his application, the staff of the consolidation department visited the site of the Khasra Numbers and recorded the statements of respondents No. 4 and 5, the father and brother of the petitioner. On strength of the statements of the father and brother of the petitioner, who are respondents No. 4 and 5, land measuring to the extent of 4 kanals and 1 marla belonging to the petitioner and respondents No. 4 and 5 was evacuated from the ownership of the petitioner, respondent No.4 and 5 and untenably allotted to respondent No.3. The order rendered by the Consolidation Officer was appealed by the petitioner before the Settlement Officer who, however, in his orders comprised in Annexure P-4 affirmed the orders rendered by the Consolidation Officer. The Divisional Commissioner, Mandi, while seized of the appeal, preferred under Section 54 of the H.P.Land Consolidation (Consolidation and Fragmentation) Act, 1971 as preferred against the orders

comprised in Annexure P-4 did not in his wisdom deem it fit to interfere with the orders rendered in Annexure P-4. The petitioner is aggrieved by the orders rendered in Annexures P-2, P-4 and P-5 and prays for theirs being quashed and set-aside.

2. In trite, the focused submission of the learned counsel for the petitioner in seeking the indulgence of this Court for quashing and setting aside the impugned annexures is anchored upon the factum of Annexure P-2 anvilled upon the statements of respondents No. 4 and 5, the father and the brother of the petitioner, comprised in Annexure P-3, carrying no effect in either whittling his right in the suit land nor being fastenable against him so as to dilute his rights therein, especially when he remained unheard. The submission aforesaid in repudiating and repulsing the impugned annexures gets waned in the face of respondents No. 4 and 5, the father and brother of the petitioner, too, having an interest common with the petitioner in the suit land, having recorded statements comprised in Annexure P-3. There is no communication by either respondents No. 4 and 5 that the statements attributed to them comprised in Annexure P-3 arise from exercise of compulsion or duress upon them by the staff of the Consolidation department. For omission of the above evidence, truth is to be imputed to their statements comprised in Annexure P-3, besides their statements are to be construed to be volitional. Apart there-from, when respondents No. 4 and 5 have an interest in the suit land common with the petitioner unless there was demonstrable evidence that there was no authority vested in them by the petitioner to, on his behalf record a statement before the Consolidation Officer, in sequel, in absence of the above material on record an invincible conclusion which ensues is that both respondents No. 4 and 5, the father and brother respectively of the petitioner, enjoyed an express or implied authorization imparted to them by the petitioner to record statements comprised in Annexure P-3. Naturally then, the effect of the statement of the father and brother of the petitioner is to be fastened also upon the petitioner. The natural concomitant effect of their statements is of theirs diluting and whittling his right in the suit land. Preponderantly, an examination of the record, as produced before this Court at the time of hearing of the petition unravels the fact that the petitioner has omitted to at an earlier stage urge before the authorities concerned who were seized of the lis that the statements attributed to respondents No. 4 and 5 were made by them in their individual capacity without theirs having carried his implied and explicit authorization hence statements comprised in Annexure P-3 are not binding upon him. In absence of the petitioner having initially omitted to raise the above ground for assailing the impugned orders baulks as well as estops him from agitating the efficacy of the orders on strength aforesaid. Moreover, it constitutes a waiver and abandonment of the above ground of attack. Consequently, he is barred from now assailing the orders on the score herein before referred.

3. In view of the above discussion, we find no merit in the petition, which is accordingly dismissed, so also the pending application(s), if any. No costs.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE.

Smt. Sandhya Bansal ..... Petitioner.
Vs.
State of H.P. & ors. ..... Respondent

Cr.MMO No.141 of 2014.
Date of decision: 20.11.2014.

Code of Criminal Procedure, 1973- Section 482- Petitioner claimed that she and her family members were meted out brutal treatment by the

police and they were kept in illegal confinement for more than 36 hours in police Station- police had lodged an FIR against the petitioners to save their skin - FIR does not disclose the commission of any cognizable offence- police had already submitted charge-sheet under Section 173 of Cr.P.C to the Magistrate after the completion of the investigation- held, that when the Magistrate is seized of the matter, High Court should not quash the FIR in exercise of its inherent powers- further, investigation cannot be transferred to CBI without any material especially when the charge-sheet had already been filed. (Para-6, 7 and 10)

Case referred:
State of Bihar and another etc. vs. Shri P.P.Sharma and another etc. etc. AIR 1991 SC 1260

For the petitioner	:	M/s Som Dutt Vasudeva and Sanjay Dutt Vasudeva, Advocates.
For the respondent	:	Mr. Virender Kumar Verma, Mr. Rupinder Singh and Ms. Meenakshi Sharma, Additional Advocate Generals for respondents No. 1 to 3. Ms. Jyotsna Rewal Dua, Advocate, for respondents No. 4 to 13. Inspector Raghubir Singh, SHO, Police Station, Dharampur.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral):

By medium of this petition preferred under section 482 of the Code of Criminal Procedure, the petitioner has sought quashing of FIR No. 77 of 2013, registered against the petitioner and others at Police Station, Parwanoo, under sections 353, 332, 34 IPC and has further sought transfer of investigation of case FIR No. 20 of 2013 registered with Police Station CID on 11.9.2013 to the Central Bureau Investigation. The petitioner claims that she and her family members including her husband and her two children as well as two other children were meted out with brutal treatment by the police personnels on the mid night of September 4th and 5th 2013 near Chakki Mor, Police Station, Parwanoo. It is further alleged that they were kept in illegal confinement in Police Station, Parwanoo lock up for two nights and one day (more than 36 hours). The precise case of the petitioner is that she alongwith her husband was going towards Shimla in their own car and had some altercation with some truck driver and for which purposes he went to lodge a complaint with the two young policemen standing at the Sales Tax Barrier at Chakki Mor. Those police personnels instead of discharging their statutory function, asked the son of the petitioner who was driving the car to park the same by the side of the road. It is thereafter alleged that the police officials started making uncalled for inquiries and used most filthy and derogatory language and then without any provocation gave forceful slap on the face of the petitioner, due to which blood oozed out from her mouth. The petitioner's son objected to this unruly behaviour, but it had no impact. Certain other allegations have been set out in the petition and it is alleged that since the accused happened to be the policemen, therefore, they are not cooperating and have falsely registered an FIR No. 77 of 2013 against her, while on the other hand, the petitioner with great difficulty, could lodge FIR No. 20 of 2013 against the police personnels.

2. It is contended that a bare reading of the contents of the FIR shows that no cognizable offence stands disclosed and the facts narrated

therein do not show in which manner the petitioner and other family members deterred the complainant from discharging his duty. It is further alleged that it cannot be believed that a woman would dare to assault a police functionary and it is only to save (his/their skin) that this FIR has been registered, because the medical examination conducted upon petitioner and other family members would reveal the brutal manner in which they have been assaulted. The FIR has been lodged out of vindictiveness and its contents are so absurd and inherently improbable that on the basis of which no prudent person can reach to a just conclusion that there are sufficient grounds for proceedings against the petitioner and her family members.

3. The Secretary (Home) to the Government of Himachal Pradesh and Director General of Police, Himachal Pradesh filed their reply, wherein the allegations leveled by the petitioner have been denied in the following manner:-

> "1. That the contents of this para are wrong hence denied. It is submitted that on dated 5.9.2013 constable Dalip Singh No. 377 6th IRBN Kolar District Sirmour was deputed along with Constable Ravinder Singh No. 359 at Chakki More Barrier and was present on duty. Constable Dalip Singh No. 377, 6th IRBN Kolar went to clear the jam near about 100 meters from excise barrier towards Parwanoo. A car arrived from Parwanoo side, the occupant of the car told Constable Dalip Singh that a Truck driver had misbehaved and when he enquired the No. of truck which they did not disclose and drove up words. The car come to him, thereafter when he was clearing the jam and one of the occupant of the car told him that he had taken the bride and allow the truck to flee. In the mean a women alighted from the car and started arraying with him. He told the lady to keep distance what she resorted to quarrel with him and told him to disclose his name and that she would get him dismissed being a daughter of SP. In the meanwhile four occupant of the car also came out and started scuffling with him and the women gave him a blower his mouth and nose which hurt him. He wanted to run that but these people caught him and hearing the noise constable Ravinder Singh come to the spot and he and truck driver who had parked their truck rescued him from them. Some local were also there who's names are Amit Sharma, Devidayal when the said women and her five associates were giving beating to him truck driver scuffle with them while rescuing him. Later on he came to know the name of the women who gave beating to him is Sandhya where as the name of the men were Tushan, Satish, Manoj, Prashant Bansal. A boy escaped after giving beating. During scuffle the two button of the shirt of constable Dalip Singh were broken and regarding this constable Dalip Singh lodge a FIR at PS Parwanoo bearing registration No. 77/2013 U/S 353, 332, 34 IPC. These person gave beating to the Constable Dalip Singh and cause obstruction in the discharge of his official duties. Investigation of this case was carried by Sh. Sushil Kumar, SDPO Parwanoo. During the course of investigation statements of witnesses have been recorded. Who stated in their statement that accused persons were arguing with Constable Dalip Singh and the woman who was sitting in the car stated that she was the daughter of the SP and told him disclose his name and she would get him dismissed and also gave beating to constable Dalip Singh I/O also during the investigation taken in to possession the uniform and broken two buttons of constable Dalip Singh and also taken in to possession by seizure memo car bearing No. CH-01AA-4517 along with documents alongwith key. Thereafter the case was transferred to CID by the order of Director General of Police HP Shimla vide their office order Endst No. CB-3-20(TPR of Case)/2013-13000-1 dated 12-9-2014."

4 To the similar effect is the reply filed by the Additional Director General of Police (CID), who has been arrayed as respondent No.3. The petitioner has filed rejoinder and reiterated the averments made in the petition.

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

5 Mr. Virender Kumar Verma, learned Additional Advocate General assisted by Mr. Rupinder Singh and Ms. Meenakshi Sharma, learned Additional Advocate Generals, for respondents No.1 to 3 and Ms. Jyotsna Rewal Dua, learned counsel for respondents No. 4 to 13 have raised a preliminary objection regarding the very maintainability of the petition on the ground that the only relief sought by the petitioner is for quashing the FIR, whereas the police after completion of investigation has forwarded the report under section 173 Cr.P.C. to the concerned Magistrate and according to him this court would have no jurisdiction to entertain this petition at this stage.

6 Now at this stage when the police report under section 173 Cr.P.C. has been forwarded to the Magistrate after completion of the investigation and the material collected by the Investigating Officer is under judicial scrutiny, can this court undertake quashing proceedings in exercise of its inherent jurisdiction? The answer to this is in the negative, as would be clear from the following observations of the Hon'ble Supreme Court in **State of Bihar and another etc. etc.** vs. **Shri P.P.Sharma and another etc. etc. AIR 1991 SC 1260**:-

> *"33. ……. We are of the considered view that at a stage when the police report under S. 173, Cr.P.C. has been forwarded to the Magistrate after completion of the investigation and the material collected by the investigating officer is under the gaze of judicial scrutiny, the High Court would do well to discipline itself not to undertake quashing proceedings at that stage in exercise of its inherent jurisdiction. We could have set aside the High Court judgment on this ground alone but elaborate argument having been addressed by the learned counsel for the parties we thought it proper to deal with all the aspects of the case."*

7 In so far as the allegations regarding the tainted investigation are concerned, I need not delve on the same lest it prejudices the cases of either of the parties. Since I have already held that at this stage when the police report under section 173 Cr.P.C. has already been forwarded to the Magistrate after completion of the investigation and the material collected by the Investigating Officer is under the gaze of judicial scrutiny, this court will not undertake quashing proceedings by exercising its inherent jurisdiction.

8 Now so far as the claim of the petitioner for transferring FIR No. 20 of 2013 to CBI is concerned, it has to be remembered that power of transfer of such investigation has to be exercised in rare and exceptional cases where the court finds it necessary in order to do justice between the parties and to instil confidence in the public mind or where the investigation by the State police lacks credibility and it is necessary for having a fair, honest and complete investigation and particularly when it is imperative to retain public confidence in the impartial working of the State agencies, but where the investigation has already been completed and charge sheet has been filed, ordinarily superior courts would not re-open the investigation and it has to be left open to the court where the charge sheet has been filed to proceed with the matter in accordance with law. Under no circumstances, should the court make any expression of its opinion on merits relating to any accusation against an individual.

9 The case in hand is already with the specialized wing of State Investigation Agency i.e. CID and there is no material placed before this court whereby it can be gathered that investigation in this FIR is not being conducted in a fair and honest manner. Moreover, the investigation has already been

completed and the charge-sheet has been filed. As warned by the Hon'ble Supreme Court, the extra ordinary powers to transfer the investigation from one Investigating Agency to the other Investigating Agency must be exercised sparingly and cautiously and in exceptional situation. No such exceptional circumstances, have been brought out in this case.

10. Accordingly, I find no merit in this petition and the same is accordingly dismissed. However, before parting it may be clarified that this order will not debar the petitioner from approaching the Magistrate for the redressal of her grievances, which needless to say shall be redressed strictly in accordance with law and uninfluenced by any observation made hereinabove.

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

Hari Om son of Shri Bhagat Ram ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1260 of 2014
Order Reserved on 13th November, 2014
Date of Order 21st November, 2014

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offence punishable under Section 15 of N.D.P.S. Act- held, that investigation is complete- challan has already been filed in the Court, therefore, no useful purpose would be served by detaining the applicant in prison - bail granted.

(Para- 7 to 9)

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. Ramakant Sharma, Advocate
For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General with Mr.J.S. Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 106 of 2014 dated 23.4.2014 registered under Section 15-61 of Narcotic Drugs and Psychotropic Substances Act 1985 in Police Station Baddi District Solan (H.P.).

2. It is pleaded that applicant is innocent and applicant did not commit any offence as alleged by prosecution. It is pleaded that applicant will not tamper with prosecution witnesses in any manner and will abide by the directions passed by the Court. It is pleaded that no recovery is to be effected from the applicant and further pleaded that age of applicant is 27 years and applicant is sole earning member of the family. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. As per police report, FIR No. 106 of 2014 dated 23.4.2014 has been registered against the applicant under Section 15-61 of Narcotic Drugs and Psychotropic Substances Act 1985. There is recital in police report that on dated 23.4.2014 at about 5.15 AM a vehicle having registration No. HP-12-F-5332 came from Pinjore side. There is further recital in police report that vehicle was checked and in dickey a plastic bag was found. There is recital in police report that in plastic bag 38 Kg. 500 grams of poppyhusk was recovered. There is further recital in police report that applicant could not produce any licence/permit. There is recital in police report that after registration of case photographs took and site plan was also prepared and statements of prosecution witnesses were also recorded. There is further recital in police report that report from FSL Junga also obtained and as per chemical report sample was of poppyhusk. There is also recital in police report that investigation is complete and challan has been filed on dated 24.7.2014. There is further recital in police report that applicant is a hardened criminal and there are also criminal cases against the applicant vide FIR No. 80 of 2010 dated 29.6.2010 under Sections 366, 376, 120B, 34 IPC P.S. Baddi District Solan and FIR No. 177 of 2012 dated 21.7.2012 under Section 15-61 of ND&PS Act 1985 P.S. Baddi District Solan. 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.

5. Following points arise for determination in this bail application:-

Point No. 1

Whether the 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 applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete in present case and challan has already been filed in the Court on dated 24.7.2014 and no recovery is to be effected from the applicant 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 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period. Court is of the

opinion that trial in present case will be concluded in due course of time and Court is of the opinion that in view of the fact that challan has been filed in Court and in view of the fact that investigation is complete and in view of the fact that no recovery is effected from the applicant and in view of the fact that poppyhusk recovered from the applicant did not fall within commercial quantity it would be expedient in the interest of justice if the applicant is released on bail. It is held that if applicant is released on bail then interest of State and general public will not be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-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 another condition will also be imposed upon the applicant that applicant will attend the trial of the case regularly. Court is of the opinion that if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail strictly in accordance with law.

9. Another submission of learned Additional Advocate General appearing on behalf of the non-applicant that two FIRs i.e. FIR No. 80 of 2010 dated 29.6.2010 and FIR No. 177 of 2012 dated 21.7.2012 already stood registered against the applicant and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. There is no evidence on record in order to prove that applicant has been convicted by any criminal Court of law as of today. Court is of the opinion that simply pendency of criminal cases relating to two FIRs against the applicant is not a sufficient ground for declining the bail. As per law accused is presumed to be innocent till criminal charges are not proved against the accused in accordance with law. In view of above stated facts, point No.1 is answered in affirmative.

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. 1 lac with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will attend the proceedings of learned trial Court regularly till conclusion of trial in accordance with law. (ii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which 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. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s), if any also disposed of.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C. J.

FAO No.482 of 2010 a/w
FAO No.158 of 2011
Decided on : 21.11.2014.

1. FAO No.482 of 2010.

Janku Devi & Ors. ...Appellants.

VERSUS

Managing Director, Himachal Road Transport Corporation ...Respondent.

2. FAO No.158 of 2011.

Himachal Road Transport Corporation ...Appellant.

VERSUS

Janku Devi & Ors. ...Respondents.

Motor Vehicle Act, 1988- Section 166- Deceased was employed in electricity board and her monthly salary was Rs.12,800/- - Tribunal held the loss of dependency to be Rs. 75,000/- per annum and applied multiplier of 7- held, that the compensation was rightly determined. (Para-10)

For the Appellant(s):	Mr.Kunal Verma, Advocate, for the appellants in FAO No.482 of 2010. Mr.Jagdish Thakur, Advocate, for the appellant in FAO No.158 of 2011.
For the Respondent(s):	Mr.Jagdish Thakur, Advocate, for the respondent in FAO No.482 of 2010. Mr.Kunal Verma, Advocate, for the respondents in FAO No.158 of 2011.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Challenge in these appeals is to the award, dated 18th June, 2010, passed by the Motor Accident Claims Tribunal(II), Shimla, Camp at Rohru, (for short, the Tribunal), in claim petition No.5-R/2 of 2007, titled Janku Devi and others vs. The Managing Director, Himachal Road Transport Corporation, whereby and whereunder compensation to the tune of Rs.5,35,000/-, with interest at the rate of 6% per annum from the date of filing of the Claim Petition till its realization, came to be awarded in favour of claimant No.1 Janku Devi and against the respondent/Himachal Road Transport Corporation, (for short, the impugned award).

2. Facts of the case, in brief, are that Miss Laxmi Devi was traveling in the bus bearing registration No.HP-14B-7501, on 2nd December, 2006, which was being driven by the driver rashly and negligently, met with the accident at Jakhru Mode, Salogra, District Solan, H.P., resulting into the death of Miss Laxmi Devi on the spot. The claimants, being dependants on the deceased, filed the claim petition for grant of compensation to the tune of Rs.10.00 lacs, as per the break-ups given in the claim petition.

3. The respondent filed reply to the claim petition and resisted the same on various grounds.

4. On the pleadings of the parties, the following issues were settled by the Tribunal:

> *"1. Whether Miss Laxmi Devi died because of rash and negligent driving of vehicle No.HP-14B-7501 by its driver? OPP*
>
> *2. If issue No.1 is proved, what amount of compensation the petitioners are entitled to? OPP*
>
> *3. Whether the petition is neither competent nor maintainable? OPR*
>
> *4. Whether the petition is bad for non-joinder of necessary parties? OPR*
>
> *5. Relief."*

5. In order to prove their case, the claimants examined Janku Devi, Jaswan, Sunil Kumar and Bachan Singh as PW-1 to PW-4, respectively. The respondent, on the other hand, examined Krishan Lal as RW-1. Parties have also placed on record documents i.e. copy of postmortem report (Ext.PB), copy of legal heir certificate (Ext.PW-1/A), death certificate (Ext.PW-1/B), copy of FIR (Ext.PW-3/A), salary certificate (Ext.PW-4/A), copy of pariwar register (Ext.PA) and inquiry report (Ext.RW-1/A).

6. The Tribunal, after scanning the entire evidence, oral as well as documentary, came to the conclusion that the driver had driven the offending vehicle rashly and negligently and caused the accident in which Miss Laxmi Devi lost her life and awarded compensation to the tune of Rs.5,35,000/-.

7. Feeling aggrieved, the claimants challenged the impugned award by way of FAO No.482 of 2010 on the ground of adequacy of compensation, while the original respondent/Corporation challenged the same by the medium of FAO No.158 of 2011, on the grounds taken in the memo of appeal, and prayed for the dismissal of the claim petition.

8. I have gone through the evidence and am of the considered view that the claimants have proved, by leading evidence, that the accident was the outcome of rash and negligent driving of the driver of the offending bus and no evidence was led by the respondent/Corporation to the contrary. Therefore, the findings recorded on issue No.1 by the Tribunal are upheld.

9. Before issue No.2 is taken up, I deem it proper to deal with issues No.3 and 4. Onus to prove both these issues was upon the respondent/Corporation, which the respondent has failed to discharge. However, I have gone through the claim petition. The claimants have pleaded and proved that the accident was the outcome of rash and negligent driving of the driver of the offending bus and the claimants are the victims of the vehicular accident. Accordingly, the findings recorded on issue No.3 are upheld. Findings under issue No.4 are also upheld being not pressed by the learned counsel for the respondent/Corporation.

10. Coming to issue No.2, admittedly, the deceased was employed in the Electricity Board and her monthly income was Rs.12,800/-, as per salary certificate Ext.PW-4/A and after making deductions, the Tribunal held that the claimants lost source of dependency to the tune of Rs.75,000/- per annum and applied the multiplier of 7 keeping in view the age of the deceased and the claimants.

11. I am of the considered view that, while awarding compensation under the head 'loss of source of dependency, the Tribunal has rightly recorded findings in paragraph 19 of the impugned award. It is apt to reproduce paragraph 19 of the impugned award hereunder:

> *"19. So far as the income of the deceased is concerned it is the admitted fact that she was serving in HPSEB, Shimla and as per salary certificate Ext.PW-4/A she was drawing a total salary of Rs.12,835/- per month.*

After deducting the special allowance/pay etc. it can be said that the monthly income of the deceased was atleast Rs.12,500/- per month or say she was earning 1.5 lacs per annum. Admittedly, the deceased was unmarried and 38 years old and so out of her total earning she must be spending at least 50% of her income on herself. In this manner the loss of income for the purpose of dependency comes to Rs.75,000/- per annum. Keeping in view the age of the petitioner No.1 the multiplier of 7 (seven) will be appropriate and on this basis the total loss of income comes to Rs.5,25,000/- and the petitioner is entitled to this much amount as compensation. In addition, she is also entitled to Rs.10,000/- as conventional amount. Hence, the total compensation payable by the respondent to petitioner No.1 comes to Rs.5,35,000/-."

12. In view of the above discussion, it is held that the compensation amount awarded by the Tribunal is neither excessive nor inadequate, rather is just and appropriate.

13. Learned counsel for the appellant/claimants argued that the Tribunal has awarded interest at the rate of 6% per annum, which is on the lower side. I deem it proper to enhance the rate of interest from 6% to 7.5% per annum from the date of the claim petition till realization. The enhanced amount be deposited by the respondent/Corporation in the Registry within a period of eight weeks and the Registry is directed to release the award amount strictly in terms of the impugned award.

14. The appeal (FAO No.158 of 2011) filed by the original respondent/Corporation is dismissed and the appeal (FAO No.482 of 2010) is allowed to the extent, as indicated above.

15. Both the appeals stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.

FAOs (MVA) No. 367 & 368 of 2007
Date of decision: 21st November, 2014.

1. FAO No. 367/2007.

Shri Jaswant Singh .....*Appellant*

Versus

Sh. Jagat Ram and others ...*Respondents*

2. FAO No. 368/2007.

Shri Jaswant Singh .....*Appellant*

Versus

Sh. Sukhdev Ram and others ...*Respondents*

Motor Vehicle Act, 1988- Section 149- Deceased and two labourers sustained injuries in an accident of the tractor- Tribunal held the insurance company liable to pay compensation with the right of recovery- held, that as per registration certificate and the insurance policy tractor was meant for agricultural purposes of the insured and not for any other purposes- deceased and two labourers were employees and had loaded bricks in the tractor- they were travelling in the vehicle as labourers and had sustained injury-therefore, it was duly proved that insured had violated the terms and conditions of the insurance policy- appeal dismissed. (Para-7 to 9)

For the appellant(s): Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. Dheeraj Vashisht, Advocate, for respondent No.1. in both the appeals.

Mr. Onkar Jairath , Advocate, for respondent No. 2 in FAO No. 368/2007 and for respondent No. 3 in FAO No. 367/2007.
Mr. Harish Behl, Advocate, for respondent No. 3 in FAO No. 368/2007 and for respondent No. 4 in FAO NO. 367/2007.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

These two appeals are outcome of one accident, which was allegedly caused by driver, namely Sukhwinder Singh, on 23.11.2001, while driving tractor *No.* PB-47-A-0486 whereby two labourers, namely, Naresh Kumar and Balbir Singh sustained injuries and succumbed to the same. The dependents of the deceased filed two separate claim petitions before the Tribunal, for the grant of compensation and the Tribunal determined both the claim petitions by passing two separate awards of the same date in MAC Petitions No. 16/03 RBT 67/05/03 and 17/03 RBT 81/05/03, respectively, whereby and whereunder the insurer was saddled with the liability with right of recovery from the owner, hereinafter referred to as "the impugned awards", for short. Thus, I deem it proper to determine both these appeals by this common judgment.

BRIEF FACTS.

2. A perusal of the record do disclose that the claimants have filed two claim petitions against the brick-kiln owner and driver of the offending tractor and the particulars of the insurance company was not known. The respondents have filed objections, particularly owner-appellant herein and the particulars of the insurance company and also the owner of the offending vehicle Jaswant Singh were disclosed. It is stated that Jaswant Singh was lateron arrayed as party respondent in the claim petitions before the Tribunal.

3. The respondents in the claim petitions, resisted and contested the claim petitions and following issues, on the pleadings of the parties, came to the framed in **FAO No.367/2007:**

(i) Whether Balbir Singh on dated 23.11.2001 at about 10 a.m. was travelling in tractor No. PB-47-A-0486 being driven by respondent No. 2 Sukhwinder Singh rashly and negligently at place Haroli-Jaijon road met with an accident in which Balbir Singh sustained fatal injuries to his person and died on the spot?.....OPP

(ii) If issue No. 1 is proved in affirmative whether the petitioners are entitled to compensation, if so to what amount and which of the respondents?....OPP

(iii) Whether the tractor trolly in question was being used other than the agriculture purpose and thereby violated the terms and conditions of the insurance policy? .....OPR-3.

(iv) Whether the respondent No. 2 was not holding a valid and effective driving licence to drive the tractor at the relevant time as alleged? ..OPR-3.

(v) Whether the tractor was being driven without valid R.C. and insurance etc. ? .....OPR3.

(vi) Relief.

4. The following issues came to be framed in **FAO No. 368 of 2007**.

(i) *Whether Naresh Kumar on dated 23.11.2001 at about 10 a.m. was travelling in tractor No. PB-47-A-0486 being driven by respondent No. 2 Sukhwinder Singh rashly and negligently at place Haroli-Jaijon road and as such met with an accident in which Naresh Kumar sustained fatal injuries to his person and died on the spot?.....OPP*

(ii) If issue No. 1 is proved in affirmative whether the petitioners are entitled to compensation, if so to what amount and which of the respondents?....OPP

(iii) Whether the tractor trolly in question was being used other than the agriculture purpose and thereby violated the terms and conditions of the insurance policy? .....OPR-3.

(iv) Whether the respondent No. 2 was not holding a valid and effective driving licence to drive the tractor at the relevant time as alleged? ..OPR-3.

(v) Whether the tractor was being driven without valid R.C. and insurance etc. ? .....OPR3.

(vi) Relief.

5. During the course of trial, Ram Nath appeared in the witness-box and stated that he had hired the tractor for carrying bricks for the construction of fodder storage shed in the village where he was carrying on agriculture vocations.

6. The Tribunal, after scanning the evidence, held that the claimants have proved by leading evidence that the driver of the offending vehicle has driven the vehicle rashly and negligently, accordingly decided issues in favour of the claimants and against the respondents.

7. In terms of the Registration Certificate and the insurance policy, copy of which are on the record, the tractor was only meant for agriculture vocations and, that too, of the insured and the insured was permitted to utilize the tractor for his own agriculture vocations, for the reasons that he is an agriculturist and accordingly, the insured, in terms of the terms and conditions contained in the Registration Certificate, executed the contract with the insurer. Thus, it is admitted fact of the parties that the tractor was meant only for agriculture vocations, that too, of the insured and not for any other purpose.

8. The claimants have specifically averred in the claim petitions that deceased were labourers in the brick-kiln and they had loaded the bricks in the offending tractor and were travelling on the same which met with an accident and they sustained injuries and succumbed to the injuries. It is not the case of the claimants that the deceased were labourers of the owner Jaswant Singh or it is also not the case of the claimants that the tractor was being used for agriculture vocations at that relevant point of time by the insured and even the bricks were being used for raising construction in relation to the agriculture vocations of the insured. Thus, the Tribunal has rightly held that the insured has committed willful breach.

9. Mr. Jagdish Thakur, Advocate, for the appellant(s) argued that it was for the insurer to plead and prove that the owner/insured has committed breach of the terms and conditions of the insurance policy. The case, as admitted by the parties, is that the vehicle was being used in violation of the terms and conditions of the Registration Certificate not to speak of breach of the terms and conditions of the insurance policy. Had there been any willful breach committed by the owner, i.e., that the driver was not having a valid and effective driving licence or any other breach, in terms of Section 149 of the Motor

Vehicles Act, the question of pleading and proving the factum by the insurer would have arisen.

10. On going through insurance policy, prima facie it reveals that the vehicle was meant only for the purpose of agriculture vocations, that too, for the owner/insured only.

11. The Tribunal has awarded a meager amount of compensation in favour of the claimants. Unfortunately, the claimants have not questioned the same and is upheld.

12. Accordingly, the appeals are dismissed alongwith pending applications if any, and the impugned awards are upheld.

13. The insurance company has already deposited the amount, the same be released in favour of the claimants, strictly in terms of the conditions contained in the impugned awards, through payee's cheque account. The insurer is at liberty to lay motion before the Tribunal for effecting recovery from the owner. The Registry is directed to place a copy of this judgment in the connected appeal.

14. Send down the record forthwith.

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

Kulwinder Kumar alias Billa son of Shri Paramjit Pal ....*Applicant*
Versus
State of H.P. ....*Non-applicant*

Cr.MP(M) No. 1259 of 2014
Order Reserved on 13th November, 2014
Date of Order 21st November, 2014

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Section 392 read with Section 34 of IPC and Section 25 of Arms Act- as per prosecution case, petitioner is hardened criminal and many FIRs have been registered against him- held, that while granting the bail nature and seriousness of offence, the character of the evidence, circumstances which are peculiar to the accused, Possibility of the presence of the accused at the trial or investigation, reasonable apprehension of witnesses being tampered with and the larger interests of the public are to be seen- object of bail is to secure the appearance of the accused person at the trial- grant of bail is the rule and committal to jail is exception- challan has already been filed in the Court and, therefore, it would be futile to keep the applicant in jail-Mere pendency of criminal cases is no ground to decline the bail. (Para-7 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, 2012 Cri. L.J. 702 Apex Court DB 702,

For the Applicant: Mr. N.K. Thakur, Sr. Advocate with Mr. Rohit Bharoll, Advocate
For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General with Mr.J.S. Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 82 of 2014 dated 3.4.2014 registered under Sections 392 read with Section 34 IPC and Section 25-54-59 of the Arms Act in Police Station Una District Una (H.P.).

2. It is pleaded that applicant has been falsely implicated in present case. It is pleaded that investigation is complete and challan is also filed in the Court. It is further pleaded that applicant undertakes to abide by all terms and conditions imposed by the Court. Prayer for acceptance of bail application filed under Section 439 Cr.P.C. is sought.

3. Per contra police report filed. As per police report, FIR No. 82 of 2014 dated 3.4.2014 registered under Sections 392 read with Section 34 IPC and Section 25-54-59 of the Arms Act in Police Station Una District Una (H.P.) against the applicant. There is recital in police report that on dated 3.4.2014 at about 6.30 PM complainant Kishan Pal and his father went to see the wheat field upon Pulsar motor cycle having registration No. HP-36A-3101. There is recital in police report that father of complainant went into the field of wheat and complainant namely Kishan Pal remained sitting upon the motor cycle. There is further recital in police report that two persons came upon another Pulsar motor cycle of black colour. There is further recital in police report that thereafter driver of motor cycle boarded down from the motor cycle and pillion rider kept the motor cycle in a motion. There is further recital in police report that thereafter the person who boarded down from the motor cycle placed pistol upon the ears of complainant namely Kishan Pal and told the complainant namely Kishan Pal to board down from the motor cycle No. HP-36-A3101 otherwise he would kill him. There is further recital in police report that thereafter motor cycle No. HP-36-A3101 which was in possession of complainant was snatched and thereafter both accused persons went towards Ghaluwal side. There is further recital in police report that complainant Kishan Pal had purchased the motor cycle No. HP-36-A3101 from Surender after paying sale consideration amount. There is further recital in police report that criminal case was registered and investigation was conducted by Ex-Inspector/SHO Krishan Lal. There is further recital in police report that information was received through telephone that snatched motor cycle No.HP-36A-3101 and accused persons were detained at place Bankhandi. There is further recital in police report that motor cycle No. HP-36-A3101 and pistol 7.65 MM were recovered and were sealed. There is further recital in police report that accused persons informed that pistol was purchased from Saharanpur U.P. but no licence was produced. There is also recital in police report that accused persons refused for identification parade. There is further recital in police report that place of incident was located at the instance of accused persons. There is further recital in police report that co-accused Kulwinder told to Investigating Agency that his accomplice was Gurpreet Singh son of Satpal. There is also recital in police report that applicant is hardened criminal and is resident of Punjab and following cases have been registered against the applicant. (1) FIR No. 190/06 dated 10.11.2006 under Section 379 IPC P.S. Adampur Punjab. (2) FIR No. 221/07 dated 18.10.2007 under Sections 382, 34 IPC P.S. Mahalpur District Hoshiarpur Punjab. (3) FIR No. 158/08 dated 3.7.2008 under Sections 332, 307, 186, 353, 34 IPC P.S. Sadar Hoshiarpur Punjab. (4) FIR No. 74/10 dated 9.6.2010 under Section 411 IPC P.S. Goraya Punjab. (5) FIR No. 45/11 dated 23.6.2011 under Sections 382, 34 IPC P.S. Haryana District Hoshiarpur Punjab (6) FIR No. 84/11 dated 10.8.2011 under Section 22-61-85 of ND&PS Act P.S. City Hoshiarpur Punjab. There is further recital in police report that on dated 18.4.2014 ASI Saravjit Singh P.S. Vilga District Jalandhar came to police station and told that accused persons Kulwinder and Gurpreet have committed dacoity

during night period in the Filling Station situated at Tarwal road Noormahal and they have fired from pistol of 7.65 MM. There is further recital in police report that thereafter custody of accused persons was handed over to police officials posted at Jalandhar through production warrant qua FIR No. 24/2014 dated 2.4.2014 registered under Section 394 IPC. There is further recital in police report that cartridge and pistol were sent for chemical examination. There is further recital in police report that motor cycle No. PB-07AG-2067 used for commission of criminal offence has been taken into possession by Investigating Agency of P.S. Vilga District Jalandhar in FIR No. 24/2014. There is further recital in police report that challan has been filed in the Court of Judicial Magistrate Court No. 1 Una on dated 30.6.2014. There is further recital in police report that applicant Kulwinder Singh is in judicial custody. There is also recital in police report that applicant Kulwinder is resident of another State and is a hardened criminal and in Punjab different cases have been registered against the applicant. There is also recital in police report that if bail is granted to the applicant then applicant will conceal himself and will also threat the 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.

5. Following points arise for determination in this bail application:-

Point No. 1

Whether the 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 applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete in present case and challan has already been filed in the Court on dated 30.6.2014 and any condition imposed by Court upon the applicant will be binding upon applicant 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.*** In present case investigation is complete and applicant is not required for any investigation purpose. Trial of the case will be completed in due course of time. It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty

of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period.

8. In view of the fact that investigation has been completed in present case and in view of the fact that challan has been filed in present case and in view of the fact that trial will be concluded in due course of time it is held that it is not expedient in the ends of justice to keep the applicant in jail. It is further held that if applicant is released on bail at this stage then interest of State and general public will not be adversely affected in present case.

9. 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 another condition will also be imposed upon the applicant that applicant will attend the trial of the case refulgarly. Court is of the opinion that if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail strictly in accordance with law.

10. Another submission of learned Additional Advocate General appearing on behalf of the non-applicant that six criminal cases have been registered against the applicant as of today and bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. There is no evidence on record in order to prove that applicant has been convicted by any criminal Court of law as of today in any of criminal cases. It is also well settled law that pendency of criminal cases is not a ground for declining the bail. As per law accused is presumed to be innocent till criminal charges are not proved against the accused in accordance with law. In view of above stated facts, point No.1 is answered in affirmative.

Point No.2

Final Order

11. 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. 1 lac with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will attend the proceedings of learned trial Court regularly till conclusion of trial in accordance with law. (ii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which 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 not required in any other criminal case. Bail application filed under Section 439 Cr.P.C. stands disposed of. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No.182 of 2007 a/w FAO No.250 of 2007
Reserved on : 14.11.2014.
Pronounced on: November 21, 2014.

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1. FAO No.182 of 2007.
New India Assurance Company Ltd. ...Appellant.
VERSUS
Randeep Singh Rana and others. ...Respondents.

2. FAO No.250 of 2007.
Randeep Singh. ...Appellant.
VERSUS
The New Shivalik Transport Company and others. ...Respondents.

Motor Vehicle Act, 1988- Section 166- Tribunal held that accident was not the result of contributory negligence of the drivers of the bus and truck and was due to the rash and negligent driving of the driver of the bus- tribunal saddled the owner of the bus with liability and directed the insurer to indemnify the insured- held, that no appeal was preferred by the owner/driver of the bus and, therefore, it was not permissible for insurer to claim that the accident was not the outcome of rash and negligent driving of the bus driver. (Para-15)

For the Appellant(s): Mr. B.M. Chauhan, Advocate, for the appellant in FAO No.182 of 2007.
Mr. Tara Singh Chauhan, Advocate, for the appellant in FAO No.250 of 2007.

For the Respondents: Mr. Neeraj Gupta, Advocate, for respondent No.2 in FAO No.182 of 2007 and for respondent No.1 in FAO No.250 of 2007.
Ms. Sunita Sharma, Advocate, for respondent(s) No.4 in FAO No.182 of 2007 and FAO No.250 of 2007.
Mr. M.L. Sharma, Advocate, for respondent No.5 in FAO No.182 of 2007 and FAO No.250 of 2007.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Challenge in these appeals is to the award, dated 5th March, 2007, passed by the Motor Accident Claims Tribunal, Bilaspur, (for short, the Tribunal), whereby and whereunder compensation to the tune of Rs.11,94,680/-, with interest at the rate of 7.5% per annum from the date of filing of the Claim Petition till its realization, came to be awarded in favour of the claimant and the insurer was saddled with the liability, (for short, the impugned award).

2. Facts of the case, in brief, are that the Claimant Randeep Singh Rana invoked the jurisdiction of the Tribunal for grant of compensation to the tune of Rs.25.00 lacs, as per the break-ups given in

the claim petition, on the ground that he became victim of a vehicular accident which took place on 22nd April, 2003 at about 1.00 p.m. near village Targhel, District Bilaspur, H.P. It was alleged that on the given day, the claimant was traveling in bus bearing registration No.HP-40-9942 and when the said bus reached at village Targhel, a truck bearing registration No.HP-13-0669 came from opposite direction and struck with the bus, as a result of which the claimant sustained injuries, was taken to Zonal Hospital, Hamirpur and his arm was amputated, hence the Claim Petition filed by the claimant.

3. The respondents filed replies to the claim petition and resisted the same on various grounds.

4. On the pleadings of the parties, the following issues were settled by the Tribunal:

> *"1. Whether the accident took place due to the rash or negligent driving of respondents No.2 and 5, as alleged? OPP*
>
> *2. If issue No.1 is proved, to what amount of compensation the petitioner is entitled to and from which of the respondents? OPP*
>
> *3. Whether the respondents No.2 and 5 were not having valid and effective driving license, as alleged, if so its effect? OPR-3&6*
>
> *4. Whether the truck in question was insured, as alleged? OPR-4*
>
> *5. Relief."*

5. In order to prove his case, the claimant examined four witnesses, while the respondents examined seven witnesses in all.

6. The Tribunal, after scanning the entire evidence and the record, held that the accident in question was not the outcome of contributory negligence of the drivers of the bus and the truck, but the accident occurred only due to the rash and negligent driving of the bus driver. Accordingly, the Tribunal saddled the owner of the bus with the liability and directed the insurer to indemnify. The owner and the driver of the truck stand exonerated by the Tribunal.

7. The insurer of the bus, feeling aggrieved, has questioned the impugned award on the ground that the accident was the outcome of contributory negligence and the Tribunal has fallen in error in holding that the accident had occurred only due to the negligence of the bus driver.

8. The claimant has questioned the impugned award on the ground of adequacy of compensation.

9. The owner and the driver of the offending bus have not questioned the impugned award on any count, thus the same has attained finality insofar as it relates to them.

10. The question to be determined in FAO No.250 of 2007, (appeal of the claimant), is - whether the amount awarded by the Tribunal is inadequate?

11. I have gone through the impugned award. The entire income of the claimant/injured has been taken into consideration while granting the compensation. Despite the fact that the

claimant was injured, is still in service and receiving the salary. However, it is also the fact that due to the aforesaid accident, the injured/claimant suffered permanent disability, which has rendered his life miserable, has lost marriage prospects, charm and amenities of life and even his physical frame was also shattered. Thus, the Tribunal has held the claimant entitled to the sum of Rs.11,94,680/- under various heads as under:

"i) Estimated future loss of income	*Rs.11,16,900/-*
ii) Pain and suffering	*Rs.25,000/-*
iii) Loss of amenities of life	*Rs.50,000/-*
iv) Transportation charges	*Rs.2,780/-*
Total:	*Rs.11,94,680/-."*

12. While calculating the compensation, the Tribunal has rightly made observations in paragraphs 32 to 40 and no fault can be found with the said findings recorded by the Tribunal.

13. Having said so, the amount cannot be said to be inadequate, is rather just and appropriate. Accordingly, the appeal filed by the claimant merits to be dismissed and the same is dismissed as such.

14. Coming to FAO No.182 of 2007, the learned counsel for the appellant/insurer has argued that the Tribunal has fallen in error in fastening the liability upon the appellant solely, while the accident was the outcome of contributory negligence of both the offending vehicles. The argument is devoid of any force for the following reasons.

15. The Tribunal has recorded reasons in paragraph 18 of the impugned award for holding that the accident was the outcome of rash and negligent driving of the bus driver. The said finding recorded by the Tribunal has neither been questioned by the owner of the bus nor by the driver. Therefore, it does not lie in the mouth of the insurer to claim that the accident was not the outcome of rash and negligent driving of the bus driver, but was the outcome of contributory negligence. It is apt to reproduce paragraph 18 of the impugned award hereunder:

> *"18. In clear and unequivocal terms, PW-2 has admitted that the truck was stopped and was stationary on the left side of the road at the place of accident and after seeing the deep gorge, he negotiated the vehicle towards his side. He has also admitted that he has negotiated the same to its extent. Though he has denied that after causing the accident, he stopped the vehicle after 100 Mts. away, but volunteered the same was stopped at about 20 yards. He has denied that he could not apply the brakes, as such, caused the accident."*

16. The claimant in paragraph 24 of the Claim Petition has pleaded that the driver of the truck came from opposite side in a very high speed and struck with the bus. However, the claimant, while appearing in the witness box as PW-1, has specifically stated that the accident occurred due to the rash and negligent driving of both the drivers.

17. The owner and the driver of the bus, (respondents No.1 and 2 before the Tribunal), have filed joint reply and denied their liability, and pleaded that the accident was the outcome of rash and negligent driving of the truck driver. The owner and the driver of the truck have also filed separate replies and pleaded that the truck was stationary and was not being driven at the relevant point of time.

18. I have also gone through the statement of the driver of the bus, who appeared in the witness box as RW-2 (wrongly recorded as PW-2 in paragraph 18 supra). He has admitted in his cross examination that the truck was stationary at the time of accident. It was also admitted by this witness that he stopped the bus at a distance of 20 meters after it was hit with the truck. Thus, the question of contributory negligence does not arise.

19. Having said so, the Tribunal has rightly held that the bus driver had driven the offending bus rashly and negligently and caused the accident. Therefore, the liability to indemnify was rightly fastened on the insurer/appellant.

20. It may be placed on record that the challan was presented against the truck driver, which too, has resulted in his acquittal.

21. As a consequence of the above discussion, the appeal filed by the insurer i.e. FAO No.182 of 2007 merits to be dismissed and the same is dismissed as such.

22. Both the appeals are dismissed accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.

M/S Oriental Insurance Company ...Appellant.
Versus
Smt. Manu Devi & others ...Respondents.

FAO No. 248 of 2007
Reserved on : 14.11.2014
Decided on: 21.11.2014

Motor Vehicle Act, 1988- Section 166- Son of the claimants had died in a motor vehicle accident- MACT awarded amount of Rs. 2,10,000/-- claimants had pleaded that deceased was earning Rs. 5,000/- per month, however, MACT had assessed income as Rs. 2,500/- per month- held, that even if, he was working as labourer his wages cannot be less than Rs. 200/- per day- he would not have earned less than Rs. 4,500/- and the loss of dependency would not be less than Rs. 3,000/- per month- multiplier of 10 would be applicable- thus, the tribunal had assessed the compensation on the lower side. (Para-14 and 15)

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.

For the respondents: Mr. V.S. Chauhan, Advocate, for respondents No. 1 and 2.
Mr. Bhupender Pathania, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Appellant has called in question the award, dated 29th March, 2006, made by the Motor Accident Claims Tribunal-II, Shimla, H.P. (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 7-R of 04/02, titled as Smt. Manu Devi and another versus Sh. Suresh Kumar and another, whereby compensation to the tune of Rs. 2,10,000/- with interest @ 7.5% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the appellant-insurer was saddled with liability (hereinafter referred to as "the impugned award"), on the grounds taken in the memo of appeal.

2. The claimants and the driver-cum-owner 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 the ground that the amount awarded is excessive and the driver was not having valid and effective driving licence and had driven the vehicle in breach of the mandate of law and the insurance policy.

Brief facts:

4. Shri Surjeet Singh, son of the claimants, was travelling in Armada Jeep, bearing registration No. HP-10-907, on 18th February, 2002, at about 3.30 p.m., was being driven by its owner-cum-driver, namely Shri Suresh Kumar, rashly and negligently, met with the accident near Summerkot, Tehsil Rohru, District Shimla and rolled down into a nullah. He sustained injuries, was taken to Civil Hospital, Rohru and died. FIR No. 19 of 2002 was lodged at Police Station Rohru.

5. The claimants have sought compensation to the tune of Rs.10,40,000/-, as per the break-ups given in the claim petition, on the ground that he was the only son of the claimants, was undergoing education and was also having income from agricultural and horticultural vocations.

6. The insurer and the driver-cum-owner have contested the claim petition on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the learned Tribunal on 16th January, 2003:

> *"1. Whether respondent No. 1 was driving jeep bearing No. HP-10-0907, on 18.2.2002 at about 3:30 PM near Samarkot, Distt. Shimla, HP in rash and negligent manner resulting in death or deceased Surjeet Singh, as alleged? OPP*
>
> *2. If issue No. 1 is proved, whether the petitioners are entitled for compensation? OPP*
>
> *3. Whether claim petition is not legally maintainable, as alleged? OPR*
>
> *4. Whether vehicle in question was being driven in violation of the terms and conditions of Insurance policy and without effective driving licence, as alleged? OPR*
>
> *5. Relief."*

Issue No. 1:

8. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that Shri Suresh Kumar,

driver of the offending vehicle, had driven the offending vehicle rashly and negligently on 18th February, 2002, caused the accident, which resulted the death of Shri Surjeet Singh. The findings returned by the Tribunal on issue No. 1 are not in dispute. Accordingly, the same are upheld.

9. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 and 4.

Issue No. 3:

10. The respondents have not led any evidence to prove that the claim petition was not maintainable. However, I have gone through the record. The claimants, being the victims of the motor vehicular accident, filed claim petition in terms of Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") for grant of compensation. Thus, the claim petition was maintainable. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 4:

11. It is apt to record herein that the respondents have not led any evidence to discharge the onus to prove issue No. 4. The appellant-insurer has failed to prove that the offending vehicle was being driven in violation of the terms and conditions of Insurance policy and without effective driving licence. Accordingly, the findings returned by the Tribunal on issue No. 4 are also upheld.

Issue No. 2:

12. Learned senior counsel for the appellant-insurer argued that the amount awarded is excessive. The argument is devoid of any force for the following reason:

13. A meager amount of Rs.2,10,000/- has been awarded in favour of the claimants. How can it be said to be excessive? The claimants-parents have lost their budding son, who was the source of their old age, hope and help.

14. There is specific averment contained in the claim petition that the deceased was a student and was also earning more than Rs. 5,000/- from agricultural and horticultural vocations. This has also been proved by the claimants, but the Tribunal has assessed his income as Rs.2,500/- per month. On what basis such assessment has been made, is not forthcoming.

15. Even, a labourer is earning Rs.200/- per day and if, at all, he would have been a labourer, he would have earned not less than Rs.4,500/- per month; was a bachelor, thus, it can be safely held that the claimants have lost their source of dependency to the tune of Rs.3,000/- per month.

16. Learned senior counsel for the appellant-insurer argued that the multiplier of '7' was applicable. The argument advanced is not correct. The Tribunal has rightly applied the multiplier of '10' while keeping in view the age of the deceased and the claimants.

17. Having said so, the appellant-insurer has failed to carve out a case for interference. Accordingly, the appeal is dismissed and the impugned award is upheld.

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 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 TARLOK SINGH CHAUHAN, J.

Smt. Poonam ... Petitioner/Respondent
Vs.
Sh. Virender Chauhan ..... Respondent/Petitioner

CMPMO No. 162 of 2014.
Reserved on: 14.11.2014
Date of decision: 21.11.2014

Hindu Marriage Act, 1955- Section 24- Petitioner claimed that she is pursuing her studies of Ph.D. and is residing in girls hostel of Kurukshetra, University- she had no source of income- Court awarded maintenance @ Rs. 2,500/- per month and Rs. 5,000/- as litigation expenses- held, that the husband is bound to maintain his wife - husband had not declared his income and had not denied the averments of the wife that his income was Rs. 35,000/- per month- As per the pay scale uploaded on the official website of the school, the TGT was getting Rs. 35,000/- as salary- teachers and administrative staff are entitled to free food and accommodation, therefore, in these circumstances, the maintenance of Rs. 2,500/- per month and litigation expenses of Rs. 5,000/- cannot be said to be excessive, rather, wife held entitled for maintenance @ Rs.10,000/- per month. (Para-10 to 18)

For the petitioner : Mr. B.S. Attri with Mr. Ashish Verma, Advocates.
For the respondent : Ms. Shikha Chauhan and Mr. Jasbir Singh, Advocates.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge :

This petition, under Article 227 of the Constitution of India, for enhancement of the amount of maintenance pendente-lite and litigation expenses, is directed against the order passed by the learned District Judge (Forest), Shimla on 19.5.2014 whereby the application under Section 24 of the Hindu Marriage Act (for short 'Act') filed by the petitioner-wife for grant of maintenance pendente-lite and litigation expenses has been allowed thereby awarding the amount of maintenance pendente-lite to the tune of Rs.2,500/- per month from the date of filing of the application and Rs.5,000/- as litigation expenses.

2. The facts, in brief, are that the respondent herein, filed a petition under Section 13 of the Act for grant of decree of divorce against the petitioner-wife, which is pending before the Court below. The petitioner-wife is presently residing in Kurukshetra University in Girls'Hostel for pursuing her studies of Ph.D. The petitioner has submitted that she has no source of income and her mother is providing necessary financial assistance for pursuing her studies and in order to defend the divorce petition she needs maintenance pendente-lite at the rate of Rs.20,000/- per month and a sum of Rs. 35,000/- as litigation expenses. She also submitted that the respondent-husband is having sufficient means for providing maintenance allowance and litigation expenses to her.

3. The respondent-husband resisted and contested the application by filing reply in which he has submitted that the instant application is not maintainable and the petitioner-wife is also estopped to file this application on account of her acts, conduct, deeds etc. He has denied that the petitioner-wife needs maintenance allowance and litigation expenses as claimed by her. He also

denied that he is having sufficient means to provide her maintenance allowance and litigation expenses. According to him, he arranged for job and rented accommodation at Kurukshetra at the instance of the petitioner-wife, who wanted to pursue her studies at Kurukshetra, but he was compelled to resign his job as the petitioner-wife did not accompany him nor she lived with him. He further submitted that he has also no source of income because of the compelling circumstances created by the petitioner-wife. The respondent-husband has stated that the petitioner-wife has been provided financial assistance by the UGC to the extent of Rs.40,000/- which fact she had suppressed from the Court below and he prayed for dismissal of the application.

4. The learned Court below vide order dated 19.5.2014 allowed the application filed by the petitioner for grant of maintenance pendente-lite and litigation expenses, which is impugned in this petition.

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

6. According to petitioner, the amount of Rs.2,500/- awarded by the Court below towards maintenance and likewise Rs.5,000/- awarded towards litigation expenses is too meager taking into consideration the present day cost of living, price index and also taking into account the status of the parties.

7. Petitioner was awarded maintenance by the Court below on the pretext that she did not possess any independent source of income and has been pursuing her Ph.D studies in Kurukshetra University and staying in Girl's Hostel. Whereas, before this Court, the respondent moved an application, being CMP No. 11042 of 2014, for bringing on record the details of financial assistance received by the petitioner from the University Grants Commission. On the strength of these details, it was claimed that the very basis of awarding compensation was bad since the petitioner had already received by way of financial assistance a sum of Rs. 5,31,182/-.

8. Petitioner filed reply to this application and did not deny the receipt of this amount. However, it was stated that she had joined URS in March, 2008 in Kurukshetra University and in October, 2010, UGC had granted JRF for two years. Thereafter, in October, 2012, the UGC had granted SRF till March, 2013. The petitioner would then contend that this amount received towards financial assistance could not in any manner be termed to be an income, particularly when this financial assistance had come to an end on 31.3.2013.

9. According to petitioner, the respondent is working as TGT (Science) in Pine Grove School, Kuthar Road, Subathu and is earning well since it is a reputed school. In support of her claim, the petitioner has annexed a profile of the respondent uploaded by the school on its website. Based upon the contents of the profile, it is alleged that prior to this school, the respondent was working as a teacher in Senior School at Subathu till 2011. In rejoinder to this application, the respondent has not specifically denied these averments.

10. The obligation for Hindu male to maintain his wife is not a modern day concept but it existed even under the Shastric Hindu Law. According to the old Shastric Hindu Law, marriage between two Hindus is a sacrament - a religious ceremony which results in a sacred and a wholly union of man and wife by virtue of which the wife becomes a part and parcel of the body of the husband. She is, therefore, called Ardhangani. It is on account of this status of a Hindu wife, under the Shastric Hindu law, that a husband was held to be under a personal obligation to maintain his wife and where he dies, possessed of properties, then his widow was entitled, as of right, to be maintained out of those properties.

Mulla in his classic work on "Hindu Law," 14the Edn., dealing with the characteristic of the right of maintenance of a Hindu wife observes:

> *"A wife is entitled to be maintained by her husband, whether he possesses property or not. When a man with his eyes open marries a girl accustomed to a certain style of living, he undertakes the obligation of maintaining her in that style. The maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relationship, and quite independent of the possession by the husband of any property, ancestral or self-acquired."*

Mayne in his Treatise on "Hindu Law and Usage" 11th Edn., while trancing the history and origin of the right of maintenance of a Hindu wife says:-

> *"The maintenance of a wife by her husband is, of course, a matter of personal obligation, which attaches from the moment of marriage."*

11. Section 24 of the Act makes a provision in favour of a spouse having no independent income sufficient for her or his support and the necessary expenses of the proceedings for maintenance pendente-lite and expenses of proceedings in the following terms:

> "**S.24. Maintenance pendente-lite and expenses of proceedings.-** *Where in any proceeding under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly, during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable.*
>
> *[Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be]."*

12. The right of a wife for maintenance is an incident of the status or estate of matrimony. It is, therefore, the bounden duty of the husband to defray the wife's costs of any proceeding under the Act and also to provide for her maintenance and support pending the disposal of such proceeding. Any decision on the subject of alimony must necessarily depend on the circumstance of each case and no fix rule can be expected on the question.

13. The respondent has withheld his actual income from the Court. While on the other hand, it is proved on record that the petitioner currently has no independent income. Though, the learned counsel for respondent would contend that since the petitioner is not only well educated but is better educated than the respondent, therefore, she can support herself. I am afraid this cannot be the answer to the claim of the maintenance raised by the wife. The maintenance under this section is dependent upon, amongst other factors, the sufficiency of independent income. Therefore, when a claimant spouse has, at the time of claiming under this section, no independent or sufficient income, capable of supporting herself, it would be no answer to such a claim, based on the preponderance of probability, that she was qualified and could support herself.

14. As noticed earlier, respondent himself has not chosen to disclose his income. In para 3(d) of the petition, the specific averment has been made to the effect that the respondent is working in Pine Grove School, Subathu and is drawing salary of Rs. 35,000/- per month and besides this, he has sufficient

immoveable property at his native place which is coparcenary and joint family property and is also having building in the urban area of Chhota Shimla.

15. In reply to this para, it has been averred that the respondent-husband is neither regular employee of Pine Grove School nor is there any contract of employment with the management as the respondent-husband is only temporarily giving his services as a substitute teacher till the regular employee joins back. As regards the income of Rs.35,000/-, it is alleged that the same is exaggerated and is far from truth. It is also submitted that the respondent is living in a joint family and, therefore, he has no exclusive ownership or possession of any property.In view of the specific averment made by the petitioner, it was incumbent upon the respondent to have annexed his salary slip so as to ascertain the nature of his employment as also the total income received therefrom. In absence of such a certificate, an adverse inference is drawn against the respondent and the income stated by the petitioner will have to be taken as correct .

16. Even otherwise in terms of the profile uploaded on the official website of the school, the respondent is working as TGT (Science) and as per the pay scales uploaded on the official website of the school, the TGT is being paid initial basic of Rs.10,230/-, Grade Pay Rs.4,200/-, D.A. 80%, H.R.A. 7%, P.F. Rs. 750/- and Special Pay Rs.5000/-. This pay works out to be roughly Rs.35,000/- per month. That apart, all teachers and other administrative staff in addition to salary are entitled to free food and accommodation in the school as per the information available on the official website of the school.

17. Now, in case the total income of the respondent is taken as Rs.35,000/- per month, then the petitioner would be entitled to atleast 1/3rd of the income which works out to Rs.11,666/- and if rounded off, the same would be Rs.12,000/- per month.

18. In this factual backdrop, the award of maintenance at the rate of Rs.2,500/- per month cannot be sustained and is too meager and, therefore, the petitioner is held entitled to monthly maintenance of Rs. 12,000/- per month from the date of filing of the application till the disposal of the main petition. Likewise, the amount of Rs. 5,000/- awarded towards litigation expenses is also far too meager and in the given facts and circumstances, the ends of justice would be met in case the same is enhanced to Rs.10,000/-. Ordered accordingly.

19. Resultantly, the petition succeeds and is disposed of in the aforesaid terms, so also the pending application(s), if any.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Smt.Rubi Sood and another .....Appellants/Non applicants.

Versus

Major (Retd.)Shri Vijay Kumar Sood and others .....Respondents/Applicants.

CMP No.15975 of 2014 in RSA No.436 of 2000.
Reserved on: 14.11.2014.
Date of decision:21st November, 2014.

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff claimed that the history and background of the title of the plaintiffs were not given in the plaint, though evidence was led to this effect and this was a technical defect - held, that application was filed when the respondents were confronted with the fact that evidence was not in accordance with

pleading during the course of hearing of appeal - amendment has been filed with an intention to fit the pleadings with the evidence adduced already, which is not permissible- the opposite party cannot be placed in the same position as if the pleadings had been correct- therefore, application is liable to be dismissed. (Para-13 to 15)

Code of Civil Procedure, 1908- Order 23 Rule 1- Application filed to withdraw the suit with liberty to file a fresh suit on the same cause of action on the ground that pleadings are not in accordance with the evidence which has been led- held, that suit can be allowed to be withdrawn due to a formal defect which does not affect the merit of the case- permission cannot be granted mechanically when the suit is originally weak- a statement by the plaintiff that there is a formal defect is not sufficient and the plaintiff is required to satisfy the Court that defect is a formal defect - since, no such defect was shown, hence, application dismissed. (Para- 18 to 21)

Cases referred:

Mahendra Meheta and others v. Amaresh Sarkar, AIR 1991 Orissa 1
Khali v. Sadhaba Bewa, AIR 1967 Orissa 58 ((1967) 33 Cut LT 65)
Nrisingh Prasad Paul v. Steel Products Ltd., AIR 1953 Cal 15: (1952) 89 Cal LJ 140)
Beni Pershad Bhargava v. Narayan Glass Works, Makhanpur, AIR 1949 Ajmer 19
Jhara Dasiani v. Magata Das 1971(2) C.W.R 1004,
Bhagavatula Gopalakrishnamurthi v. Dhulipalla Sreedhara Rao AIR 1950 Mad 32: ((1949) 2 MLJ 421),
Siddik Mahomed Shah v. Mt. Saran AIR 1930 PC 57 (1): (58 MLJ 7)
Hindustan Commercial Corporation, Cuttack v. Bank of Baroda, Cuttack, (1983) 55 Cut LT 219.
Debashis Singha Roy & Ors. vs. Tarapada Roy & Ors. 2001 (2) CCC 30 (Cal.)
Ramrao Bhagwantrao Inamdar and another vs. Babu Appanna Samage and others AIR 1940 Bombay 121 (FB)
K.S. Bhoopathy and others vs. Kokila and others (2000) 5 SCC 458

For the Appellants : Mr.G.C.Gupta, Senior Advocate with Ms.Meera Devi, Advocate.

For the Respondents : Mr.Ajay Kumar, Senior Advocate with Mr.Dheeraj Vashisht, Advocate, for applicants/ respondents No.5, 7 to 9.
Mr.Bhupender Gupta, Senior Advocate with Mr.Neeraj Gupta, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge .

This application has been preferred by the applicants/ respondents under Order 6 Rule 17 read with Sections 151 and 153 CPC or in the alternative under Order 23 Rule 1 CPC with the prayer that the applicants-plaintiffs be allowed to amend the plaint or in the alternative the plaintiffs be allowed to withdraw the suit with permission to file fresh on the same cause of action.

2. It is averred by the applicants-plaintiffs that they are owners of 1/4th undivided share in Shop No.72, Lower Bazar, Shimla standing built upon land comprised in Khasra No. 313, Bazar Ward, Barra Shimla and during the

course of arguments in the case, it was found that due to an oversight and inadvertent mistake, history and background of the title of the plaintiffs was not been given in the plaint, though evidence was led in this behalf which is a technical defect in the pleadings of the plaintiffs. It is further averred that the plaintiffs are owners of 1/4th share in the shop in question through their predecessors-in-interest late Shri Kedar Nath Sood and Shri Sansar Chand Sood. During the pendency of the case, the original plaintiff No.2 and 3 have died and their legal representatives have been brought on record. Similarly, original defendant No.1 and 2 have also died and name of defendant No.2 has been deleted from the array of the defendants and legal heir of original defendant No.1 has been brought on record as appellant No.1.

3. The plaintiffs have averred that with a view to overcome the technical defect in the pleadings, lest the plaintiffs are non-suited on this count, they want to amend the plaint by adding Para No.2A to the plaint to the following effect:-

> "2A. That the said 1/4th share in the suit property and adjoining shop No.72/1 originally belonged to Shri Tikhu Mal s/o Shri Mukadi Mal and Shri Khusi Lal, s/o Shri Hira Lal Sood who vide sale deed dated 15th February, 1926 duly registered in the Office of the Sub Registrar, Shimla, sold their undivided ¼ share in the said properties 72 and 72/1 in favour of Shri Mukand Lal s/o Shri Bhandari Mal and Shri Sansar Chand s/o Shri Shiv Dayal. Shri Mukand Lal aforesaid sold his 1/8th share in shop No.72 and 72/1 to Shri Kedar Nath, s/o Shri Shiv Dayal vide sale deed dated 15.2.1926 duly registered with the Sub Registrar, Shimla. In the original sale deed of 1926 shop No.72 by mistake and drafting error has wrongly been mentioned as shop No.72/2 and the said mistake has also been repeated in the subsequent sale deed of Shri Mukand Lal. The said inadvertent mistake was also carried forward in the Municipal records for some time but later on rectified when mistake was discovered. In fact on Khasra No.313, Bazar Ward, Barra Shimla there are only two shops, that is shop No.72 and 72/1. Shop No.72/2 has never been in existence at all and reference to shop No.72/2 in the sale deed is a drafting error/defect. In the sale deeds of 1926 and subsequent sale deed of December, 1977 executed by Dr.Mukand Lal in favour of Shri Kedar Nath, said two shops are properly identified by permanent boundaries which fact is also mentioned in the sale certificate of Shri Himat Singh, issued by the Custodian Department namely, on the north Alley and passage, on the south Lower Bazar, on the East Alley No.9 and on the west house of Bhedu Mal Mohinder Chand and dimensions of the properties are on the east 21 feet, on the west 25 feet, on the south 29 feet, on the north 28 feet, total being 644 square feet. Even as on the date the boundaries of property No.72 and 72/1 are the same and the dimensions of shop No.72 and 72/1 on the spot are also the same as also in the revenue record right from 1907 onward till date. The said two properties are encompassed in the said dimensions in the papers as also in the record. Thus reference of shop No.72/2 in sale Deeds was an error/defect. In fact, reference to 72/2 is reference to shop No.72."

4. It is also averred that due to subsequent developments in the wake of death of parties, the plaintiffs want to make consequential amendments in Para 1 of the plaint to bring the pleadings in consonance with latest memo of parties by deleting the last two lines of Para 1 of the plaint and substitute it with following lines:-

> "deceased defendant No.1 late Shri Ajay Kumar and grandmother of Plaintiff No.1 and 3 to 7"

Similarly, to bring the pleadings in consonance with amended memo of parties, Para 2 of the plaint would require formal amendments by adding the word

"original" a in line No.4 after the word i.e. and in line No.6 after the word inherited by and before the word plaintiff by and in last line of Para 2 before the word defendant No.1.

5. The plaintiffs have averred that the said amendments are necessary to determine the real matter in controversy between the parties. The plaintiffs do not want to lead any further evidence in the case after amendment as they have already led evidence in the case to the effect that shop No.72/2 was never in existence. No prejudice will be caused to the defendants in case the amendment is allowed. It is further averred that the amendment so sought is only clarificatory in nature giving the history and background of the property which was omitted in the original plaint, though oral and documentary evidence about the history and background of the property has been led by the plaintiffs. Smt.Udhi Devi was owner of 3/4th share in shop No.72, Lower Bazar, Shimla and the only question involved is as to who is owner of remaining 1/4th share and to determine this point, the amendment is all the more necessary. It is averred that the suit is likely to fail for the said technical and formal defect in the pleadings, though evidence has come that on the spot there are only two shops i.e. shop No.72 and 72/1. Lastly, it is averred that in these circumstances there are sufficient grounds for allowing the plaintiffs to withdraw the suit and institute fresh suit, if necessary, for the subject matter of the suit or part of claim thereof with permission to file the same on the same cause of action, hence this application.

6. The non-applicants/appellants filed reply to this application and stated that a joint application under Order 6 Rule 17 and under Order 23 Rule 1 CPC is not competent and maintainable and the present application is liable to be dismissed on this score alone as the applicants have failed to make out a case for granting permission to them for filing fresh suit on the same cause of action. There is no technical or formal defect in the plaint upon which the suit of the applicants may fail and the same is likely to be dismissed on merits.

7. It is averred by the non-applicants/appellants that the application under Order 6 Rule 17 CPC is not competent and maintainable at this belated stage after a period of 25 years of filing of the original suit without explaining as to why the said amendment was not applied for at the earlier stage. The grounds stated in the application are not sufficient grounds for allowing the applicants to amend the plaint by changing the entire complexion of the suit. In case the amendment so sought is allowed, it would totally displace the non-applicants and set up a new case in favour of the applicants. The case was finally heard by the trial Court where also a similar plea was raised on behalf of the non-applicants, however, the applicants have been insisting upon what they had stated in the plaint. After the judgment was passed by the trial Court, the matter was again argued on behalf of the non-applicants before the appellate Court where no such plea was raised by the applicants and got a judgment from the appellate Court. It is after the present appeal which was filed in the year 2000, in which the applicants had filed a caveat petition and no such pleas were raised and it is only after the matter was partly heard by the Hon'ble Court that the present application has been moved. Right from the year 1926, the applicants and their predecessors-in-interest had been accepting what was written in the sale deeds and even mutations were attested in favour of the predecessors-in-interest of the applicants and after the death of predecessor-in-interest of the applicants, the mutation of inheritance was further attested in the presence of the applicants where also no such plea was raised. The original owners of the property never raised an objection that shop No.72/2 was wrongly mentioned in the sale deeds and the sale deeds were never challenged by them and even in the plaint, said sale deeds have not been challenged by the applicants.

8. It is also averred that the present application is also not maintainable in view of the fact that the original plaint has been signed and

verified by Shri Vijay Kumar Sood, whereas, the present application has been sighed and supported by an affidavit of Shri Ashwani Kumar Sood, who appeared as PW-1 and nowhere stated that in place of property No.72, 72/2 had been mentioned. In his statement on oath, he has stated that 72/2 has been mentioned by mistake in place of 72/1 in the sale deed dated 15.2.1926. There is no technical or formal defect in the pleading as mentioned by the applicants and the application is also not maintainable in view of the fact that the proposed amended plaint has not been filed along with the application. The application is also not maintainable in view of the fact that Shri Deepak Sood, respondent No.6, is being represented by separate counsel, who has not signed the application and as such some of the applicants cannot be allowed to amend the plaint.

9. On merits, it is admitted that the plaintiffs are owners of 1/4th undivided share in shop No.72, Lower Bazar,Shimla, however, it is specifically denied that during the course of arguments, it was found that due to oversight and inadvertent mistake, history of the title of the plaintiffs has not been given in the plaint, though the evidence has been led in this behalf. It is denied that the said omission on the part of the plaintiffs is a technical or formal defect in the pleadings of the plaintiffs and further denied that the plaintiffs have been maintaining that they are owners of 1/4th share in the shop in question through their predecessor-in-interest late Shri Kedar Nath Sood and Shri Sansar Chand Sood and purchased 1/8th share of Shri Mukand Lal in shop No.72/2 and 72/1 in the year 1971 vide registered sale deed which was never challenged and the mutation was also attested on the basis of sale deeds of the year 1926 and 1971.

10. The non-applicants have further averred that there is neither technical defect in the pleadings nor is any amendment required in the same and the applicants by way of amendment cannot be allowed to set up a new case after lapse of 25 years, especially the matter having been decided by two Courts and the applicants had ample time to seek amendment. Tikhumal and Hira Lal Sood had transferred 1/4th share in shop No.72/2 and 72/1 in favour of Mukand Lal, son of Shri Bhandari Mal and Shri Sansar Chand son of Shri Shiv Dayal. Mukand Lal further sold what he had purchased from Tikhumal and Hira Lal through sale deed executed in the year 1971. Tikhumal and Hira Lal Sood had never been the owners of Shop No.72 to the extent of any share and as such they had no right to transfer 1/4th share in shop No.72, Lower Bazar, Shimla. It is specifically denied that it was by mistake and drafting error that the shop No.72/2 was mentioned in place of 72 in the two sale deeds and subsequent mutations and revenue records. The original owners as well as their successor-in-interest never challenged the sale deeds or laid claim before any authority with respect to the same. It is denied that there were only two shops in the year 1926.

11. It is further claimed that as per the plan submitted by the applicants, there were three shops on the spot which fact is also confirmed in the sale deed executed by Himat Singh in favour of Smt.Udhi Devi and the boundaries mentioned in the sale deed executed by Shri Mukand Lal also do not tally with the sale deed executed in favour of Smt. Udhi Devi nor any dimension given in the sale deed. It is also denied that the reference to shop No.72/2 is in fact reference to shop No.72 and the non-applicants reserve their rights to file a complete reply to the para sought to be added by the amendment in case the amendment is ultimately allowed.

12. The non-applicants have denied that the amendment sought is necessary to determine the real controversy between the parties, rather applicants by way of amendment want to set a new cause of action which is not permissible under the law and even otherwise the amendment cannot be allowed to make it in consonance with the evidence. The evidence is to be in consonance with the pleadings. The present application is an abuse of process of law and in

case the application is allowed, the non-applicants will be greatly prejudiced. No copy of the proposed amended plaint has been supplied to the non-applicants. It is denied that the amendment is clarificatory in nature. The amendment is likely to change the entire complexion of the suit. It is denied that Udhi Devi was owner of 3/4th share in the shop, however, even if it is presumed that she was owner of 3/4th share in the shop, it will not lead to any inference that remaining 1/4th share is owner by the applicants. The fact regarding 1/4th share in the property can be decided on the basis of pleading and evidence led by the parties. It is also denied that in the evidence it has come on record that there are only two shops. There are no grounds for allowing the plaintiffs to withdraw the suit with permission to file a fresh suit on the same and similar cause of action with respect to the property which is the subject matter of the suit and in case the applicants want to withdraw the suit unconditionally, the non applicants have no objection for the same. The non-applicants accordingly prayed for dismissal of the application with costs.

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

13. The learned counsel for the applicants-respondents has argued that there is a technical defect in the pleadings and the proposed amendment is necessary to adjudicate the real matter in controversy between the parties and the applicants-respondents also do not want to lead any further evidence in case the amendment is allowed as the evidence in tune with the proposed amendment is already on record. To my mind, it is not so simple a proposition as has been argued by the learned counsel for the applicants-respondents. The case has been heard at length on 28.08.2014 and 29.08.2014 and when during the course of hearing the respondents were confronted with their evidence being not in tune with the pleadings, they sought time for seeking amendment of the plaint.

14. A perusal of the proposed amendment would show that the same has been preferred only with the intention to fit the pleadings with the evidence already adduced which is not permissible in law. (***Refer: AIR 1991 Orissa 1 Mahendra Meheta and others*** *v.* ***Amaresh Sarkar, AIR 1967 Orissa 58 ((1967) 33 Cut LT 65) (Khali v. Sadhaba Bewa), AIR 1953 Cal 15: ((1952) 89 Cal LJ 140) (Nrisingh Prasad Paul v. Steel Products Ltd.), AIR 1949 Ajmer 19 (Beni Pershad Bhargava v. Narayan Glass Works, Makhanpur), 1971(2) C.W.R 1004 (Jhara Dasiani v. Magata Das), AIR 1950 Mad 32: ((1949) 2 MLJ 421), (Bhagavatula Gopalakrishnamurthi v. Dhulipalla Sreedhara Rao), AIR 1930 PC 57 (1): (58 MLJ 7) (Siddik Mahomed Shah v. Mt. Saran) and (1983) 55 Cut LT 219 (Hindustan Commercial Corporation, Cuttack v. Bank of Baroda, Cuttack).***

15. It is well settled that if the evidence is not in consonance with the pleadings, it may be thrown out and, at this stage, the plaintiffs-respondents cannot be permitted to file this application as the same is not bonafide and it is intended to fill-up lacunas in the case. In case the amendment is allowed, the other party cannot be placed in the same position as if the pleadings had been originally correct. The injury now caused to the defendants would be such that the same cannot be compensated in any terms much less in monetary terms.

16. Insofar as the question of permitting the plaintiffs to withdraw the suit, at this stage, with liberty to file the same on the same cause of action is concerned, this prayer also cannot be granted to them.

17. Order 23 Rule 1 CPC reads as under:-

> *"[**1.Withdrawal of suit or abandonment of part of claim**.- (1) At any time after, the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:*

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject- matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.]"

18. The only kind of defect which attracts the applicability of Order 23, Rule 1(3) CPC is formal defect. The formal defect is a defect of form described by a rule or procedure. The formal defect connotes defects of various kinds not affecting the merits of the case. In ***Debashis Singha Roy & Ors.*** *vs.* ***Tarapada Roy & Ors. 2001 (2) CCC 30 (Cal.),*** the Calcutta High Court has held that non-joinder of parties and non-description of suit land is not a formal defect.

19. A suit cannot be allowed to be withdrawn for a defect of substance. (*See*: ***Ramrao Bhagwantrao Inamdar and another*** *vs.* ***Babu Appanna Samage and others AIR 1940 Bombay 121 (FB).*** The court cannot be oblivious to the fact that no litigant can be allowed to file suit one after another on the same cause of action only for the purpose of keeping alive the dispute between the parties to be reopened at the discretion of the plaintiff. This would not only causes harassment to the parties against whom it is filed, but it is unnecessary impart on the public exchequer and unnecessary load on the court time. The grant of leave envisaged in sub-rule (3) of rule -1 of Order 23 CPC is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection because this provision is founded on public policy.

20. It is settled law that permission to withdraw the suit with liberty to file a fresh suit cannot be granted mechanically and the court is duty bound to satisfy itself that there exist proper grounds for granting such permission. Such permission cannot be resorted to when the claim set out in the original suit is weak. The Hon'ble Supreme Court in ***K.S. Bhoopathy and others*** *vs.* ***Kokila and others (2000) 5 SCC 458*** has held as follows:-

"13. The provision in Order XXIII, Rule 1, C.P.C. is an exception to the common law principle of non-suit. Therefore on principle an application by

a plaintiff under sub-rule (3) cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the Court after satisfying the Court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided, (1) where the Court is satisfied that a suit must fail by reason of some formal defect, and the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule (1) is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or Courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate Court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII, Rule 1(3), C.P.C. for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower Courts and inordinate delay in disposal of the cases.

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

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

21. A mere statement by the plaintiff that there is a formal defect in the plaint and form in the suit is not enough. As already observed earlier, a formal defect is a defect of form unrelated to the case of the plaintiff on merits and is required to be spelt out specifically in the application seeking permission to withdraw the suit.

22. Accordingly, there is no merit in the application and the same is dismissed with no order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Co. Nangal .....Appellant
Versus
Sh. Gaurav Sharma and others ...Respondents

FAO (MVA) No. 350 of 2007
Date of decision: 21st November, 2014.

Motor Vehicle Act, 1988- Section 166- Insurer claimed that accident was result of contributory negligence – however, no evidence was led by the insurer to prove this fact- evidence of the claimants showed that driver was driving the vehicle in a rash and negligent manner- driver had not questioned this finding, hence, plea of the insurer was not acceptable. (Para- 7 and 8)

For the appellant: Mr. Sanjeev Kuthiala, Advocate.
For the respondents: Mr. Ashok Sood, Advocate, for respondents No. 1 to 3.
Mr. S.D. Gill, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The Insurance Company has made a futile exercise by filing appeal, in terms of Section 173 of the Motor Vehicles Act, for short "the Act", questioning the impugned award dated 25.6.2007, made by the Motor Accident Claims, Tribunal, Shimla in MACC No.21-S/2 of 2003, tilted *Sh. Gaurav Sharma and others vs. Smt. Swaran Kaur and others*, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claimants had filed a claim petition before the Tribunal for the grant of compensation to the tune of Rs.8 lacs, as per the break-ups given in the claim petition.

3. The respondents in the claim petition, resisted and contested the claim petition and following issues, on the pleadings of the parties, came to the framed:

(i) Whether the death of Kewal Krishan took place due to rash and negligent driving of truck NO.HP-20A-2423 by the respondent, Sukhdev? OPP

(ii) *In case the issue No.1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP*

(iii) *Whether the petition is not maintainable? OPR*

(iv) *Whether the petitioner himself was negligent and responsible for causing the accident? OPR*

(v) *Whether this Tribunal has no jurisdiction to entertain the petition? OPR*

(vi) *Whether the petition is barred by limitation? OPR*

(vii) *Whether the vehicle in question was being driven in violation of the terms and conditions of the insurance policy? OPR*

(viii) *Whether the driver of the vehicle in question was not having a valid and effective driving license? OPR*

(ix) *Whether the petition is bad for non-joinder of parties? OPR*

(x) *Relief.*

4. The claimants, driver and owner have examined the witnesses but the insurer has not led any evidence.

5. The Tribunal, after scanning the evidence held that the claimants became victims of a vehicular accident, which was caused by driver, namely, Sukhdev, while driving offending truck bearing registration No.HP-20A-2423, rashly and negligently on 13.8.2002, at 10.05 a.m. at place Stag Hotel, Parontha More near Kandaghat. The Tribunal also held that the claimants are entitled to compensation to the tune of Rs.1,90,780/- and saddled the insurer with the liability with right of recovery, on the ground that the owner has committed willful breach, in terms of Section149 of the Act, read with the Insurance Policy.

6. The claimants, driver and insured have not questioned the impugned award on any aground, thus, it has attained finality, so far it relates to them.

7. The insurer has questioned the impugned award on the ground that the accident was outcome of the contributory negligence. The insurer has not led any evidence, thus the evidence led by the claimants has remained un-rebutted.

8. I have gone through the record. The claimants have proved that driver Sukhdev had driven the offending vehicle rashly and negligently. He has not questioned it, has attained finality. The findings recorded on issue No. 1 are upheld accordingly.

9. The impugned award is not excessive in any way and the same is upheld.

10. The Tribunal has rightly recorded the finding that the owner has committed willful breach, which was not questioned by the owner/insured, has attained the finality against the insured.

11. Having said so, the appeal merits to be dismissed, accordingly it is dismissed and the impugned award is upheld.

12. The Registry is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award. The insurer is at liberty to lay motion before the Tribunal for effecting recovery from the owner.

13. Accordingly, the appeal stands disposed of alongwith pending applications, if any. Send down the record forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

United India Insurance Company Ltd. ...Appellant.
Versus
Sh. Mohan Lal & others ...Respondents.

FAO No. 529 of 2008
Decided on: 21.11.2014

Motor Vehicle Act, 1988- Section 149- A cover note was issued which was valid from 16.9.2005 till 15.9.2005- insurer pleaded that cover note was issued without the payment of premium and the cover note was cancelled – held, that there is no evidence that cancellation of the policy was conveyed to the insured in absence of which the Insurance Company will be liable to satisfy the award. (Para-9 to 18)

Cases referred:
New India Assurance Co. Ltd. versus Rula and others, reported in AIR 2000 Supreme Court 1082
Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd., reported in 2007 AIR SCW 7948
United India Insurance Co. Ltd. versus Laxmamma & Ors., reported in 2012 AIR SCW 2657

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Ms. Poonam Gehlot, Advocate, vice Ms. Anu Tuli, for respondent No. 1.
Mr. Romesh Verma, Advocate, for respondent No. 2.
Nemo for respondent No. 3.
Mr. Lalit K. Sharma, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Appellant-insurer has invoked the jurisdiction of this Court by the medium of this appeal in terms of Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") and has called in question the award, dated 30th June, 2008, made by the Motor Accident Claims Tribunal-II, Solan, District Solan, H.P. (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 1-S/02 of 2006, titled as Mohan Lal versus Kishan Lal and others, whereby compensation to the tune of Rs.7,14,000/- came to be awarded in favour of the claimant and the appellant-insurer was saddled with liability (hereinafter referred to as "the impugned award"), on the grounds taken in the memo of appeal.

2. The claimant and the drivers-cum-owners and the insurer of the scooter have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

Brief facts:

3. The claimant had claimed compensation to the tune of Rs.10,00,000/-, as per the break-ups given in the claim petition, on the ground

that he became the victim of motor vehicular accident, which was caused by the driver, namely Shri Kishan Lal, while driving the car, bearing registration No. HP-01 A-0722, rashly and negligently on 23rd October, 2005, near Bye Pass Solan.

4. The respondents resisted the claim petition on the grounds taken in the respective memo of objections.

5. Following issues came to be framed by the Tribunal on 5th April, 2007:

> *"1. Whether the petitioner sustained injuries as a result of an accident involving vehicle bearing No. HP-01 A-0722 and scooter bearing No. HR-12 D-2329 due to rash and negligent driving of the offending vehicles by respondents No. 1 & 4? ...OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioner is entitled for compensation, if so, to what amount? ...OPP*
>
> *3. Whether the petition is not maintainable? ...OPR-1-2 & 4-5*
>
> *4. Whether the petitioner is estopped by his own acts, deeds and conduct from filing the present petition? ...OPR-1&2*
>
> *5. Whether the accident took place due to rash and negligent driving of the Car by respondent No. 1, as alleged? ...OPR-4&5*
>
> *6. Whether the Car No. HP-01 A-0722 was not insured with the respondent No.3? ...OPR-3*
>
> *7. Whether the petitioner has no cause of action against the respondents No. 4 & 5? ...OPR-4&5*
>
> *8. Whether the driver of the Car was not holding valid & effective driving licence at the time of accident? ...OPR-3*
>
> *9. Whether the registration certificate, fitness certificate and permit papers of the Car were not valid nor effective? ...OPR-3*
>
> *10. Whether the scooter was not insured with respondent No. 6? ...OPR-6*
>
> *11. Whether the driver of the scooter was not holding valid and effective driving licence at the time of accident? ...OPR-6*
>
> *12. Whether the scooter was not validly registered, if so, its effect? ...OPR-6*
>
> *13. Whether the petitioner was pillion rider on the scooter and the respondent No. 6 is not liable to pay compensation to the petitioner? ...OPR-6*
>
> *14. Relief."*

Issue No. 1:

6. After scanning the evidence, oral as well as documentary, the Tribunal held that the claimant has proved that the driver, Shri Kishan Lal, had driven the offending vehicle, i.e. car, bearing registration No. HP-01 A-0722, rashly and negligently on 23rd October, 2005 and hit the scooter, bearing registration No. HR-12D-2329, and the claimant sustained injuries. Accordingly, issue No. 1 was decided in favour of the claimant and against driver of the car, namely Shri Kishan Lal. The findings returned on this issue are not in dispute, are upheld.

Issues No. 3 to 13:

7. The findings returned on issues No. 3 to 13 are also not in dispute for the reason that the claimant, owners-cum-drivers and the insurer of the scooter have not questioned the impugned award on any count. Thus, the findings returned by the Tribunal on issues No. 3 to 13 are also upheld.

Issue No. 2:

8. The only dispute in this appeal is - whether the owner-cum-driver of the car is to satisfy the award for the reason that the insurer is not liable to pay?

9. Learned counsel for the appellant-insurer argued that the cover note, which was proved by the insurer, is on record as Ext. RW-1, was issued without depositing the premium amount, was cancelled, thus, the appellant-insurer is not liable.

10. The Tribunal, after scanning the evidence and the documents on the file, held that the risk was covered in view of the fact that insurance cover, Ext. RW-1, was subsisting on the date of accident, i.e. 23rd October, 2005.

11. I have gone through Ext. RW-1. It contains details of the entire insurance policy. According to Ext. RW-1, the insurance policy was effective from 16th September, 2005, to 15th September, 2006, and one of the conditions contained is "The Period of Validity of this cover note will expire on 15/9/06". Thus, the validity of the cover note was till 15th September, 2006.

12. The appellant-insurer has not proved that the factum of cancellation of the cover note was conveyed to the insured.

13. According to the learned counsel for the appellant-insurer, it is a case of fraud. He was asked to show whether any action was drawn against the alleged erring official. He was unable to answer.

14. The Apex Court in a case titled as **New India Assurance Co. Ltd. versus Rula and others,** reported in **AIR 2000 Supreme Court 1082,** has held that the insurer has to mandatorily intimate the owner by way of notice about the cancellation of insurance policy and if the accident occurs between the period till the cancellation is conveyed, it is the insurer, who is liable. It is apt to reproduce para 11 of the judgment herein:

> *"11. This decision, which is a 3-Judge Bench decision, squarely covers the present case also. The subsequent cancellation of the Insurance Policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the Policy on the date on which the accident took place. If, on the date of accident, there was a Policy of Insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of Insurance Policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party."*

15. The matter again came up for consideration before the Apex Court in **Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd.,** reported in **2007 AIR SCW 7948,** and the same principle has been laid down. It is apt to reproduce paras 26 to 28 of the judgment herein:

> *"26. We are not oblivious of the distinction between the statutory liability of the Insurance Company vis-a-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other*

cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim.

27. A beneficial legislation as is well known should not be construed in such a manner so as to bring within its ambit a benefit which was not contemplated by the legislature to be given to the party. In Regional Director, Employees' State Insurance Corporation, Trichur v. Ramanuja Match Industries [AIR 1985 SC 278], this Court held :

> *"We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial .legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme."*

We, therefore, agree with the opinion of the High Court.

28. However, as the appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our extra-ordinary jurisdiction under Article 142 of the Constitution of India, direct the Respondent No.1 to pay the amount of claim to the appellants herein and recover the same from the owner of the vehicle viz., Respondent No.2, particularly in view of the fact that no appeal was preferred by him. We direct accordingly."

16. In the case titled as **United India Insurance Co. Ltd. versus Laxmamma & Ors.,** reported in **2012 AIR SCW 2657,** the Apex Court has discussed the law developed on the issue and ultimately held that if cancellation order is not made or if the accident occurs till the cancellation is made and conveyed, the insurer is liable. It is profitable to reproduce para 19 of the judgment herein:

> *"19. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."*

17. I have laid down the same principle in cases tilted as **M/s New Prem Bus Service versus Laxman Singh & another**, being **FAO No. 316 of 2008,** decided on 23rd May, 2014 and **FAO No. 35 of 2009,** titled as **National Insurance Company Ltd. versus Smt. Anjana Sharma & others,** being the lead case,

decided on 4th July, 2014. It is apt to reproduce paras 15 and 16 of the judgment rendered in **Anjana Sharma's case (supra)** herein:

> *"15. Admittedly, the cover note was issued alongwith the insurance policy. The cover note and the insurance policy are Ext. RW-2/B & Ext. RW-2/A in M.A.C.P. No. 38-G/2004 and Ext. RW-3/B and Ext. RW-3/A in MACP RBT No. 68-G/2010/2004, respectively. While going through the insurance policy and the cover note, one comes to an inescapable conclusion that it was issued on 28th April, 2003 and was valid up to 27th April, 2004. But, were cancelled on 29th April, 2003, without mentioning any reason. It is nowhere mentioned in the cover note that the premium amount was not received. Further, there is no evidence on the file in support of the fact that the amount was not deposited.*
>
> *16. Learned counsel for the appellant(s) was asked to show whether there is any evidence on the file to the effect that notice was given to the owner-insured about the cancellation of the insurance policy and the cover on 29th April, 2003, he failed to reply the same."*

18. Viewed thus, the Tribunal has rightly returned findings on this issue at page No. 11. Accordingly, the findings returned by the Tribunal on issue No. 2 are upheld.

19. Having said so, I am of the considered view that the Tribunal has rightly saddled the appellant-insurer with liability and this appeal merits to be dismissed; is dismissed and the impugned award is upheld accordingly.

20. Registry is directed to release the awarded amount in favour of the claimant strictly as per the terms and conditions contained in the impugned award.

21. Send down the record after placing copy of the judgment on Tribunal's file.

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

State of Himachal Pradesh .....Appellant
Versus
Krishan Lal .....Respondent

Cr. Appeal No. 342/2008
Reserved on 18.9.2014
Decided on 19.9.2014

Indian Penal Code, 1860- Section 376- As per prosecution case, accused asked the prosecutrix for Pattals on which she replied that she had only 200 pattals and more pattals would be supplied by her Jethani- accused asked the prosecutrix to accompany him- prosecutrix was raped on the way- prosecutrix admitted that accused knew house of her Jethani- no hue and cry was raised by her- there were contradictions in the testimony of the prosecutrix – no injuries were found on her person- held, that in these circumstances, version of the prosecutrix was not reliable. (Para-16 to 18)

For the appellant : Mr. Ashok Chaudhary, Addl. AG.
For the respondent : Mr. J.R. Poswal, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This appeal is instituted against judgment rendered by learned Sessions Judge, Bilaspur, Himachal Pradesh in Sessions Trial No. 5 of 2004 dated 17.1.2008, whereby respondent-accused (herein after referred to as 'accused' for brevity sake), who was charged and tried for offence under section 376 of the Indian Penal Code, has been acquitted.

2. Case of the Prosecution in a nutshell is that on 20.4.2003 at about 4.30 pm, husband of the prosecutrix had gone to attend a marriage. She was alone with her children. At 10.00 pm, one Shri Rajinder Kumar, resident of Tikkari and accused, who is a Peon in the Veterinary Hospital in Panjgain, came to her house and they told her that they required *Pattals*. She told them that she had only 200 *Pattals* available with her and in case they required more *Pattals*, same could be taken from her *Jethani* Sukh Dei. They asked her to show the house of her *Jethani* Sukh Dei. She agreed. They went towards the house of Sukh Dei. Rajinder Kumar left by saying that he had to go to his house. Thereafter, prosecutrix and accused started moving towards the house of Sukh Dei. They had hardly covered some distance when accused caught her hand. She ran towards jungle. Accused followed her and caught her. Her shirt was torn. He threw her on the ground. She kept crying. Accused opened her *Salwar* and had intercourse with her against her consent/will and thereafter, accused ran away. She went to the house of Kamla Devi and told her about the incident. She also rang up her father, Sukh Ram and told about the incident. Shri Ranjit Singh, Pradhan of the Gram Panchayat was also told about the same. Thereafter, she went to her house and her father also came there. She had suffered bruises on her back and leg. She was also medically examined. Slide was also prepared at that time. Statements of witnesses were recorded. Accused was also subjected to medical examination. Police completed the investigation and thereafter put up challan after completing all the codal formalities. Accused was tried and acquitted by the trial Court i.e. Sessions Judge, Bilaspur, hence, this appeal.

3. Mr. Ashok Chaudhary, Additional Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

4. Mr. J.R. Poswal, Advocate has supported judgment dated 17.1.2008.

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

6. PW-1 Ranjit Singh deposed that he was at his house when he received a telephonic message from prosecutrix, after 9.00 pm. She informed that accused had come to her house and mis-behaved with her.

7. PW-2 and PW-3, are formal witnesses.

8. PW-4 is the prosecutrix. She deposed that about three years ago, on 20.4.2003, at about 10.00 PM, she was sitting with her children at her house. Accused came to her house alongwith one Rajinder Kumar. They asked her for *Pattals*. Rajinder demanded ten thousand *Pattals*. She showed her inability to supply that much quantity. She had only 200 *Pattals* with her. She advised them to have *Pattals* from Sukh Dei, her *Jethani*. Accused requested her to accompany them to the house of Sukh Dei. She showed her inability. However, they repeatedly requested her that she should accompany them to the house of Sukh Dei. They had come to her house on the scooter of Rajinder Kumar. She accompanied them on scooter but on the way, Rajinder alighted from the scooter by telling that he had work at the house of his maternal uncle. She went on scooter with accused. They covered some distance. After that accused stopped the scooter. He caught hold of her from arm and her shirt was torn. Accused forcibly took her to Khadyater, opened her *Salwar* and committed rape upon her. She was crying but her mouth was gagged by him. She rescued from the clutches of the accused and put on her *Salwar* and came back to her house. From there, she straightway came to the house of Kamla Devi. She also informed her *Jethani* and made a telephonic call to the Pradhan i.e. Ranjit Singh She has admitted in her cross-examination that road was adjacent to her house leading to Solag, which is a Pucca road. Her house is situated 40 feet below the road. House of her *Jethani* Kamla Devi is situated adjacent to her house and house of Sukh Dei is about 300 feet by road. Towards upper side of the house of Sukh Dei, there is jungle and house of her *Jethani*, Sukh Dei is also below the road about 50 feet away. House of Gorkhu Ram is situated adjoining to the house of Sukh Dei. She was made to sit on the scooter in front of her house. Rajinder hails from her parental village. He knew the house of Sukh Dei. Rajinder alighted from scooter after 20 feet when all the three of them boarded the scooter. Thereafter, accused took scooter 150 feet from the place where Rajinder alighted. Rajinder alighted near the culvert. Accused stopped the scooter near the house of Sukh Dei. She raised hue and cry. Khadyater is situated on upper side of the road. A path is also leading towards Khadyater. Accused dragged her 150 feet towards Khadyater. Her mouth was gagged throughout. She tried to rescue herself. She pushed accused however, her hands could not reach the face of the accused as such no scratches were caused on the face of the accused. She has not narrated this incident to Rajinder. She has narrated the incident on the same day to the maternal uncle of Rajinder. She has also admitted that her mother-in-law and sister-in-law were also present at her house.

9. PW-5 Sukh Ram deposed that prosecutrix was his daughter. She was married to Chhota Ram. He received a telephonic message from the prosecutrix that two persons, accused and Rajinder Kumar came to her house for taking *Pattals* and when she was going to the house of her *Jethani*, on the way accused committed sexual intercourse with her.

10. PW-6 Mamta Kumari, is the daughter of the prosecutrix. She deposed that on 20.4.2003, at about 10.00 at night, Rajinder and accused came

in the courtyard of her house. They were watching television. Her father had gone to attend a marriage. Mother was present in the house. Rajinder and accused asked the mother for *Pattals*. She told them she had only 200 *Pattals*. She told them that Sukh Dei could supply required quantity of *Pattals*. These persons insisted the prosecutrix to accompany them to the house of Sukh Dei. On the persuasion of Rajinder, mother accompanied them to the house of Sukh Dei. House of Sukh Dei was at 200 yards from their house. When accused visited her house, her younger brother, grandmother and Bua (paternal aunt) were present. Mother came back after half an hour.

11. PW-7 Dr. B. Bhangal has issued MLC Ext. PW7/A. According to the opinion of PW-7, possibility of rape could not be ruled out.

12. PW-8 Ishwar Dass deposed that on 21.4.2003, FIR Ext. PW4/B was lodged by the prosecutrix. Accused was arrested. He moved an application Ext. PW8/B to obtain the MLC. He also prepared site plan vide Ext. PW8/C.

13. PW-9 is a formal witness.

14. PW-10 examined the accused. He issued MLC Ext.PW10/A.

15. PW-11 Rajinder Kumar is a formal witness.

16. According to PW-4 (prosecutrix), accused had come to her house alongwith Rajinder Kumar. Rajinder asked for *Pattals*. She had told them that she had only 200 *Pattals* and more *Pattals* could be supplied by her *Jethani*, Sukh Dei. They insisted her to accompany them to the house of Sukh Dei. She boarded the scooter driven by Rajinder and went towards the house of Sukh Dei. On the way, Rajinder alighted from the scooter. Thereafter, she was driven on scooter by accused for some distance. Thereafter, she was raped. It is apparent that prosecutrix has accompanied accused voluntarily. According to the prosecutrix, Rajinder knew the house of Sukh Dei. If Rajinder knew the House of Sukh Dei, she was not supposed to go with him. House of Kamla Devi was situated near her house. House of Sukh Dei was only 300 feet by road. She could raise hue and cry. Her version that she was dragged to a distance of 150 feet and her mouth was gagged, can not be believed. She was an adult lady and could easily resist the advances of the accused. According to the FIR, after the incident, she went to the house of Kamla Devi, her *Jethani* and narrated the incident to her. However, while appearing as PW-4, she has categorically deposed that she put on her *Salwar* and came to her house. From there she went to the house of Kamla Devi. In the FIR, it is stated that she escaped from the accused and went towards jungle. She was raped in the jungle. However, when she appeared as PW-4, she deposed that accused dragged her to a distance of 150 feet and then committed rape in Khadyater.

17. According to Ext. PW8/C, site plan, house of Gorkhu Ram and Sukh Dei are situated near the place of alleged occurrence. House of Mahender Singh was also at a distance of 100 metres from the place of alleged occurrence. If she had raised hue and cry, persons residing in the houses of Gorkhu Ram, Sukh Dei and Mahender Singh could hear the same.

18. DW-1 Prem Lal has proved relevant extract of register Ex. DW-1/A and DW-1/B. It is clear from these documents that the prosecutrix has visited the dispensary a number of times. Thus, it can not be believed that accused was stranger to her. She was known to the accused. There were no gag injuries on the mouth and lips of the prosecutrix as per cross-examination of PW-7, Dr. B. Bhangal. She has also admitted that if prosecutrix had been gagged, injuries like abrasions etc. were bound to be present on her lips and mouth. Statement of PW-4 does not inspire confidence. She has made various improvements in her statement. Prosecution has not proved the case beyond the reasonable doubt.

19. Learned trial Court has correctly appreciated the entire evidence and there is no occasion for this Court to interfere with the well reasoned judgment of trial Court.

20. Consequently, there is no merit in the appeal and the same is dismissed. Pending applications, if any, are also disposed of. The bail bonds are discharged.

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

Hem Raj .....Appellant.
Vs.
State of H.P. .....Respondent.

Cr. Appeal No. 212 of 2011.
Reserved on: October 29, 2014.
Decided on: October 30, 2014.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 11 kgs 730 gms of charas- police officials specifically deposed that accused was found at a secluded place, where no witness was available and there was no habitation nearby- testimonies of the police officials were reliable and could not be doubted simply because of non-association of independent witnesses. (Para-17)

N.D.P.S. Act, 1985- PW-1 deposed that the bag was sealed with seal impression 'C'- PW-2 deposed that bag was sealed with seal impression 'T' – PW-5 stated that parcel sealed with seal 'E' was handed over to him- NCB forms showed the seal impression 'C'- held, that in view of NCB form, testimony of PW-2 that seal impression was T and that of PW-5 that seal impression was 'E' were of no consequences. (Para-19)

For the appellant: Mr. Ravi Tanta, Advocate, vice Mr. Ajay Kochhar, Advocate.
For the respondent: Mr. Ramesh Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 21.5.2011, rendered by the learned Special Judge (II), Kinnaur at Rampur, H.P., in RBT No. 16-AR/3 of 2009/2010, whereby the appellant-accused (hereinafter referred to as the accused) who was charged with and tried for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, was convicted and sentenced to undergo rigorous imprisonment for ten years and a fine of Rs. One lac and in default of payment of fine, he was further ordered to undergo simple imprisonment for two years.

2. The case of the prosecution, in a nut shell, is that on 16.6.2009 at about 5:30 AM, the police party headed by Dy.S.P. (Probationer) Pankaj Sharma (PW-6), was present at *Tuman More* on *Shawad-Ani Road*. They found accused Hem Raj coming from *Shawad* side carrying a rucksack on his back. He was stopped by the police party on suspicion. The place was secluded. Thus, no independent witnesses were available. The accused opted to be searched by the police. Sh. Pankaj Sharma (PW-6) and other witnesses subjected themselves to be searched by the accused but nothing incriminating was found and memo Ext. PW-1/B was prepared to this effect. PW-6 Pankaj Sharma Dy. S.P.

(Probationer) conducted the search of the bag Ext. P-2. It contained charas. It was weighed and found to be 11 kgs 730 gms. The charas alongwith the bag was packed and sealed with seal 'C'. NCB forms in triplicate were filled on the spot. The sample of seal 'C' was also taken separately on Ext. PW-6/B. The case property was taken into possession vide memo Ext. PW-1/C. *'Rukka'* Ext. PW-2/A was sent through Constable Bhoop Singh to the Police Station. FIR Ext. PW-2/B was registered on the basis of the *'rukka'*. The accused was arrested. He was informed about the grounds of arrest vide memo Ext. PW-1/E. The case property alongwith NCB forms were deposited with MHC Anoop Kumar in the *malkhana*. Entry to this effect Ext. PW-7/A, was made in the *malkhana* register. The case property alongwith NCB forms were sent for chemical analysis to FSL, Junga through HHC Roshan Lal. Special report was sent to S.D.P.O., Anni. On receipt of the report of the Chemical Examiner Ext. PW-7/B, challan was put up against the accused after completing all the codal formalities.

3. The prosecution has examined as many as 7 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. His case is of simpliciter denial. The learned Trial Court convicted and sentenced the accused, as stated hereinabove. Hence, the present appeal.

4. Mr. Ravi Tanta, Advocate, appearing vice Mr. Ajay Kochhar, Advocate, for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Ramesh Thakur, learned Asstt. Advocate General, has supported the judgment of the learned Special Judge(II), Kinnaur at Rampur, H.P. dated 21.5.2011.

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

6. PW-1, HC Pushap Dev deposed that on 16.6.2009 he alongwith S.I. Gurbachan Singh, ASI Rajinder Kumar, ASI Ludar Singh, Constable Bhoop Singh, Constable Bali Ram and Constable Chet Ram under the supervision of Dy. S.P. (probationer) Pankaj Sharma, left Police Station Anni, at 3:00 AM in official vehicle No. HP-34-0298, towards *Sward* side in connection with *nakabandi*. At about 5:30 AM when they were present at *Tuman More* on *Sward Anni road*, one person wearing black pant and check shirt came from *Sward* side towards *Nagan* side carrying a bag on his back. On seeing the police party, he stopped and got perplexed. On suspicion of possessing some contraband, Dy. S.P. (Probationer) Pankaj Sharma, asked that person about his name and address. He disclosed his name and address. The accused was informed about his right to be searched in the presence of the Magistrate or the Gazetted Officer, orally as well as in writing, to which the accused opted to be searched by the police. Consent memo Ext. PW-1/A was prepared. The place was isolated and there was no habitation nearby and as such it was not possible to associate any independent witness. He alongwith Dy. S.P. (Probationer) Pankaj Sharma and ASI Rajinder Kumar joined as witnesses. He alongwith both the witnesses gave their personal search to the accused and search memo Ext. PW-1/B to this effect was prepared. The rucksack was searched. It contained charas. It weighed 11 kgs 730 gms. The charas was put back into the same polythene envelopes which were put in the same rucksack. The same was packed and wrapped with a piece of cloth and sealed with six seals bearing impression 'C'. NCB forms in triplicate were filled up and after drawing specimen of seal, the seal after its use was handed over to him. The charas recovered from the accused was taken into possession vide seizure memo Ext. PW-1/C. *'Rukka'* was scribed by Dy. S.P. (Probationer) Pankaj Sharma. He sent the same to P.S. Anni, through Constable Bhoop Singh. He denied the suggestion in his cross-examination that on 16.6.2009 at 5:30 AM, bus No. HP-34-8389 in which Malik Kumar was driver and Manohar Lal was conductor, started from bus stand Anni to Kullu. He denied the suggestion that the bus was stopped by them below

Haripur College. He denied the suggestion that Hem Raj accused had boarded the bus at Nagan and he was to go to Kingal. He also denied the suggestion that the accused was issued a ticket from Nagan to Kingal for of Rs. 20/-. He also denied the suggestion that Constable Bhoop Singh boarded the bus and called accused Hem Raj by name and thereafter he made him to get down from the bus and then he was taken to P.S. Anni. He also denied the suggestion that when the accused was taken down, at that time he was not holding any bag. He also denied the suggestion that the accused was falsely implicated. *Tuman More* is situated at a distance of 2 to 2 ½ kms. from Nagan. He denied the suggestion that *Tuman More* is situated at a distance of 1200 meters from Nagan. He also denied the suggestion that 200-300 meters before *Tuman More*, there is a bridge on the *'khud'*. According to him, besides the fish farm, there is a shop of Madan. It was opened late in the morning. He also denied the suggestion that 30 meters above the bridge there are 4 houses of the Brahmins. He denied the suggestion that one person was on duty round the clock at the fish farm. They remained on the spot upto around 11:45 AM. He also denied the suggestion that after every half an hour, one bus and 4-5 other vehicles cross through *Tuman More*. He also denied the suggestion that no independent witnesses from Village Nagan or from near the bridge was associated, because the entire proceedings were conducted by them in the Police Station. He also denied the suggestion that consent memo Ext. PW-1/A was falsely prepared.

7. PW-2 Constable Bhoop Singh, also deposed the manner in which the accused was apprehended, searched and the sealing process was completed on the spot. According to him, ASI Rajinder Kumar and HC Pushap Dev were joined in investigation by the I.O. as witnesses as no independent witnesses were available and the place where the accused person was intercepted was an isolated place. At that time, no person was passing from that place. The charas weighed 11 Kgs. 750 gms. The charas was packed and sealed with seal impression 'T'. NCB forms in triplicate were filled in and specimen of seal was obtained. Thereafter, seal was handed over to HC Pushap Dev. *'Rukka'* Ext. PW-2/A was prepared and handed over to MHC Anup Kumar in the Police Station on the basis of which FIR Ext. PW-2/B was registered. He admitted in his cross-examination that Anni Kullu bus service via Shimla starts from Anni at 5:30 AM. He denied the suggestion that on 16.6.2009 bus No. HP-34-8389 in which Malik Kumar was driver and Manohar Lal was conductor was going from Anni to Kullu via Shimla. He denied the suggestion that the accused Hem Raj boarded the bus for going to Kingal at Nagan. He denied the suggestion that the bus was intercepted below Haripur College. He denied the suggestion that he called accused Hem Raj by name and brought him down from the bus. He denied the suggestion that the accused was brought to the Police Station, Anni. According to him, the distance from Nagan to *Tunam More* would be around 2 or 2 ½ kms. He denied the suggestion that there were four houses of Brahmins situated at a distance of 30-40 meters above the bridge. He also deposed that no attempt was made to join any independent witness from the nearby places. They did not come upto the bridge to find out that some person was present in the shop or in the fish farm.

8. Statements of PW-3 HHC Kashmi Ram and PW-4 ASI Sohan Lal, are formal in nature.

9. PW-5 HHC Roshan Lal deposed that on 17.6.2009 MHC Anoop Kumar handed over one sealed parcel weighing 11.370 kgs. Sealed with seal bearing impression 'E' alongwith NCB forms and specimen of seal vide RC No. 28/09 dated 17.6.2009 for being deposited in FSL, Junga. He deposited the same at FSL, Junga. Till the property remained in his custody, it was not tampered with.

10. PW-6 Pankaj Sharma, deposed that he alongwith other police officials left Police Station Anni in official vehicle No. HP-34-0292 alongwith I.O. Kit and floodlight in connection with general patrol duty and *Nakabandi* towards

Nagan. At about 5.30 pm, when they were present at *Tumon More* on *Shwar-Anni Road*, one person came from *Shwa*r side towards Nagan holding a rucksack on his back. That person was stopped by them. The accused got perplexed. He disclosed his name to the police. He was apprised of his right to be searched in presence of a Magistrate or any Gazetted Officer. The accused opted to be searched by the police vide consent memo Ext. PW-1/A. The place was isolated and no independent witness was available. There was also no habitation nearby. He joined ASI Rajender Kumar and HC Pushap Dev as witnesses. All of them gave their search to the accused person vide search memo Ext. PW-2/B. The Charas was found in the bag. It weighed 11.370 kgs. The charas was put back in the same bag, which was packed and sealed with seal bearing impression 'C'. NCB forms in triplicate, were filled in by him and thereafter, specimen of seal Ext. PW-6/B was drawn and seal was handed over to HC Pushap Dev. The Charas was taken into possession vide seizure memo Ext. PW-1/C. The personal search of the accused person was conducted. The site plan was also prepared. The accused was arrested vide arrest memo PW-1/E. He deposited the case property alongwith NCB forms and specimen of seal with MHC Anup Kumar in the *Malkhana* of the Police Station. The House of Mohar Singh was also raided in the presence of his wife Jiwni Devi. But, nothing incriminating was recovered from his house. Search Memo Ext. PW-6/G was prepared. He denied the suggestion in his cross-examination that the accused boarded the bus at Nagan and he was to go to Kingal on 16.6.2009. He also denied the suggestion that accused Hem Raj had purchased Bus ticket for Rs. 20/- bearing No. 008433. He also denied the suggestion that Constable Bhoop Singh stopped the aforesaid bus at Haripur and called accused Hem Raj out of the bus. He also denied the suggestion that the police personnel after making the accused person to get down from the bus, brought him to Police Station Anni. No attempt was made to join independent witnesses as none was available on the spot or nearby. He denied the suggestion that the documents were prepared in advance.

11. PW-7 HC Anoop Kumar, deposed that on 16.6.2009, Constable Bhoop Singh brought *Rukka* Ext. PW-2/A. He sent the case file to Shri Pankaj Sharma, Dy. S.P. (Probationer). Shri Pankaj Sharma, has deposited the case property comprising of one sealed parcel which was sealed with seal impression 'C' alongwith specimen of seal and NCB forms in triplicate in *Malkhana.* He made entry in the *Malkhana* register at Sr. No. 205, the extract of which is Ext. PW-7/A. He sent the parcel alongwith NCB forms and specimen of seal to FSL Junga through HHC Roshan Lal vide RC No. 28/2009 on 17.6.2009. The copy of RC and receipt is Ext. PW-7/B. The case property remained intact in his custody and it was not tampered with. The report of Chemical Examiner is Ext. PW-7/C.

12. DW-1 Constable Mohar Singh, has proved entry at page No. 241 of the log book of vehicle HP-34-0298 vide memo Ext. DW-1/A.

13. The accused has appeared as DW-2. According to him, he boarded the HRTC Bus No. HP-34-8389 at Nagan at 8.45 AM. When the bus reached below College at Haripur, two police officials present on the road stopped the bus. One of the police official was Head Constable and other was Constable. The police Constable entered the bus and called his name and asked him to get down from the bus. He got down from the bus. The police officials had conversation with the driver of the bus. When he boarded the bus, he was not having any luggage with him. On asking by the police at that time also, he was not possessing any luggage. There were large number of passengers, mainly girls present in the bus. The police vehicle came from *Nula* side and then the police official took him to Police Station Anni. The Police officials showed him the bag and thereafter they obtained his signatures on several documents. The bag did not belong to him. On the next day, he was brought to Rampur and his brother met him there. He has narrated the entire story to his

brother. He has been falsely implicated by the police in this case. He had purchased bus ticket from Kingal vide Ext. DW-2/A. In his cross-examination, he deposed that the bus was full and he was standing in the bus. At the time of his arrest, his personal search was conducted and search memo Ext. PW-1/D was prepared. It was signed by him. He also admitted that the articles recovered from the personal search were entered in the search memo. He denied the suggestion that since he was not possessing any ticket and as such the same was not mentioned in the search memo Ext. PW-1/D. He deposed that the police had returned the ticket to him after perusing the same.

14. DW-3 Malik Kumar, is the driver of bus No. HP-34-8389. According to him, the accused person signaled the bus to stop at Nagan. He told him that the bus was full but the accused persons stated that he wanted to board. He boarded the bus. He was not possessing any baggage at that time. Near Haripur, one of the police officials was of the rank of Head Constable and he did not notice the rank of the other police official. He was not having any star on his uniform. He called the name of accused Hem Raj and made him to get down from the bus. At that time, the accused person did not possess any baggage. In his cross examination, he denied the suggestion that on 16.6.2009, the accused had not boarded the bus at Nagan.

15. DW-4 Manohar Lal is the conductor of the bus. He deposed that Ext. DW-2/A, ticket was from Nagan to Kingal. The date of issue of this ticket was 16th of the month. The police officials stopped the bus at Haripur. The accused was present in the bus. The police officials got the accused to alight from the bus. The accused person was not carrying any baggage when he got down from the bus. The police officials asked them to leave the place and they left towards Luhri side. In his cross-examination he deposed that the bus was 37 seater. At that time about 65 passengers were present in the bus out of which 20-22 passengers were standing. When the accused person boarded the bus at that time, he had no conversation with the driver or with him.

16. Mr. Ravi Tanta, Advocate has vehemently argued that the prosecution has not examined any independent witness during the entire process of seizure and arrest of the accused. PW-1 H.C. Pushap Dev has specifically deposed that the place where the accused was apprehended was isolated and there was no habitation nearby as such it was not possible to associate any independent witness. ASI Rajender Kumar joined them as witness. PW-2 Constable Bhoop Singh also deposed that ASI Rajender Kumar and HC Pushap Dev were joined by the IO as witnesses as no independent witnesses were available as the place where the accused was intercepted was isolated.

17. PW-6 Pankaj Sharma, Dy. S.P. (Probationer) also deposed that the place was isolated. Therefore, no independent witnesses were available and there was no habitation nearby. He joined ASI Rajender Kumar and HC Pushap Dev as witnesses. The statement of PW-1 HC Pushap Dev, PW-2 Constable Bhoop Singh and PW-6 Pankaj Sharma are truthful and natural. The statements of officials witnesses can be relied upon if inspire confidence. The learned trial Court has rightly relied upon the statements of PW-1 HC Pushap Dev, PW-2 Constable Bhoop Singh and PW-6 Pankaj Sharma, Dy. S.P.(Probationer) to the effect that no independent witness was available at the spot. It was 5.30 AM in the morning. The habitation was at a far off place. The shop of one Madan was not opened in the morning as per the statements of PW-1 H.C. Pushap Dev and PW-2 Constable Bhoop Singh. PW-1 HC Pushap Dev has also deposed that efforts were made to join independent witnesses.

18. Mr. Ravi Tanta, Advocate has also argued that there is variance with regard to seal impression. PW-1 HC Pushap Dev has deposed that the contraband was put back in the same polythene bag which was put in the same rucksack, which was packed and wrapped with a piece of cloth and sealed with

6 seals bearing impression 'C'. PW-2 Constable Bhoop Singh has deposed that the Charas was put back into the same bag which was packed and sealed with seal bearing impression 'T'. PW-5 HHC Roshan Lal has deposed that on 17.6.2009, MHC Anoop Kumar handed over one sealed parcel weighing 11.730 kgs sealed with seal bearing impression 'E' alongwith the NCB forms. PW-6 Shri Pankaj Sharma, Dy.S.P. (Probationer) has categorically deposed that charas was taken into possession vide seizure memo Ext. PW-1/C. The charas was put back into the same bag which was packed and sealed with seal bearing impression 'C'. Even, PW-7 HC Anoop Kumar has deposed that Sh. Pankaj Sharma Dy. S.P. (Probationer), has deposited the case property comprising of one sealed parcel which was sealed with seal impression 'C' alongwith specimen of seal and NCB forms in triplicate in *Malkhana.*

19. We have gone through NCB forms, the sample seal is with alphabet 'C'. in Ext. PW-7/C, the FSL has received one sealed cloth parcel bearing 6 seals of impression 'C'. Thus, the statement of PW-2 Bhoop Singh to the effect that seal impression was 'T' and PW-5 Shri Pankaj Sharma, Dy. S.P. (Probationer), contraband was bearing seal impression 'E' is of no consequence.

20. Mr. Ravi Tanta, Advocate has also argued that the accused has been falsely implicated. According to him, his client had infact boarded the HRTC Bus No. HP-34-8389 at Nagan and had purchased ticket to travel to Kingal. He has referred to statement of accused DW-2, accused Hem Raj, DW-3 Malik Kumar and DW-4 Manohar Lal. According to DW-2, he was travelling in the Bus and was asked to get down from the bus by the police officials. He has proved Ext. DW-2/A, ticket. DW-3 Malik Kumar was driver of the bus bearing registration No. HP-34-8389. According to him, the accused signaled him to stop the bus on 16.6.2009. He stopped the bus at Nagan. He told him that the bus was full but the accused person stated that he wanted to go. DW-4 Manohar Lal, in his cross-examination has admitted that when the accused person boarded the bus, he had no conversation either with the driver or with him. The version of DW-2 accused Hem Raj, DW-3 Malik Kumar and DW-4 Manohar Lal does not inspire any confidence. PW-1 HC Pushap Dev denied the suggestion that the bus was stopped by them below Haripur college. He also denied the suggestion that the accused had boarded the bus and he was going to Kingal. He has also denied the suggestion that the accused was brought to the police station and falsely implicated in the case. He also denied the suggestion that the accused was issued ticket from Nagan to Kingal for a fare of Rs.20/-. He also denied the suggestion that the Constable Bhoop Singh boarded the bus and called Hem Raj accused by name and thereafter he made him to get down from the bus and then he was taken to police station Anni. PW-2 Constable Bhoop Singh has also denied the suggestion that accused has boarded the bus for travelling to Kingal at Nagan. He also denied the suggestion that they stopped the said bus below Haripur college. He has also denied that he called the accused by name and brought him down from the bus. PW-1 HC Pushap Dev and PW-2 Constable Bhoop Singh have denied that 30 meters above the bridge, there were four houses of the Brahmins. PW-6 has also denied the suggestion that the accused had purchased bus ticket for Rs.20/- bearing No. 008433. He also denied the suggestion that the bus was stopped by PW-2 Constable Bhoop Singh. He also denied the suggestion that accused was made to got down from the bus. The search of the accused was carried out. There is no entry of ticket in the recovery memo as per Ext. PW-1/B. The charas has been recovered from the exclusive and conscious possession of the accused. The prosecution has followed the prescribed procedure. There is no violation of any mandatory provisions of the Act. The prosecution has proved the case beyond reasonable doubt.

21. Accordingly, there is no occasion for us to interfere with the well reasoned judgment of the trial Court dated 21.5.2011. The appeal is dismissed.

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

Kulbhushan Sharma ..... Appellant
Versus
Neeraj Sharma .....Respondent

FAO No. 376/2014
Decided on: 10.11.2014

Hindu Marriage Act, 1956- Section13(1)(i)- Husband claimed divorce on the ground of cruelty and desertion – evidence showed that wife was forced to leave her matrimonial home after she gave birth to a female child - no person visited her in the Hospital at the time of delivery- no maintenance was paid to the child and wife-she had to file a petition for maintenance and the husband, instead of paying maintenance, filed a revision petition- held, that husband had created such an atmosphere that wife could not be expected to live in the matrimonial home- behaviour of the husband towards his wife was cruel and he could not be permitted to take advantage of his own wrong. (Para-12)

Cases referred:
Shobha Rani v. Madhukar Reddi AIR 1988 SC 121
Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511
Manisha Tyagi vs. Deepak Kumar 2010(1) Divorce & Matrimonial Cases 451
Ravi Kumar vs. Julumidevi (2010) 4 SCC 476
Pankaj Mahajan vs. Dimple Alias Kajal (2011) 12 SCC 1
Vishwanath Agrawal vs. Sarla Vishwanath Agrawal (2012) 7 SCC 288
Bipinchandra Jaisinghbai Shah versus Prabhavati, AIR 1957 SC 176
Lachman Utamchand Kirpalani versus Meena alias Mota, AIR 1964 SC 40
Smt. Rohini Kumari versus Narendra Singh, AIR 1972 SC 459

For the appellant : Mr. Peeyush Verma, Advocate.
For the respondent : None

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This appeal is instituted against order dated 2.8.2014 passed by learned Addl. District Judge (II) Shimla, Himachal Pradesh in HMA Case No. 19-S/3 of 2014/10.

2. "Key facts" necessary for adjudication of the present appeal are that a divorce petition was filed by the appellant under section 13(1)(i-a) and (i-b) of the Hindu Marriage Act, 1955. Marriage between the parties was solemnized on 27.4.2002 in accordance with Hindu rites and ceremonies. A girl was born on 31.12.2003. Appellant is lecturer. Respondent is working as Professional Assistant (Library) in Indian Institute of Advanced Studies, Boileauganj.

3. According to the appellant, respondent pressed upon him to live separately from his parents. Behaviour of the respondent became harsh and inhuman with the passage of time. She was ignorant and irresponsible. She used to pick up quarrels with the appellant and his family members. She left the matrimonial home in the month of April 2004 alongwith minor child. Respondent has deserted the appellant and has subjected him to mental distress, agony and cruelty.

4. Petition was contested by the respondent. According to the respondent. According to her, behaviour of the appellant and his family members changed, after the birth of female child. She was harassed for bringing insufficient dowry and chided for not being beautiful. Appellant has moved an application seeking custody of the child. He has not made any efforts to contact her and the child.

5. Appellant filed rejoinder to the reply filed by the respondent. Issues were framed by learned Addl. District Judge on 9.8.2012. Learned Addl. District Judge dismissed the petition on 2.8.2014. Hence, this appeal.

6. I have heard the learned counsel for the appellant and also gone through the order carefully.

7. PW-1 Shri Bharat Ram Sharma has denied that after the birth of the child, respondent went to the house of her parents. He feigned ignorance in his cross-examination that respondent was harassed and forced to leave the matrimonial home as she delivered a female child.

8. PW-2 Shri K.D. Sharma is father of the appellant. He denied that he wanted a male child. He denied that the parents and relatives of his daughter-in-law came to his house and tried to advise the appellant.

9. Appellant has appeared as PW-4. He denied the suggestion that respondent was ousted from matrimonial home as they wanted a male child. He admitted that he did not pay any amount towards the education and other expenses of the child. He also admitted in categorical terms that the child was granted maintenance allowance in proceedings under Section 125 of the Criminal Procedure Code. He had filed revision against order granting maintenance allowance.

10. Respondent has appeared as RW-1. According to her, she was ousted from matrimonial home as she has delivered a female child. Behaviour of the appellant and his family members changed after the birth of the female child on 31.12.2003. She denied the suggestion that appellant was subjected to any mental cruelty by her. Appellant reached hospital at the time of delivery of the child on 31.12.2003 at 6.30 pm. No member from his family came at the time of delivery and her brother dropped her in the house of her in-laws. She went to the house of her in laws on 24.4.2004. Nobody has thereafter taken her.

11. RW-2 Kundan Lal is the father of the respondent. According to him also, behaviour of the family of the appellant changed after the birth of female child.

12. What emerges from the facts enumerated herein above is that marriage the parties was solemnized on 27.4.2002. Female child was born on 31.12.2003. Respondent was forced to leave the matrimonial home. She has given birth to a female child. No member from the family of the appellant has visited her in the hospital at the time of delivery. Respondent's brother dropped her in the in laws' house. Appellant has not paid any amount towards the maintenance of the infant child, rather respondent was forced to file a petition under Section 125 of the Criminal Procedure Code. Maintenance was granted to the child. Appellant instead of complying the orders, filed a revision against the same. He is a lecturer. Circumstances created by the appellant were so hostile that the respondent was forced to leave the matrimonial home. Appellant has miserably failed to prove that she treated him with cruelty. Rather, to the contrary, behaviour of the appellant was cruel towards his wife and child. Appellant has also failed to prove that the respondent has deserted him. Conduct of the appellant was such that the respondent had to leave the matrimonial home. Appellant can not be permitted to take advantage of his own wrongs. The respondent has not deserted the appellant. Neither the appellant

nor his family members have tried to bring the respondent back to her matrimonial home.

13. Their Lordships of the Hon'ble Supreme Court in case **Shobha Rani v. Madhukar Reddi** reported in **AIR 1988 SC 121** have explained the term "cruelty" as under:

> **"4. Section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.**
>
> **5. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, [1966] 2 All E.R. 257 (259) "the categories of cruelty are not closed." Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful/realm of cruelty."**

14. Their Lordships of the Hon'ble Supreme Court in **Samar Ghosh vs. Jaya Ghosh** reported in **(2007) 4 SCC 511**, have enumerated some instances of human behaviour, which may be important in dealing with the cases of mental cruelty, as under:

> **"98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty**

can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger

or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

15. Their Lordships of the Hon'ble Supreme Court have held in **Manisha Tyagi vs. Deepak Kumar** reported in **2010(1) Divorce & Matrimonial Cases 451**, as under:

> **"24. This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonable be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension**

that would be harmful or injurious to continue the cohabitation with the other spouse. Therefore, to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However, in this case even with aforesaid standard both the Trial Court and the Appellate Court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce."

16. Their Lordships of the Hon'ble Supreme Court have held in **Ravi Kumar vs. Julumidevi** reported in (2010) 4 SCC 476, as under:

"19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it ma be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial case can be of infinite variety – it may be subtle or even brutal and may be by gestures and word. That possible explains why Lord Denning in Sheldon v. Sheldon held that categories of cruelty in matrimonial case are never closed.

21. This Court is reminded of what was said by Lord Reid in Gollins v. Gollins about judging cruelty in matrimonial cases. The pertinent observations are (AC p.660)

> **".. In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."**

22. " About the changing perception of cruelty in matrimonial cases, this Court observed in Shobha Rani v. Madhukar Reddi at AIR p. 123, para 5 of the report: (SCC p.108, para 5)

> **"5. It will be necessary to bear in mind that there has been (a) marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court**

should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties."

17. Their Lordships of the Hon'ble Supreme Court have held in **Pankaj Mahajan vs. Dimple Alias Kajal** reported in (2011) 12 SCC 1, as under

"36. From the pleadings and evidence, the following instances of cruelty are specifically pleaded and stated. They are:

i. Giving repeated threats to commit suicide and even trying to commit suicide on one occasion by jumping from the terrace.

ii. Pushing the appellant from the staircase resulting into fracture of his right forearm.

iii. Slapping the appellant and assaulting him. iv. Misbehaving with the colleagues and relatives of the appellant causing humiliation and embarrassment to him.

v. Not attending to household chores and not even making food for the appellant, leaving him to fend for himself.

vi. Not taking care of the baby.

vii. Insulting the parents of the appellant and misbehaving with them.

viii. Forcing the appellant to live separately from his parents.

ix. Causing nuisance to the landlord's family of the appellant, causing the said landlord to force the appellant to vacate the premises.

x. Repeated fits of insanity, abnormal behaviour causing great mental tension to the appellant.

xi. Always quarreling with the appellant and abusing him.

xii. Always behaving in an abnormal manner and doing weird acts causing great mental cruelty to the appellant.

18. Their Lordships of the Hon'ble Supreme Court have held in **Vishwanath Agrawal vs. Sarla Vishwanath Agrawal** reported in **(2012) 7 SCC 288** as under:

"22. The expression 'cruelty' has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.

28. In Praveen Mehta v. Inderjit Mehta, AIR 2002 SC 2582 it has been held that mental cruelty is a state of mind and

feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment, and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The facts and circumstances are to be assessed emerging from the evidence on record and thereafter, a fair inference has to be drawn whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other."

19. Their Lordships of the Hon'ble Supreme Court in ***Bipinchandra Jaisinghbai Shah*** *versus* ***Prabhavati***, AIR 1957 SC 176 have held that two essential conditions must be there to prove the desertion: (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Their Lordships have held that desertion is a matter of interference to be drawn from the facts and circumstances of each case. Their Lordships have held as under:

> "What is desertion? "Rayden on Divorce" which is a standard work on the subject at p.128 (6th Edn.) has summarized the case-law on the subject in these terms:-
>
> "Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".
>
> The legal position has been admirably summarized in paras 453 and 454 at pp. 241. to 243 of Halsbury's Laws of England (3rd Edn.), VoL 12, in the following words:-
>
> "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated. The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.
>
> The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".
>
> Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the

other spouse in a state of temporary passion, for example anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances to each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co- exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the (animus deserendi) coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end, and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard CJ. in the case of Lawson v. Lawson, 1955-1 All E R 341 at p. 342(A), may be referred to :-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution..... "

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer

by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

20. Their Lordships of the Hon'ble Supreme Court in ***Lachman Utamchand Kirpalani*** *versus* ***Meena alias Mota***, AIR 1964 SC 40 have held that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. Their Lordships have further held that the burden of proving desertion - the 'factum' as well as the 'animus deserendi' is on the petitioner and he or she has to establish beyond reasonable doubt to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. Their Lordships have held as under:

> "The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal for Bombay where the Court had to consider the provisions of S. 3(1) of the Bombay Hindu Divorce Act, 1947 whose language is in pari materia with that of S. 10(1) of the Act. In the judgment of this Court in Bipin Chandra v. Prabhavati, 1956 SCR 838; ((S) AIR 1957 SC 176) there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion were considered and the following summary of the law in Halsbury's Laws of England (3rd Edn.) Vol. 12 was cited with approval :
>
> "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the order without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases." The position was thus further explained by this Court. "If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently the cease cohabitation, it will not amount to desertion. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention of bring cohabitation permanently to an end (animus deserndi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.. . . . . Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi coexist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time." Two more matters which have a bearing on the points in dispute in this appeal might also be mentioned. The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. It is settled Law that the burden of proving desertion -
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> the "factum" as well as the "animus deserendi" - is on the petitioner; and he or she has to establish beyond reasonable doubt, to the satisfaction of

the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause. As Dunning, L. observed : (Dunn v. Dunn

(1948) 2 All ER 822 at p. 823) :

"The burden he (Counsel for the husband) said was on

her to prove just cause (for living apart). The argument

contains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a failure to distinguish between a legal burden of proof laid down by law and a provisional, burden raised by the state of the evidence . . . . . The legal burden throughout this case is on the husband, as petitioner, to prove that this wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal; and, indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the Court has still, at the end of the case, to ask itself: Is the legal burden discharged? Has the husband proved that she deserted him without cause? Take this case. The wife was very deaf, and for that reason could not explain to the Court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herself stated that they operated on her mind. Counsel for the husband says that the judge ought not to have done that. If there were a legal burden on the wife he would be right, but there was none. The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himself at the end of the case: Has that burden been discharged?"

21. Their Lordships of the Hon'ble Supreme Court in ***Smt. Rohini Kumari versus Narendra Singh***, AIR 1972 SC 459 have explained the expression 'desertion' to mean the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage.

"Under Section 10 (1) (a) a decree for judicial separation can be granted on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. According to the Explanation the expression "desertion" with its grammatical variation and cognate expression means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage. The argument raised on behalf of the wife is that the husband had contracted a second marriage on May 17, 1955. The petition for judicial separation was filed on August 8, 1955 under the Act which came into force on May 18, 1955. The burden under the section was on the husband to establish that the wife had deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition. In the presence of the Explanation it could not be said on the date on which the petition was filed that the wife had deserted the husband without reasonable cause because the latter had married Countess Rita and that must be regarded as a reasonable cause

for her staying away from him. Our attention has been invited to the statement in Rayden on Divorce, 11th Edn. Page 223 with regard to the elements of desertion According to that statement for the offence of desertion there must be two elements present on the side of the deserting spouse namely, the factum, i.e. physical separation and the animus deserendi i.e. the intention to bring cohabitation permanently to an end. The two elements present on the side of the deserted spouse should be absence of consent and absence of conduct reasonably causing the deserting spouse to form his or her intention to bring cohabitation to an end. The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be subject to the qualification that if without just cause or excuse a man persists in doing things which he knows his wife probably will not tolerate and which no ordinary woman would tolerate and then she leaves, he has deserted her whatever his desire or intention may have been. The doctrine of "constructive desertion" is discussed at page 229. It is stated that desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves the wife and the case of a man who with the same intention compels his wife by his conduct to leave him."

22. In view of the analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending applications, if any, also stand disposed of. 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.

Sushil Kumar alias Shilu ...Appellant
Versus
State of Himachal Pradesh ...Respondent

Cr. Appeal No. 255/2011
Reserved on: 5.11.2104
Decided on: 17.11.2014

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 5.600 kg of charas-PW-1 deposed that he was asked to call independent witness but could not find any independent witness- PW-2 also deposed that he had sent PW-1 to search for independent witness but PW-1 could not find any independent witness- held, that in these circumstances, prosecution version cannot be doubted due to non-association of independent witnesses. (Para-14)

For the Appellant: Mr. Avinash Jaryal, Advocate.
For the Respondent: Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against a judgment rendered by learned Special Judge, Fast Track Court, Kullu, Himachal Pradesh on 26.5.2011 in Sessions Trial No. 50 of 2010, whereby appellant/accused (herein after referred to as 'accused' for convenience sake), who was charged with and tried for offence

under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein after referred to as 'the Act' for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1.00 Lakh, in default of payment of fine to further undergo simple imprisonment for a period of two years.

2. Case of the prosecution, in a nutshell, is that on 9.4.2010, ASI Sada Nand alongwith ASI Kesar Singh, HC Gopal Chand and Constable Sunil Kumar was going in official vehicle No. HP.34A-9986. The vehicle was being driven by Constable Rup Singh. At about 6.15 pm, when police party reached village Tarakara near a culvert, they saw a person coming down towards road having black coloured backpack(rucksack). On seeing the police, he turned towards hand pump side and ran towards Nullah. He jumped down from that Nullah. Police party, on the basis of suspicion, chased him and nabbed him. Accused person received injuries. He disclosed his name as Sushil Kumar alias Shilu. SI Sada Nand associated ASI Kesar Singh and Constable Sunil Kumar as witnesses. IO told accused that his personal search is required to be taken. He was apprised about his legal right, orally as well as in writing, that he could give his personal search in the presence of a Magistrate or a Gazetted Officer. SI Sada Nand after giving his personal search to the accused conducted the search of the accused. Contraband was recovered from the bag. It was found to be Charas. Charas was weighed and it was found to be 5.600 kg. Charas was again put in the same packet. It was further wrapped with cloth. IO filled up NCB form in triplicate. Seizure memo was prepared. Rukka was sent to the Police Station. FIR was registered on the basis of said Rukka. Accused was taken to the hospital for medical examination. The case property was sent to the FSL Junga for chemical examination. The investigation was completed. Challan was put up and after concluding the trial, accused was convicted and sentenced as noticed herein above.

3. Mr. Avinash Jaryal, Advocate has vehemently argued that the Prosecution has failed to prove its case against the accused.

4. Mr. Ramesh Thakur, Assistant Advocate General has supported judgment dated 26.5.2011.

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

6. PW-1 Constable Sunil Kumar has deposed that he alongwith ASI Kesar Singh, HC Gopal was on patrolling duty at Sangri Baag in official vehicle No. HP.34A.9986. The vehicle was being driven by Constable Rup Singh. When they reached at Tarakara bridge, one person came from upper side of the road having a rucksack of black colour. He ran towards Nullah and jumped from the road. Police chased him. He was nabbed. IO sent him to call for independent witnesses from the locality. IO asked the accused about his identity. IO told the accused that he was suspecting some narcotic substance in his possession. He left the place in search of independent witnesses but could not find any independent witness from the nearby place. He informed the IO that no independent witness was available in the village. IO associated him and Kesar Singh as witnesses. IO asked the accused to whom he wanted to give his personal search. Accused was told by the IO that he could get himself (accused) searched by him or by some Gazetted Officer. Accused told the IO that he wanted to be searched by the police. Consent memo was prepared and it was signed by him alongwith Kesar Singh and the accused. The consent memo is Ext. PW-1/A. ASI Sada Nand gave his personal search to the accused. Thereafter, the search of bag was conducted. The bag was opened, in which one white coloured bag was found which was having words “VEEKAY ENTERPRISES” The bag found inside the main bag was opened on which VEEKAY ENTERPRISES was written. It was opened and one another polythene bag yellow in colour was found which was wrapped with yellow coloured tape.

The tape was removed and small polythene packets were found in which black coloured substance was found. The black coloured substance was tasted and found to be Charas. IO also found other substance which was round. It was also tasted. The contraband was weighed. It was found to be 5.600 kg. Charas was put in the same polythene packet and put in the rucksack. Thereafter, it was sealed in a piece of parcel. Parcel containing bags and Charas was sealed with seven impressions of seal 'A' and second parcel containing weighing machine etc. was sealed with four impressions of seal 'A'. The NCB form I in triplicate was filled by the IO. All the articles were taken into possession vide memo Ext. PW-1/B. Copy of recovery memo was supplied to the accused. Sample seal was taken on a piece of cloth vide Ext. PW-1/C. Photographs of the place were also taken. SHO prepared the file and handed it over to him. He returned back to the place of occurrence and handed over the case file to the IO at the spot. IO informed the accused about the grounds of arrest and arrested him vide memo Ext. PW-1/D. In his cross-examination, he admitted that there remains traffic on the road. Volunteered that there was no vehicle plying at that time. He was not aware that the houses of Jogi Ram and Dot Ram were situated just 10 metres away from National Highway at village Tarakara. He denied that the houses of Toti Devi, Chhabilu, Mohan Lal, Ses Ram and Singhu are situated adjoining to the houses of Jogi and Dot Ram at village Tarakara. He left the spot at 8.30 pm to the Police Station and reached at the Police Station at 9.00 pm. He again started back towards the place of occurrence at about 9.40 pm. He reached the spot at 10.00 pm. IO apprised the accused about the grounds of arrest and arrested him. 7. PW-2 SI Sada Nand deposed that he alongwith ASI Kesar Singh, HC Gopal Singh, Constable Sunil Kumar proceeded on patrol duty towards village Tarakara in official vehicle on 9.4.1010. When they reached at village Tarakara at about 6.15 pm, one person came from hillside. He jumped below the road. He was apprehended. Constable Sunil Kumar was sent to search for independent witnesses. Constable Sunil Kumar came back after about 15 minutes and told the IO that no independent witness was available. He associated ASI Kesar Singh and Constable Sunil Kumar as witnesses. He apprised the accused about his legal right regarding personal search that he could be searched before a Magistrate, Gazetted Officer or the police. Accused gave his consent vide consent memo Ext. PW-1/A. Contraband was recovered from the bag carried by the accused. It was duly sealed with 7 impressions of seal 'A'. It weighed 5.600 kg. A Rukka was sent vide Ext. PW-1/C to the Police Station through Constable Sunil Kumar at 8.30 pm. Constable Sunil Kumar again came back to the place of occurrence at about 10.15 pm. He denied the suggestion in his cross-examination that the houses of Jogi Ram and Dot Ram are situated just 10 yards from the road. He was not aware that the houses of Toti Devi, Chhabilu, Mohan Lal, Ses Ram and Singhu Ram are situated in village Tarakara.

8. PW-3 Constable Rajnish Kumar deposed that on 12.4.2010, MHC Ram Krishan has handed over one parcel sealed with seal impressions 'A' and 'K' alongwith sample seals 'A' and 'K' NCB I form in triplicate, seizure memo and copy of FIR with the directions to deposit the same with FSL Junga vide RC No. 106/10. He deposited the same with FSL Junga on 12.4.2010.

9. PW-4 SI Tej Ram deposed that he received one Rukka through Constable Sunil Kumar vide Ext. PW-2/C. FIR was registered vide Ex. PW-4/B. ASI Sada Nand has produced two parcels, one containing Charas 5.600 kg and another parcel containing bowl etc alongwith NCB I form in triplicate. He resealed the Charas with 7 impressions of seal 'K' and he also resealed second parcel with 4 seal impressions of 'K'. He has taken the impression of seal on a piece of cloth vide Ext. PW-4/C.

10. PW-5 Inspector Mahesh Kumar sent the parcel of Charas to FSL Junga vide forwarding letter Ext. PW-5/A.

11. PW-6 Dr. Sushil has examined the accused on 11.4.2010 at 10.30 pm. He has noticed injuries on his body. He issued MLC Ext. PW-6/A.

12. PW-7 Dr. Ashok Rana has examined the accused and issued MLC Ext. PW-7/A.

13. PW-8 MHC Ram Krishan deposed that he was posted as MHC Police Station Kullu. On 10.4.2010, SHO Tej Ram handed over two parcels alongwith NCB I form in triplicate, sample of seals A and K, photocopies of FIR and seizure memo. Out of these, two parcels, one was sealed with 7 impressions of seal 'A' and resealed with 7 impressions of seal 'K'. Second Pulinda was stated to be containing weighing machine sealed with 4 impressions of seal 'A' and resealed with 4 impressions of seal 'K'. He handed over sealed parcel on 11.4.2010 alongwith NCB Form and FIR to Constable Rajnish Kumar with the direction to deposit the same with FSL Junga.

14. Mr. Avinash Jaryal has vehemently argued that the prosecution has not examined any independent witness. It has come in the statement of PW-1 that the IO told him to call for independent witnesses from the locality. He left the place of occurrence and went to search for independent witnesses. He could not find any independent witness from nearby place. He informed that no one was available in the village. PW-2 Sada Nand also deposed that he sent Sunil Kumar to search for independent witnesses. Constable Sunil Kumar came after 15 minutes and told him that no independent witnesses were available. Mr. Avinash Jaryal has argued that according to PW-1 Sunil Kumar, he left with Rukka to the Police Station at 9.00 pm and came back at 10.00 pm. However, PW-2 deposed that Constable Sunil Kumar took Rukka at 8.30 pm and came back at 10.15 pm. There is variance of only 15 minutes. It is a minor contradiction. PW-1 Sunil Kumar and PW-2 Sada Nand have denied that the houses of Jogi Ram and Dot Ram were situated near the National Highway. It has come in the statement of PW-1 that they were on National Highway but no vehicles were plying at that time.

15. Accused has been apprised of his legal right to be searched before a Magistrate. He has given his consent. There is no procedural lapse in the seizure and sampling undertaken on the spot. Rukka was prepared by PW-2 Sada Nand. It was sent to Police Station through Sunil Kumar, on the basis of which , FIR was registered. PW-1 Sunil Kumar brought back the documents. NCB form was filled in. Contraband was sealed with 7 impressions of seal 'A'. Samples of the seal were obtained on a piece of cloth vide Ext. PW-1/C. PW-4 Tej Ram has deposed that Sada Nand produced two parcels containing Charas weighing 5.600 kg. He resealed the parcel of Charas by affixing 7 seals of seal impression 'K'. The samples have reached FSL Junga intact. The substance was found to be Charas. It has also come in the statements of PW-6 and PW-7 i.e. Dr. Sushil and Dr. Ashok Rana that the accused has received injuries.

16. Accordingly, the prosecution has proved its case against the accused to the hilt. We will not interfere with the well reasoned judgment of the learned trial court.

17. In view of the discussion and analysis made hereinabove, there is no merit in the appeal and the same is dismissed. Pending applications, if any, are also disposed of.

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

Hari Krishan Karol .....Appellant.
Versus
Surinder Kumar .....Respondent.

RSA No.455 of 2003
Reserved on 10.11.2014.
Decided on: 18.11.2014.

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit seeking specific performance of the agreement- defendant admitted the execution of the agreement and the receipt of the claim- he claimed that he had written letters to the plaintiff to get the sale deed executed but the plaintiff had failed to get the sale deed executed- however, letters were not placed on record- held, that plea of the defendant cannot be accepted. (Para-13)

Specific Relief Act, 1963- Section 12- Defendant had entered into an agreement to sell the land with the plaintiff in which he had undertaken to get the consent of his brother for selling his share- held, that share of the defendant was severable and identifiable- therefore, plaintiff is entitled for the execution of the sale deed regarding the share of the defendant. (Para- 13 to 25)

Cases referred:

Kartar Singh vrs. Harjinder Singh & ors., AIR 1990 SC 854

Sardar Singh vs. Smt. Krishna Devi and another, AIR 1995 SC 491

Manzoor Ahmed Magray versus Gulam Hassan Aram and others AIR 2000 SC 191

A. Abdul Rashid Khan (Dead) and others versus P.A.K.A. Shahul Hamid and others., (2000) 10 SCC 636

P.C.Varghese vs. Devaki Amma Balambika Devi and others, AIR 2006 SC 145

Kammana Sambamurthy (deceased by L.Rs) versus Kalipatnapu Atchutamma (deceased by L.R) and others., AIR 2011 SC 103

Harendra Chandra Das and others versus Nanda Lal Roy and others, AIR 1933 Calcutta 98

Dwijendra Kumar Roy and others vrs. Monmohan De AIR 1957 Calcutta 209

Ahammed versus Mammad Kunhi and others, AIR 1987 Kerala 228

Santhos Kumar and others, versus Varghese George and others, AIR 1988 Kerala 277

K. S. Krishnan vs. Kizhakkumbrath Arumugha Tharakar, AIR 1993 Kerala 134

Dhara Singh Vs. Fateh Singh & ors., AIR 2009 Rajasthan 132

For the appellant: Mr. G.D.Verma, Sr. Advocate, with Mr. B.C.Verma, Advocate.

For the respondent: Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge (I), Kangra at Dharamshala, H.P., dated 3.7.2003 passed in Civil Appeal No. 65-K/2001.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff, for the convenience sake), filed a suit for specific performance against the appellant-defendant (hereinafter referred to as the defendant). According to the plaintiff, the defendant entered into agreement to sell the whole land comprised in khata No. 104, khatauni No. 165, 166, khasra Nos. 371, 372, 373, 373/1, 373/2, 374, kita-6, area measuring 202 sq. meters, as entered in the *jamabandi* for the year 1990-91, situated in *Mohal* Bohan, *Mauza* Bohan, Tehsil Dehra, District Kangra, H.P. for consideration of Rs. 30,000/-. The defendant had received a sum of Rs. 15,000/- as earnest money. The defendant has agreed to execute the sale deed on or before 10.7.1993. The defendant had undertaken to get the consent of his brother also to sell his share. It was also agreed that in case his brother refused to execute the sale deed in respect of his share, then the defendant would sell his share in the suit land to the plaintiff for Rs. 15,000/- which had already been received by him. The plaintiff was always willing to perform his part of agreement and asked the defendant to transfer his share in the land by a sale deed, but he put off on one pretext or the other. The plaintiff has served two legal notices dated 12.7.1993 and 29.3.1994, asking him to execute the sale deed, however, the defendant has not even cared to reply those notices.

3. The suit was contested by the defendant. The defendant has admitted that the agreement was entered between the plaintiff and the defendant. He also admitted that he had received Rs. 15,000/-. He admitted that the sale deed was to be executed on or before 10.7.1993. According to him, he has posted two letters to the plaintiff on 14.6.1993 and 16.8.1993 in which he had asked the plaintiff to get the sale deed executed. He denied that the possession of the suit land was ever handed over to the plaintiff rather the land remained in the joint possession of defendant and his brother. The issues were framed by the learned Sub Judge Ist Class, Court No. 2, Dehra on 10.3.2000. The learned Sub Judge, decreed the suit of specific performance in favour of the plaintiff vide judgment dated 23.2.2001. The defendant feeling aggrieved by the judgment and decree dated 23.2.2001, preferred appeal before the learned Addl. District Judge(I), Kangra. The learned Addl. District Judge(I), Kangra dismissed the same on 3.7.2003. Hence, this regular second appeal.

4. This regular second appeal was admitted by this Court on 13.7.2004 on the following substantial questions of law:

> "1. Whether the Courts below have mis-interpreted mis-read and mis-construed Agreement for sale exhibit PW-1/A?
>
> 2. Whether in view of the specific Agreement between the Seller and Purchaser in Exhibit PW-1/A, that if seller and his brother Shri Krishan Gopal, evade or refuse to execute sale-deed, therefore, respondent shall be entitled to get double of the amount as received by him, therefore, decree for specific performance could not have been passed?"

5. Mr. G.D.Verma, Sr. Advocate, appearing on behalf of the appellant has vehemently argued that the Courts' below have mis-read and mis-construed the agreement for sale Ext. PW-1/A dated 10.7.1993. He also argued that the decree of performance could not have been passed. On the other hand, Mr. Bhupinder Gupta, Sr. Advocate, has supported the judgments and decrees passed by both the Courts' below.

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

7. Since the substantial questions of law are inter-related, hence in order to avoid repetition of evidence, these were taken up together for discussion.

8. It is admitted by both the parties that the agreement was entered into on 8.2.1993. The sale deed was to be executed on or before 10.7.1993. The defendant has admitted that he has received a sum of Rs. 15,000/- from the plaintiff.

9. The plaintiff has appeared as PW-1. According to him, the defendant has agreed to sell the suit land to him. The suit was filed for half share of the defendant in the suit land. The defendant was required to get consent of his brother on or before 10.7.1993 to execute sale deed in his favour. The defendant has not performed his part of the agreement. The plaintiff has served two legal notices upon the defendant. The plaintiff has denied that he has received any letters from the defendant.

10. PW-2 Advocate R.G.Dhiman deposed that he has issued legal notice Ext. PW-2/A on 12.7.1997 on the instructions of the plaintiff. The notice came back undelivered. He handed over the acknowledgement Ext. PW-2/B and envelope Ext. PW-2/C to the plaintiff.

11. PW-3 Gian Chand deposed that he had scribed the document Ext. PW-1/A in favour of Surinder Kumar on the instructions of the defendant. The contents of the same were read over and explained to the parties.

12. DW-1 Hari Krishan has deposed that he alongwith his brother was owner of the suit land. He has apprised the plaintiff of this fact. He has also admitted that he received a sum of Rs. 15,000/- from the plaintiff. He has apprised the plaintiff that he could buy his share. He was not interested to give the land to the plaintiff. When the agreement was signed, he was in dire need of money. Towards the end of his examination-in-chief, he deposed that he was neither interested in giving the land nor to refund the money. In his cross-examination, he admitted that as per Ext. PW-1/A, he was owner of the ½ share of land with his brother. He also admitted that he has signed Ext. PW-1/A after understanding the contents of the same. He also deposed in his cross-examination that he was ready and willing for the execution of the sale deed qua his share. He also admitted that he has never issued any legal notice to the plaintiff.

13. Though, the defendant has taken a specific stand that he has written two letters dated 14.6.1993 and 16.8.1993 for the execution of the sale deed, however, the fact of the matter is that these letters were never placed on record. The plaintiff has served the defendant with legal notice Ext. PW-2/A on 12.7.1993. The same came back undelivered. Mr. G.D.Verma, Sr. Advocate, has also argued that the subject matter of the agreement is composite and is not severable or divisible. Thus, the agreement cannot be enforced. However, the fact of the matter is that the defendant has not pleaded this fact in his written statement. He has drawn the attention of the Court to Section 12 of the Specific Reliefs Act, 1963. In the instant case, the share of the defendant was identifiable and severable. The plaintiff could seek decree for specific performance as per the agreement Ext. PW-1/A to the extent of the share of the defendant. The plaintiff was always ready and willing to perform his part as per the agreement. He has served legal notices upon the defendant. The agreement was to be executed on or before 10.7.1993. The execution of the agreement has been admitted by the defendant. He has also admitted that a sum of Rs. 15,000/- was received by him from the plaintiff as earnest money. It is also evident from the plaint that the plaintiff has only asked for specific performance of the agreement dated 8.2.1993 directing the defendant to execute the sale deed in respect of land measuring 101 sq. meters being half share of land comprised in khata No. 104, khatauni No. 165, 166, khasra Nos. 371, 372, 373, 373/1, 373/2, 374, kita-6, area measuring 202 sq. meters, as entered in the jamabandi for the year 1990-91.

14. In the case of ***Kartar Singh vrs. Harjinder Singh & ors.,*** reported in ***AIR 1990 SC 854,*** their lordships of the Hon'ble Supreme Court have held that when the vendor entered into a written agreement with the appellant for himself and on behalf of his sister for sale of all properties and the sister refused to sell property coming to her share, in a suit of specific performance of agreement, a decree was granted in respect of half share of suit property. It was held as follows:

> "4. We are afraid that the very foundation of the. reasoning of the Division Bench of the High Court is defective. It was never disputed that the respondent and his sister had each half share in the suit properties. Hence a mere failure to mention in the agreement that they had such share in the property would not entitle one to come to the conclusion that they did not have that share. When the property is owned jointly, unless it is shown to the contrary, it has to be held that each one of the joint owners owns a moiety of the property. In the present case, there is neither a pleading nor a contention that the respondent and his sister did not own the property in equal shares. Secondly, the agreement of sale clearly mentions that respondent was entering into the agreement both on behalf of himself and his sister, and that he was, under the agreement, selling the whole of his share and also the whole of the share of his sister in the property. Further in the agreement itself he had stated that he was responsible to get the sale-deed executed by his sister and that he would pursuade her to do so. This being the case, the properties agreed to be sold were clearly distinguishable by the shares of the respective vendors. In the circumstances when the absentee vendor, for some reason or the other, refused to accept the agreement, there is no reason why the agreement should not be enforced against the vendor who had signed it and whose property is identifiable by his specific share.
>
> 5. We are, therefore, of the view that this is not a case which is covered by S. 12 of the Act. It is clear from S. 12 that it relates to the specific performance of a part of a contract. The present is not a case of the performance of a part of the contract but of the whole of the contract so far as the contracting party, namely, the respondent is concerned. Under the agreement, he had contracted to sale whole of his property. The two contracts, viz. for the sale of his share and of his sister's share were separate and were severable from each other although they were incorporated in one agreement. In fact, there was no contract between the appellant and the respondent's sister and the only valid contract was with respondent in respect of his share in the property."

15. Their lordships of the Hon'ble Supreme Court in the case of ***Sardar Singh versus Smt. Krishna Devi and another***, reported in ***AIR 1995 SC 491,*** have held that when the property was capable of division, justice demanded partial enforcement of contract instead of refusing specific performance in its entirety. Their lordships have held as under:

> "15. In view of the finding that the appellant had half share in the property contracted to be sold by Kartar Lal, his brother, the agreement of sale does not bind the appellant. The decree for specific performance as against Kartar Lal became final. Admittedly the respondent and her husband are neighbours. The appellant and his brother being co-parceners or co-owners and the appellant after getting the tenant ejected both the brothers started living in the house. As a prudent purchaser Joginder Nath ought to have made enquiries whether Kartar Lal had exclusive title to the property. Evidence of mutation of names in the Municipal Register establishes that the property was mutated in the joint names of the appellant and Kartar Lal and was in joint possession and enjoyment. The Courts below, therefore, have,

committed manifest error of law in exercising their discretion directing specific performance of the contract for the entire property. The house being divisible and the appellant being not a consenting party to the contract, equity and justice demand partial enforcement of the contract, instead of refusing specific performance in its entirety, which would meet the ends of justice. Accordingly we hold that Joginder Nath having contracted to purchase the property, it must be referable only in respect of half the right, title and interest held by Kartar Lal, his vendor. The The first respondent being successor in interest, becomes entitled to the enforcement of the contract of the half share by specific performance. The decree of the trial Court is confirmed only to the extend of half share in the aforestated property. The appeal is accordingly allowed and the decree of the High Court is set aside and that of the trial Court is modified to the above extent. The parties are directed to bear their own costs throughout."

16. In the case of ***Manzoor Ahmed Magray versus Gulam Hassan Aram and others*** reported in ***AIR 2000 SC 191,*** their lordships of the Hon'ble Supreme Court have held that when the defendant entered into agreement to sell land jointly purchased by him alongwith brother and son who were minors at relevant time and each having one third share, the decree for specific relief with regard to 1/3rd or 2/3rd share owned by defendant and his son for which he could execute sale deed was not barred. Their lordships of the Hon'ble Supreme Court have held as under:

"15. Further, in the present case, defendant No. 1 Mohd. Yousuf Magray entered into an agreement to sell the land purchased by him in 1968-69 in three names, namely, himself, his brother (Ghulam Rasool at the relevant time - minor) and his minor son (Manzoor Ahmad Magray). Clause 2 of the agreement stipulated that Mohd. Yousuf would be bound to include and join his brother Ghulam Rasool for the execution and completion of the sale deed in respect of the said land. The learned single Judge by judgment and decree dated 16th November, 1981 granted relief for specific performance of the contract only for 1/3rd share of Mohd. Yousuf (defendant No. 1). Against that judgment the plaintiff as well as defendant No. 1 filed appeals. The Division Bench dismissed the appeal filed by Mohd. Yousuf. It allowed the appeal of the plaintiff qua the share of minor son of defendant No. 1 by holding that land was purchased by Mohd. Yousuf in the name of his son and in fact, it was owned by him. The Division Bench, however, dismissed the claim for specific performance in respect of 1/3rd share of Ghulam Rasool. Against that part of the decree, plaintiff has not preferred any appeal.

16. As stated above, Section 15 of the J. and K. Act makes it abundantly clear that where a party to a contract is unable to perform the whole of his part of it, the Court may at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform. Hence, there is no bar for passing the decree for specific relief with regard to 1/3rd or 2/3rd share owned by the contracting party for which he can execute the sale deed. For the share of Ghulam Rasool (brother of defendant No. 1) admittedly, no decree is passed by the High Court. Dealing with the similar contention where agreement was for sale of property belonging to brother and sister each having half share the Court in Kartar Singh v. Harjinder Singh, (1990) 3 SCC 517 : (AIR 1990 SC 854) held that when the absentee vendor, for some reason or the other refused to accept the agreement, there is no reason why the agreement should not be enforced against the vendor who had signed and his property is identifiable by specific share. The Court further held that such case is not covered by Section 12 of the Specific Relief Act, 1963 which relates to specific performance of a part of

a contract. Such type of case would be the case where specific performance of the whole of the contract so far as contracting party is concerned. Further, whenever a share in the property is sold the vendee has right to apply for the partition of the property and get the share demarcated. Hence there would not be any difficulty in granting specific performance of the contract to the extent to which it is binding between the parties.

Re : (e) Suit land cannot be alienated or transferred"

17. In the case of ***A. Abdul Rashid Khan (Dead) and others versus P.A.K.A. Shahul Hamid and others.,*** reported in ***(2000) 10 SCC 636,*** their lordships of the Hon'ble Supreme Court have held that the joint owner of property agreeing to sell such property is bound to execute sale deed, if other co-sharer does not join, the vendor joint-owner is bound at least to the extent of his share and the agreement to sell would be specifically enforceable. Their lordships have held as under:

"14. Thus we have no hesitation to hold, even where any property is held jointly, and once any party to the contract has agreed to sell such joint property agreement, then, even if other co-sharer has not joined at least to the extent of his share, he is bound to execute, the sale deed. However, in the absence of other co-sharer there could not be any decree of any specified part of the property to be partitioned and possession given. The decree could only be to the extent of transferring the share of the Appellants in such property to other such contracting party. In the present case, it is not in dispute that the Appellants have 5/6"' share in the property. So, the Plaintiffs suit for specific performance to the extent of this 5/6"' share was rightly decreed by the High Court which requires no interference."

18. In the case of ***P.C.Varghese versus Devaki Amma Balambika Devi and others,*** reported in ***AIR 2006 SC 145,*** their lordships of the Hon'ble Supreme Court have held that the decree for specific performance of contract regarding vendors excluding share of minor can be passed and it was composite contract. Their lordships have held as under:

"19. We fail to understand as to how the agreement for sale can be said to be a contingent contract, as was submitted by Mr. Reddy. The agreement nowhere states that in the event the permission to sell the minor's share is not obtained within the period specified therein, the same shall become invalid or otherwise unenforceable in law. The application for grant of permission to sell the minor's share, as noticed hereinbefore, was rejected only during the pendency of the suit.

34. The submission of Mr. Reddy to the effect that the learned Trial Judge committed a serious error in granting a decree for partition along with a decree for specific performance of contract need not detain us long as in view of Section 22(1)(a) of the Act a decree for partition and separate possession of the property can be granted in addition to a decree for specific performance of contract. As in this case, the Appellant herein in view of amended prayer 'C' relinquished his claim in respect of the property belonging to the minor - Respondent No. 4, he also prayed for a decree for partition and such a prayer having been allowed, no exception thereto can be taken. In any event, the said question has not been raised by the Respondents before the High Court at all. Section 22 enacts a rule of pleading that in order to avoid multiplicity of proceedings, the plaintiff may claim a decree for possession and/ or partition in a suit for specific performance. Even though strictly speaking, the right to possession accrues only when a suit for specific performance is decreed, indisputably such a decree for possession and/

or partition is prayed for in anticipation of the grant of prayer for specific performance of contract. [See Babu Lal Vs. M/s. Hazari Lal Kishori Lal and Others (1982) 1 SCC 525]

38. For the reasons aforementioned,, the impugned judgment cannot be sustained, which is set aside accordingly. The Appeal is allowed. No costs."

19. Similarly, their lordships of the Hon'ble Supreme Court in the case of ***Kammana Sambamurthy (deceased by L.Rs) versus Kalipatnapu Atchutamma (deceased by L.R) and others.,*** reported in ***AIR 2011 SC 103,*** have held as under:

"21. Section 12 prohibits specific performance of a part of a contract except in the circumstances under sub-sections (2), (3) and (4). The circumstances mentioned in these sub-sections are exhaustive. Is Section 12 attracted in the facts and circumstances of the present case? We do not think so. The present case is not a case of the performance of a part of the contract but the whole of the contract insofar as the vendor is concerned since he had agreed to sell the property in its entirety but it later turned out that vendor had only half share in the property and his wife held the remaining half. The agreement is binding on the vendor as it is without being fractured. As regards him, there is neither segregation or separation of contract nor creation of a new contract. In Kartar Singh v. Harjinder Singh & Ors. (1990) 3 SCC 517, this Court was concerned with a case where vendor--brother and a sister had each half share in the suit properties. The agreement for the sale was executed by the brother concerning the suit properties in which the sister had half share. The sister was not executant to the agreement; rather she refused to accept the agreement. The question for consideration before this Court was whether agreement could be enforced against the vendor--brother to the extent of his half share. This Court considered Section 12 and held as under :

"5. We are, therefore, of the view that this is not a case which is covered by Section 12 of the Act. It is clear from Section 12 that it relates to the specific performance of a part of a contract. The present is not a case of the performance of a part of the contract but of the whole of the contract so far as the contracting party, namely, the respondent is concerned. Under the agreement, he had contracted to sell whole of his property. The two contracts, viz. for the sale of his share and of his sister's share were separate and were severable from each other although they were incorporated in one agreement. In fact, there was no contract between the appellant and the respondent's sister and the only valid contract was with respondent in respect of his share in the property.

6. As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty. Whenever a share in the property is sold the vendee has a right to apply for the partition of the property and get the share demarcated. We also do not see any difficulty in granting specific performance merely because the properties are scattered at different places. There is no law that the properties to be sold must be situated at one place. As regards the apportionment of consideration, since admittedly the appellant and respondent's sister each have half share in the properties, the consideration can easily be reduced by 50 per cent which is what the first appellate court has rightly done."

24.. In view of the above decisions of this Court and the facts and circumstances which have already been noticed by us, in our opinion, there is no impediment for enforcement of the agreement against the vendor to the extent of his half share in the property. However, Mr. A.T.M. Sampath, learned counsel for the vendor's wife placed great reliance upon HPA International v. Bhagwandas Fateh Chand Daswani & Ors. (2004) 6 SCC 537 and, particularly, the following paragraphs of the report.

> "67. If the vendee intended to seek conveyance separately of the life interest of the vendor, the earliest opportunity for him was when he had received notice dated 11-9-1979 sent through the lawyer by the vendor cancelling the contract. Assuming that at that time he could not opt for lesser relief as the suit for sanction was pending, he could have, in any case, opted for conveyance of life interest of the vendor soon after he came to know of the negotiations for sale with Bob Daswani, which took place in the presence of one of the partners of the plaintiff vendee. Even after deriving the knowledge of the execution of the sale deed dated 29-12-1979 Ext. D-1, the option to obtain lesser relief of transfer of life interest was not exercised. It was exercised as late as on 25-11-1986 by filing an affidavit and at the time when pleadings of the parties were completed and the joint trial in the two suits had already commenced. During long pendency of the suits between 1979 to 1986, the parties interested in the property changed their positions. The vendor by executing a registered sale deed in favour of the subsequent vendee got his public dues paid to relieve the pressure on the property and obtained market price of the property. After obtaining possession of the property pursuant to the sale deed, the subsequent vendee has raised construction and inducted tenants. Accepting the legal stand based on Sections 90, 91 and 92 of the Indian Trusts Act that the subsequent vendee, being a purchaser with knowledge of prior agreement, is holding the property as a trustee for the benefit of the prior vendee, the vendor, who changed his position by effecting a subsequent sale cannot be compelled to convey his life interest when such lesser relief was not claimed at the earliest opportunity and the terms of the contract did not contemplate transfer of life interest alone."
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> ******
>
> 98. The above argument has no merit and the aforesaid decision is hardly of any help to the vendee. This is not a case where the vendor had only right of spes successionis and after execution of agreement of sale, he subsequently acquired full interest in the property to be held bound by Section 43 of the Transfer of Property Act. In the case before us, the reversioners were not parties to the agreement of sale. When in the suit for sanction to transfer their interest they were made parties and were noticed, they expressly objected to the proposed transfer. No principle of estoppel or provisions of Section 43 of the Transfer of Property Act can, therefore, operate against them. So far as the subsequent vendee is concerned, in the course of suit, he was pushed to a position in which he could not take a stand that he had no knowledge of the prior agreement with the vendee but he has separately purchased life interest from the vendor and obtained separate release deeds, on payment of consideration, from the reversioners. The reversioners being not parties to the

> sale agreement, Ext. P-1 entered into with the vendee, the latter could not enforce the contract, Ext. P-1 against the former."

It is sufficient to say that the agreement of sale and the facts which their Lordships had to consider in the case of HPA International4 were in many respects different from the agreement in the present case. In that case vide agreement of sale (Exhibit P1) therein, full interest in the property, i.e. life interest of the vendor and spes successionis of reversioners with sanction of the court was agreed to be sold. The reversioners were not parties to the sale agreement that was entered with the vendee therein. The parties were conscious that the vendor had only life interest in the property and he could not convey more than his own interest. The court found that vendee entered into a speculative deal for obtaining full interest in the property depending upon the sanction to be granted by the court. In the backdrop of these facts, this Court observed in paragraphs 68, 69 and 70 of the report thus:

> "68. On duly appreciating the evidence on record, construing specific terms of the contract and considering the conduct of the parties, we have arrived at the conclusion that the rescission of the contract, due to non-grant of sanction by the Court within two years after execution of the contract and filing of the suit for sanction, was not an act of breach of contract on the part of the vendor to justify grant of relief of specific performance of the contract to the prior vendee.
>
> 69. We are also of the view that the plaintiff vendee, by his own act in the pending suits, was responsible for rendering the suit for sanction as infructuous. He was guilty of lapse in not seeking conveyance of life interest of the vendor at the earliest opportunity when notice of rescission of the contract was received by him and later when he derived the knowledge of execution of registered sale deed in favour of the subsequent vendee. The option was exercised conditionally in the midst of the joint trial of the two suits.
>
> 70. There was one integrated and indivisible contract by the vendor to convey full interest in the property i.e. his own life interest and the interest of the reversioners with sanction of the Court. As the Court had not granted the sanction, the contract could not be specifically enforced. The lesser relief of transfer of life interest was not claimed within a reasonable time after the vendor had intimated that the contract, as agreed for full interest, was not possible of performance. We find that neither equity nor law is in favour of the plaintiff vendee."

The Court further observed in paragraph 100 of the report as follows:

> "100. In the case before us, we have not found that the vendor was guilty of rendering the suit for sanction infructuous. It did terminate the contract pending the suit for sanction but never withdrew that suit. The vendee himself prosecuted it and rendered it infructuous by his own filing of an affidavit giving up his claim for the interest of reversioners. In such a situation where the vendor was not in any manner guilty of not obtaining the sanction and the clause of the contract requiring the Court's sanction for conveyance of full interest, being for the benefit of both the parties, the contract had been rendered unenforceable with the dismissal of the sanction suit."

HPA International, thus, have no considerable bearing on the case in hand."

20. In the case of ***Harendra Chandra Das and others versus Nanda Lal Roy and others,*** reported in ***AIR 1933 Calcutta 98,*** the Division Bench has held that contract, whether divisible, is a question of fact.

21. In the case of ***Dwijendra Kumar Roy and others vrs. Monmohan De*** reported in ***AIR 1957 Calcutta 209,*** the learned Single Judge has held that contract must be specifically enforced as a whole and the exceptions to this general rule are to be found in Sections 14 to 16 of the Act. Sections 14 to 17 of the Act taken together are both positive and negative in their form and they constitute a complete code within the terms of which relief by way of specific performance of part of a contract will have to be brought. In this case defendants No. 1 to 4 have entered into a contract to settle certain lands belonging to them with the plaintiff at a rental of Rs. 70 per annum on receipt of a *salami* of Rs. 700. In a suit for specific performance it was found that the contract was not binding on the minor defendant No. 2 in respect of his ¼ share in the suit lands. The learned Single Judge has held that neither Section 14 nor Section 16 was applicable to the case but the plaintiff was entitled to a decree for specific performance in regard to ¾ share of the adult contracting defendants without any abatement in the stipulated *salami* and rent in respect of the *sixteen annas* share, provided he was prepared to relinquish his claim to further performance and compensation as required by the proviso to S. 15. It has been held as follows:

> "8. The relevant law of partial enforcement is to be found in Sections 14 to 17 of the Specific Relief Act. Section 17 of the Act provides that "the Court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections". The general rule thus is that a contract must be specifically enforced as a whole and the exceptions to this general rule are to be found in Sections 14 to 16 of the Act. The Judicial Committee in , has authoritatively laid down that the four Sections 14 to 17 of the Act taken together "are both positive and negative in their form" and "they constitute a complete Code within the terms of which" relief by way of specific performance of part of a contract will have to be brought. My present enquiry is thus of a limited character, namely, whether the plaintiff has succeeded in making out a case under any of the said three Sections 14 to 16.
>
> 9. On the facts found, the suit contract was made in favour of the plaintiff by defendants Nos. 3 and 4 and defendant No. 1 acting on behalf of himself and his minor brother defendant No. 2, and the contract, so far as this defendant No. 2 is concerned, is unenforceable in law. In the face of the decision in L.P.A. Nos. 8 and 9 of 1952 (Cal) (B), cited by the appellants, it is difficult to apply Section 16 to such a case when, under almost similar circumstances, this Court (Das and Sen, JJ.) refused to hold that the disputed contract was divisible in the sense that its enforceable and unenforceable parts stood on "separate and independent'' footings within the meaning of the Section. I must, therefore, leave aside Section 16 and turn to the other two Sections 14 and 15. Of these, again, Section 14 requires that the unenforceable part should bear only a small proportion to the whole in value which obviously refers to or connotes negligible or insignificant or immaterial deficiency, implying substantial compliance with the whole contract. The present case is certainly not one of substantial compliance, as contemplated in Section 14 and, accordingly, that section also must be left out of account. I am thus left with Section 15 which applies where inter alia substantial compliance is not possible and the latter part of the section which is in the nature of a proviso provides that in such a rase the defaulting party may be made "to perform so much of his part of the contract as he can perform provided that the plaintiff relinquishes all

claim to further performance, and all right to compensation either for the deficiency or for the loss or damage sustained by him through the default of the defendant."

This section has often been applied to cases like the present and specific performance of the enforceable part of the contract has been decreed if the plaintiff relinquished his claim to the remainder as required by the statutory proviso, quoted above. For instance, it is enough to refer to Dinanath Sarma v. Gour Nath Sarma ; Purna Chandra Mukherjee v. Gopendra Krishna AIR 1926 Cal 744 (D); Panchananda Kundu v. Rajani Kanta Pal ; Rai Promatha Nath Mittra v. Gostha Behari Sen . Reference may also be made to Shama Charan Kotal v. Kumed Dasi 27 Cal LJ 611: (AIR 1918 Cal 889) (G); Srinath Bhattacharya v. Jatindra Mohan Chatterji, 30 Cal WN 263: (AIR 1926 Cal 445) (H); Mahendra Nath Srimani v. Kailash Nath Das ; Nripendra Ch. Sarkar v. Ekherali Joardar and Baluswami Aiyar v. Lakshmana Aiyar, ILR 44 Mad 605: (AIR 1921 Mad 172) (FB) (K), which appear to proceed on the same principle and the correctness of the position has been accepted and applied in the L.P.A. Nos. 8 and 9 of 1952 (Cal) (B), particularly relied on by the appellants, where the decision of the Privy Council in , has been exhaustively reviewed, examined and explained. Harendra Chandra Das v. Nanda Lal Roy is even wider but, in view of the fact that the plaintiff is content to have the lesser relief under Section 15 (Proviso), it is unnecessary to consider the applicability of that case to the facts before us. I would, accordingly, hold that the plaintiff-respondent is entitled to a decree for specific performance in regard to the three-fourths share of the adult contracting defendants Nos. 1 and 3 and 4 without any abatement in the stipulated selami and rent in respect of the sixteen annas share. That is what the Courts below have given him and the plaintiff has definitely accepted it and thus waived or relinquished all his claim in respect of the remaining one-fourth as required by the proviso in Section 15. Even if the necessary relinquishment be not inferable from the above circumstance, the plaintiff-respondent is in no worse position, as his learned Counsel has categorically and unequivocally stated before me that his client is prepared to relinquish his claim to further performance and compensation, as required by the proviso in Section 15. This is clearly sufficient, as relinquishment for purposes of the said section can be made at any stage of the litigation (Vide the Kalyanpur Lime Wows Ltd. v. The State of Bihar, (M), approving Waryam Singh v. Gopi Chand, ILR 11 Lah 69: (AIR 1930 Lah 34) (N), and as, in my opinion, there is nothing on the present record to justify withhold ing of specific performance, in the exercise of my discretion, I am bound to affirm the decisions of the two Courts below. This appeal must, therefore, fail."

22. In the case of ***Ahammed versus Mammad Kunhi and others,*** reported in ***AIR 1987 Kerala 228,*** the learned Single Judge has held that where an agent was authorized by power of attorney to sell half right over property and on basis of that power he entered into an agreement with purchaser plaintiff to sell the entire property, the authorized portion was separable from the unauthorized portion in a claim by plaintiff under S. 22 of Specific Relief Act for enforcement of agreement for sale and only that extent of agreement was enforceable over which alone the agent had the authority.

"5. Both the trial court and the appellate court found the agreement to be valid to the extent of 1/2 right over the suit property. At the same time, basing on Sections 227 and 228 of the Contract Act, the trial court and the appellate court found that the agreement entered into by the 1st defendant beyond his authority is not separable from the portion for which he had the authority. On this ground the agreement was found to be not enforceable. What Section 227 of the Contract Act says is that

when an agent does more than he is authorised to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal. What Section 228 says is that when an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction. I do not think that the courts below were right in the finding that the authorised portion is not separable from the unauthorised portion. What was authorised under Ext.B6 was only sale or agreement for sale of 1/2 of the property. But what was agreed was sale of the full right. Section 12 of the Specific Relief Act authorises specific performance of a part of contract in certain specified cases even though the general provision is that specific performance of part of a contract shall not be directed. Under Section 22 of the Specific Relief Act, notwithstanding anything to the contrary contained in the Code of Civil Procedure, any person suing for specific performance of a contract for the transfer of immovable property may, in appropriate cases, ask for partition and separate possession of the property in addition to such performance. Therefore, it cannot be said that the unauthorised portion of Ext.A 1 is inseparable from the authorised portion and hence for that reason the agreement is not enforceable to any extent. Even though what was claimed in the plaint was specific performance of the entire agreement, it is seen that at the time of arguments plaintiff restricted his claim to enforcement of the agreement to 1/2 of the property over which atone the 1st defendant had authority. I disagree with the courts below in this respect and find that the authorised portion was separable from the unauthorised portion."

23. In the case of ***Santhos Kumar and others, versus Varghese George and others,*** reported in ***AIR 1988 Kerala 277,*** the Division Bench has held that where no permission of Court under Section 8 of the Hindu Minority and Guardianship Act, 1956 was obtained, the agreement to sell property in favour of the plaintiff was executed by the natural guardian on behalf of himself and minors was not binding on the minors. The plaintiff could be granted decree for part performance against the guardian.

"7. Section 8 of the Hindu Minority and Guardianship Act enumerates the powers of a natural guardian. Section 8(1) reads :

"The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate, but the guardian can in no case bind the minor by a personal covenant".

Section 8(2) of the Act prohibits the natural guardian from mortgaging, charging or transferring the minor's property without permission of the Court. Section 8(3) stipulates that any disposal of immovable property by a natural guardian, in contravention of Sub-section (1) or Sub-section (2), is voidable at the instance of the minor or any person claiming under him. Section 8(4) mandates the court not to grant permission to the natural guardian to do any of the acts mentioned in Sub-section (2) except in case of necessity or for an evident advantage to the minor. Thus it is manfestly clear that under Section 8 of the Act, property of the minor can be alienated, mortgaged or leased or gifted only for his evident advantage or necessity and the court's permission is a condition precedent. Any transaction by a natural guardian of the immovable property of the minors without permission of the court will not have any legal force and would not be binding on the minors.

8. In the case in hand there is not leading or evidence at all that the 1st defendant as natural guardian entered into the agreement to alienate the property belonging to the minors with permission obtained from the Court under Section 8 of the Act. As there is no evidence that the agreement was entered into by the 1st defendant' for the manifest advantage of the minors and with the permission of the Court their right will not be adversely affected. Defendants 3 to 6 are perfectly entitled to, avoid the agreement entered into by the 1st defendant in favour of the plaintiff without permission of the Court, Even if it is held that the transaction was beneficial to the minors and to their manifest advantage, still it cannot improve the position, as the Court's prior permission was not obtained. As permission of the Court was not taken by the guardian for the sale of the property the minor defendants can very well avoid the agreement.

9. It has next to be considered whether the plaintiff can obtain decree for specific performance of the agreement so far as the property belonging to defendants 1 and 2 is concerned. Section 12(1) of the Specific Relief Act, 1963 postulates that except in cases falling in Sub-sections (2) to (4), the Court shall not direct specific performance of a part of contract so far as they can be performed, and for compensation so far as it is not possible to perform them. Sub-section (2) deals with the case, when the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money. In such animation the court may direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency.

In the case in hand defendants 1 and 2 are in a position to convey substantially what the plaintiff has contracted to get. Out of the total extent of 94 cents, the extent of property belonging to the minors is only 18 cents. With respect to the property belonging to defendants 1 and 2 they cannot raise any controversy so far as the plaint claim is concerned. As defendants 1 and 2 are in a position to convey substantially what the plaintiff as a purchaser had contracted to get, the court can definitely decree the suit for specific performance as against their property. As it is found that defendants 1 and 2 have no title with regard to 18 cents of property belonging to the minor defendants and as they did not obtain sanction of the Court as provided under Section 8 of the Hindu Minority and Guardianship Act specific performance cannot be granted with regard to that item of property. In such a case the Court has to see whether the part of the contract which cannot be performed bears only a small proportion to the whole in value. Where it is found that the promisor had no title in regard to one item out of several, he had agreed to convey, the court has to see whether the part of the contract which cannot be performed bears only a small proportion to the whole in value and admits of compensation in money, or that such part does not bear only a small proportion to the whole in value or does not admit of compensation in money. In a case where the part of the contract which cannot be performed is the conveyance of ah item which is only a small portion of the whole in value and admits of compensation in money, the provisions of Section 12(2) of the Specific Relief Act became applicable. In Rutherford v. Acton Admas, AIR 1915 PC 113 it is stated as follows :

> "if a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy".

Defendants 1 and 2 cannot perform the whole of the agreement and they can perform only that part of the agreement which relates to their own property. As the property belonging to the minor defendants is only a small proportion to the whole of the agreement, it has to be held that specific performance of so much of the contract as can be performed can be granted in favour of the plaintiff."

24. In the case of ***K. S. Krishnan versus Kizhakkumbrath Arumugha Tharakar,*** reported in ***AIR 1993 Kerala 134,*** the learned Single Judge has held that the agreement can be enforced against one of the co-owners in respect of his share. It has been held as follows:

"18. The law being what has been stated above there cannot be any difficulty in enforcing a contract against one of the co-sharers who had jointly contracted to convey a property. If any of them is unable to convey his portion there is no legal bar in getting specific performance of the remaining portion against the other co-sharers. Each of the co-sharers is entitled to possession and enjoyment of the whole property along with others. He has an equal right to the possession of every part and parcel of the property. It may be that their interests are unequal but still they have got unity of possession and each of the co-sharers can transfer his share and the transferee becomes a co-sharer along with others. Section 44 of the Transfer of Property Act says that the transferee acquires as to such share or interest the transferor' right to joint possession or other common or part enjoyment of the property. The transferee can also enforce partition of his rights but subject to the conditions and liabilities affecting at the date of the transfer. Thus in a case where several co-sharers had contracted to convey a joint property belonging to them the contract can be enforced against one of them if the others are unable to convey their shares."

25. In the case of ***Dhara Singh versus Fateh Singh & ors.,*** reported in ***AIR 2009 Rajasthan 132,*** the learned Single Judge has held that the purchaser would be entitled to get partition by stepping into shoes of his vendor and decree of specific performance cannot be denied to plaintiff purchaser. It has been held as follows:

"15. Therefore, merely because the land in question was owned jointly by joint owners, it does not prevent sale by joint owners to the extent of their share and purchaser would become entitled to get partition of such land owned in joint names by stepping into shoes of their vendors. Since this position of law is clear enough, the decree for specific performance could not have been refused by the learned trial Court while deciding issue No. 8 against the plaintiff which appears to have been wrongly decided by the learned trial Court against the plaintiff-appellant and contrary to the judgment of Apex Court in the case of P.C. Varghese (AIR 2006 SC 145) (supra).

16. It is true that the relief of specific performance is a discretionary relief and it is not necessary for the trial Court to always decree specific performance of contract and the plaintiff can be compensated in the form of compensation in monetary terms. However, the said discretion has to be fairly used and in accordance with law. The fact that the plaintiff was put in physical possession at the time of agreement dated 9.2.1985 itself and paid major portion of the consideration under agreement in the year 1985 itself, entirely tilts the balance in favour of the plaintiff and in these circumstances, he was entitled to secure the specific performance of the agreement in question itself and mere compensation at double the amount paid by the plaintiff cannot adequately compensate the plaintiff who is in possession of 9 bighas of agricultural land since 1985 and is doing agricultural operations thereon since then. This Court also does

not find any reason to upset the findings of the learned Trial Court on issues decided in favour of the plaintiff.

17. The legal impediment in securing such transfer by proving that he is bonafide resident of Rajasthan, is also no longer available to the defendants in view of aforesaid notification dated 22.4.1991 cited by the learned counsel for the plaintiff-appellant. The judgments relied upon by the learned counsel for the respondents-defendants are mostly under the circumstances where the plaintiff was not in possession of the suit property and after long number of years, the Court did not consider it appropriate to award the specific performance of the contract in question, in view of high escalation of the price of the land. Here the situation is different. Under the agreement in question, the plaintiff is in physical possession of the land in question since 1985 and for long number of years he is carrying on his agricultural operations on the land in question, therefore, now denying him specific performance and allowing him only compensation in monetary terms cannot be considered to be justified. As far as question of any compensation to the defendants is concerned, that too is not found to be justified because it is only the rights of parties at the time of entering into the agreement, which will be decided in the litigation and merely because this Court now finds that the decree of specific ought to have been granted in favour of the plaintiff, it cannot be said that the defendants would be entitled to any sort of difference on account of escalation of price or compensation to settle the equities. The defendants had agreed to sell said 9 bighas of land for consideration of Rs. 74,250/- and the plaintiff had already paid consideration to the extent of Rs. 66,450/-. This was according to the then prevailing market rate and the plaintiff is admittedly in possession of the land in question since then. Therefore, now awarding any extra-compensation in the form of consideration in favour of the defendants are now expected to do is only to execute the sale-deed in performance of the agreement which they entered into on 9.2.1985 followed by agreement dated 15.2.1985, whereby with some additional payment, the bar of any time limit was agreed to be removed by the parties. However, on the unpaid sum of consideration of Rs. 7, 800/- the defendants would be entitled to get interest @ 9% per annum."

26. Accordingly, the Courts below have correctly appreciated Ext. PW-1/A and the substantial questions of law are answered accordingly. It is held that the agreement could be specifically enforced against the share of defendant.

27. Consequently, the appeal is dismissed.

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

Santosh Kumar and another. ...Petitioners.
Versus
Vijay Ram and others ...Respondents

CMPMO No. 82 of 2014
Reserved on: 10.11.2014
Decided on: 18.11.2014

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff filed an application for seeking amendment to the effect that defendants were not entitled to compensation and for seeking to restrain the defendants from spending the award amount- held, that the award was passed on 12.6.2013- plaintiff was not a party before Land Acquisition Collector and did not know about the proceeding- therefore, plaintiff had filed the application after exercise of due

diligence – amendment was necessary for adjudicating the controversy between the parties- amendment was allowed subject to payment of cost of Rs.1,000/-. (Para-7 to 10)

Land Acquisition Act, 1894 - Section 31- Claim of the person entitled to share in compensation if not adjudicated upon in land acquisition proceedings is not barred before the Civil Court.. (Para-13 to 19)

Cases referred

Shri Deo Sansthan Chinchwad and others vs. Chintaman Dharnidhar Deo and another, AIR 1962 Bombay 214

Jog Raj and another v. Banarsi Dass and another, AIR 1978 Punjab and Haryana 189

Karnail Singh v. Jagir Singh, AIR 1984 Punjab and Haryana 294

Hira Singh (deceased by LRs v. Smt. Sahini and others, AIR 1987 Delhi 168

Shantibala alias Shantilata Dei vs. Krushna Chandra Samantaray and others, AIR 2004 Orissa 9

Kempoji Rao v. Special Land Acquisition and Estate Officer, AIR 2008 Karnataka 54

Sampath Kumar vs. Ayyakannu and another, (2002) 7 SCC 559

Rajesh Kumar Aggarwal and others vs. K.K. Modi and others, (2006) 4 SCC 385

For the Petitioners	:	Mr. Neeraj Gupta, Advocate.
For the Respondents	:	Mr. B.S. Chauhan, Advocate for respondent No.1. Respondents No.2 to 4, 6 and 7 already ex parte.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This petition is instituted against the order dated 5.12.2013 rendered by Civil Judge (Senior Division), Kinnaur District at Reckong Peo.

2. "Key facts" necessary for the adjudication of this petition are that plaintiff-respondent (hereinafter referred to as the "plaintiff" for convenience sake) has filed a suit for declaration against the petitioners-defendants (hereinafter referred to as the "defendants" for convenience sake). The suit was contested by the contesting defendants by filing written statement. According to the defendants, a "will" was executed by deceased Amber Sukh on 19.2.1994 in their favour. They have become absolute owner on the basis of same. Mutation was attested in their favour on 1.9.1994.

3. Plaintiff filed an application under order 6 rule 17 of the Code of Civil Procedure seeking amendment of the plaint by inserting new paras in the plaint. According to the averments contained in the application, State Government has acquired land for construction of the border road. Award No.03/12 was passed on 12.6.2012 by the Land Acquisition Collector, Sub Division Kalpa at Reckong Peo. A sum of Rs. 83,63,739/- has been awarded in favour of the defendants. The payment was duly deposited in the bank. Plaintiff sought to raise the plea that defendants were not entitled to amount of compensation and the decree for permanent prohibitory injunction was also sought seeking to restrain defendants from spending the award amount. Application was contested by the defendants. Learned trial court allowed the application on 5.12.2013. Hence, the present petition.

4. Mr. Neeraj Gupta learned counsel for the defendants has vehemently argued that plaintiff has the remedy under section 31 of the Land Acquisition Act, 1894 (herein after referred to as ' Act' for brevity sake).

5. Mr. B.S. Chauhan, learned counsel appearing on behalf of plaintiff has strenuously argued that defendants have rightly availed the remedy by filing a suit. According to him, amendment in the plaint would avoid multiplicity of litigation.

6. I have heard the learned counsel for the parties and have perused the impugned order dated 5.12.2013 carefully.

7. What emerges from the facts enumerated hereinabove is that plaintiff has instituted a suit against the defendants. Case of the defendants precisely is that they have become absolute owner on the basis of "will" executed by Amber Sukh on 19.2.1994. The mutation was also attested in their favour. However, fact of the matter is that land was acquired by the State Government for the construction of border road. Award was passed on 12.6.2012. A sum of Rs. 83,63,739/- has been awarded in favour of the defendants. Plaintiff wanted to amend para 5 of the plaint by adding the following lines:

> **"In fact, the mother of defendants No.1 and 2 was earlier married to one Sh. Vidyapur of Village Jangi and after the death of Vidyapur she was remarried with Sh. Kirpa Ram father of defendants No.1 and 2 at village Rarang, District Kinnaur and was residing there."**

8. He also wanted to amend para 6 of the plaint by adding the followings word:

> **"alienation and also restraining from spending the awarded amount of Rs. 83,63,739/- in any manner whatsoever and in case they are not restrained from spending the awarded amount, then in that event the very purpose of filing of the present suit would be defeated."**

9. He further wanted to amend para V of the prayer clause by adding the following words:

> **"alienating and spending the awarded amount in any manner by issuance of permanent prohibitory injunction and substituted the word "Mandate" by adding the words "Permanent prohibitory injunction."**

10. The underlined principle to allow amendments to the pleading is definitely to avoid multiplicity of litigation. In the instant case, plaintiff has exercised due diligence while preferring an application for amendment of the plaint. The award has been made after the suit was instituted on 13.9.2009. The award No.03/12 was rendered on 12.6.2013. The amendment was necessary for the adjudication of the real controversy involved between the parties. The awarded amount has already been disbursed to the defendants. The plaintiff was not party before the Land Acquisition Collector. He did not know about the proceedings pending before the Land Acquisition Officer. The application cannot be termed to be filed belatedly. Defendants have also been duly compensated by awarding costs of ` 1,000/-.

11. There is no merit in the contention of Mr. Neeraj Gupta that plaintiff could take recourse under section 31 of the Act.

12. Section 31 of the Act reads as under:

> **"31. Payment of compensation or deposit of same in Court.**
>
> **(1) On making an award under section 11, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award, and shall pay it to them unless prevented by some one or more of the contingencies mentioned in the next sub-section.**

(2) If they shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted:

Provided that any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount:

Provided also that no person who has Received the amount otherwise than under protest shall be entitled to make any application under section 18:

Provided also that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto.

(3) Notwithstanding anything in this section, the Collector may, with the sanction of [1][appropriate Government] instead of awarding a money compensation in respect of any land, make any arrangement with a person having a limited interest in such land, either by the grant of other lands in exchange, the remission of land revenue on other lands held under the same title, or in such other way as may be equitable having regard to the interests of the parties concerned.

(4) Nothing in the last foregoing sub-section shall be construed to interfere with or limit the power of the Collector to enter into any arrangement with any person interested in the land and competent to contract in respect thereof."

13. Division Bench of Bombay High Court in ***Shri Deo Sansthan Chinchwad and others*** vs. ***Chintaman Dharnidhar Deo and another***, AIR 1962 Bombay 214 has held that claim of person entitled to share in compensation if not adjudicated upon in land acquisition proceedings, separate suit by such person to recovery his share from person who has received compensation is competent. The Division Bench has held as under:

"(12) As against Mr. Jahagirdar's contention, it was urged by Mr. Chitale, learned advocate appearing on behalf of the respondents, that the suit would be competent because apportionment proceedings are entirely separate proceedings and would require a separate notice to person interested in the compensation money. In this connection, he relied on the decision of the Calcutta High Court in Hurmitian Bibi v.padma Lochun Das, ILR 12 Cal 33, where it was held that the apportionment of the compensation under Section 39 of Act X of 1870 is intended to be proceeding distinct from that of settling the amount of compensation under the previous provisions of the Act, and any dispute as to the apportionment is only decided as between those persons who are actually before the Court. A separate notice, therefore, of the apportionment proceedings is requisite to bind any person by those proceedings, and where such a noticee has not been served, any party interested, although served with the notice of the proceedings for setting the amount of the compensation, cannot be considered a party to the proceedings for apportioning it, and is not barred, by the decision of the latter proceedings, from bringing a suit under the proviso to Section 40, to recover a share of the money so

apportioned. We do not think it is necessary to deide whether a separate notice of the apportionment proceedings would be required because admittedly in the present case there have been no apportionment proceedings. Mr. Chitale further contended that even assuming that plaitiff No. 1 had notice of the acquisition proceedings in his capacity as a chief trustee, a separate notice should have been given to him since it must have been known to the Revenue authorities that he had an interest in a private capacity in the village vasul to the extent of Rs. 417-4-0. We do not think it is necessary to decide this question either for the purpose of the present appeal. Mr. Chitale has also invited our attention to the Privy Council decision in Ramchandra Rao v. Ramchandra Rao, 24 Bom LR 963: (AIR 1922 PC 80), where it was held that the Land Acquisition Act of 1894 contemplated two separate and distinct forms of procedure, one for fixing the amount of compensation described as the award, and the other, for determining in case of dispute the relative rights of the persons entitled to the compensation money. Any dispute as to relative rights of persons entitled to receive compensation money is settled by litigation in the ordinary way. It was further held in that case that the decision of a competent Court even in proceedings under the Land Acquisition Act would operate as res judicata and the same question cannot be reopened in a subsequent litigation between the same parties. That case, it is true, is also distinguishable on facts. In the present case, the question of apportionment of the compensation amount appears tohave been altogether lost sight of by the Land Acquisition authorities despite entries in the Record of Rights. When the plaintiffs applied to the Collector for their share in the compensation money, the amount had been already paid to the Sansthan and the Collector does not appear to have acted under any of the provisions of the Land Acquisition Act. He merely asked the plaintiffs to apply to the Sansthan for their share in the compensation amount and, in case of refusal, to file a suit to recover the same. Mr. Chitale contends that in these circumstances, in view of the third proviso to Section 31(2) of the Land Acquisition Act, the suit filed by the plaintiffs would be maintainable. In our judgment, there is considerable force in this argument. Under the thrid proviso to Section 31(2) of the Act, nothing contained in sub-section (2) shall affect the liability of any person who may receive the whole or any part of any compensation awarded under the Act, to pay the same to the person lawfully entitled thereto. Unless, therefore, the claim of such a person, who is lawfully entitled to a share in the compensation money, is already adjudicated upon under the provisions of the Land Acquisition Act or such person having had notice to such proceedings, appears therein and fails to assert and prosecute his claim to a share in accordance with the provisions of that Act, he would be entitled to file a suit to recover his share from the person who may have received the whole or any part of the compensation amount awarded under the Act. We must, therefore, reject Mr. Jagirdar's contention that the suit is not maintainable as plaintiffs did not get their claim adjudicated upon under the provisions of the Land Acquisition Act."

14. Learned Single Judge of Punjab and Haryana High Court in ***Jog Raj and another*** v. ***Banarsi Dass and another***, AIR 1978 Punjab and Haryana 189 has held that where there is a dispute regarding the apportionment of the amount of compensation and the Collector makes payment to one of the claimants, the other claimant can recover his share of the amount

of compensation from the claimant who has been paid the amount by filing a civil suit. Learned Single Judge has held as under:

> **"7. Mr. G. C. Mittal, in support of his contention, referred to Hemanta Kumar Banerjee v. Satish Chandra Banerjee, AIR 1941 Cal 635, wherein it was observed that last proviso to S. 31(2) contemplates civil suit. It does not create right to get refund but merely recognises right existing independently of the section. He also referred to Shri Deo Sansthan Chinchwad v. Chintaman Dharnidhar Deo. AIR 1962 Bom 214, wherein similar observations were made. There cannot be any dispute that a suit is maintainable for recovery under proviso to S. 31(2). But it is not the only remedy. I am of the view that both the remedies for recovery of such amounts are open and it is for the party concerned to choose either of them.**
>
> **13. On the merits, I have also examined the matter, I have already held above that two courses were open to the tenants--firstly they could file an application before the Additional District Judge for making payment to the landlord out of the enhanced amount after taking into consideration the amount already paid by the Collector and to pay the balance to them and secondly to file a suit for recovery of their share out of the amount paid by the Collector to the landlord. They adopted the first course to which they were entitled to. For the aforesaid reasons, I do not find any fault with the judgment of the Additional District Judge and confirm the same."**

15. The Division Bench of Punjab and Haryana High Court in ***Karnail Singh v. Jagir Singh***, AIR 1984 Punjab and Haryana 294 has held that the suit for recovery for compensation amount is maintainable. The Division Bench has held as under:

> **"7. SECTION 31 has been interpreted by the Supreme Court So Dr. G. H. Grant v. State of Bihar AIR 1966 SC 237. J. C. Shah, J., speaking for the majority observed as follows (at p. 244):--**
>
> **"In, determining, the, court, of,, amount of compensation: which may be offered, he has, it is true, to apportion the, amount-of compensation between the persons known or believed to. be interested in the land, of whom. or of whose claims, he has information. whether or not they have appeared before him,. But the scheme, of. apportionment by the Collector. does trot finally. determine the rights of the Persons interested in. the. amount of compensation: the. award. is only conclusive. between the Collector and the persons interested. and not among the persons interested. The Collector has no power. to finally adjudicate, upon the title to compensation:. that dispute,. has to he decided other in. a reference 1 under SC GB '18. or. under SECTION 30-or in a "separate suit. Payment at compensation. therefore. '"under SECTION. 31 to. the, person declared by the away' ' to be entitled thereto discharges the State of 1", liability. to pay compensation (subject to any modification by the Court leaving. it open-to the. claimant to compensation to under 29 state: his., right in g reference.. under. SECTION 30 or by a separate suit.,,."**
>
> **From the above observations, it. is clear that the award i final so far as the Collector. and the persons in interested. are concerned,. but it, is. not, so., among the persons. contested 1 the land. The Persons. 1 interested can get. their dispute solved together by asking the Collector to make i. referred Under SECTION.**

18, pee, of this. Act or by-a separate.. suit. The same view had been expressed earlier in Hemanta Kumar Banerjee y Satish Chanda Banerjee,' AIR'. 1941 Cal 635. Hitkarini Sabha v., Jabalpftr Corporation, AIR 1958 Madh Pra 339, and Shri Deo Sansthan Chinchwad V. Chintaman Phamidhar 1 AIR 1962 BQM 214.)eo, Similar mat r came Up before me were. while sitting. in single Bench. in Jog. Rai v. Benars Dass., (1978) 80 Pun LR @258., AIR 1978 Punj & Har 189). 1 also took same view and held, that a suit. is.for re maintainable covers of an amount under proviso to SECTION 31(2) of the Act."

16. Learned Single Judge of Delhi High Court in ***Hira Singh (deceased by LRs*** v. ***Smt. Sahini and others***, AIR 1987 Delhi 168 has held that suit seeking recovery of compensation from person who received it is maintainable. Learned Single Judge has held as under:

"10. There is no dispute to the fact that Khasra No. 932 was acquired by the Government vide award No. 1691 dt. Mar. 23, 1964 announced on Mar. 31, 1964, Khasra No. 932 was placed in Block 'B' and compensation thereof was assessed at Rs.1,500/- per bigha. At the time of the announcement of the award, Shri Fateh Singh was the recorded owner/ person interested. No application has been made for apportionment of compensation by any person under S. 18 of the said Act. It is not the case of the appellant that Surat Singh had received any notice of apportionment of compensation. The consensus of judicial opinion is that where a claim of a person entitled to compensation is not adjudicated upon in the land acquisition proceedings, separate suit by such person to recover his share from person who had actually received compensation is competent. Reference may be made to the decision of the Privy Council in TB Ramchandra Rao v. ANS Ramchandra Rao. AIR 1922 PC 80. It was held that Land Acquisition Act contemplated two separate and distinct forms of procedure, one for fixing the amount of compensation described in the award, and the other, for determining in case of dispute the relative rights of persons entitled to receive compensation money. Any dispute as to the relative rights of persons entitled to receive compensation money may be settled by litigation in the ordinary way. This is the effect of the third proviso to S. 31 (2) of the Act. The claim of Surat Singh has not been determined or adjudicated upon under the provisions of the Land Acquisition Act. He is entitled to file a suit to recover his share from the person who has actually received the amount of compensation awarded under the Act. I, therefore, find no merit in the second submission of the counsel for the appellant."

17. Learned Single Judge of Orissa High Court in ***Shantibala alias Shantilata Dei*** vs. ***Krushna Chandra Samantaray and others***, AIR 2004 Orissa 9 has held that decree for recovery can be passed against person wrongfully receiving compensation and against State jointly and severally. Learned Single Judge has held as under:

13. The third proviso from the above quoted provision of law provides that a person if receives compensation amount though legally not entitled to the same, then he is liable to pay the same to the person who is lawfully entitled to the same. The said provision ipso facto does not disentitles the looser of the land or forbids him to claim the relief of recovery of compensation amount jointly and severally from the State as well as the person who has received it wrongly. On the other hand, while adjudicating a dispute of the present nature Court should take into consideration all relevant facts and evidence and circumstances leading to payment by the

Land Acquisition Officer to a wrong person and to decide if the circumstance available on record are sufficient to exonerate the State or to pass a decree for recovery jointly and severally.

14. In the above context, this Court finds no relevancy of the ratio in the case of Secretary of State for India, AIR 1924 Mad 521 (Supra) and Shri Deo Sansthan, Chinchwad, AIR 1962 Bom 214 (supra). In the case of State v. Smt. Sugandhi, AIR 1980 Madh Pra 19 (supra), learned Judges of the Division Bench of Madhya Pradesh High Court have judiciously consider such a contention and have stated that (Para 25 of AIR) :--

"As to the fourth point, normally the State is not a necessary or a proper party to a suit for recovery of compensation alleged to have been paid to a wrong person. Having paid the amount after the award was made, to a person who came forward to claim it, the State should normally stand absolved from the liability. The person who ought to have received the compensation for reason of his better title has his remedy against the person to whom the money has been wrongly paid. Third proviso to Section 31(2) of the Land Acquisition Act saves such a right to the person lawfully entitled to compensation, to claim the same from the person to whom the amount has been wrongly paid. There are, however, authorities for the proposition that where the Collector has shown negligence in paying to a wrong person (such negligence as would be actionable), the Collector should be asked to pay again. It is not right, the authorities say, that the Government should throw on a party whose property it has compulsorily acquired, the risk and burden of recovering the compensation from someone to whom the Government has wrongly paid it. (See K.N.K.R.M.K. Chattyat Firm v. Secy. of State, AIR 1933 Rang 176, Deputy Collector, Cocanada v. Maharaja of Pittapur, (1926) ILR 49 Mad 519 : AIR 1926 Mad 492 (1)."

However, in that reported case learned Judge did not find want of bona fide in the conduct of the Land Acquisition Officer and therefore declined to pass a decree jointly and severally.

15. From the foregoing discussions this Court finds that law does not prohibits grant of a decree jointly and severally. Evidence on record i.e. Ext. 4 and oral evidence adduced from the side of the plaintiff goes to show that the Land Acquisition Collector did not act bona fide while hastily made payment of half of the compensation amount to defendant No. 1 notwithstanding a protest raised from plaintiff's side disputing to such rights of defendant No. 1. Defendant No. 4 has not been able to prove on record that such payment was made to defendant No. 1 after due enquiry or in the absence of any protest or resistance from any quarter. Thus the evidence on record does not protect the defendant No. 4 against a decree.

16. The trial Court has also committed another mistake by granting a decree of the claimed amount in favour of the plaintiff. Fact remains that plaintiff is entitled to the proportionate compensation to the extent she lost from the purchased lands and if that comes within the half share of her vender. It is also stated at the Bar that plaintiff has also received compensation for acquisition of remaining portion from the disputed plot. There is no clear and cogent evidence available on record in that respect. Therefore, while passing a decree for recovery of the compensation amount by the plaintiff jointly and severally from the defendant to Nos. 1 and 4, it

is ordered that plaintiff is entitled to recover such amount proportionate to the extent of land lost by her from out of that Ac. 0.210 decimals. If the loss of the land sustained by the plaintiff is for more than 50% of the land acquired under that Notification then also her claim shall remain confined only to 50% of the compensation amount determined under the concerned acquisition proceeding inasmuch as she has not claimed for any further compensation for loss of such land. If the loss of the land by her is for any lessor area then decree shall be passed proportionately for a lesser amount. While modifying the judgment and decree of the trial Court accordingly the trial Court is directed to determine that aspect to pass a decree for a certain amount.

17. It appears from Ext. 4 i.e., the Award passed in Land Acquisition Case No. 51 of 1969 that the Land Acquisition Collector had been directed to determine the above aspect for payment of proportionate compensation to the plaintiff. There is nothing on record to indicate that the Land Acquisition Collector undertook any follow up action to comply with such direction in that Award. There has been a gap of about three decades and as yet plaintiff is to get the compensation amount which is her legitimate due. Statutory interest in such a case is inadequate relief against the financial loss and damage due to non-availability of such money at her disposal. Therefore, it will be appropriate for the defendant No. 4 to get the proportionate compensation determined, if not already done, expeditiously and if possible to make payment of the same as per that Award (Ext. 4). Unless the defendant No. 4 shall attend to that job sincerely, then the trial Court while determining the amount of compensation which the plaintiff is entitle to recover shall also allow appropriate amount towards damage as against the defendants jointly and severally.

In the result, the appeal is allowed and the decree of the Court below stands modified in the following manner :--

(a) Plaintiff is entitle to a money decree jointly and severally against defendant Nos. 1 and 4 for the compensation amount which shall be proportionate to the land lost by her under the concerned Notification but in any case such amount shall not exceed the amount of compensation claimed in the suit.

(b) It will be appropriate and desirable for the defendant No. 4 to verify and determine the amount of such compensation which plaintiff should get and if possible to pay the same expeditiously and in the interest of equity and justice.

(c) Notwithstanding the proceeding direction to defendant No. 4 the trial Court shall take further evidence, if any, adduced by the parties or any of them to determine the amount for which the decree shall be passed and at that stage looking to the conduct of the defendant No. 4 trial Court shall determine if any amount shall be awarded towards damage and if so, the quantum thereof. For that limited purpose the case be regarded as remanded.

(d) Hearing-fee is assessed at contested scale and the defendants/respondents 1 and 4 jointly and severally bear the cost all throughout.

18. Learned Single Judge of Karnataka in ***Kempoji Rao v. Special Land Acquisition and Estate Officer***, AIR 2008 Karnataka 54 has held that if payment is made to a person other than actual owner, owner is required to

proceed and claim reimbursement from recipient. Learned Single Judge has held as under:

> **"11. That apart, payment under section 31 of the Act even as indicated in the provision is not conclusive if a person entitled for payment has not received compensation but some other person has claimed it as original petition and the entitlement of the proper person to receive or claim reimbursement from the recipient is kept open under the very provision and that cannot be achieved in a proceeding of this nature but has to be independently."**

19. In the instant also, the plaintiff has an independent right to recover the amount from the defendants by seeking amendment of the plaint. The award has been made after the filing of the suit. It would avoid multiplicity of litigation. The relief sought for by the plaintiff could not be decided under section 31 of the Act. It is required to be independently determined in a properly instituted suit. The basic structure of the suit has not been changed. No prejudice has caused to the defendants. The trial court was bound to take into consideration subsequent developments, i.e. award made by the Land Acquisition Officer, in order to shorten the litigation.

20. Their Lordships of the Hon'ble Supreme Court in ***Sampath Kumar vs. Ayyakannu and another***, (2002) 7 SCC 559 have held that only such amendments as are directed towards putting forth and seeking determination of the real questions in controversy between the parties should be permitted to be made. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In the latter case the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. Their Lordships have held as under:

> **"9. Order 6 rule 17 of the CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting-forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No strait-jacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment."**

21. Their Lordships of the Hon'ble Supreme Court in ***Rajesh Kumar Aggarwal and others*** vs. ***K.K. Modi and others***, (2006) 4 SCC 385 have held that the object of order 6 rule 17 of the Code of Civil Procedure is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. The court always should amend the pleadings of a party unless it is satisfied that the party applying was acting mala fide. The amendment to pleading should be liberally allowed since procedural

obstacles ought not to impede the dispensation of justice. The court should also take notice of subsequent events in order to shorten the litigation to preserve and safeguard the rights of both the parties and to subserve the ends of justice. Their Lordships have held as under:

> **"15. The object of the rule is that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.**
>
> **16. Order VI Rule 17 consist of two parts whereas the first part is discretionary (may) and leaves it to the Court to order amendment of pleading. The second part is imperative (shall) and enjoins the Court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.**
>
> **17. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.**
>
> **18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary has expressed certain opinion and entered into a discussion on merits of the amendment. In cases like this, the Court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard rights of both parties and to sub-serve the ends of justice. It is settled by catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court.**
>
> **19. While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case.**
>
> **20. We shall now consider the proposed amendment and to see whether it introduces a totally different, new and inconsistent case as observed by the Hon'ble Judges of the Division Bench and as to whether the application does not appear to have been made in good faith. We have already noticed the prayer in the plaint and the application for amendment. In our view, the amendment sought was necessary for the purpose of determining the real controversy between the parties as the beneficiaries of the Trust. It was alleged that respondent No.1 is not only in exclusive possession of 57,942**

shares of GPI and the dividend received on the said shares but has also been and is still exercising voting rights with regard to these shares and that he has used the Trust to strengthen his control over GPI. Therefore, the proposed amendment was sought in the interest of the beneficiaries and to sell the shares and proceeds invested in Government bonds and or securities. A reading of the entire plaint and the prayer made thereunder and the proposed amendment would go to show that there was no question of any inconsistency with the case originally made out in the plaint. The Court always gives leave to amend the pleadings of a party unless it is satisfied that the party applying was acting malafide. There are a plethora of precedents pertaining to the grant or refusal of permission for amendment of pleadings. The various decisions rendered by this Court and the proposition laid down therein are widely known. This Court has consistently held that the amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice. The amendments sought for by the appellants has become necessary in view of the facts that the appellants being the beneficiaries of the Trust are not deriving any benefit from the creation of the Trust since 1991-92 and that if the shares are sold and then invested in Government bonds/securities the investment would yield a minimum return of 10-12%. It was alleged by the appellants that respondent No.1 is opposing the sale in view of the fact that if the said shares are sold after the suit is decreed in favour of the appellants, he will be the loser and, therefore, it is solely on account of the attitude on the part of respondent No.1 that the appellants have constrained to seek relief against the same."

22. In the instant case also the cause of action has arisen during the pendency of the suit and the proposed amendment has rightly been allowed by the trial court.

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

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

Amin Chand Mehta .....Appellant.
Versus
Commissioner of Wealth Tax .....Respondent.

WTA No. 01 of 2009.
Reserved on: 31.10.14
Decided on: 19.11.2014.

Wealth Tax Act,1957- Section 17- Assessee contended that his land was agricultural land and did not fall within the definition of the urban land - there are trees standing on the land and it was not possible to raise any construction without seeking permission from the Competent Authority- held, that as per the definition of the urban land any land classified as agricultural land or the land in which the construction of the building is not possible would not fall within the definition of the urban land- as the land of the assessee is agricultural land and no construction is possible without the permission of Municipal Corporation, it is not liable for the assessment. (Para- 6 to 9)

Case referred:
Commissioner of Wealth Tax versus D.C.M. Ltd., reported in (2007) 290 ITR 615 (Delhi)

For the appellant: Mr. Vishal Mohan, Advocate.
For the respondent: Mr. Diwan S. Negi, Advocate, vice Ms. Vandana Kuthiala, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted by the appellant-assessee against the order rendered by the learned Income Tax Appellate Tribunal in WTA Nos. 49 to 54/Chd/2008 dated 30.1.2009.

2. The appeal was admitted on the following substantial questions of law:

> "1. Whether the ld. Tribunal is right in law in holding that agricultural land within the municipality are subjectable to Wealth Tax being a part of the assets as defined under Section 2 (ea) of the Wealth Tax Act?
>
> 2. Whether in law the ld. Tribunal is right in holding that land covered by trees on which construction for the time being is not possible well within the definition of assets for the levy of Wealth Tax Act even though construction was not possible on the valuation date?
>
> 3. Whether land on which construction is not possible, being covered by trees possesses market value that too similar to that of the lands on which construction is possible?"

3. Key facts, necessary for the adjudication of this appeal are that the notice was issued to the appellant under Section 17 of the Wealth Tax Act, 1957. He filed reply/return to the same. The assessment order was passed by the Wealth Tax Officer against the appellant on 27.12.2006. He preferred appeal against the order dated 27.12.2006 before the Commissioner of Wealth Tax (Appeals), Shimla. The Commissioner of Wealth Tax (Appeals), Shimla, dismissed the same on 22.9.2008. The appellant challenged the order dated 22.9.2008 before the Income Tax Appellate Tribunal, Chandigarh Bench 'B'. The Income Tax Appellate Tribunal, Chandigarh Bench 'B', dismissed the same on 30.1.2009. Hence, this present appeal.

4. Mr. Vishal Mohan, Advocate, for the appellant has vehemently argued that the impugned land is agriculture land and does not fall within the definition of "urban land". In other words, his submission is that it was beyond the purview of Wealth Tax. He also argued that the trees are standing on the land, thus the construction was not possible without seeking permission from the statutory authorities. He has also relied upon the demarcation report carried out by the Assistant Collector, Shimla (Urban) on 14.3.2008, whereby the land was found to be covered by trees. He lastly contended that the land on which the trees are standing cannot be used for construction purpose without seeking permission of the competent authority. On the other hand, learned counsel for the department has supported the orders passed by the learned authorities below.

5. We have gone through the orders passed by the Wealth Tax Officer dated 27.12.2006, Commissioner of Wealth Tax (Appeals) dated 22.9.2008 and Income Tax Appellate Tribunal, Chandigarh Bench, dated 30.1.2009. The appellant has also placed on record the copy of the *jamabandi* in respect of the agricultural/non-agricultural land owned by the appellant.

6. Mr. Vishal Mohan, Advocate, for the appellant has drawn the attention of this Court to the amendment carried out in Section 2 (ea)(b) retrospectively w.e.f 1.4.1993, as per the Finance Act, 2013. It reads as under:

> "2 (ea)(b). "urban land" means land situate-
>
> (i) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the valuation date; or
>
> (ii) in any area within such distance, not being more than eight kilometers from the local limits of any municipality or cantonment board referred to in sub-clause (i), as the Central Government may, having regard to the extent of, and scope for, urbanization of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette,
>
> but does not include land classified as agricultural land in the records of the Government and used for agricultural purposes or land on which construction of a building is not permissible under any law for the time being in force in the area in which such land is situated or the land occupied by any building which has been constructed with the approval of the appropriate authority or any unused land held by the assessee for industrial purposes for a period of two years from the date of its acquisition by him or any land held by the assessee as stock-in-trade for a period of ten years from the date of its acquisition by him."

7. It is evident from the amendment carried out retrospectively that the land classified as agricultural land in the records of the government and used for agriculture purposes or land on which construction of building is not permissible under any law for the time being in force, in the area in which the land is situated, would not fall within the ambit of expression "urban area". The land of the assessee is agricultural land though situated in the municipal limits of M.C. Shimla. No construction is permissible in the forest land without the permission of the Municipal Corporation Building Bye-laws and Town and Country Planning Act.

8. In the case of ***Commissioner of Wealth Tax versus D.C.M. Ltd.,*** reported in ***(2007) 290 ITR 615 (Delhi),*** the Hon'ble Division Bench has held that once the land or any building thereupon making it a combination of land and building is not urban land, then it could not be an asset as defined under Section 2(ea) of the Act. Their lordships also held that the "urban land" would not include land, on which construction of a building is not permissible under any law for the time being in force in the area whether the land is situated or land occupied by any building. The intention of the legislature appears to be that the land which falls within this exception would have to be excluded from the abmit and scope of the expression "urban land".

9. Thus, the land owned and possessed by the appellant-assessee would not fall within abmit of the Section 2(ea)(b) and the learned Authorities were also not right in coming to the conclusion that the construction was possible on the lands covered by the trees. The land on which the trees are standing cannot be treated at par for the purpose of market value with the land on which the construction is possible. The land on which the trees are standing, construction is not possible without seeking permission from the competent authorities and thus the market value of this land would be lower. The substantial questions of law are answered accordingly.

10. Consequently, the appeal is allowed. Order dated 30.1.2009, rendered by the learned Income Tax Appellate Tribunal, Chandigarh, is set aside. The proceedings initiated against the appellant are dropped.

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

Amin Chand Mehta .....Appellant.
Versus
Commissioner of Wealth Tax .....Respondent.

WTA No. 02 of 2009.
Reserved on: 04.11.14
Decided on: 19.11.2014.

Wealth Tax Act, 1952- Section 17- Assessee contended that his land was agricultural land and does not fall within the definition of the urban land - there are trees standing on the land and it was not possible to raise any construction without seeking permission from the Competent Authority- held, that as per the definition of the urban land any land classified as agricultural land or the land in which the construction of the building is not possible would not fall within the definition of the urban land- as the land of the assessee is agricultural land and no construction is possible without the permission of Municipal Corporation, it is not liable for the assessment. (Para- 6 to 9)

Case referred:
Commissioner of Wealth Tax versus D.C.M. Ltd., reported in (2007) 290 ITR 615 (Delhi)

For the appellant: Mr. Vishal Mohan, Advocate.
For the respondent: Mr. Vinay Kuthiala, Sr. Advocate, with Mr. Diwan Singh Negi, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted by the appellant-assessee against the order rendered by the learned Income Tax Appellate Tribunal in WTA Nos. 49 to 54/Chd/2008 dated 30.1.2009.

2. The appeal was admitted on the following substantial questions of law:

> "1. Whether the ld. Tribunal is right in law in holding that agricultural land within the municipality are subjectable to Wealth Tax being a part of the assets as defined under Section 2 (ea) of the Wealth Tax Act?
>
> 2. Whether in law the ld. Tribunal is right in holding that land covered by trees on which construction for the time being is not possible well within the definition of assets for the levy of Wealth Tax Act even though construction was not possible on the valuation date?

3. Whether land on which construction is not possible, being covered by trees possesses market value that too similar to that of the lands on which construction is possible?"

3. Key facts, necessary for the adjudication of this appeal are that the notice was issued to the appellant under Section 17 of the Wealth Tax Act, 1957. He filed reply/return to the same. The assessment order was passed by the Wealth Tax Officer against the appellant on 14.8.2007. He preferred appeal against the order dated 14.8.2007 before the Commissioner of Wealth Tax (Appeals), Shimla. The Commissioner of Wealth Tax (Appeals), Shimla, dismissed the same on 22.9.2008. The appellant challenged the order dated 22.9.2008 before the Income Tax Appellate Tribunal, Chandigarh Bench 'B'. The Income Tax Appellate Tribunal, Chandigarh Bench 'B', dismissed the same on 30.1.2009. Hence, this present appeal.

4. Mr. Vishal Mohan, Advocate, for the appellant has vehemently argued that the impugned land is agriculture land and does not fall within the definition of "urban land". In other words, his submission is that it was beyond the purview of Wealth Tax. He also argued that the trees are standing on the land, thus the construction was not possible without seeking permission from the statutory authorities. He has also relied upon the demarcation report carried out by the Assistant Collector, Shimla (Urban) on 14.3.2008, whereby the land was found to be covered by trees. He lastly contended that the land on which the trees are standing cannot be used for construction purpose without seeking permission of the competent authority. On the other hand, learned counsel for the department has supported the orders passed by the learned authorities below.

5. We have gone through the orders passed by the Wealth Tax Officer dated 14.8.2007, Commissioner of Wealth Tax (Appeals) dated 22.9.2008 and Income Tax Appellate Tribunal, Chandigarh Bench, dated 30.1.2009. The appellant has also placed on record the copy of the *jamabandi* in respect of the agricultural/non-agricultural land owned by the appellant.

6. Mr. Vishal Mohan, Advocate, for the appellant has drawn the attention of this Court to the amendment carried out in Section 2 (ea)(b) retrospectively w.e.f 1.4.1993, as per the Finance Act, 2013. It reads as under:

"2 (ea)(b). "urban land" means land situate-

(i) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the valuation date; or

(ii) in any area within such distance, not being more than eight kilometers from the local limits of any municipality or cantonment board referred to in sub-clause (i), as the Central Government may, having regard to the extent of, and scope for, urbanization of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette,

but does not include land classified as agricultural land in the records of the Government and used for agricultural purposes or land on which construction of a building is not permissible under any law for the time being in force in the area in which such land is situated or the land occupied by any building which has been constructed with the approval of the appropriate authority or any unused land held by the assessee for industrial purposes for a period of two years from the date of its

acquisition by him or any land held by the assessee as stock-in-trade for a period of ten years from the date of its acquisition by him."

7. It is evident from the amendment carried out retrospectively that the land classified as agricultural land in the records of the government and used for agriculture purposes or land on which construction of building is not permissible under any law for the time being in force, in the area in which the land is situated, would not fall within the ambit of expression "urban area". The land of the assessee is agricultural land though situated in the municipal limits of M.C. Shimla. No construction is permissible in the forest land without the permission of the Municipal Corporation Building Bye-laws and Town and Country Planning Act.

8. In the case of ***Commissioner of Wealth Tax versus D.C.M. Ltd.,*** reported in ***(2007) 290 ITR 615 (Delhi),*** the Hon'ble Division Bench has held that once the land or any building thereupon making it a combination of land and building is not urban land, then it could not be an asset as defined under Section 2(ea) of the Act. Their lordships also held that the "urban land" would not include land, on which construction of a building is not permissible under any law for the time being in force in the area whether the land is situated or land occupied by any building. The intention of the legislature appears to be that the land which falls within this exception would have to be excluded from the abmit and scope of the expression "urban land".

9. Thus, the land owned and possessed by the appellant-assessee would not fall within abmit of the Section 2(ea)(b) and the learned Authorities were also not right in coming to the conclusion that the construction was possible on the lands covered by the trees. The land on which the trees are standing cannot be treated at par for the purpose of market value with the land on which the construction is possible. The land on which the trees are standing, construction is not possible without seeking permission from the competent authorities and thus the market value of this land would be lower. The substantial questions of law are answered accordingly.

10. Consequently, the appeal is allowed. Order dated 30.1.2009, rendered by the learned Income Tax Appellate Tribunal, Chandigarh, is set aside. The proceedings initiated against the appellant are dropped.

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

CWP No. 8272 of 2014
alongwith CWP No.8376 of 2014
Decided on: 21.11.2014

1. CWP No.8272 of 2014

Govind Ram. ...Petitioner.
Versus
Union of India. ...Respondent.

2. CWP No. 8376 of 2014

Pratap Singh. ...Petitioner.
Versus
Union of India. ...Respondent.

Constitution of India, 1950- Article 226- Petitioner was appointed as a Constable in S.S.B. in the category of combatized cadre on 20.08.1974- he completed 24 years of regular service in the year 1998 - respondent issued an office memorandum introducing Assured Career Progression

Scheme- petitioner was promoted as head constable - petitioner made a representation which was rejected on the ground that he was not entitled to grant of 2nd financial up-gradation benefits without fulfilling the normal promotion norm of qualifying mandatory pre-promotional course - held, that petitioner was entitled to the benefit of ACP scheme after the completion of 24 years as per Para-15 of the scheme and it was for the respondent to ensure that petitioner undergoes mandatory pre-promotional course- it was not asserted that petitioner had refused to undergo the course - the action of the respondents of not releasing the monetary benefits to the petitioners as per Assured Career Progression Scheme, 1999 is arbitrary and violative of Articles 14 and 16 of the Constitution of India. (Para-3 to 6)

For the Petitioner: Mr. Vaibhav Tanwar, Advocate.
For the Respondent: Mr. Ashok Sharma, A.S.G.I.

The following judgment of the Court was delivered:

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

Since common questions of law and facts are involved in both the petitions, the same are taken up together and are being disposed of by a common judgment. However, facts of CWP No. 8272/2014 have been taken into consideration for clarity sake.

2. Petitioner was appointed in S.S.B. as Constable in the category of combatized cadre on 20.8.1974. Petitioner completed 24 years of regular service in the year 1998. Respondent issued office memorandum dated 9.8.1999 whereby Assured Career Progression Scheme was introduced. Conditions of grant of Assured Career Profession Scheme are annexed as Annexure P-1. Para 15 of the same reads as under:

> **"15. Subject to condition No.4 above, in cases where the employees have already completed 24 years of regular service, with or without a promotion, the second financial upgradation under the scheme shall be granted directly. Further, in order to rationalize unequal level of stagnation, benefit of surplus regular service (not taken into account for the first upgradation under the scheme) shall be given at the subsequent stage (second) of financial upgradation under the ACP Scheme as a one time measure. In other words, in respect of employees who have already rendered more than 12 years but less than 24 years of regular service, while the first financial upgradation shall be granted immediately, the surplus regular service beyond the first 12 years shall also be counted towards the next 12 years, of regular service required for grant of the second financial upgradation and, consequently, they shall be considered for the second financial upgradation also as and when they complete 24 years of regular service, without waiting for completion of 12 more years of regular service after the first financial upgradation already granted under the Scheme."**

3. Petitioner was promoted as Head Constable in the year 2001. He superannuated in the year 2009. The Ministry of Finance, Government of India vide order dated 23.8.2012 agreed to the proposal of the Ministry of Home Affairs, Government of India for implementation of the Delhi High Court orders for the grant of benefit of Assured Career Progression Scheme. Similarly, Ministry of Home Affairs issued office order dated 27.8.2012 stating that the Ministry of Finance has agreed to implement the orders of the Delhi High Court

for the grant of benefit of Assured Career Progression Scheme. In furtherance of office orders dated 23.8.2012 and 27.8.2012, respondent No.3, i.e. Director General (SSB) sent a copy of office orders 23.8.2012 and 27.8.2012 to all the concerned including the Commandants of all the Battalions for information and necessary compliance. Respondent No.3 on 3.5.2013 requested all the concerns including the Commandants of all the Battalions to confirm grant of financial upgradation under Assured Career Progression Scheme to the post of Sub Inspector to all the eligible Constables/Head Constables including retired personnel in accordance with the original Assured Career Progression Scheme of the year 1999. Representation was made by the petitioner. Representation was rejected by the respondents on 16.9.2014 only on the ground that as per instructions, petitioner was not entitled to grant of 2nd financial up-gradation benefits w.e.f. 9.8.1999 without fulfilling the normal promotion norms/qualifying mandatory pre-promotional course in accordance with original ACP Scheme and MHA letter dated 19.6.2001. Memorandum dated 16.9.2014 is contrary to the scheme. Petitioner was entitled to benefit of ACP scheme immediately after the completion of 24 years as per para 15, as quoted hereinabove. It was for the respondents to ensure to make the petitioner to undergo mandatory pre-promotional course. It is not the case of the respondents that the petitioner was sent to undergo mandatory pre-promotional course and he has refused to undergo the same. According to the scheme, the financial upgradation under the ACP Scheme was purely personal to the employee and has no relevance to his seniority position. It merely contemplates placement on personal basis in the higher pay scale and was to be treated actual/functional promotion of the employees concerned. Petitioner has earned only one promotion throughout his career when he was promoted as Head Constable in the year 2001. The condition, if any, imposed in the ACP scheme would be deemed to have been waived.

4. Ministry of Finance and Ministry of Home Affairs have observed to scrupulously implement the judgment subject to verification of number of years put in by the petitioners in regular services. Respondent No.3 has also issued instructions to all the concerned including Commandants of all the Battalions to grant the benefits of the ACP scheme.

5. The memorandum dated 16.9.2014 is against the judgment of the Delhi High Court rendered in Writ Petition (Civil) No. 2987/2014 dated 26.5.2014 titled as ***Bachitter Singh*** Vs. ***Union of India and others***. The operative portion of the judgment reads as under:

> **"In view of the aforesaid statement made by counsel for the respondents and keeping in view the fact that the issue is covered by a number of decisions of this court, we grant the prayer made by the writ petitioners for grant of benefits under the Scheme(s) subject to the verification of the number of years put in by the writ petitioners in regular service. The benefits shall be granted to the petitioners expeditiously but not later than three months from today."**

6. Case of the petitioner is squarely covered by office orders dated 23.8.2012 and 27.8.2012 issued by the Ministry of Finance and Ministry of Home Affairs. Necessary directions have been issued by respondent No.3 to implement the scheme qua the petitioners and similarly situate persons as per original Assured Career Progression Scheme of the year 1999. Petitioner in CWP No. 8272/2014 has superannuated on 1.8.2009 and petitioner in CWP No. 8376/2014 has superannuated on 31.7.2008. Respondents were expected to redress the grievance of the petitioners of their own. They were fully eligible for the grant of benefit under Assured Career Progression Scheme after the completion of requisite number of years of service. The action of the respondents not to release the monetary benefits to the petitioners as per

Assured Career Progression Scheme, 1999 is arbitrary and thus violative of Articles 14 and 16 of the Constitution of India.

7. Accordingly, in view of the analysis and discussion made hereinabove, the writ petitions are allowed. Respondents are directed to grant to the petitioners pay scale of Rs. 5500-175-9000 from 1999 and thereafter fix their pay in the pay scale of Rs. 7300-34800 plus Grade Pay of Rs. 4200/- with effect from 1.1.2006. Respondents are also directed to release the arrears of salary since 1999 till the date of retirement of the petitioners alongwith interest @ 9% per annum within a period of eight weeks from today. Pension of the petitioners shall also be worked out accordingly. Pending application(s), if any, also stands disposed of. No costs.

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

Jai Ram Kaundal. ...Petitioner.
Versus
State of H.P. and another. ...Respondents.

CWP No. 2624 of 2010
Reserved on: 19.11.2014
Decided on: 21.11. 2014

Constitution of India, 1950- Article 226- Petitioner was appointed as a Medical Officer and he joined his duty on 4.6.1993- subsequently, an advertisement was issued on 31.10.1996 for the post of ex-serviceman scheduled caste- petitioner made a representation for considering him against the said post- his representation was rejected on the ground that rules do not provide for benefit of fixation of pay and seniority when Officer is not recruited against the reserved vacancy of ex-serviceman- held, that instructions of the Government providing that if any ex-serviceman belonging to scheduled caste or scheduled tribe is selected for appointment, his selection can be counted against the overall quota of reservation for scheduled caste or scheduled tribe and that he cannot claim any benefit of being an ex-serviceman shall be applicable when the vacancy is available on the date of recruitment of the candidate but will not apply when no vacancy was available and the petitioner had specifically indicated his preference for being considered against the post of ex-serviceman. (Para- 2 to 4)

For the Petitioner: Mr. Sanjeev Bhushan, Advocate.
For the Respondents: Mr. Ramesh Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Petitioner was appointed as Medical Officer (Dental) vide office order dated 31.5.1993. He joined his duties on 4.6.1993. One post of ex-serviceman scheduled caste was advertised vide advertisement No.5/96 dated 31.10.1996. Petitioner made a representation through proper channel to consider him against the vacancy of scheduled caste ex-serviceman. He has also stated in the representation that he has given the option to be considered against the reserved vacancy of ex-serviceman as and when available. Case of the petitioner was rejected vide office order dated 6.10.2008 on the basis of instructions dated 21.7.1982. According to the letter dated 6.10.2008, rules do

not provide to give benefit of fixation of pay and seniority when the officer is not recruited against the reserved vacancy of ex-serviceman. The same stand has been reiterated by the respondents in the reply.

2. However, fact of the matter is that petitioner was appointed on 31.5.1993 when the post of scheduled caste ex-serviceman was not available. It is in these circumstances he applied against scheduled caste category and appointed as Medical Officer (Dental) on 31.5.1993. The post of scheduled caste ex-serviceman has only become available on 31.10.1996. Case of the petitioner was required to be considered against this post, particularly when he had given option to be considered against the post of scheduled caste ex-serviceman as and when available. Petitioner had no option but to seek appointment against the scheduled caste post since the post of scheduled caste ex-serviceman was not available in the year 1993 when he was appointed as a Medical Officer (Dental). The instructions issued on 21.7.1982 clarifying that if any ex-serviceman belonging to scheduled caste or scheduled tribe is selected for an appointment, out of the vacancies reserved for being filled by ex-serviceman, his selection would be counted against the overall quota of reservation that shall be provided to scheduled caste or scheduled tribe as the case may be and once a person has been considered against scheduled caste or scheduled tribe quota, he cannot claim any benefit of being an ex-serviceman on a later date. These instructions would apply only when the ex-serviceman belonging to scheduled caste or scheduled tribe is selected for appointment out of vacancies reserved for being filled by ex-serviceman. In the instant case, the post of ex-serviceman was not available in the year 1993. It has become available only on 31.10.1996. Once the petitioner has given his option, he should have been considered against the post of ex-serviceman and conferred with all the rights upon him as per rules.

3. The employer has to take reasonable common sense view of the matter. Petitioner is an ex-serviceman. He joined the post, which was available immediately after his retirement from army. He could not wait till availability of the post of ex-serviceman scheduled caste being advertised. It is in these circumstances, he got himself appointed against the post of scheduled caste category and simultaneously gave his option to be considered against the post of ex-serviceman as and when available. Respondents have misconstrued instructions dated 21.7.1982 to deny the benefit of pay fixation and seniority to the petitioner.

4. The benefits which were available as per instructions dated 19.2.1975 to the demobilized armed personnel when recruited to non-reserved post and vacancy becoming available in near future even if occurs subsequently, the same would be applicable to the petitioner also. The personnel appointed against ex-serviceman category are entitled to pay fixation and seniority. The rules have been framed to give benefits to the ex-servicemen. The underlined principle to give reservation to the ex-servicemen is to attract the youth to join Indian Army and to appreciate the services they have rendered to the Nation. These provisions being special provisions are to mitigate the hardship being faced by the incumbents to seek employment, after their retirement at the young age, have to be construed liberally.

5. Accordingly, in view of the analysis made hereinabove, the petition is allowed. Annexures P-3 and P-4 are quashed and set aside. Petitioner would be deemed to have been appointed against the post of ex-serviceman scheduled caste advertised on 31.10.1996 for all intents and purposes. His pay shall be fixed in accordance with Armed Forces Personal Reservation of Vacancy in H.P. Non-Technical Service Rules, 1985 within a period of six weeks from today. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Neeraja Marwaha. ...Petitioner.
Versus
State of H.P. and others. ...Respondents.

CWP No. 6044 of 2014
Decided on: 21.11.2014

Constitution of India, 1950- Article 226- Gratuity of the petitioner was withheld on the ground that decision from the Court was awaited but record shows that case was disposed of- held, that gratuity is a property and not a bounty - State being a welfare state could not be oblivious to the decision of the case- State directed to release the amount with interest @ 8% per annum. (Para- 3 to 5)

Case referred:
State of Jharkhand and others vs. Jitendra Kumar Srivastava and another, (2013) 12 SCC 210

For the Petitioner: Ms. Ranjana Parmar, Advocate.
For the Respondents: Mr. Shrawan Dogra, A.G. with Mr. M.A. Khan, Addl. A.G. with Mr. P.M. Negi, Dy. A.G.

The following judgment of the Court was delivered:

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

Petitioner was promoted to the post of Junior Assistant vide office order dated 7.6.2000. The promotion orders were withdrawn by the respondents on 17.3.2003. Petitioner challenged order dated 17.3.2003 by way of original application. It was transferred to this Court and assigned CWP (T) No.9658 of 2008. It was decided on 22.3.2010. Respondents preferred an appeal against the judgment dated 22.3.2010. The same was disposed of by a Division Bench of this Court on 24.4.2012. Fact of the matter is that the judgment rendered in ***Ram Lal Sharma and others*** vs. ***State of H.P. and another*** stood implemented, as per statement of the learned Additional Advocate General recorded in LPA No. 484 of 2012 decided on 26.11.2013. Case of the petitioner was required to be looked into on the analogy of Ram Lal Sharma's case.

2. Petitioner has sought voluntary retirement on 31.5.2013. The gratuity of the petitioner was sanctioned. However, the Chief Medical Officer sent a communication to the Director of Health Services bringing to his notice that decision of the Tribunal was still awaited. The Chief Medical Officer thereafter vide office order dated 6.6.2014 withheld a sum of Rs. 1,06,238/- only on the ground that original application was pending decision. The contents of letter dated 6.6.2014 were factually incorrect. The original application filed by the petitioner, which was transferred to this Court and converted as CWP (T) No.9658 of 2008 stood decided on 22.3.2010. The LPA No.712 of 2011 preferred against order dated 22.3.2010 was decided by a Division Bench of this Court and on the basis of the statement of learned Additional Advocate General recorded in LPA No. 484 of 2012, the petitioner would be entitled to similar treatment, which was accorded to Ram Lal Sharma.

3. Respondent being a welfare State could not be oblivious to the developments which have taken place from 22.3.2010 till LPAs No. 712/2011

and 484 of 2012 decided on 24.4.2012 and 26.11.2013. The gratuity is a property and not a bounty.

4. Their Lordships of the Hon'ble Supreme Court in ***State of Jharkhand and others vs. Jitendra Kumar Srivastava and another***, (2013) 12 SCC 210 have held that it is an accepted position that gratuity and pension are not bounties. An employee earns these benefits by dint of his long, continuous, faithful and unblemished service. It is thus a hard earned benefit which accrues to an employee and is in the nature of "property". Their Lordships have held as under:

> **"8. It is an accepted position that gratuity and pension are not the bounties. An employee earns these benefits by dint of his long, continuous, faithful and un-blemished service. Conceptually it is so lucidly described in D.S. Nakara and Ors. Vs. Union of India; (1983) 1 SCC 305 by Justice D.A. Desai, who spoke for the Bench, in his inimitable style, in the following words:**
>
> > **"18. The approach of the respondents raises a vital and none too easy of answer, question as to why pension is paid. And why was it required to be liberalised? Is the employer, which expression will include even the State, bound to pay pension? Is there any obligation on the employer to provide for the erstwhile employee even after the contract of employment has come to an end and the employee has ceased to render service?**
> >
> > **19. What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose, is it thwarted by such artificial division of retirement pre and post a certain date? We need seek answer to these and incidental questions so as to render just justice between parties to this petition.**
> >
> > **20. The antiquated notion of pension being a bounty a gratituous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar and Ors.[1971] Su. S.C.R. 634 wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied maters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab and Anr. V. Iqbal Singh (1976) IILLJ 377SC".**
>
> **It is thus hard earned benefit which accrues to an employee and is in the nature of "property". This right to property cannot be taken away without the due process of law as per the provisions of Article 300 A of the Constitution of India.**
>
> **9. Having explained the legal position, let us first discuss the rules relating to release of Pension.**

14. Right to receive pension was recognized as right to property by the Constitution Bench Judgment of this Court in Deokinandan Prasad vs. State of Bihar; (1971) 2 SCC 330, as is apparent from the following discussion:

> **"27. The last question to be considered, is, whether the right to receive pension by a Government servant is property, so as to attract Articles 19(1)(f) and 31(1) of the Constitution. This question falls to be decided in order to consider whether the writ petition is maintainable under Article 32. To this aspect, we have already adverted to earlier and we now proceed to consider the same.**
>
> **28. According to the petitioner the right to receive pension is property and the respondents by an executive order dated June 12, 1968 have wrongfully withheld his pension. That order affects his fundamental rights under Articles 19(1)(f) and 31(1) of the Constitution. The respondents, as we have already indicated, do not dispute the right of the petitioner to get pension, but for the order passed on August 5, 1966. There is only a bald averment in the counter- affidavit that no question of any fundamental right arises for consideration. Mr. Jha, learned counsel for the respondents, was not prepared to take up the position that the right to receive pension cannot be considered to be property under any circumstances. According to him, in this case, no order has been passed by the State granting pension. We understood the learned counsel to urge that if the State had passed an order granting pension and later on resiles from that order, the latter order may be considered to affect the petitioner's right regarding property so as to attract Articles 19(1)(f) and 31(1) of the Constitution.**
>
> **29. We are not inclined to accept the contention of the learned counsel for the respondents. By a reference to the material provisions in the Pension Rules, we have already indicated that the grant of pension does not depend upon an order being passed by the authorities to that effect. It may be that for the purposes of quantifying the amount having regard to the period of service and other allied matters, it may be necessary for the authorities to pass an order to that effect, but the right to receive pension flows to an officer not because of the said order but by virtue of the Rules. The Rules, we have already pointed out, clearly recognise the right of persons like the petitioner to receive pension under the circumstances mentioned therein.**
>
> **30. The question whether the pension granted to a public servant is property attracting Article 31(1) came up for consideration before the Punjab High Court in Bhagwant Singh v. Union of India A.I.R. 1962 Pun 503. It was held that such a right constitutes "property" and any interference will be a breach of Article 31(1) of the Constitution. It was further held that the State cannot by an executive order curtail or abolish altogether the right of the public servant to receive pension. This decision was given by a learned Single Judge. This decision was taken up in Letters Patent Appeal by the Union of India. The Letters Patent Bench in its decision in Union of India v. Bhagwant Singh I.L.R. 1965 Pun 1 approved the decision of the learned Single Judge. The Letters Patent**

Bench held that the pension granted to a public servant on his retirement is "property" within the meaning of Article 31(1) of the Constitution and he could be deprived of the same only by an authority of law and that pension does not cease to be property on the mere denial or cancellation of it. It was further held that the character of pension as "property" cannot possibly undergo such mutation at the whim of a particular person or authority.

31. The matter again came up before a Full Bench of the Punjab and Haryana High Court in K.R. Erry v. The State of Punjab I.L.R. 1967 P & H 278. The High Court had to consider the nature of the right of an officer to get pension. The majority quoted with approval the principles laid down in the two earlier decisions of the same High Court, referred to above, and held that the pension is not to be treated as a bounty payable on the sweet will and pleasure of the Government and that the right to superannuation pension including its amount is a valuable right vesting in a Government servant It was further held by the majority that even though an opportunity had already been afforded to the officer on an earlier occasion for showing cause against the imposition of penalty for lapse or misconduct on his part and he has been found guilty, nevertheless, when a cut is sought to be imposed in the quantum of pension payable to an officer on the basis of misconduct already proved against him, a further opportunity to show cause in that regard must be given to the officer. This view regarding the giving of further opportunity was expressed by the learned Judges on the basis of the relevant Punjab Civil Service Rules. But the learned Chief Justice in his dissenting judgment was not prepared to agree with the majority that under such circumstances a further opportunity should be given to an officer when a reduction in the amount of pension payable is made by the State. It is not necessary for us in the case on hand, to consider the question whether before taking action by way of reducing or denying the pension on the basis of disciplinary action already taken, a further notice to show cause should be given to an officer. That question does not arise for consideration before us. Nor are we concerned with the further question regarding the procedure, if any, to be adopted by the authorities before reducing or withholding the pension for the first time after the retirement of an officer. Hence we express no opinion regarding the views expressed by the majority and the minority Judges in the above Punjab High Court decision, on this aspect. But we agree with the view of the majority when it has approved its earlier decision that pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a government servant.

32. This Court in State of Madhya Pradesh v. Ranojirao Shinde and Anr. MANU/SC/0030/1968 : [1968]3SCR489 had to consider the question whether a "cash grant" is "property" within the meaning of that expression in Articles 19(1)(f) and 31(1) of the Constitution. This Court held that it was property, observing "it is obvious that a right to sum of money is property".

> **33. Having due regard to the above decisions, we are of the opinion that the right of the petitioner to receive pension is property under Article 31(1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by Sub-article (5) of Article 19. Therefore, it follows that the order dated June 12, 1968 denying the petitioner right to receive pension affects the fundamental right of the petitioner under Articles 19(1)(f) and 31(1)of the Constitution, and as such the writ petition under Article 32 is maintainable. It may be that under the Pension Act (Act 23 of 1871) there is a bar against a civil court entertaining any suit relating to the matters mentioned therein. That does not stand in the way of a Writ of Mandamus being issued to the State to properly consider the claim of the petitioner for payment of pension according to law".**

15. In State of West Bengal Vs. Haresh C. Banerjee and Ors. (2006) 7 SCC 651, this Court recognized that even when, after the repeal of Article 19(1)(f) and Article 31 (1) of the Constitution vide Constitution (Forty-Fourth Amendment) Act, 1978 w.e.f. 20th June, 1979, the right to property was no longer remained a fundamental right, it was still a Constitutional right, as provided in Article 300A of the Constitution. Right to receive pension was treated as right to property. Otherwise, challenge in that case was to the vires of Rule 10(1) of the West Bengal Services (Death-cum-- Retirement Benefit) Rules, 1971 which conferred the right upon the Governor to withhold or withdraw a pension or any part thereof under certain circumstances and the said challenge was repelled by this Court.

16. Fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognized as a right in "property". Article 300 A of the Constitution of India reads as under:

> **"300A Persons not to be deprived of property save by authority of law. - No person shall be deprived of his property save by authority of law."**

Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the Constitutional mandate enshrined in Article 300A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced."

5. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is allowed. Annexure P-8 to the effect whereby a sum of Rs.1,06,238/-has been withheld, is quashed and set aside. The respondents are directed to release a sum of Rs.1,06,238/- to the petitioner within a period of six weeks from today with interest @ 8% per annum. Pending application(s), if any, also stands disposed of. No cost.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No. 430 of 2010
a/w FAO No. 76 of 2011
Decided on: 21.11.2014

FAO No. 430 of 2010

The New India Assurance Company ...Appellant.
Versus
Smt. Ato Devi & others ...Respondents.

.....

FAO No. 76 of 2011

Smt. Ato Devi & others ...Appellants.
Versus
Bobby Bus Service & others ...Respondents.

Motor Vehicle Act, 1988- Section 149- Insurer pleaded that the driver of the vehicle did not have effective and valid driving licence- Driving licence disclosed that it was issued by Registration and Licencing Authority, Nadaun- no evidence was led to prove that the licence was not valid, therefore, the plea of the insurer that licence was not valid is not acceptable. (Para-12 to 13)

Motor Vehicle Act, 1988- Section 166- Deceased was bachelor and a government employee drawing gross salary of Rs. 7604/- -claimants were three in number, therefore, 1/3rd of the amount was to be deducted towards the personal expenses -applying multiplier of 13, claimants are entitled to the sum of Rs.7,80,000/- as loss of earning- Rs. 2,000/- under the head 'funeral expenses' and Rs. 2,500/- under the head 'loss of estate'. (Para-14 to 17)

Cases referred:

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

FAO No. 430 of 2010

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Mr. Naresh Kaul, Advocate, for respondents No. 1 to 3.
Mr. Pushpinder Jaswal, Advocate, for respondents No. 4 and 5.

FAO No. 76 of 2011

For the appellants: Mr. Naresh Kaul, Advocate.
For the respondents: Mr. Pushpinder Jaswal, Advocate, for respondents No. 1 and 3.
Mr. B.M. Chauhan, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Both these appeals are outcome of award, dated 1st June, 2010, made by the Motor Accident Claims Tribunal, Chamba Division, Chamba, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 32 of 2008, titled as Smt. Ato Devi and others versus Bobby Bus Service and others, whereby compensation to the tune of Rs. 6,29,950/- with interest @ 12% per annum from the date of filing of the petition till its realization came to be awarded in

favour of the claimants and the insurer was saddled with liability (hereinafter referred to as "the impugned award"), thus, I deem it proper to dispose of both these appeals by this common judgment.

2. The insurer has questioned the impugned award by the medium of FAO No. 430 of 2010 on the ground that the Tribunal has fallen in error in saddling it with liability and the amount awarded in excessive.

3. The claimants have called in question the impugned award by the medium of FAO No. 76 of 2011 on the ground of adequacy of the compensation.

Brief facts:

4. The claimants, being the victims of the motor vehicular accident, invoked the jurisdiction of the Tribunal in terms of Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") for grant of compensation on the grounds taken in the memo of claim petition.

5. The case, as presented by the claimants in the claim petition, was that deceased-Shiv Charan, who was 22 years of age, while going towards Hamirpur, met with an accident on 26th January, 2008, at place Mandir Bil Bani Mod near Rit Bhatha, P.S. Nadaun, which was caused by the driver, namely Shri Vipin Singh, who was driving bus, bearing registration No.HP-55B-6701, rashly and negligently. He was taken to Primary Health Center, Nadaun, wherefrom was shifted to PGI Chandigarh and succumbed to injuries on 29th January, 2008, at 2.45 a.m. The claimants had sought compensation to the tune of Rs. 25,00,000/-, as per the break-ups given in the claim petition.

6. The owner-insured, the driver and the insurer contested the claim petition on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the Tribunal on 16th March, 2009:

> *"1. Whether deceased Shiv Charan died due to rash and negligent driving of vehicle No. HP-55B-6701 by respondent No. 3 Vipin Singh as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled for compensation, if so, to what amount and from whom? OPP*
>
> *3. Whether the petition is not maintainable as alleged? OPR*
>
> *4. Whether the petition is bad for non joinder of necessary parties? OPR-2*
>
> *5. Whether the petitioner Nos. 2 and 3 were not dependent upon the deceased as alleged? OPR-2*
>
> *6. Whether the vehicle in question was being used in contravention of its authorized use, if so, to what effect? OPR-2*
>
> *7. Whether driver of the vehicle in question was not holding a valid and effective driving licence as alleged? OPR-2*
>
> *8. Relief."*

8. The claimants have examined Constable Janak Raj as PW-2, Shri Amar Nath as PW-3, Shri Yogender Singh as PW-4 and one of the claimants, Smt. Ato Devi, has herself stepped into the witness box as PW-1. The respondents in the claim petition have not examined any witness except the driver, Shri Vipin Singh, has stepped into the witness box as RW-1.

Issues No. 1 and 3 to 6:

9. The claimants have proved by leading evidence, oral as well as documentary, that the driver, namely Shri Vipin Singh, had driven the offending vehicle rashly and negligently and FIR No. 18 of 2008, Ext. PW-2/A, was lodged at Police Station Nadaun, District Hamirpur.

10. The findings returned by the Tribunal on issues No. 1 and 3 to 6 are not in dispute for the reason that the claimants have questioned the impugned award on the ground of adequacy of compensation and the insurer has questioned the same on the grounds that the owner-insured has committed willful breach as the driver of the offending vehicle was not having valid and effective driving licence at the relevant point of time and the amount awarded is excessive. However, I have gone through the claim petition and the record. Issues No. 1 and 3 to 6 have rightly been decided by the Tribunal in favour of the claimants and against the respondents, are, accordingly, upheld.

11. Before I deal with issue No. 2, I deem it proper to determine issue No. 7.

Issue No. 7:

12. The Tribunal has discussed the evidence and held that the driver was having the valid and effective driving licence. The driving licence is on the record as Ext. R-2, which do disclose that it was issued by the Registration and Licensing Authority, Nadaun, District Hamirpur, and was valid at the time of accident. The insurer has not led any evidence to discharge the onus to prove the issue.

13. There is no record on the file, not to speak of proof, to show that the driver of the offending vehicle was not having a valid and effective driving licence. Perusal of the copy of the driving licence, Ext. R-2, discloses that the driver was having a valid and effective driving licence. Thus, the Tribunal has rightly decided issue No. 7 against the insurer and saddled it with liability, is accordingly upheld.

Issue No. 2:

14. Admittedly, the deceased was a Government employee, was drawing gross salary of Rs. 7604/-, in terms of the Last Pay Certificate, Ext. PA. The claimants are three in number and the deceased was bachelor. Applying the ratio laid down by the Apex Court in **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** one-third was to be deducted for the reason that the claimants, i.e. mother has lost her budding son, who was the only source of hope and help in her old age, was dependent upon him and the brother & sister have lost their brother in budding age, was source of their hope and help and were deprived of love and affection of their brother.

15. Thus, the Tribunal has rightly deducted one-third, but has fallen in error in holding that the claimants have lost source of income to the tune of Rs.3,333/- per month. It can be safely held that the claimants have lost source of income to the tune of Rs. 5,000/- per month after deducting one-third. Hence, the claimants have lost source of income to the tune of Rs.60,000/- (Rs. 5,000/- x 12) per annum.

16. Keeping in view the age of the deceased and the claimants, the Tribunal has rightly applied multiplier of '13', which is appropriate multiplier.

17. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.7,80,000/- (Rs. 60,000/- x 13). The mother is also held entitled to Rs. 2,000/- under the head 'funeral expenses' and Rs. 2,500/- under the head 'loss of estate'.

18. It appears that the Tribunal has fallen in error in awarding interest @ 12% per annum, which is at higher side in view of the law laid down by the Apex Court read with the rates of the Reserve Bank of India. Accordingly, it is held that the claimants are entitled to interest @ 7.5% per annum from the date of filing of the claim petition till its realization. The impugned award is modified accordingly.

19. Having glance of the above discussion, both the appeals are disposed of and the impugned award is modified, as indicated hereinabove.

20. The insurer is directed to deposit the enhanced awarded amount before the Registry within twelve weeks. On deposition of the same, the Registry is directed to release the awarded amount in favour of the claimants, out of which, 50% of the amount be released in favour of claimant No. 1 and the remaining 50% in favour of claimants No. 2 and 3 in equal shares after proper identification.

21. Send down the record after placing copy of the judgment on Tribunal's file.

22. A copy of this judgment be also placed on the file of FAO No. 76 of 2011.

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

Veena Devi. ...Petitioner.
Vs.
Himachal Pradesh State Electricity Board Ltd. & anr. ...Respondents.

CWP No. 5400 of 2014
Reserved on: 20.11.2014
Decided on: 21.11.2014

Constitution of India, 1950- Article 226- Petitioner was appointed as a clerk on contract basis- she claimed regularization before Administrative Tribunal- Tribunal directed the board to regularize the services of the petitioner as a clerk from the date of completion of 10 years of continuous services and to grant all the consequential benefits- Board regularized her services but did not take into consideration the services rendered by her on contract basis- held, that as per Central Civil Services (Pension) Rules, 1972, if a person engaged by Government on a contract basis for a specific period is appointed to the same or another post without interruption in duty , he may opt to retain the Government contribution or to refund the monetary benefit- Board should behave as model employer and cannot be permitted to exploit the situation by not regularizing the services rendered on contract basis. (Para-6)

For the Petitioner: Mr. Adarsh K. Vashista, Advocate.
For the Respondents: Ms. Sharmila Patial, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Petitioner was appointed as a Clerk in the respondent-Board on contract basis on 16.11.1988. Petitioner had been working continuously with effect from 16.11.1988. She was legitimately expecting that her services would be regularized by the respondents taking into consideration her interrupted services with effect from 16.11.1988. Petitioner approached erstwhile Himachal Pradesh Administrative Tribunal by way of O.A(D) No. 414/1998 seeking regularization. The Tribunal was pleased to direct the respondent-Board to regularize the services of the petitioner as a Clerk/Typist from the day she completed ten years of continuous service on contract basis and grant all the

consequential benefits, i.e. annual increments alongwith interest @ 10%. Order dated 29.6.2001 was assailed by the Board before this Court by way of CWP No.1134/2001. It was disposed of by this Court on 4.8.2008. The matter was ordered to be placed before the Board of Directors of the Board, who on its own was permitted to consider the case of the petitioner for regularization of service as a special case. In sequel to the judgment rendered by this Court, the Board regularized the services of the petitioner vide letter dated 21.3.2009. The Board though has regularized the services of the petitioner vide letter dated 21.3.2009, however, the services rendered by the petitioner with effect from 16.11.1988 on contract basis have not been taken into consideration towards qualifying service for pension.

2. Rule 17 of the Central Civil Services (Pension) Rules, 1972 reads as under:

17. Counting of service on contract –

"(1) A person who is initially engaged by the Government on a contract for a specified period and is subsequently appointed to the same or another post in a substantive capacity in a pensionable establishment without interruption of duty, may opt either:-

(a)	to retain the Government contribution in the Contributory Provident Fund with interest thereon including any other compensation for that service ; or
(b)	to agree to refund to the Government the monetary benefits referred to in Clause (a) or to forgo the same if they have not been paid to him and count in lieu thereof the service for which the aforesaid monetary benefits may have been payable.

(2) The option under sub-rule (1) shall be communicated to the Head of Office under intimation to the Accounts Officer within a period of three months from the date of issue of the order of permanent transfer to pensionable service, or if the Government servant is on leave on that day, within three months of his return from leave, whichever is later.

(3) If no communication is received by the Head of Office within the period referred to in sub-rule (2), the Government servant shall be deemed to have opted for the retention of the monetary benefits payable or paid to him on account of service rendered on contract."

3. It is clear from the plain language employed in rule 17 of the Central Civil Services (Pension) Rules, 1972 that if a person is initially engaged by the Government on contract for a specified period and is subsequently appointed to the same or another post in a sustentative capacity in a pensionable establishment without interruption of duty, he may opt either to retain the Government contribution in the Contributory Provident Fund with interest thereon including any other compensation for that service or to agree to refund to the Government the monetary benefit referred to in clause or to forgo the same if they have not been paid to him and count in lieu thereof the service for which the aforesaid monetary benefits may have been payable.

4. Mr. Adarsh Vashista submitted at the Bar that the deductions were made from the salary of the petitioner towards contributory fund and his client is ready and willing to refund the same and in lieu thereof to count the services rendered on contract basis as qualifying service for pensionary benefits.

5. The Board is a State within the meaning of Article 12 of the Constitution of India. The Board, on its own, should have counted the services with effect from 16.11.1988 to 21.3.2009 towards qualifying service instead of compelling the petitioner to approach this Court for the redressal of her

grievance. The services rendered by the petitioner with effect from 16.11.1988 to 21.3.2009 cannot be obliterated. The Board is a pensionable establishment. Petitioner has already made a representation, but the same was not decided.

6. The Board should show sensitivity while dealing with the matters pertaining to pensionary/retiral benefits. The Board must act as model employer. The action of respondents not to count the qualifying services with effect from 16.11.1988 to 21.3.2009 would also amount to unfair labour practice. The Board cannot be permitted to exploit the situation by not regularizing the services of the incumbents rendered on contract basis for years together and thereafter not counting the services rendered on contract basis for the purpose of pensionary/retiral benefits after the regularisation.

7. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is allowed. Respondents are directed to count the services of the petitioner rendered on contract basis as Clerk/Typist with effect from 16.11.1988 to 21.3.2009 for the purpose of qualifying service for pensionary benefits. The Petitioner is directed to refund the contributory fund made by the Board within a period of eight 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 SURESHWAR THAKUR, J.

Banka Ram ...Appellant/defendant.
Vs.
Des Raj & others ...Respondents/Plaintiffs.

RSA No. 440 of 2003.
Reserved on: 19th November, 2014.
Decided on: 24th November, 2014.

Specific Relief Act,1963- Section 38- Plaintiff claimed to be a co-owner in possession of the suit land to the extent of 1/4th share- he further claimed that revenue entries were wrongly changed and the plaintiff was being dispossessed on the basis of wrong entries- defendants claimed that they were in possession since the time of their ancestors as tenants in the Will without the payment of any rent- they further set up an exchange or arrangement between the predecessor-in-interest of the parties – jamabandi for the year 1953-54 recorded the joint ownership of the parties- subsequent jamabandi shows the suit land to be in possession of G and K and the defendant to be in exclusive possession under them – held, that there was no valid order for change of revenue entries- hence, subsequent entries would have no legal effect. (Para-8)

For the Appellant: Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate.
For the Respondents: Mr. K.D. Sood, Senior Advocate with Rajneesh K. Lall, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

This appeal is directed against the impugned judgment and decree, rendered on 02.09.2003 by the learned District Judge, Hamirpur, H.P.,

in Civil Appeal No. 32 of 1997, whereby, the learned District Judge allowed the appeal preferred by the plaintiff/respondent and reversed the findings of the learned trail Court rendered on 17.09.1997 in Civil Suit No. 239 of 1992.

2. Briefly stated the facts of the case are that the original plaintiff Kangru Ram filed the suit against the defendants Milkhi Ram and Prabhi for declaration and permanent prohibitory injunction. It has been averred that the suit land comprised in khata No.40, Khatauni No. 63, khasra Nos. 416, 419, 420, 570, 648, kita 5 measuring 15 kanals, 4 marlas, situated in Tika Jhatwar, Maouza Ugialta, Tehsil and District Hamirpur, H.P. The plaintiff had claimed himself as co-owner in possession of the suit land to the extent of ¼ share. The suit land has been pleaded to be in joint co-onwership and possession of the parties as no partition has taken place in accordance with law and the revenue entries in the column of possession in favour of the defendants as tenant at will are wrong and illegal and thereby the same are not binding on the plaintiff. It has been further pleaded that the revenue entries have been wrongly changed in connivance with the revenue officials by the defendants and that the defendants have threatened to dispossess the plaintiff forcibly on the basis of wrong entries with respect to the possession. It has been further pleaded that during consolidation operation over the suit land in March, 1992, he filed an application before the Consolidation Officer which was dismissed on 15.6.1992. The plaintiff has also pleaded in alternative that in case during pendency of the defendants dispossessed the plaintiff from the suit land, a decree of possession be also passed. Hence the suit.

3. The defendants/appellant contested the suit and filed the written statement wherein the defendants have claimed exclusive possession over the suit land since the time of their ancestors in the capacity of tenants at will without any rent as the defendants have given Shamlat land in village Dugli to the plaintiff to the extent of 5/26 share which comes to 1 kanal 15 marlas and in addition to it, abadi in Tika Dabrera to the extent of 1/64 shares which comes to 10 marlas and thereby have pleaded the entry of possession in their favour to be legal and correct which was incorporated during the life time of Gopala, the predecessor-in-interest of the parties. The defendants have also pleaded the separate possession of the parties to their respective share since their ancestors. The defendants have pleaded the exchange or arrangement between the processor-in-interest of the parties and in alternative of no such exchange or arrangement having been proved then the defendants have claimed the complete ouster of the plaintiff from the suit land and thereby claiming adverse possession to the interest of the plaintiff.

4. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiff is joint owner in possession of the suit land, as alleged? .....OPP
2. Whether the plaintiff is entitled to the relief of injunction as prayed for? .....OPP
3. Whether the suit land to the extent of the share of plaintiff is also in the ownership and possession of defendants by way of exchange as alleged? ....OPD
4. Whether the defendants being in possession have become owners of the suit land by way of adverse possession?.....OPD
5. Relief.

5. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff(s)/respondent(s). In appeal, preferred against the judgment and decree of the learned trial Court by the plaintiff(s)/respondent(s) before the learned first Appellate Court, the

learned first Appellate Court allowed the appeal and reversed the findings recorded by the learned trial Court.

6. Now the defendant/appellant has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeal came up for admission on 19.12.2003, this Court, admitted the appeal instituted by the defendant/appellant against the judgment and decree rendered by the learned first Appellate Court on the hereinafter extracted substantial questions of law:-

1. Whether the Lower Appellate Court has taken wrong view of law in holding the findings on issue No.3, which was returned against the defendants-appellants have attained finality, as the defendants did not challenge the same in appeal, especially when the suit filed by the plaintiff-respondent was dismissed?
2. Whether the Courts below have misunderstood the controversy by misreading the plea raised by the defendants in the written statement regarding complete ouster of the plaintiff-respondent from the joint property? Have not both the courts below applied wrong principles of law in erroneously negativing the case put forth by the defendants/-1ppellant, by holding that the adverse possession is not proved?
3. Whether the Lower Appellate Court has ignored the revenue entries which have the presumption of truth by taking wrong view of law that the basis of exchange was not proved, by ignoring the admission of the plaintiff-respondent accepting the exclusive possession of the defendants-appellant over the suit land?

Substantial questions of Law No.1 to 3.

7. The jamabandi qua the suit land pertaining to the year 1953-54 comprised in Ex.DB reflects the factum of the suit land being recorded in the joint ownership of the parties at contest. However, it is recorded in possession of one Gopala and Kangaru, in their capacity as co-owners. The suit land is located in Tika Jhatwar. The parties at contest also jointly owned the property located at Tikka Dugli. The subsequent jamabandis qua the suit land comprised in Exts.DC, DD, DE, DF, DG, DH and Exts. P-2 to P-5 and Ex. D-1, however, contrary to the reflection in the jamabandi for the year 1953-54 comprised in Ex.DB, wherein though the suit land is recorded in the joint ownership of the parties at contest and Gopala and Kangaru are displayed to be in possession thereof, reflect the defendants to be in exclusive possession thereof being tenants under Gopala and Kangaru. Besides, in the column of rent in the jambandis aforesaid a communication exists of the possession of the defendants qua the suit land having accrued on account of exchange thereof inter se them and the plaintiff with the land at Tikka Dugli.

8. The bedrock of the controversy hinges upon the factum of the legality of the entries comprised in the jamabandis aforesaid with reflections therein of the defendant being tenants in possession of the suit land under Gopala and Kangaru and such possession has come to be acquired by them in pursuance to an exchange having been effected inter se the plaintiff and the defendants, inasmuch as, the plaintiff having in pursuance thereto acquired possession of the land in Tikka Dugli, whereas, the defendants having acquired possession of the suit land located in Tikka Jhatwar. However, the efficacy of the entries aforesaid lacks both legal vigour and tenacity. The reason for concluding as aptly done by the learned first Appellate Court is of no probative and tenacious proof having erupted comprised in the rendition of a valid order by the authority/competent revenue officer in pursuance where to the entries aforesaid were recorded in the jamabandis aforesaid. In the absence of evidence

comprised in the display by the apposite records existing before this Court of the entries comprised in the jamabandis aforesaid with reflection therein of the defendants having acquired possession of the suit property in pursuance to an exchange having been effected inter se them and the plaintiff for constituting them to be garnering an aura of sanctity, rather renders the entries to have been incorporated without any legal authorization and, as such, construable to be nonest and void as aptly done by the learned first Appellate Court. Even otherwise, there being omission of adduction of cogent evidence comprised in the adduction into evidence of the exchange deed purportedly executed/entered inter se the parties at contest, whereunder the plaintiff acquired the possession of the land situated at Tika Dugli and the defendants acquired possession of the suit land situated at Tika Jhatwar, renders the contention as raised by the defendants/appellant of theirs having acquired possession of the suit land situated in Tikka Jhatwar in pursuance thereto, to be legally frail and of little probative worth. Naturally, then the aforesaid entries with portrayal therein in the jamabandis aforesaid are to be concluded to be arbitrarily recorded and of no significance in whittling or jeopardizing the rights of the plaintiff in the suit property with his being recorded as co-owner alongwith the defendants in the jamabandi for the year 1953-54 which precedes the subsequent jamabandis with untenable and erroneous reflections therein of the defendants being in possession thereof in pursuance to an exchange inter se the parties encompassing the suit land and the land at Tika Dugli. Consequently, the entries in the jamabandis subsequent to the jamabandi for the year 1953-54, for reiteration when not having been proved to be preceded by a valid order of an authorized revenue officer, gain no leverage. Moreover, the reflection of the defendants/appellant as tenants qua the suit land under the plaintiff, too erodes the efficacy of the entries in the jamabandis comprised in Ex.DC onwards especially when too in the respective columns of ownership thereof, the suit land has been reflected to be in joint ownership of the parties at contest, yet with the defendants having been recorded to be in exclusive possession thereon in the capacity as tenants, is in dire detraction to and antithetical to the principle of the joint/co-ownership which embodies, hence, the rule of community of title and unity of possession inhering in all co-khatedars or co-owners, as the parties at contest are reflected in the jamabandis subsequent to the jambandi for the year 1953-54. For amplification when the parties at contest in the jamabandis succeeding to the jamabandi for the year 1953-54 are also recorded as joint owners of the suit land, the effect and the import of the said entries is of theirs inhering in the joint owners, who are the parties at contest, a right to claim community of title and unity of possession qua each inch of property recorded in their joint ownership, it is enigmatic in what manner with, hence, the mutually contradictory status reflected therein to be embodied in the defendants, hence, as such, theirs sequeling affliction to the rule of joint ownership vesting a title as co-owner even in the defendants as also untenably diluting their rights as co-owners in the joint suit property, then came to be recorded. Therefore, the defendant cannot claim or assert the status as untenably reflected in the jamabandis succeeding to the jambandi for the year 1953-54 of theirs being tenants upon the suit land and that too under the plaintiff, who too like them is recorded as co-owner in the suit property. In other words, the reflection of the defendants/appellant as tenants in exclusive possession of the suit property in the jamabandis succeeding to the jamabandi for the year 1953-54, though at the same time marking an amplifying reflection therein of theirs being recorded as joint owners of the suit land alongwith the plaintiff, is a reflection which does not appeal to the embodied sacrosanct legal canon of joint ownership and its inhering in all joint owners inclusive of the defendants/appellant equivalent and compatible rights as such over the suit land. Consequently, the entries marking the fact of the defendants/appellant being in possession of the suit property as tenant in pursuance to an exchange effected inter se them and the plaintiff, inasmuch as in pursuance thereto while they having abdicated their possession in favour of the plaintiff in Tikka Dugli and having acquired

possession of the suit land from the plaintiff at Tikka Jhatwar, more so, when the factum of such exchange for the reasons aforesaid and for the further reason when there is no attestation of mutation in pursuance to the exchange purportedly entered into inter se the parties at contest nor consequent reflections in the apposite jambandis, are of no significance, rather render the plea of the defendants of theirs having acquired possession of the suit property from the plaintiff in pursuance thereto to be an unacceptable and frail submission. Further more, it ought not to be omitted to be also bespoken that the exchange even if it had been entered or effected inter se the parties at contest then the jamabandis subsequent to Ex.DB which is the jamabandi for the year 1953-54, would have portrayed deletion of the name of the plaintiff from the column of ownership and a manifest corresponding reflection in the remarks column of the jamabandi or in its column of ownership of the defendants/appellant having acquired the suit land by way of exchange and theirs having become exclusive owner thereof in pursuance thereto. However, the above reflections are omitted to be communicated in jamabandis subsequent to the jamabandi for the year 1953-54, as such omission of aforesaid reflections also reinforcingly, hence, appears to spur an inference that there was no exchange entered into inter se the parties at contest nor also it has to be obviously concluded that the entries reflecting the defendants to have acquired the possession as tenant of the suit property in pursuance thereto have no legal validity or sinew.

9. The learned counsel for the defendants/appellant has argued that with there being a plea in the written statement, of the defendants being in possession of the suit property in complete ouster of the plaintiff is a plea compatible to the plea of theirs having acquired title to the suit land by adverse possession. However, assuming that the plea of complete ouster of the plaintiff/respondent from the suit land at the instance of the defendants/appellant is comprised in the written statement of the defendants/appellant, inasmuch as theirs being in possession of the suit land in complete ouster of the plaintiff, who even did not participate in the mesne profits and having never objected to their exclusive possession over the suit land, is equivalent to a communication of plea of acquisition of title to the suit land by adverse possession. Nonetheless, though the factum of pleading of complete ouster of the plaintiff/respondent by the defendants/appellant does exist in the written statement of the defendants/appellant, yet the said plea has been ambiguously pleaded, inasmuch as it does not take within its fold, of such complete ouster of the plaintiff from the suit land, though equivalent to an assertion by the defendants of theirs having acquired title to the suit land by adverse possession, the legally enshrined germane fact as to when such overt act marking the inception or commencement of possession of the defendants/appellant with an animus possidendi, arose with precision with exactitude in time. In the face of imprecise averments in the written statement of the defendant qua the commencement of their possession over the suit land with an animus possidendi, renders the said plea to be construable to be nebulously or loosely phrased constituting it to be not, hence, comprising the raising of an appositely communicated contention at the instance of the defendants/appellant of theirs having acquired title to the suit land by prescription, inasmuch as theirs having by their overt acts commencing with an animus possidendi erupting at a precisely communicated time gained possession of the suit land and continuously thereafter with a hostile animus towards the defendants, retained it. Non existence of precise communications qua the commencement with exactitude in time of adverse possession by the defendants qua the suit land comprised in the commission of overt acts by the defendants/appellant with an animus possidendi, portrays, hence, that the plea has been loosely phrased and does not, hence, also embody the necessary ingredients for its constituting a tenable plea of the defendants/appellant, of theirs having acquired title to the suit property by adverse possession.

Therefore, the evidence, if any as exists on record comprised in the admissions of the plaintiffs in their respective testimonies or of the defendants qua the exclusive possession of the defendant over the suit land, does not give succor to the said plea, inasmuch as it being beyond pleadings, rather possession, if any, of the defendants/appellant over the suit land, even if exclusive, yet given the fact that for the reasons attributed hereinabove, the jamabandi for the year 1953-54 comprised in Ex.DB has been alone construed to be tenable and its manifesting the fact of the parties at contest being recorded therein to be in joint ownership, naturally the legal incident thereof is of theirs enjoying compatible and equal right with each other qua every inch of the suit land, as such, possession, if any, even if exclusive of the defendants/appellant over the suit land is to be construed to be possession on behalf of the plaintiff/respondent as well. Such possession does not, when the entries subsequent to Ex. DB have been construed to be arbitrary and nonest, as such, imputing no right in the defendants as tenants over the suit property, obviously, then when the entries in Ex.DB prevail, constitute possession donning the mantle of or vesting a right either as tenants or as prescriptive owners in the defendants. As such, the sacrosanct conclusion is that the parties enjoy rights common/joint with each other and have joint interest over the suit land especially when the entries existing in Ex.DB remain un-eroded by the subsequent entries in the subsequent jamabandis which latter entries have been concluded to be while not having been preceded by any valid order of an authorized officer to be nonest.

10. Even though, the learned counsel for the defendants/appellant has contended that the learned first Appellate Court has affirmed the findings recorded by the learned trial Court qua the factum of no cogent evidence and convincing proof erupting qua the factum of the suit land having been acquired by the defendants/appellant in pursuance to an exchange having been effectuated or entered inter se them, as such, besides when while affirming, such findings, the learned first Appellate Court had concluded that it necessitates affirmation on the score of the defendants/appellant not having assailed it before the learned first Appellate Court, hence, imbuing it with finality, which manner of affirmation by the learned trial Court has been contended to be untenbale. Assuming that there may be purported untenability foisted to the factum of affirmation afforded by the learned first Appellate Court to the aforesaid findings recorded by the learned trial Court, nonetheless, the effect thereof fades in the face of the learned first appellate Court having dwelt ad nauseam and exhaustively qua the validity and sustainability of such findings, by an advertence to the compatible proof thereto, in sequel to which exercise it concluded the exchange as set up by the defendants/appellant to foist tenability to the entries in the jamabandis subsequent to the one recorded in Ex.DB, acquire no tenability or legality. Consequently, when the entire issue has been thrashed out at ad nauseam by the learned first Appellate, it estops the learned counsel appearing for the appellant/defendant to contend that the effect thereof has been dealt with in a slip shod and cryptic manner, besides without application of mind by the learned trial Court rather the said fact when has been dealt with in a thorough as well as in an elaborative manner and besides on a circumspect analysis of the evidence on record, hence, the contention of the learned counsel appearing for the appellant is rejected. Consequently, the findings of the learned first Appellate Court are based upon a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication. Accordingly, the substantial questions of law No. 1 to 3 are answered against the defendants/appellant and in favour of the plaintiff/respondent.

11. The result of the above discussion is that the appeal preferred by the defendants/appellant is dismissed and the judgment and decree rendered by the learned first Appellate Court is affirmed and maintained. Record of the

learned Courts below be sent back forthwith. All pending applications, if any, are also disposed of. No costs.

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

Bhim Singh .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 358 of 2011.
Reserved on: November 21, 2014.
Decided on: November 24, 2014.

Indian Penal Code, 1860- Section 302- As per prosecution version, accused had given beating mercilessly to deceased and thereafter, he had tried to commit suicide by touching electric wires of transformer - he received severe injuries- he was taken to hospital where he died- PW-1, PW-2 and PW-8 resiled from their testimonies recorded by the police and categorically denied that they had seen the accused giving beating to the deceased- PW-6 had strained relation with the accused which makes it difficult to rely upon his version that deceased had visited his home- medical officer had not found any burn injury on his hand- PW-5 also admitted that it was not possible to touch the wires without using the staircase- held, that the testimonies of eye-witnesses do not prove the prosecution version- no witness from the vicinity had heard any cries- hence, in these circumstances, accused is acquitted. (Para- 29 to 31 and 35 to 37)

Code of Criminal Procedure, 1973- Section 161- Extra judicial confession- As per prosecution case, accused stated before PW-3 and PW-6 that "*Aaj mene ise dil se mara hai*"- they had not disclosed this fact to the police - held, that in these circumstances, extra judicial confession could not be relied upon. (Para-32)

For the petitioner: Mr. Adarsh Sharma, Advocate, vice counsel.
For the respondent: Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 7.10.2010, rendered by the learned Addl. Sessions Judge, Mandi, Camp at Karsog, in Sessions Trial No. 4 of 2009, whereby the appellant-accused (hereinafter referred to as the accused) who was charged with and tried for offences under Sections 302 & 309 IPC. He was sentenced to undergo imprisonment for life (rigorous) and to pay a fine in the sum of Rs. 5,000/- for the commission of offence under Section 302 IPC and in default of payment of fine, he was ordered to suffer simple imprisonment for six months. He was also sentenced to undergo simple imprisonment for one year for the commission of offence under Section 309 IPC.

2. The case of the prosecution, in a nut shell, is that the complainant Banti Devi is resident of village Khumaro. Accused is her son. About 9 years back, accused married Kaushalya Devi without the consent of his parents. Accused has two daughters and one son. Elder daughter Neha (deceased) was seven or eight years old. She was studying in the second class. About three months prior to the incident accused had beaten his wife and children. His wife Kaushalya Devi went to her parental house alongwith the

younger daughter. Accused used to administer beatings to his wife and children.

3. On 20.6.2009, Neha alongwith her brother Dinesh came to the house of Smt. Banti Devi during evening time. The accused was living separately from his parents. Neha and Dinesh took meals and slept in the room of the complainant. Accused was working as labourer. During night at about 2:30 AM, accused knocked at the door of the house of the complainant and pushed the door to open it. The complainant was sitting inside her room as she was not able to sleep due to toothache. The light of the room was on. The accused asked her about his children. She and her husband told him that both Neha and Dinesh were sleeping. She also asked accused to go to kitchen in order to take dinner. Neha and Dinesh were sleeping in the room of the complainant alongwith Kala (daughter of the complainant). The accused dragged Neha from her hairs and started beating her. Neha cried and the complainant tried to save Neha. Accused gave kick blows on the shoulder of the complainant. Accused also slapped her. The accused threatened to kill them. She alongwith her husband, Neha and Kala started raising alarm but nobody came on the spot. Accused continued beating Neha. He threatened that in case somebody would come forward to save Neha, he would kill them and resultantly, all of them were frightened. The accused removed Phati (wooden piece) from the table and started beating Neha mercilessly. Phati was also having a nail. Neha sustained injuries on her forehead, arms, legs back and stomach. She started bleeding profusely. The complainant alongwith Kushal Chand and Bindu went to the house of Yuv Raj, Vice President of the Panchayat. When they were returning back to her house, she heard explosion at electricity transformer. When they reached near the transformer, accused was lying on the spot and his clothes and stomach was burnt. She was told by her family members that accused went towards transformer when Neha fell unconscious. When complainant alongwith other persons reached at her house, she found that Neha was demanding water. She was also vomiting. She was brought to Civil Hospital Karsog. She died there at 6:30 AM. Neha died due to beatings administered by accused with the aid of hands and Phati.

4. On 21.6.2009, a telephonic message was received from Civil Hospital, Karsog at PS Karsog that one girl admitted in the hospital has died having sustained injuries. This information was recorded in the *rojnamcha*. SI Vijay Sen directed HC Tek Chand to go to hospital. At about 8:00 AM, HC Tek Chand informed SI Vijay Sen on telephone that the girl had died. S.I. Vijay Sen went to hospital and statement of complainant Banti Devi was recorded under Section 154 Cr.P.C by SI Vijay Sen. FIR was registered at PS Karsog. MLC certificate of Neha was obtained. Her post mortem report was also received. The inquest report was prepared. Viscera of the deceased was handed over to the police by the MO Civil Hospital, Karsog for the purpose of examination. The accused was also medically examined. The blood stained Kurta and Paijama were also taken into possession. The blood stained pieces of plastic mattress, burnt inner and shirt of the accused were also taken into possession by SI Vijay Sen. The pieces of Phati and one stick were also taken into possession. The table was also taken into possession by the police. Reports were received from FSL, Junga. The investigation was completed and thereafter challan was put up after completing all the codal formalities.

5. The prosecution has examined as many as 22 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C. He has denied the case of the prosecution. The learned Trial Court convicted and sentenced the accused, as stated hereinabove. Hence, the present appeal.

6. Mr. Adarsh Sharma, Advocate, appearing for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Ramesh Thakur, learned Asstt. Advocate

General, has supported the judgment of the learned Addl. Sessions Judge, Mandi, Camp at Karsog, dated 7.10.2010.

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

8. PW-1 Banti Devi is the mother of the accused. According to her, the marriage between accused and Kaushalya Devi was solemnized about 12 years back. He married Kaushalya Devi without their consent. Three children were born out of this wedlock. The name of the eldest daughter was Neha. She was seven years old at the time of her death. She was studying in 2nd class at that time. About one year back, quarrel took place between Kaushalya and the accused. Both of them had consumed liquor. Accused and Kaushalya were living in separate houses. She was living in separate house. The distance between their house was about 200 ft. Kaushalya had left the house and went to the house of her parents. Neha and Dinesh remained in the house of the accused. Accused used to administer beatings to his children under the influence of liquor. On 20.6.2009, Neha and Dinesh came to her house. The accused was working as labourer under NREGA scheme. When Neha and Dinesh came to her house, they did not take meals. Both of them slept with her at night. Her husband slept in the separate room. She was having toothache on that day. At about 1:30 AM, accused Bhim Singh came to her house. He was under the influence of liquor. He asked her about his family. Her husband woke up and told the accused that his children were sleeping. At that time, she was sitting on the cot. The light was on. She was not able to sleep during night due to toothache. Her husband told accused that he should go to kitchen if he want to take food. The accused did not take meals. The accused asked the children to leave her house. Her husband also asked the accused to leave the house if he did not want to take meals. The accused stated that he would take the children to his house. She caught Neha. She told accused that she would not permit Neha to be taken out of her house during night. The accused pushed her. She raised alarm. Her husband Amar Singh came to the room. The accused had also pushed her husband. She asked children to raise alarm. Neha and Dinesh started raising cries. Accused threatened to kill her. There was wooden table inside the room. Accused removed one Phati from the table. He hit on her leg with that Phati. She left the room in order to save herself. She went to the house of Prem Lata, Panch in the Village. Accused did not beat Neha in her presence. She was declared hostile and cross-examined by the learned Public Prosecutor. She denied the suggestion that the accused had inflicted injuries on the person of Neha with the aid of Phati having been removed by him from the wooden table. She admitted that there was iron nail in the Phati. She denied that Neha was bleeding from her head, forehead, arms, legs, back and stomach. She denied that accused continued administering beatings to Neha despite the fact that she was bleeding profusely. She admitted that she went to the house of Up-Pradhan Yuv Raj alongwith Kushal and Bindu. She had gone to the house of Yuv Raj to bring him to the spot. She admitted that when she was returning back to her house alongwith Yuvraj, Kushal and Bindu they heard explosion of electricity transformer. She admitted that due to explosion, supply of electricity to the village was disrupted. She admitted that accused was lying near the transformer. She did not remember that her family member had told her that when Neha became unconscious, accused had fled from the room. She admitted that Neha was also vomiting at that time. She admitted that Neha was brought to Civil Hospital, Karsog. She admitted that Neha had died at about 6:30 AM in the hospital. She also denied that Neha died due to administering of severe beatings by accused with Phati. The police visited the spot. The police photographed the spot. The police took into possession blood stained Kurta and Pajama of her husband Amar Singh and burnt shirt and inner of accused and pieces of plastic mattresses stained with blood vide memo Ext. PA. The police also took into possession eight wooden pieces of 'kial' and one stick of 'fagra' (firewood tree) stained with blood, vide

memo Ext. PB. Wooden table was also taken into possession. The shirt is Ext. P-2 and Pajama is Ext. P-3. The burnt shirt is Ext. P-5 and burnt inner is Ext. P-6. The wooden pieces were Ext. P-10 and stick Ext. P-11. The chappal was Ext. P-13. The wooden table was also produced in the Court vide Ext.P-14. According to her, portion A to A of her statement mark A recorded under Section 154 Cr.P.C. was not correct. She was confronted with portion A to A of her statement mark A recorded under Section 154 Cr.P.C., she has deposed that this statement was not given by her to the police. Portion B to B of her statement mark A recorded under Section 154 Cr.P.C. was not correct. She was confronted with portion B to B of her statement mark A recorded under Section 154 Cr.P.C., she has deposed that this statement was not given by her to the police. Portion C to C of her statement mark A recorded under Section 154 Cr.P.C. was not correct. She was confronted with portion C to C of her statement mark A recorded under Section 154 Cr.P.C., she has deposed that this statement was not given by her to the police. Portion D to D of her statement mark A recorded under Section 154 Cr.P.C. was not correct. She was confronted with portion D to D of her statement mark A recorded under Section 154 Cr.P.C., she has deposed that this statement was not given by her to the police. She denied the suggestion that during night accused had dragged Neha from hair and started administering beatings to her without any cause. Portion E to E of her statement mark A recorded under Section 154 Cr.P.C. was not correct. She was confronted with portion E to E of her statement mark A recorded under Section 154 Cr.P.C., she stated that this statement was not given by her to the police. She denied the suggestion that when accused realized that death of Neha was inevitable due to the beatings given by him, he attempted to commit suicide by touching live wires of electricity transformer. She denied the suggestion that Neha had died due to administering of beatings with the aid of Phati by the accused. In her cross-examination, she admitted that the accused had demanded share in the property from his father. On the date of occurrence, accused had demanded his share in the property from his father. Hot words were exchanged between her, accused and her husband. Thereafter, she went to the house of Up-Pradhan of the Panchayat to bring him on the spot. She also admitted that Kala and Bir Chand had also accompanied her to the house of Up-Pradhan of Panchayat. There was retaining wall of 20 ft. height in the compound of her house. She also admitted that there were stones and bushes near the retaining wall. She also admitted that Neha had also run from the house after them when they had gone to the house of Up-Pradhan. She also admitted that accused used to look after his wife and children properly. She also admitted that they were locked in litigation with Kushal Chand, Duni Chand and Bindu. She did not call Kushal Chand, Duni Chand and Bindu to her house at the time of occurrence. She admitted the suggestion that accused has been falsely implicated in the case by Kushal Chand, Duni Chand and Bindu in connivance with the police.

9. PW-2 Amar Singh is the father of the accused. According to him, Neha and Dinesh came to their house. Both of them slept on the date of occurrence. He slept in the separate room. Gulabo Devi and Bir Chand were also present in his house on that day. At about 1:30 AM (night), accused came to his house under the influence of liquor. He asked him about the whereabouts of his children. He told him that his daughter and son were sleeping in separate room with Banti. He told accused that he should not take children to his house during night. Accused picked up a quarrel with him. His wife Banti came out of her room when accused quarreled with him. Accused pushed Banti Devi and he went inside the room and again stated that she fled from the spot. The accused again started picking up quarrel with him. He pushed him and fled away from the spot. Accused did not administer beatings to Neha in his presence. He was also declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that about three months prior to this incident, accused gave beatings to his wife and children and resultantly Kaushalya went to her

parental house alongwith the youngest daughter. He denied the suggestion that about 6-7 days back prior to this incident, accused Bhim Singh had beaten his daughter Neha and that she has bleeding from nose and mouth. Kushal Chand was his nephew. He denied the suggestion that Neha had taken shelter in the house of Kushal Chand. He admitted that Neha was brought to his house by Kushal Chand and Prem Lata. He denied the suggestion that during night at about 2 or 2:30 AM, accused dragged Neha from the hair and brought her to his room. He also denied that accused was beating Neha and in the meantime, his wife Banti Devi also came inside the room. He also denied the suggestion that Banti Devi tried to save Neha from accused in his room but she was pushed by the accused. He also denied the suggestion that accused had threatened to kill them. He denied the suggestion that accused removed Phati from wooden table lying in the room. He denied the suggestion that accused gave beatings to Neha with the aid of Phati. He admitted that nobody came to his house when they had raised alarm. He denied the suggestion that Neha was bleeding from her head, forehead, arms, legs and back. He denied the suggestion that Neha was beaten mercilessly by the accused. He denied the suggestion that Phati was broken into pieces as a result of infliction of injuries on the person of Neha by the accused. He also denied the suggestion that Neha was also beaten by the accused with the aid of stick of Fagra. He denied the suggestion that they told Prem Lata that accused had killed Neha. He also denied the suggestion that Neha was unconscious when they went to the house of Prem Lata, Panch. He also denied the suggestion that Prem lala told Kushal Chand that Neha had been killed by accused and as such he should visit his house. He admitted that when they reached in their house, the accused was sitting on the bench lying in the house. He admitted that there was explosion at electricity transformer and supply of electricity was disrupted. He admitted that the accused was found lying burnt near the aforesaid transformer. He denied the suggestion that blood stained kurta and pajama was handed over to the police by him. He denied the suggestion that kurta and pajama were worn by him on the date of incident. He admitted that kurta and pajama Ext. P-2 and P-3 had been handed over to the police by him vide memo Ext. PA. The burnt shirt and inner of the accused were handed over to the police by him vide memo Ext. PA. He was not aware that blood stained pieces of plastic mattresses were taken into possession by the police. He admitted that memo Ext. PA was also signed by witnesses Prem Lata and Lata Kumari. He denied the suggestion that Neha had died on account of the beatings administered by the accused with the aid of Phati, kick and fist blows. He denied the suggestion that when accused realized that Neha might have died due to beatings administered by him to her, he made an attempt to commit suicide by touching live wire of electricity transformer. Portion A to A of his statement Mark C recorded under Section 161 Cr.P.C. was not correct. He was confronted with portion A to A of his statement Mark C under Section 161 Cr.P.C. He stated that he has not given this statement to the police. Portion B to B of his statement Mark C recorded under Section 161 Cr.P.C. was not correct. He was confronted with portion B to B of his statement Mark C under Section 161 Cr.P.C.. He stated that he has not given this statement to the police. Similarly, he denied portion C to C, D to D, E to E, F to F and G to G of his statement recorded under Section 161 Cr.P.C. According to him, he never made these statements to the police. In his cross-examination by the learned defence counsel, he admitted that the accused has demanded his share in the property. The accused has demanded his share at the night of this incident. He alongwith his wife and second son Bir Chand went to the house of Prem Lata, Panch to bring her to their house to settle the dispute. He admitted that Neha had also run after them when they left the house in order to go to the house of Panch Prem Lata. He admitted that Neha had fallen from the compound of the house on the bushes beneath the retaining wall. He also admitted that Neha had sustained injuries on her body due to this fall. He did not know that accused had lifted Neha from the bushes and brought her to the house. He admitted that he had inimical relations with Kushal Chand, Duni Chand and

Bindu. Neither Kushal Chand nor Duni Chand or Bindu had come to his house on the night of occurrence. He admitted that the accused was implicated falsely in the case at the instance of Kushal Chand, Duni Chand and Bindu. He also admitted that Kashalya, Neha, Dinesh and Nikata were looked after by the accused properly.

10. PW-3 Prem Lata, deposed that she was present in her house on 20.6.2009. During night, at about 2 or 2:30 AM, Banti, Amar Singh, Bir Chand and Kala came to her house. They disclosed her that Neha had been beaten mercilessly by accused and as such she should visit their house. She went to the house of Kushal Chand alongwith these persons. She took Kushal Chand with her and thereafter, they went to the house of Banti Devi. Accused was sitting on wooden bench. Neha was also lying on the bench. Neha was bleeding. She asked accused as to what had happened to Neha. The accused stated that "*Aaj mene ise dil se mara hai*". Thereafter, Banti, Amar Singh, Kushal Chand and Duni Chand went to the house of Yuv Raj, Up Pradhan in order to call him to the spot. She remained inside the house alongwith Bir Chand. Accused came out of the room and sat in the corner of old house of Amar Singh. She asked Bir Chand as to where Bhim Singh had gone. In the meantime, explosion took place at electrical transformer and supply of electricity was disrupted. Accused fell on the ground near transformer. Up Pradhan Yuv Raj, Banti, Amar Singh and Kushal Chand also reached near the transformer when this explosion took place. The accused was brought to the house. The shirt of the accused was burnt. Accused and Neha were immediately brought to the Civil Hospital, Karsog. Kushal Chand had disclosed to her that about 6-7 days prior to this incident, Neha had been beaten mercilessly by the accused and that she took shelter in his house. Kushal Chand had also visited her house and told her that Neha had taken shelter in his house because she was scared of her father. She had visited the house of Kushal Chand and found Neha sitting in the room of lower storey of the house. At that time, she had found that Neha was bleeding from her nose and her mouth was swollen. Banti had also disclosed to her that accused had beaten Neha with the aid of Phati removed from wooden table and stick of Fagra. The police visited the spot. Banti Devi handed over to the police eight pieces of 'kial' wood and one stick of Fagra in her presence and these articles were sealed in parcel. Memo Ext. PB was prepared in this connection by the police. Blood stained kurta and pajama were also handed over to the police. Blood stained pieces of plastic mattresses were also handed over to the police by Amar Singh and Banti Devi. Wooden table was also handed over to the police. In her cross-examination, she admitted that the accused has constructed his own house. She has not disclosed to the police that Neha has urinated in her Salwaar. She had also not disclosed to the police during the course of recording her statement that accused had dragged Neha inside the room and made her to lie on the cot. She has not disclosed to the police during the course of recording of her statement that accused had disclosed to her that "*Aaj mene ise dil se mara hai*". She admitted that the accused has never administered beatings to his wife and children in her presence.

11. PW-4 Kaushalya Devi, is the mother of the deceased. According to her, Neha was eldest child. The accused used to administer beatings to her and her children under the influence of liquor. She used to leave the house in order to take shelter in the house of villagers to save herself from the accused. She also lodged report with the police regarding cruelty meted out to her by the accused. On 21.6.2009, she received a telephonic message that her daughter Neha had been killed by her husband and that she should immediately come to the Civil Hospital, Karsog. From Police Station, Karsog, she went to Civil Hospital Karsog. She admitted in her cross-examination that the accused has demanded his share from his father. Fight has taken place on 20.6.2009 regarding the disputed property.

12. PW-5 Baldev deposed that he received a telephonic message from Haru Ram about the disruption of supply of electricity in Village Pacthi. He went to check electricity transformer. He found one pair of chappal lying near the transformer. He also found that the fuse of the transformer was not in working order. He informed Assistant Engineer and Junior Engineer about the disruption of supply of electricity. He also informed them that some person had touched live wires of transformer. Sh. R.K.Sharma, Junior Engineer came to the spot and took the photographs of the spot. Thereafter, electricity supply was restored. Fuse of the transformer gets damaged in case somebody touches live wire of the transformer. In his cross-examination, he admitted that one cannot touch wires of transformer without the support of staircase. He also admitted that lightening can disrupt the supply of electricity.

13. PW-6 Kushal Chand deposed that the accused was married with Kaushalya about 6-7 years back. Neha came to his house. The mouth of Neha was swollen. He asked Neha as to what had happened. Neha told him that she was beaten by her father. He called Panch Prem Lata to his house. He told Prem Lata that Neha had been beaten by her father. He alongwith Prem Lata took Neha to the house of her grand father. They handed over Neha to her grand parents. On 29.6.2009, Amar Singh, Prem Lata and Banti Devi came in the compound of his house. They were also accompanied by Het Ram and Sushma. It was 2:30 AM at that time. All of them called him out from his house. He came out of his house. He asked all of them as to what had happened. Amar Singh and Banti told him that he should visit their house because Bhim Singh was administering beatings to his daughter Neha. Thereafter, he went to the house of Amar Singh alongwith Prem Lata, Duni Chand, Amar Singh, Banti, Het Ram and Sushma. When they reached the house of Amar Singh, it was found that Bhim Singh was sitting on the Bench and Neha was also lying on the Bench. Neha was unconscious. He asked Bhim Singh as to why he had beaten his daughter. Accused told him that "*Aaj mene ise dil se mara hai*". Neha demanded water. They had seen injuries on her body including bruises. They went to the house of Up Pradhan Yuv Raj. Up Pradhan was brought to the house of Amar Singh by them. When they were reaching near the house of Amar Singh, explosion took place at electricity transformer and supply of electricity was disrupted. Accused was lying near the transformer and his clothes were burnt. They brought the accused to the house of Amar Singh. Thereafter, Neha and Bhim Singh were brought to Civil Hospital, Karsog. In his cross-examination, he deposed that when Neha came to his house, about 6-7 days prior to this incident her mouth was found swollen. He did not lodge any report with the police. He admitted categorically that he was not on visiting terms with Amar Singh. His statement was recorded by the police one day after this incident. He has disclosed to the police during the course of recording of his statement that he had asked accused as to why he had beaten Neha. (Confronted with his statement Mark D under Section 161 Cr.P.C. wherein it is not so recorded). He had not disclosed to the police during the course of recording of his statement that only Amar Singh, Banti, Bir Chand and Kala came to his house during night. Volunteered that he had disclosed to the police that apart from these persons, Het Ram, Sushma and Prem Lata had also come to his house. He has disclosed to the police during the course of recording of his statement that accused told him that "*Aaj mene ise dil se mara hai*". (Confronted with his statement Mark D under Section 161 Cr.P.C. wherein it is not so recorded). He disclosed to the police during the course of recording of his statement that Amar Singh told him that accused had beaten Neha with Phati and stick of Fagra. (Confronted with his statement Mark D under Section 161 Cr.P.C. wherein it is not so recorded). He has disclosed to the police during the course of recording of his statement that he has found Bhim Singh lying near transformer in burnt condition. (Confronted with his statement Mark D under Section 161 Cr.P.C. wherein it is not so recorded). He also admitted in cross-examination that Bindu and Duni Chand were his brothers.

14. PW-7 Yuv Raj, deposed that he was Up-Pradhan of Gram Panchayat Kalashan. On 20.6.2009, at about 3:15 AM Banti Devi, Amar Singh, Kushal Chand and Duni Chand came to his house. They told him that Bhim Singh had beaten his daughter and as such he should go to the house of Amar Singh. He accompanied them to the house of Amar Singh. When they reached near the house of Amar Singh, explosion took place at the electricity transformer. They went near the transformer. It was found by them that accused was lying near transformer in burnt condition. They took Bhim Singh accused to the house of Amar Singh. Neha was lying inside the room on cot. She was unconscious. There were injuries on her entire body. She was also bleeding. Wooden pieces and one stick of Fagra were lying inside the room. Banti Devi and Amar Singh told him that Neha had been beaten by the accused. He denied the suggestion that Neha sustained injuries due to fall. He admitted that quarrel had taken place between Tilak Raj and accused about one year prior to the date of the incident. He admitted that criminal case was registered at Police Station Karsog in this connection. The case was transferred to their Panchayat and compromise has taken place between Tilak Raj and the accused.

15. PW-8 Bir Chand deposed that he has passed +2 examination. Accused was his brother. On 20.6.2009, Neha was sleeping with her grand mother. He was sleeping with his father. Dinesh was also sleeping with them. During night, he heard noise. He woke up. He saw that accused was beating his parents. Neha was present in the room with his mother. He got frightened. He came out of his room. His mother Banti Devi raised alarm. Accused removed Phati from the table. The accused had not beaten anybody with the aid of Phati in his presence. He alongwith his father, mother and sister went to the house of Prem Lata. Prem Lata told them that they should also call other villagers to the spot. Thereafter they went to the house of Kushal Chand and Duni Chand. Both of them had also accompanied them to their house. When they reached their house, accused was sitting on the bench. Neha was also sitting on the bench resting her head on the same. Thereafter, his mother went to the house of Yuv Raj, Vice President of the Panchayat. Accused went towards the electricity transformer. After some time, they heard explosion at the electricity transformer. On hearing explosion, they went towards the transformer. Accused was found lying near the transformer. Clothes, chest and arm portion of the body of accused was burnt. When Neha was lying on the bench, blood was oozing from her person. Neha and accused were brought to Civil Hospital, Karsog. Neha died in the hospital. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that accused has beaten Neha with the aid of Phati. He also denied the suggestion that Neha was dragged from her hair by the accused and she was brought to their room. He was not aware that there was a nail in the Phati. He denied portion A to A and B to B of his statement recorded under Section 161 Cr.P.C. In his cross-examination, he admitted that the accused used to live separately in his house constructed by him. He used to demand his share in the property from his father. He also admitted that Kaushalya takes liquor. He also admitted that accused used to ask his wife not to take liquor. He also admitted that during the night of occurrence, hot words were exchanged between accused and Amar Singh when accused demanded his share in the property from his father. He admitted that Amar Singh told accused that he would call Panchayat to settle this dispute. He also admitted that he alongwith his mother and sister went to the house of Panch and Up Pradhan to call them to their house. He did not know that Neha had run after them from the house when they had gone to the house of Up-Pradhan and Panch. He admitted the suggestion that Neha had fallen from the courtyard and resultantly, she had sustained injuries on her person. He also admitted that his father is locked in litigation with Kushal Chand and Duni Chand. He also admitted that Kushal Chand and Duni Chand are not in visiting terms with them. He also admitted that Neha was lifted from the bushes by accused and was brought to the room of the house. He has seen

pieces of Phati outside the house when the same were taken into possession by the police. Table was lying in broken condition in a room. He did not know that it was raining on the night of occurrence. Towards the end of his cross-examination, he denied the suggestion that accused used to take proper care of his children.

16. PW-9 Dalip Singh Verma, deposed that he received telephonic message from Rajinder Kumar JE that one person had climbed on electricity transformer at Kumaro which has resulted in disruption of electricity.

17. PW-10 Nikka Ram, has taken photographs Ext. P-21 to P-25.

18. PW-11 Haru Ram, deposed that on 21.6.2009, at 4:30 AM, Bir Chand came to his house. Bir Chand told him that accused had beaten his daughter and she was lying unconscious. Bir Chand had also disclosed him that accused had beaten his daughter with Phati. He also told him that accused had climbed on electricity transformer and he was lying near the transformer. His condition was serious.

19. PW-12 Dr. Dinesh Sharma, has conducted post mortem on the body of deceased Neha Kumari. He issued MLC Ext. PE. According to him, the deceased died due to neurogenic shock due to ante mortem head injury. The injuries shown in MLC could have been caused with the aid of blunt weapon. The duration of injuries shown in the MLC was within few hours. PW-12 Dr. Dinesh Sharma, has also examined the accused. He has issued MLC Ext. PG.

20. Statements of PW-13 Pawan, PW-14 Jai Ram, PW-15 Const. Jai Singh, PW-16 Const. Lal Singh, are formal in nature.

21. PW-17 HC Shrawan Kumar deposed that on 21.6.2009, the case property relating to this FIR was deposited with him by the I.O. and the same was deposited in the Malkhana by him. On 23.6.2009, the case property was sent to FSL, Junga through Const. Lal Singh vide RC No. 60/2009.

22. PW-18 HC Tek Chand deposed that on 21.6.2009, he went to Civil Hospital, Karsog in connection with report No. 8 recorded in the *rojnamcha* at Police Station, Karsog. Neha was subjected to medical examination by the Medical Officer. Neha died in the hospital. The Police Station, Karsog was informed by him on telephone. Thereafter, SHO Vijay Sen visited the hospital.

23. Statement of PW-19 Tilak Singh, is formal in nature.

24. PW-20 Insp. Rajinder Parshad, deposed that the accused was likely to be discharged from the hospital on 16.7.2009. He directed HHC Ishwar Dass to bring accused to Police Station Karsog, after his discharge from the hospital for interrogation. He was subjected to interrogation.

25. Statement of PW-21 Insp. Amar Chand Sharma, is formal in nature.

26. PW-22 SI Vijay Sen, is the I.O. He deposed the manner in which the information was received at Police Station, Karsog at 6:10 AM. The dead body was kept in the mortuary of the hospital. The post mortem examination was got conducted. He recorded the statement of Banti Devi under Section 154 Cr.P.C. vide Ext. PY. The accused was also got medically examined. His blood and urine samples were taken separately. Site plan was prepared. He took into possession Phati, one stick of Phagra from the room, pair of Chappal and photographs of the spot. The parcels were sent to FSL, Junga. He denied the suggestion in the cross-examination by the learned Advocate appearing on behalf of the accused that Banti and Amar Singh had disclosed him during the course of investigation that the accused had picked up a quarrel with Amar Singh relating to some land dispute. He denied the suggestion that Neha fell on

the stones and sustained injuries on her person. He denied the suggestion that Phati was taken into possession by him which was broken into pieces.

27. The case of the prosecution, precisely, is that the accused had beaten Neha mercilessly. Thereafter, he tried to commit suicide by touching electric wires of transformer. He received severe injuries. The accused and Neha were taken to hospital. Neha died in the hospital at 6:30 AM. The police investigated the matter.

28. According to the prosecution, PW-1 Banti Devi, PW-2 Amar Singh and PW-8 Bir Chand were eye-witnesses of the incident dated 20.6.2009. PW-1 Banti Devi is the mother of the accused. In her examination-in-chief, she has categorically deposed that the accused did not beat Neha in her presence. She was declared hostile. She was cross-examined. She denied the suggestion that the accused had inflicted injuries on the person of Neha with the aid of Phati, having been removed by him from the table, lying in the room. She denied the suggestion that Neha was bleeding from her head, forehead, arm and stomach. She also denied the suggestion that her family members had told her that Neha became unconscious and accused had fled from the room. She has denied portions A to A, B to B, C to C, D to D and E to E of her statement recorded under Section 154 Cr.P.C. In her cross-examination, she has admitted specifically that accused had demanded share in the property from his father. Hot words were exchanged between the accused, her and Amar Singh, her husband. Thereafter, she went to the house of Up Pradhan to bring her on the spot. She also admitted that there was retaining wall of 20 ft. height in the compound of her house. She also admitted that Neha was talking when she had returned to her house from the house of Up- Pradhan. She also admitted that the accused Bhim Singh used to look after his children properly. She also admitted that they were locked in litigation with Kushal Chand, Duni Chand and Bindu. She also admitted in her cross-examination that Neha had also run from the house after them when they had gone to the house of Up-Pradhan. PW-2 Amar Singh deposed that accused did not administer beatings to Neha in his presence. He also denied the suggestion that about 3 months prior to the incident, accused had given beatings to his wife and children and resultantly, Kaushalya, the wife of the accused, went to her parents' house. He also denied the suggestion that about 6-7 days back, accused had beaten his daughter Neha and she bled from the nose and mouth. He also denied the suggestion that accused gave beatings to Neha with the aid of Phati. He also denied the suggestion that Neha was beaten by the accused with the stick. He also denied portions A to A, B to B, C to C, D to D, E to E and G to G of his statement recorded under Section 161 Cr.P.C. In his cross-examination, he also admitted that accused had demanded his share in his property on the night of the incident. They went alongwith the wife and second son Bir Chand to the house of Prem Lata to bring her to their house to settle the dispute. He also admitted that Neha had also ran after them when they left the house in order to go to the house of Panch Prem Lata. He also admitted that Neha had fallen from the compound of the house on the bushes beneath the retaining wall. He also admitted the suggestion that Neha had sustained injuries on her body due to this fall. PW-8 Bir Chand was also present on the spot as per the prosecution version. In his cross-examination, he denied that the accused has beaten anybody with the aid of Phati in his presence. He alongwith his father, mother and sister went to the house of Prem Lata Panch. He denied the suggestion that the accused had beaten Neha with the aid of Phati. In his cross-examination, he also denied the suggestion that Neha was pulled from her hair by the accused. He also denied that there was nail in the Phati. In his cross-examination, he further admitted that the accused used to demand share in the property from his father. He also admitted that his father was locked in litigation with Kushal Chand and Duni Chand. They were not in visiting terms.

29. According to PW-1 Banti Devi, PW-2 Amar Singh and PW-8 Bir Chand, the accused has not administered beatings to the deceased. According to the statements of PW-1 Banti Devi and PW-2 Amar Singh the accused was demanding his share in the property. A quarrel had taken place. They went to the house of Pradhan. Neha (deceased) followed them and according to the statement of PW-2, the father of the accused, Neha had fallen from the compound of the house in the bushes beneath the retaining wall and she received injuries on body due to this fall.

30. PW-1 Banti Devi, PW-2 Amar Singh and PW-8 Bir Chand have also resiled from their statements recorded under Section 154/161 Cr.P.C. They were cross-examined. In their cross-examination also, these witnesses have categorically denied that they have seen the accused giving beatings to the deceased Neha.

31. Now, as far as the statement of PW-3 Prem Lata is concerned, she was told by Kushal Chand, the manner in which Neha had received injuries 6-7 days prior to the incident. Kushal Chand has appeared as PW-6. According to him, Neha came to his house. Her face was swollen. It has come in the statements of PW-1 Banti Devi, PW-2 Amar Singh that relations with Kushal Chand were inimical. It has also come in the statement of PW-8 Bir Chand that the relations between Kushal Chand and his father were strained. They were involved in litigation and they were not in visiting terms. If the relations were strained, there was no occasion for Neha to visit the house of Kushal Chand. Thus, the statements of PW-3 Prem Lata and PW-6 Kushal Chand are not trustworthy. Duni Chand is also brother of Kushal Chand.

32. The statements of PW-3 Prem Lata and PW-6 Kushal Chand have been relied upon by the prosecution to prove extra judicial confession made by the accused by uttering "*Aaj maine dil se ise mara hai*". The statements cannot be relied upon for the simple reason that they have not stated so when their statements were recorded by the police under Section 161 Cr.P.C. PW-3 Prem Lata has admitted in her cross-examination that she has not disclosed to the police during the course of recording her statement that the accused has disclosed to her that "*Aaj maine dil se ise mara hai*". PW-6 Kushal Chand has also admitted that he was not in visiting terms with Amar Singh. He had disclosed to the police during the course of recording of his statement that he had asked the accused why he had beaten Neha. (Confronted with statement Mark D under Section 161 Cr.P.C., in which it is not so recorded). He had also disclosed to the police during the course of recording of his statement that accused told him that "*Aaj maine dil se ise mara hai*". (Confronted with the statement Mark D under Section 161 Cr.P.C. in which it is not so recorded). He admitted towards the end of his cross-examination that Bindu and Duni Chand were his brothers. In case the accused had made extra-judicial confession before PW-3 Prem Lata and PW-6 Kushal Chand, it ought to have been recorded in statements recorded under Section 161 Cr.P.C. The witnesses have made improvements upon their previous statement recorded under Section 161 Cr.P.C.

33. According to PW-12 Dr. Dinesh Sharma, the deceased died due to neurogenic shock due to ante mortem head injury. The accused was also examined by PW-12 Dr. Dinesh Sharma. According to the prosecution case, the accused felt repentant and tried to commit suicide by touching the live electric wire of the transformer. PW-12 Dr. Dinesh Sharma has specifically deposed that the accused had not sustained burn injuries on his hands. If the accused had touched the electric wire with his hands, there ought to have been burn injuries on his hands. He has received burn injuries mainly on his stomach. PW-5 Baldev has admitted in his cross-examination that no one can touch the transformer without the support of staircase. Thus, the prosecution version

that the accused has tried to commit suicide by touching the transformer wire is not proved conclusively.

34. What emerges from the entire evidence discussed hereinabove, is that the accused had demanded a share of property from his father during the fateful night. The quarrel took place between the father, mother and the accused. The family went to the house of Pradhan to settle the dispute. We have already noticed, as per the statements of PW-1 Banti Devi and PW-2 Amar Singh that Neha came after them. PW-2 Amar Singh has deposed that Neha had fallen. Thus, the defence version is also probablized that Neha might have received injuries by falling from 20 feet compound wall.

35. According to the prosecution version, the accused was living separately from his family. His wife was also residing separately. Two children used to remain with the accused. The relations between the accused and his family members were strained due to property dispute. Thus, there was no occasion for Neha and Dinesh to come to the house of their grand parents during night, more particularly, when PW-1 Banti Devi deposed that they had not taken their meals at her house. PW-1 Banti Devi deposed that the accused was drunk. We have gone through the FSL report. The presence of ethyl alcohol in blood and his urine was only 32.88 mg% and 67.27 mg%, respectively. It cannot be stated on the basis of Ext. PA/J, report of the FSL that the accused was drunk at the time when he is stated to have gone to his father's house and the alleged incident took place.

36. The distance between the house of the accused and other family members was only 200 ft. away. There were other houses near the house of Amar Singh. In case, they had raised hue and cry, the same would have been noticed by the people residing near the house of Amar Singh.

37. PW-8 Bir Singh was young boy. He had already passed 10+2 examination. The mother, father and brother could easily save Neha, if she was beaten mercilessly by the accused. The prosecution has taken into possession the Pajama and Shirt of Amar Singh which were stained with blood. He has appeared as PW-2. PW-2 Amar Singh, in his statement has not deposed that he had tried to save Neha and had moved her to the hospital. How, his clothes were stained with blood has not been explained by the prosecution. The blood, if any, was bound to be present on the clothes of the accused and not of PW-2 Amar Singh vide Ext. 8a and 8b of Ext. PA/H, FSL report. The shirt of the accused was also sent for chemical examination. It was found with small holes of burning, characteristic of burning by spark from electricity. No blood stains were found on it as per Ext. PA/G, FSL report. The prosecution has failed to prove its case against the accused beyond reasonable doubt.

38. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 7.10.2010 rendered by learned Addl. Sessions Judge, Mandi, Camp at Karsog, H.P., in Sessions Trial No. 4 of 2009 is set aside. The accused is acquitted of the charges framed under Sections 302 and 309 IPC. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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

Manmohan Kansal & ors. .....Petitioners.
Versus
Hem Raj & ors. .....Respondents.

CMPMO No. 373 of 2014.
Decided on: 24.11.2014.

Code of Civil Procedure, 1908- Order 26 Rule 9- An application for appointment of Local Commissioner was filed when the case was listed for arguments- it was specifically asserted in the Written Statement that the land was demarcated prior to the institution of the suit- it was not asserted that the defendant had encroached upon the suit land during the pendency of the suit- held, that the application was filed at the belated stage for collection of evidence which was not permissible- hence, application dismissed. (Para-5)

For the petitioners: Mr. V.D.Khidta, Advocate.
For the respondents: None.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J. (oral)

This petition is instituted against the order dated 28.10.2014 rendered by the learned Civil Judge, (Sr. Divn.), Court No. 1, Paonta Sahib, passed in CMA No. 242/6 of 2014 in Civil Suit No. 89/1 of 2008.

2. Key facts, necessary for the adjudication of this petition are that the petitioners-plaintiffs (hereinafter referred to as the plaintiffs for convenience sake) have filed a suit for permanent prohibitory injunction restraining the respondents-defendants (hereinafter referred to as the defendants), from interfering, raising construction of any kind, whatsoever, in land comprised in Khata Khatauni No. 2 min/2 & 3, bearing Khasra Nos. 92/58 and 57, measuring 79-0 bighas, situated in Mauza Kodri-Parmanand, Tehsil Paonta Sahib, Distt. Sirmour, H.P., as per *jamabandi* for the year 1998-99.

3. The suit was contested by the defendants. Replication was filed. The issues were framed by the learned trial Court on 28.2.2009. The matter was listed for final arguments. At that stage, the plaintiffs moved an application under Order 26 Rule 9 CPC, for appointment of Local Commissioner. The application was contested by the defendants. The application was rejected by the learned trial Court on 28.10.2014. Hence, this petition.

4. I have heard Mr. V.D.Khidta, Advocate for the petitioners and gone through the record and order dated 28.10.2014.

5. The suit was instituted by the plaintiffs in the year 2008. The application under Order 26 Rule 9 CPC has been filed when the matter was listed for final arguments. The defendants have specifically averred in para 7 of the Written Statement that the Patwari and Field Kanungo had visited the spot on 5.9.2005, carried out demarcation and found that shrubs and trees were cut from Kh. Nos. 50, 48 and 58 and not from the suit land. The plaintiffs were already aware about this position. The issues were framed by the learned trial Court on 28.2.2009. It is not the case of the plaintiffs that the defendants have encroached upon any portion of the suit land, during the pendency of the suit and thus the demarcation was necessary. The application was filed at a very belated stage. The plaintiffs cannot be permitted to collect evidence under the garb of filing application under Order 26 Rule 9 CPC. The plaintiffs, as rightly observed by the learned Civil Judge (Sr. Divn.), Court No. 1, Paonta Sahib, have alternative remedy to approach the revenue authorities for fixing the boundaries of the land. There is neither any illegality nor perversity in the order dated 28.10.2014. Accordingly, the present petition is dismissed. No costs.

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

Naresh Chand and others .....Petitioners
Versus
State of H.P. and others. ..... Respondents

CWP No. 1205 of 2014.
Date of decision: 24.11.2014

Constitution of India, 1950- Article 226- Petitioners were denied the appointment as JBT on the ground that they had not secured the qualifying marks for appointment- held, that the respondent will consider the case of the petitioner in accordance with law and in case decision goes against them, they will be at liberty to approach the Court again and in case decision is in their favour they would be entitled to seniority from the date of their appointment.

For the petitioners: Mr.Sanjeev Bhushan and Mr.Ajay Thakur, Advocates.
For the respondents: Mr.Shrawan Dogra, Advocate General with Mr.Romesh Verma & Mr.Anup Rattan, Additional Advocate Generals & Mr. J.K. Verma, Deputy Advocate General for respondents-State.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

By the medium of the present writ petition, the petitioners have challenged the action of the respondents-State, whereby the petitioners have been denied appointment as JBT teachers.

2. Respondents No.1 to 3 have filed the reply.

3. During the pendency of the writ petition, the grievance of the writ petitioners No.2, 4, 8 and 10 stands redressed and, therefore, they were ordered to be deleted from the array of the writ petitioners, vide order dated 21st April, 2014, passed by this Court. Thereafter, in terms of order dated 23rd September, 2014, the official respondents were directed to file fresh affidavit, but failed to do so.

4. We have gone through the reply filed by the respondents No.1 to 3. It is apt to reproduce paragraphs 4, 5 and 6, of the preliminary submissions hereunder:

> *"4. That as per the information received from respondent No.3 i.e. Deputy Director of Elementary Education, Chamba he advertised the post for sponsoring the name of eligible candidates for the purpose of appointment as JBT on contract basis under entire reserve category/sub category from all the employment exchange of Chamba District. The petitioner No.1 was appeared for counseling on 26-11-2013 and had produced the IRDP certificate during the course of counseling, but the same was not considered due to the reason that the Employment Exchange, Churach, and District Chamba sponsored him just under Scheduled Tribe category. IT is further submitted that if the petitioner No.1 is considered under ST (IRDP) category, he cannot given appointment as JBT on contract basis in District Chamba, as he has just scored 100 marks in TET examination. Whereas, the last candidate under ST/IRDP category as selected has scored 104 marks in TET examination and if his candidature has been considered under ST category, the last candidate under ST category as*

selected has scored 102 marks in TET examination and it is further submitted that the last candidate of General category who was selected and given appointment as JBT in Chamba District had scored 100 marks in Teacher Eligibility Test (TET) and had scored 2222 out of 2800 marks in JBT examination that comes to 79.3% and whereas, the present petitioner No.1 who had also scored 100 marks in TET examination and had scored 1910 out of 2800 marks in JBT examination that comes to 68.7% was not selected. Hence, the petitioner No.1 not eligible for appointment as JBT on contract basis in Chamba District.

5. That the petitioner No.1, 3, 5 & 6 who had appeared for counseling, to be appointed as JBT on contract basis under Scheduled Tribe category had scored 100 marks respectively in Teacher Eligibility Test (TET) could not be selected, whereas the last candidate had been selected after applying the 200 points roster as per provision laid down under Rule 15 & 16 of Recruitment & Promotion Rules of JBT category namely Sh. Vinod Kumar who had scored 102 marks in TET and appeared at Sr. No.117 of the revised merit list. It is further submitted that the petitioner No.2, 4, 8 & 10 appeared for counseling and belonged to ST (IRDP)/SC/ST category respectively and had been selected. That the petitioner No.7 & 9 who were belonging to General IRDP category had scored 100 & 101 marks in TET examination respectively could not be selected, whereas the last candidate belonging to General IRDP category namely Sh. Sandeep Sharma appearing at Sr. No.114 of the revised merit list, had scored 102 marks in TET examination and had been selected as such.

6. That as per information received from respondent No.3 i.e. Deputy Director of Elementary Education, Chamba 191 posts allotted to District Chamba for appointment as JBT on contract basis out of which 183 posts has filled on contract basis by the respondent No.3 as per Recruitment & Promotion Rules of JBTs and remaining posts are not fill up due to non availability of reserve category candidates in the District. Hence, the present petition filed by the petitioners deserves to be dismissed."

5. In view of the reply filed by respondents No.1 to 3 read with the rejoinder filed by the writ petitioners, we are of the considered view that petitioners No.1, 3, 5 to 7 and 9 have carved out a case for interference.

6. However, we deem it proper to dispose of the writ petition by directing respondents No.1 to 3/competent Authority to consider the case of petitioners No.1, 3, 5 to 7 and 9 as per law and make a decision within a period of six weeks from today.

7. It goes without saying that in case the consideration order goes against the petitioners, they are at liberty to challenge the same and in case the consideration order goes in their favour, seniority shall be assigned to them in view of the judgment rendered by this Court in **LPA No.170 of 2014**, titled as **Shri Balak Ram vs. State of Himachal Pradesh and others**, **on 19.11.2014**.

8. The petition stands disposed of accordingly, so also the pending CMPs, if any. Copy dasti.

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

1. Cr. Appeal No.368 of 2007.
2. Cr. Appeal No.32 of 2008.
Judgment reserved on: 3.9.2014.
Date of Decision: November 24, 2014.

1. Cr.A. No. 368 of 2007.

Prem Chand ....Appellant
Vs.
State of H.P. .....Respondent.

For the Appellant(s):	Mr.Jagdish Vats, Advocate.
For the Respondent:	Mr.B.S.Parmar, Additional Advocate General with Mr. Ashok Chaudhary, Additional Advocate General, Mr.Vikram Thakur, Deputy Advocate General & Mr. J.S.Guleria, Assistant Advocate General

2. Cr.A. No. 32 of 2008.

State of HP. ....Appellant.
Vs.
Pawan Kumar and others. .....Respondents.

For the appellant:	Mr.B.S.Parmar and Mr.Ashok Chaudhary Addl. A.Gs with Mr.Vikram Thakur Dy. AG and Mr. J.S.Guleria Asstt. Advocate General.
For the respondents:	Mr.Jagdish Vats, Advocate.

Indian Penal Code, 1860- Sections 302 and 324 read with Section 34- PW-1 specifically stated that accused was in possession of dagger and had inflicted a dagger blow on the back side of the deceased- when PW-1 tried to rescue the deceased, accused inflicted a dagger blow on his abdomen- his testimony was corroborated by other prosecution witnesses- medical evidence also showed that the deceased had died due to rupture of the descending thoracic aorta- medical evidence also proved incised wound on the abdomen of PW-1- dagger was recovered at the instance of accused- held, that in these circumstances, prosecution version was duly proved. (Para-12 to 17)

Indian Penal Code, 1860- Section 34- Common intention means a pre oriented plan – it must exist prior to the commission of the act- no evidence was led to prove that the accused shared common intention hence accused could not be convicted with the aid of Section 34. (Para-26)

Cases referred:

Shyamal Ghosh Vs State of West Bengal AIR 2012 SC 3539
Hariom and others Vs. State of Uttar Pradesh AIR 1993 (1) Crimes 294
Ramashish Yadav and others Vs. State of Bihar AIR 1999 SC 3830
Krishnan and another Vs State AIR 2003 SC 2978
Narinder Singh and another Vs. State of Punjab AIR 2000 SC 2212
Suresh and another Vs. State of UP AIR 2001 SC 1344
State of Rajashthan Vs. Talevar and another 2011 (11) SCC 666
Surendra Vs. State of Rajasthan AIR 2012 SC (Supp) 78
State of Rajasthan Vs. Shera Ram @ Vishnu Dutt 2012 (1) SCC 602
Balak Ram and another Vs. State of UP AIR 1974 SC 2165
Allarakha K. Mansuri Vs. State of Gujarat (2002) 3 SCC 57
Raghunath Vs. State of Haryana (2003) 1 SCC 398

State of U.P Vs. Ram Veer Singh and others, AIR 2007 SC 3075
S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others
AIR 2008 SC 2066,
Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra (2008) 11 SCC 186
Arulvelu and another Vs. State (2009) 10 SCC 206
Perla Somasekhara Reddy and others Vs. State of A.P. (2009) 16 SCC 98
Ram Singh @ Chhaju Vs. State of Himachal Pradesh (2010) 2 SCC 445

The following judgment of the Court was delivered:

P.S. Rana Judge

Both appeals filed against the same judgment and sentence passed by learned Sessions Judge Una in Sessions Case No. 6 of 2006 titled State of H.P. Vs. Prem Chand @ Bhalli and others decided on 29.9.2007 as both appeals have arisen out of the same judgment and sentence. Hence both appeals are consolidated in order to avoid repetition in the ends of justice.

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by prosecution that on dated 29.5.2005 at about 8.30 p.m. near a flour mill in village Jalgran Tehsil and District Una co-accused Prem Chand @ Bhalli in furtherance of common intention committed murder intentionally and caused death of Karnail Singh through sword. It is further alleged by prosecution that on the same date time and place co-accused Prem Chand @ Bhalli in furtherance of common intention voluntarily caused hurt to complainant Kuldip Kumar through sharp edged weapon. It is alleged by prosecution that on dated 29.5.2005 PW1 Kuldip Kumar and deceased Karnail Singh went to attend a marriage ceremony at village Haroli. It is alleged by prosecution that after attending marriage ceremony PW1 Kuldeep Kumar boarded a bus to village Jalgran. It is further alleged by prosecution that on dated 29.5.2005 at about 8.30 p.m. when complainant Kuldeep Kumar and deceased Karnail Singh after alighting from the bus near village Jalgran and when they crossed the road they met with co- accused Prem Chand along with other co-accused persons. It is alleged by prosecution that co-accused Surat Ram was in possession of a stick and co-accused Prem Chand was in possession of a dagger. It is further alleged by prosecution that co-accused Prem Chand and other co-accused persons assaulted deceased Karnail Singh. It is further alleged by prosecution that co-accused Prem Chand inflicted a dagger blow on the left side of the back portion of body of deceased Karnail Singh and co-accused Surat Ram inflicted a stick blow upon deceased Karnail Singh. It is further alleged by prosecution that other co-accused namely Pawan Kumar, Surat Ram and Ashwani Kumar also assaulted deceased Karnail Singh with fist blows. It is further alleged by prosecution that when PW1 Kuldip Kumar intervened to rescue deceased Karnail Singh co-accused Prem Chand inflicted dagger blow upon injured PW1 Kuldip Kumar in the abdomen. It is further alleged by prosecution that thereafter PW1 Kuldip Singh raised alarm whereupon PW2 Purshotam and one Prem Chand both residents of village Jalgran came at the spot and thereafter accused persons left the place of incident. It is further alleged by prosecution that thereafter PW1 Kuldip Kumar and PW2 Purshotam and Prem Chand took deceased Karnail Singh to Zonal hospital Una where Karnail Singh was declared brought dead. It is further alleged by prosecution that thereafter HHC Ashwani Kumar informed PW17 Inspector Ajay Rana that two persons namely Karnail Singh and Kuldeep Kumar were brought to regional hospital Una in injured condition and karnail Singh had died. It is further alleged by prosecution that on the basis of information PW17 Ajay Rana recorded daily diary report No. 17 Ext 13/A and proceeded to zonal hospital Una along with ASI Darshan Singh, HC Dilbag Singh, HC Sarabjit Singh,

Constable Vijay Kumar, LHC Ram Avtar and LHC Nirmal Singh. It is further alleged by prosecution that statement of complainant PW1 Kuldeep Kumar under Section 154 Cr PC Ext PW1/A was recorded and thereafter FIR was registered. It is further alleged by prosecution that injured PW1 Kuldeep Kumar was also medically examined in regional hospital Una and medico legal certificate Ext PW8/A was issued. It is further alleged by prosecution that blood stained dust Ext P3 and two blood stained stones Ext P4 were took into possession and sealed in a parcel. It is further alleged by prosecution that site plan Ext PW17/A was prepared. It is further alleged by prosecution that blood stained shirt Ext P2 of complainant Kuldeep Kumar took into possession vide seizure memo Ext PW1/B. It is further alleged by prosecution that inquest reports Ext PW17/B and Ext PW17/C prepared and post mortem report also obtained. It is further alleged by prosecution that co-accused Ashwani Kumar was also medically examined and photographs of the spot Ext PC/1 to Ext PC/8 also obtained. It is further alleged by prosecution that sealed parcels were deposited in malkhana and disclosure statement of co-accused Prem Chand Ext PW6/A was obtained qua dagger Ext P1. It is further alleged by prosecution that pursuant to disclosure statement Ext PW6/A dagger Ext P1 was recovered and same was took into possession and sketch of weapon of offence Ext PA-1 was prepared. It is further alleged by prosecution that statements of prosecution witnesses were recorded. It is further alleged by prosecution that compromise executed between deceased Karnail Singh and accused persons also took into possession by PW16 Pritam Singh vide memo Ext PW3/B. It is further alleged by prosecution that sword sealed in a parcel was also deposited. It is alleged by prosecution that all the parcels were sent for chemical analysis to FSL Junga through PW12 Constable Kushal Dev vide RC No. 996 of 2005 dated 6.6.2005. It is further alleged by prosecution that chemical analyst report Ext PW17/H took into possession. Learned Sessions Judge Una framed charges against accused persons under Section 302 read with Section 34 of the Indian Penal Code and under Section 324 read with Section 34 of the Indian Penal Code. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined as many as seventeen witnesses in support of its case:

Sr.No.	Name of Witnesses
PW1	Kuldeep Kumar
PW2	Prushotam Lal
PW3	Rajender Bhogal
PW4	Sikandar Kumar
PW5	Rajender Kumar
PW6	Madan Lal
PW7	Prakash Chand
PW8	Dr. V.K. Raizada
PW9	Dr. G.Upadhayaya
PW10	Dr. Ashok Dharoch
PW11	HC Rajesh Kumar
PW12	HC Kushal Dev
PW13	HC Sandeep Kumar
PW14	HC Shashi Kumar

PW15	ASI Mohinder Singh
PW16	Insp. Pritam Singh
PW17	Insp. Ajay Rana

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr. No.	Description.
Ext. PA	Compromise.
Ext. PB	Application
Ext. PW1/A	Statement of Kuldeep Kumar U/S 154 Cr.P.C.
Ext. PW1/B	Recovery Memo
Ext. PW3/A	Recovery Memo
Ext. PW3/B	Memo of Compromise
Ext. PW4/A	Recovery Memo
Ext. PW5/A	Memo of statement of accused U/S 27 of Evidence Act.
Ext. PW5/B	Recovery Memo
Ext. PW6/A	Disclosure statement U/S 27 of Evidence Act.
Ext. PW7/A	Recovery Memo.
Ext. PW8/A	MLC of Kuldeep Kumar.
Ext. PW9/A	Postmortem Report of deceased Karnail Singh aged 23 years.
Ext. PW10/A	M.L.C. of Ashwani co-accused.
Ext. PW13/A	Copy of Rapat No. 17 Rojnamcha. Dated 29.5.2005
Ext. PW15/A	FIR
Ext. PW17/A	Site Plan.
Ext. PW17/B	Death report.
Ext. PW17/C	Inquest Report.
Ext. PW17/D	Site Plan.
Ext. PW17/E	Site Plan.
Ext. PW17/F &Ext.PW17/G	Statement of Rajender Bhogal U/S 161 Cr.P.C. for contradiction purpose.
Ext. PW17/H	Chemical Examiner Report.
Ext. PA-1	Sketch map of dagger
Ext. PC-1 to Ext. PC-12	Photographs.

Ext. PC-13	Negatives of photographs
Ext. DA	Copy of MLC of accused Prem Chand.

5. Accused persons examined DW1 Raj Kumar. Learned Sessions Judge Una convicted co-accused Prem Chand @ Bhalli under Sections 302 and 324 read with Section 34 IPC and acquitted co-accused Pawan Kumar @ Bindu, Surat Ram and Ashwani Kumar. Learned trial Court imposed sentence of life imprisonment and fine of Rs.5000/- (Five thousand) and in default of payment of fine simple imprisonment for two months qua criminal offence under Section 302 IPC upon co-accused Prem Chand. Learned trial Court also imposed sentence of simple imprisonment for six months and fine of Rs.2000/- (Two thousand) and in default of payment of fine simple imprisonment for one month qua criminal offence under Section 324 IPC upon co-accused Prem Chand. Learned trial Court further directed that sentences of substantive imprisonment shall run concurrently.

6. Feeling aggrieved against the judgment and sentence passed by learned Sessions Judge Una two appeals filed i.e. Cr. Appeal No. 368 of 2007 titled Prem Chand Vs. State of HP and Cr. Appeal No. 32 of 2008 titled State of HP Vs. Pawan Kumar and others.

7. We have heard learned Advocate appearing on behalf of appellant and learned Addl. Advocate General appearing on behalf of State of HP in both appeals.

8. Question that arises for determination before us in these appeals is whether learned Sessions Judge Una did not properly appreciate oral as well as documentary evidence adduced by the parties as alleged in both appeals.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9 PW1 Kuldeep Kumar has stated that he is permanent resident of village Jakhera Tehsil and District Una. He has stated that he is residing with his father's sister at village Jalgran for the past six years. He has stated that accused persons are also residents of village Jalgran. He has stated that about one month ago co-accused Ashwani Kumar and co-accused Pawan Kumar quarreled with him and thereafter a compromise was executed by the members of gram panchayat Jalgran. He has stated that about 15 days later co-accused Ashwani Kumar and co-accused Pawan Kumar assaulted deceased Karnail Singh resident of same village and thereafter a compromise was got executed between deceased Karnail Singh and said assailants. He has stated that on dated 29.5.2005 he and deceased Karnail Singh went to attend a marriage ceremony at village Haroli and after attending the marriage ceremony he and deceased Karnail Singh boarded a bus to village Jalgran. He has stated that at about 8.30 p.m. on dated 29.5.2005 when he and deceased Karnail Singh after alighting from the bus reached near Jalgran village and when they crossed the road they met accused persons. He has stated that at that time co-accused Surat Ram was in possession of stick while co-accused Prem Chand was armed with dagger. He has stated that all the accused persons assaulted deceased Karnail Singh. He has stated that co-accused Prem Chand administered a dagger blow on the left side of the back portion of body of deceased Karnail Singh. He has stated that co-accused Surat Ram had given a stick blow upon the deceased. He has stated that co-accused Ashwani Kumar and Pawan Kumar assaulted him with fist cuffs because he intervened to rescue the deceased from the assault of accused persons. He has stated that one of co-accused Prem Chand also administered a dagger blow on his abdomen. He has stated that he raised alarm where upon Purshotam and Prem Chand came at the spot. He has stated that thereafter accused persons left the place of incident. He has stated that he, Parshotam and Prem Chand took deceased Karnail Singh to Zonal hospital Una where he was declared brought dead. He has stated that soon

thereafter police arrived at the hospital and recorded statement under Section 154 Cr PC Ext PW1/A.He has stated that he identified all accused persons in the Court. He has stated that he was also medically examined on the same day. He has stated that dagger Ext P1 is the same which was used by accused persons at the time of occurrence. He has stated that during the course of investigation the police recovered his blood stained T-shirt which he was wearing at the time of incident vide memo Ext PW1/B. He has stated that T-shirt Ext P2 is the same which he was wearing at the time of incident. He has stated that fight lasted about 10 to 15 minutes at the spot. He has denied suggestion that it was dark at the time of incident and assailants could not be identified from the distance of ten feet. He denied suggestion that deceased was a quarrelsome person and used to pick up quarrels with many people in the village. He denied suggestion that he and deceased Karnail Singh had consumed liquor and picked up a quarrel with accused persons during the marriage party at village Haroli on dated 29.5.2005. He denied suggestion that he and deceased Karnail Singh, Madan Lal, Parshotam, Kehar Singh, Chaman Lal, Sikandar, Rajender and Jagdev after coming back from village Haroli went to the house of co-accused Surat Ram in the evening on dated 29.5.2005. He denied suggestion that when co-accused Ashwani Kumar had alighted from the bus he and deceased had assaulted co-accused Ashwani Kumar with sticks in the evening on dated 29.5.2005. He denied suggestion that dagger Ext P1 was in his hand. He has denied suggestion that co-accused Prem Chand was beaten by him, by deceased Karnail Singh and other co-accused persons. He denied suggestion that deceased Karnail Singh had caught hold of co-accused Prem Chand and asked him to administer a dagger blow to co-accused Prem Chand. He denied suggestion that co-accused Surat Ram and co-accused Pawan Kumar were not present at the spot. He denied suggestion that accused persons have been falsely implicated in the present case.

9.1. PW2 Purshotam Lal has stated that he is permanent resident of village Jalgran-Tabba Tehsil and District Una. He has stated that he is mason by profession. He has stated that accused persons are also residents of same village. He has stated that on dated 29.5.2005 at about 8.30 p.m. when he was returning home from day's work co-accused Prem Chand met him on the road side in Jalran village. He has stated that he saw co-accused Ashwani Kumar and Pawan Kumar were beating deceased Karnail Singh. He has stated that co-accused Surat Ram was assaulting deceased Karnail Singh with stick. He has stated co-accused Prem Chand administered a dagger blow on the left side of the back portion of deceased Karnail Singh. He has stated that complainant Kuldeep Kumar was raising the alarm. He has stated that thereafter co-accused Prem Chand also administered dagger blow on the abdomen of Kuldeep Kumar injured. He has stated that he and one Prem Chand intervened to rescue deceased Karnail Singh and complainant Kuldeep Kumar from the assault of accused persons. He has stated that thereafter accused persons ran away from the scene. He has stated that thereafter he took deceased Karnail Singh and injured Kuldeep Kumar to Zonal Hospital Una. He has stated that deceased Karnail Singh was declared brought dead. He has stated that accused persons were visible to him when he saw them from near the flour mill. He has stated that incident took place for about 10 to 15 minutes. He has stated that he had also received stick blow injury on his left arm but he was not medically examined. He has denied suggestion that he and deceased Karnail Singh and the prosecution witnesses namely Madan, Prem Chand, Kehar Singh, Chaman Lal, Skinder Kumar, Rajinder Singh and Jagdev Ram have gone in the house of co-accused Surat Ram in the evening on dated 29.5.2005. He has denied suggestion that complainant party is in the habit of picking up quarrel on small matters in village. He denied suggestion that co-accused Ashwani Kumar had alighted from a private bus and soon thereafter complainant Kuldeep Kumar, deceased Karnail Singh, Madan Lal, Kehar Singh, Prem Chand, Chaman Lal, Rajinder and Jagdev came from the house of co-accused Prem Chand and

assaulted co-accused Ashwani Kumar with sticks. He denied suggestion that complainant Kuldeep Kumar was in possession of dagger Ext P1. He denied suggestion that co-accused Prem Chand intervened to rescue co-accused Ashwani Kumar. He denied suggestion that co-accused Prem Chand had also received injury on his head and chest. He denied suggestion that complainant Kuldeep Kumar and deceased Karnail Singh and others have beaten up co-accused Ashwani Kumar and co-accused Prem Chand under the influence of liquor. He denied suggestion that deceased Karnail Singh had received injury from the hands of complainant Kuldeep Kumar. He has denied suggestion that accused persons have been falsely implicated in the present case due to old enmity.

9.2. PW3 Rajender Bhogal has stated that he is permanent resident of village Jalgran. He has stated that in the year 2005 he was Pradhan of gram panchayat Tabba. He has stated that his shop is less than a half kilometer away from the flour mill of Jagat Singh. He has stated that in the month of May 2005 when he was present at his shop certain police officials happened to pass in front of his shop and they directed him to accompany them. He has stated that thereafter he went to the flour mill of Jagat Singh where police officials were sitting. He has stated that one of the police officials was holding a dagger at that time and seizure memo was prepared. He has stated that recovery memo Ext PW3/A bears his signature. He has stated that accused persons are known to him. He has stated that accused persons did not give any disclosure statement in his presence. He denied suggestion that on dated 1.6.2005 co-accused Prem Chand @ Bhalli had given a disclosure statement in his presence that he had concealed a dagger in the field. He denied suggestion that disclosure statements of accused persons were also reduced into writing in his presence. He has stated that no sketch of dagger was prepared in his presence. He denied suggestion that he deposed falsely in order to save accused persons. He has stated that no weapon of offence was recovered in his presence.

9.3. PW4 Sikandar Kumar has stated that he is permanent resident of village Jalgran. He has stated that on dated 30.5.2005 he joined investigation of the case. He has stated that in his presence the investigating officer took into possession blood stained soil and stones from the spot of incident and memo of recovery Ext PW4/A was prepared. He denied suggestion that he did not join investigation of the present case. He denied suggestion that he deposed falsely against accused persons due to enmity.

9.4. PW5 Rajender Kumar has stated that he is permanent resident of village Jalgran. He has stated that accused persons also reside in the same village. He has stated that on dated 2.6.2005 co-accused Surat Ram while in custody gave a disclosure statement that he had concealed a stick near a street at village Jalgran and the same was got recovered. He has stated that memo Ext PW5/B was prepared. He has stated that at the instance of co-accused Surat Ram stick Ext P5 was got recovered. He denied suggestion that he belongs to complainant party. He denied suggestion that he had joined hands with complainant Kuldeep Kumar for assaulting accused persons. He has stated that deceased Karnail Singh was distantly related to him. He denied suggestion that no disclosure statement was given by co-accused Surat Ram in his presence. He denied suggestion that no stick was recovered as per disclosure statement of co-accused Surat Ram.

9.5. PW6 Madan Lal has stated that he is permanent resident of village Jalgran. He has stated that accused persons also reside in the same village. He has stated that he joined investigation of the case. He has stated that on dated 1.6.2005 co-accused Prem Chand @ Bhalli while in police custody gave a disclosure statement that he had concealed a dagger under the edge of a field behind the flour mill of one Jagga in village Jalgran and he could recover the same. He has stated that disclosure statement Ext PW6/A was prepared. He has stated that as per disclosure statement dagger was recovered and took into

possession vide memo Ext PW3/A. He has stated that dagger Ext P1 was recovered at the instance of co-accused Prem Chand. He has denied suggestion that disclosure statement was given by co-accused Prem Chand. He denied suggestion that police was already in possession of dagger. He denied suggestion that he, complainant Kuldeep Kumar and deceased Karnail Singh had assaulted co-accused Ashwani Kumar and Prem Chand. He denied suggestion that he deposed falsely due to old enmity with accused persons.

9.6. PW7 Parkash Chand has stated that he is permanent resident of village Jalgran. He has stated that about two years ago co-accused Prem Chand produced before the police a blood stained shirt in his presence. He has stated that police took shirt into possession vide memo Ext PW7/A. He has stated that shirt Ext P6 is the same which was produced before the police by co-accused Prem Chand. He has denied suggestion that co-accused Prem Chand did not produce shirt before the police. He denied suggestion that investigating officer has prepared a false recovery memo Ext PW7/A.

9.7. PW8 Dr. V.K.Raizada has stated that he was posted as Medical Officer at regional hospital Una since 1996. He has stated that on dated 29.5.2005 at about 9 p.m. he examined complainant Kuldeep Kumar son of Ramesh Kumar and observed the following injuries. He has stated there was an incised wound over the left side of upper abdomen and the size of the wound was 8 cm in length and 3 cms in width in the middle. He has stated that width of the wound was more at the centre than the periphery and the wound was deep as the muscles were visible through opening of the wound. He has stated that bleeding was reddish in colour and its margins were clean. He has stated that the nature of the above injury was simple which was caused with sharp edged weapon. He has stated that probable duration of the injury was within four hours. He has stated that he issued MLC Ext PW8/A. He has stated that he also seen dagger Ext P1. He has stated that injury found upon the person of injured Kuldeep Kumar could be sustained by dagger Ext P1. He has stated that injury sustained by Kuldeep Kumar could not be caused in the process of snatching the weapon Ext P1. He has denied suggestion that injury mentioned in the MLC could be possible in the process of snatching and turning the dagger Ext P1 towards victim.

9.8. PW9 Dr. G.Upadhyaya Medical Officer has stated that he was posted as Medical officer at regional hospital Una since 2002. He has stated that on May 2005 he conducted autopsy of deceased Karnail Singh and following injury was observed. He has stated there was an obliquely placed cut wound on the left side of the back of deceased and it was between 9th and 10th rib. He has stated that the size of the wound was 3x2 cm and the depth thereof was reaching up to the vertebrae bones and a tear of the size of 3x3 cm was found present in diaphragm. He has stated that the wound was 20 cms away from the anterior superior lilac spine and 4 cms from midline and thoracic cavity was full of blood. He has stated that descending thoracic aorta was found ruptured and about 750 ml blood was found present in the thoracic cavity. He has stated that the cause of death of deceased Karnail Singh was rupture of the descending thoracic aorta. He has stated that probable time that elapsed between the injury and the death was 5 to 30 minutes and probable time that elapsed between the death and post mortem was 15 hours. He has stated that he prepared post mortem report Ext PW9/A. He has stated that he also seen the dagger Ext P1. He has stated that injury could be caused with dagger Ext P1. He has stated that on dated 31.5.2005 at about 8.45 p.m. he medically examined co-accused Prem Chand and observed following injury. (1) There was an abrasion on the frontal area of his skull (left side). The size of the abrasion was 2 cm x 0.2 cm. Coagulated blood was present on the abrasion. (2) There was abrasion on the left tempro parietal area. The size of this abrasion was 2 cm x 0.2 cm. Coagulated blood was present on this abrasion as well. (3) There was an obliquely placed abrasion on the left side of the back. The size of the abrasion was 10 cm x 2 cm. (4) There was a bruise on the right side of the chest. The size

of the bruise was 2 cm x 2 cm. He has stated that the nature of all the injuries was simple and probable duration was 12 to 72 hours. He has stated that he issued medico legal certificate Ext DA. He has stated that head is a vital part of the body. He has stated that two of the abrasions were simple. He has stated that injuries could be caused with a stick. He has stated that injuries sustained by co-accused Prem Chand were not dangerous to life. He has stated that above said injuries could be caused in a struggle by a victim.

9.9. PW10 Dr. Ashok Dharoch has stated that he was posted in regional hospital Una in 2005. He has stated that on dated 30.5.2005 he examined co-accused Ashwani Kumar son of Surat and observed following injuries. (1) There was a lacerated wound on the right side of his face. Tenderness was present there. (2) There was a lacerated wound on the left side of his forehead. The margins of the wound were irregular. He has stated that nature of the injury was simple caused with blunt weapon. He has stated that he issued MLC Ext PW10/A. He has stated that injury could be possible in the process of disengaging him from scuffle. He has admitted that head is a vital part of the body and injury No.2 was on the forehead. He has stated that injury could be caused by way of beating with fist blow. He has stated that injury could be possible with stick. He has stated that nature of injury sustained by co-accused Ashwani Kumar was in fact grievous.

9.10. PW11 Rajesh Kumar has stated that he was posted as Moharar Head Constable at police station Dadar Una in 2005. He has stated that on dated 30.5.2005 four sealed parcels were deposited with him by Inspector Ajay Rana. He has stated that on dated 31.5.2005 another sealed parcel containing shirt stained with blood was also deposited with him by Inspector Ajay Rana. He has stated that on dated 1.6.2005 he deposited another parcel with him containing a small dagger. He has stated that on dated 6.6.2005 he sent all the aforesaid parcels for chemical analysis to FSL Junga through constable Kushal Dev. He has stated that on dated 7.6.2005 constable Kushal Dev handed over to him receipt in respect of said parcels. He has stated that receipt according to him was obtained from the concerned official FSL Junga. He has stated that parcels remained intact in his custody. He denied suggestion that parcels were tampered with.

9.11. PW12 HC Kushal Dev has stated that he was posted as constable at police station Una since 2003 He has stated that on dated 6.6.2005 MHC Rajesh Kumar handed over to him six sealed parcels related to the case vide RC No. 96 of 2005 and he was directed to deposit the said parcels in the office of FSL Junga. He has stated that he carried parcels and deposited same with concerned official and also obtained receipt. He has stated that parcels remained intact in his custody. He denied suggestion that no parcel was entrusted to him by MHC. He denied suggestion that parcels were tampered with during transit process from Una to FSL Junga.

9.12. PW13 HC Sandeep Kumar has stated that he was posted as LHC at Police Station Una in 2005. He has stated that on dated 29.5.2005 when he was present at police station he received information on telephone that two persons namely Karnail Singh and Kuldeep Kumar were brought to regional hospital Una in an injured state and he also received information that Karnail Singh had died. He has stated that information was given by HHC Ashwani Kumar from police Assistance Cell Regional Hospital Una. He has stated that he recorded daily diary report No.17 dated 29.5.2005 copy of which is Ext PW13/A.

9.13. PW14 HC Shashi Kumar has stated that he was posted as photographer in police department. He has stated that on dated 30.5.2005 he clicked photographs of the spot and surrounding location of village Jalgran. He has stated that photographs are Ext PC1 to Ext PC8. He has stated that he also took photographs of the body of deceased Karnail Singh and photographs are Ext PC9 to Ext PC12 and its negative films are Ext PC13. He has stated that

camera used by him in clicking the photographs was issued by higher authorities. He has stated that he did not develop the negative films.

9.14. PW15 ASI Mohinder Singh has stated that he was posted as Investigator in Police Station Una from 2003 to 2005. He has stated that on dated 29.5.2005 at about 10.55 p.m. when he was present in police station a report in the shape of statement of Kuldeep Kumar under Section 154 Cr PC Ext PW1/A was handed over to him by LHC Vijay Kumar for registration of case. He has stated that on the basis of said statement he registered FIR Ext PW15/A. He has denied suggestion that FIR Ext PW15/A was not drawn at the time mentioned in the FIR.

9.15 PW16 Pritam Singh has stated that he was posted as Additional Station House Officer at police station Una from 2004 to 2006. He has stated that he has partly investigated the case. He has stated that on dated 19.7.2005 PW3 Rajender Bhogal handed over to him an application Ext PB and a compromise deed Ext PA which he took into possession vide memo Ext PW3/B. He has stated that he recorded the statements of Rajender Bhogal, Kamal Dev Sharma and Om Parkash as per their versions. He denied suggestion that no statement was given to him by Om Parkash and Kamal Dev. He denied suggestion that no document was produced before him by Rejender Bhogal.

9.16. PW17 Inspector Ajay Rana has stated that he was posted as Station House Officer police station Una from February 2005. He has stated that on dated 29.5.2005 at about 9.25 p.m. when he was present at police station he received a telephonic call from HHC Ashwani Kumar who informed him that two persons namely Karnail Singh and Kuldeep Kumar came to regional hospital Una in an injured state. He has stated that he was also informed that Karnail Singh had received grievous injuries and was brought to the hospital and had died. He has stated that after receiving information he immediately recorded daily diary report No. 17 Ext PW13/A and proceeded to said hospital along with ASI Darshan Singh, HC Dilbag Singh, HC Sarabjit singh, Constable Vijay Kumar, LHC Ram Avtar and LHC Nirmal Singh. He has stated that he reached at hospital and found that Karnail Singh had died. He has stated that thereafter he recorded the statement of complainant Kuldeep Kumar under Section 154 Cr PC Ext PW1/A and thereafter FIR Ext PW15/A was registered. He has stated that complainant Kuldeep Kumar was also medically examined. He has stated that he took into possession medico legal certificate Ext PW8/A issued by the Medical Officer qua injury sustained by Kuldeep Kumar. He has stated that dead body of Karnail Singh was kept in the mortuary of hospital. He has stated that on dated 30.5.2005 he proceeded to the spot and observed some dust, straws and two stones which were lying there stained with blood. He has stated that he picked up sample of the blood stained dust, straws and two stones and sealed them in a parcel. He has stated that seal after use was entrusted to an independent witness Chaman Lal vide recovery memo Ext PW4/A. He has stated that he prepared site plan Ext PW17/A. He has stated that he went to the mortuary and prepared inquest reports Ext PW17/B and Ext PW17/C and also got an autopsy Ext PW9/A qua deceased Karnail Singh. He has stated that on dated 30.5.2005 co-accused Prem Chand and co-accused Pawan Kumar @ Bindu surrendered at their own before him and he apprehended them. He has stated that shirt of co-accused Pawan Kumar was stained with drops of blood and he took shirt Ext P6 into possession vide memo Ext PW7/A. He has stated that shirt was sealed in a parcel. He has stated that co-accused Prem Chand given a disclosure statement that he had concealed a small dagger behind the flour mill of one Jagga Singh. He has stated that he reduced his disclosure statement into writing which is Ext PW6/A. He has stated that pursuant to the disclosure statement co-accused Prem Chand dagger Ext P1 was recovered vide memo Ext PW3/A. He has stated that he prepared a sketch map of weapon of offence Ext PA. He has stated that seal after use was entrusted to Madan Lal. He has stated that site plan of the spot of recovery and the surrounding area was prepared which is Ext PW17/E. He has stated that co-accused Surat Ram has

also given disclosure statement under Section 27 of the Indian Evidence Act that he had thrown bamboo stick in the bushes. He has stated that he reduced his disclosure statement into writing which is Ext PW5/A and thereafter stick Ext P5 was recovered by him from the bushes. He has stated that he also prepared site plan and also recorded the statements of witnesses strictly in accordance with their versions. He has stated that on completion of investigation he handed over case file to Sub Inspector Pritam Singh. He has stated that he recorded the statement of Rajinder Bhogal Ext PW17/F and Ext PW17/G in accordance with his version. He has stated that report of forensic science laboratory is Ext PW17/H. He has denied suggestion that complainant Kuldeep Kumar was not in a position to give any statement when he recorded his statement under Section 154 Cr PC. He denied suggestion that no disclosure statement was given by co-accused Prem Chand and Surat Ram. He denied suggestion that weapon of offence was not recovered at the instance of co-accused Prem Chand. He denied suggestion that stick Ext P5 was not recovered at the instance of co-accused Surat Ram. He denied suggestion that he did not record the statements of the witnesses as per their version. He denied suggestion that FIR was recorded by him after deliberations. He has admitted that co-accused Prem Chand had also sustained injury.

10. Statement of co-accused Prem Chand under Section 313 Cr PC was recorded. Co-accused Prem Chand and Ashwani Kumar have stated that they have been falsely implicated in the present case. They have stated that co-accused Ashwani Kumar was assaulted by deceased Karnail Singh and the prosecution witnesses PW1 Kuldeep Kumar PW2 Purshotam Lal PW4 Sikender PW5 Rajinder Kumar PW6 Madan Lal Prem Chand Kehar Singh Chaman Lal and Jagdev have joined hands in assaulting them after co-accused Ashwani Kumar alighted from Partap bus. They have stated that they intervened to rescue Ashwani Kumar from the clutches of the assailants but assailants also assaulted them too with sticks and fist cuffs. They have stated that deceased Karnail Singh who had grabbed co-accused Prem Chand from behind had asked complainant Kuldeep Kumar to administer a dagger blow on him which was in the hand of Kuldeep Kumar. They have stated that in the process of saving from the attack appellant Prem Chand suddenly took a turn towards his right side and dagger which was aimed at appellant Prem Chand hit deceased Karnail Singh. They have stated that thereafter complainant Kuldeep Kumar again attacked them and scuffle ensued. They have stated that during the scuffle complainant Kuldeep Kumar had sustained injury. They have stated that co-accused Prem Chand and co-accused Ashwani Kumar were rescued by Joginder Singh and Lali who took them to police station Una. They have stated that they narrated true facts of the incident to the Investigating Officer but Investigating Officer did not listen to them and filed present case against him. Co-accused Surat Ram has stated that he has been falsely implicated in the present case. He has stated that he is government servant and always used to stay outside his house for his work. He has stated that on dated 29.5.2005 he attended marriage ceremony and after taking lunch at village Haroli he and co-accused Pawan Kumar went to village Basoli in the marriage of his sister-in-law's daughter. He has stated that on dated 29.5.2005 at about 12.30 a.m. police came at village Haroli and thereafter he and co-accused Pawan Kumar were brought to police station Una. He has stated that he had no knowledge about the incident but the Investigating Officer did not listen to him. Co-accused Pawan Kumar has stated that he has been falsely implicated in the present case. He has stated that on dated 29.5.2005 he attended marriage ceremony at village Haroli from where he and co-accused Surat Ram went to attend marriage of his relative at village Basoli. He has stated that on the intervening night of 29.5.2005 police came and took them to police station Una. He has stated that they requested the investigating agency that they are innocent but investigating agency did not listen to them.

11. DW1 Raj Kumar has stated that he is permanent resident of village Basoli Tehsil and District Una. He has stated that on dated 29.5.2005 the marriage of one Naseeb Chand's daughter Neelam Kumari was solemnized at his residence at village Basoli and he was also invited to attend the marriage. He has stated that co-accused Surat Ram and co-accused Pawan Kumar were also present in the house of Naseeb Chand. He has stated that at about 11.30 p.m. on dated 29.5.2005 a police party headed by Inspector Ajay Rana the then Station House Officer arrived at the house of Nasseb Chand and apprehended co-accused Surat Ram and Pawan Kumar saying that they were to be taken to police station Una. He has stated that he remained present in the house of Naseeb Chand from 6.30 p.m. to 11.30 p.m. on dated 29.5.2005. He has stated that during this period co-accused Surat Ram and Pawan Kumar were also present at the house of Naseeb Chand. He has stated that he is press reporter by profession. He has stated that he is serving as Press Reporter with City Channel Shimla. He has denied suggestion that co-accused Surat Ram and co-accused Pawan Kumar had not gone to the house of Naseeb Chand on dated 29.5.2005.

Findings in Criminal Appeal No. 368 of 2007 titled Prem Chand Vs. State of HP.

Testimony of PW1 Kuldeep Kumar is fatal to appellant Prem Chand beyond reasonable doubt.

12. In the present case testimony of PW1 Kuldeep Kumar eye witness of the incident is fatal to appellant Prem Chand. PW1 Kuldeep Kumar has specifically stated in positive manner that at the time of incident appellant Prem Chand @ Bhalli was in possession of dagger and has stated in positive manner that appellant Prem Chand inflicted a dagger blow on the left side of the back portion of body of deceased Karnail Singh. PW1 Kuldeep Kumar has stated in positive manner that he intervened to rescue deceased Karnail Singh from further assault thereafter appellant Prem Chand also inflicted dagger blow on his abdomen. Testimony of PW1 Kuldeep Kumar to this effect is trust worthy, reliable and inspires confidence of the Court. There is no reason to disbelieve the testimony of PW1 Kuldeep Kumar qua inflicting of injury by appellant Prem Chand upon deceased Karnail Singh and upon injured Kuldeep Kumar.

Testimony of eye witness PW2 Purshotam Lal is also fatal to appellant Prem Chand

13. PW2 Purshotam Lal is the eye witness of the incident. He has stated in positive manner that appellant Prem Chand had inflicted dagger blow on the left side of the back portion of body of deceased Karnail Singh. PW2 Purshotam Lal has stated in positive manner that co-accused Prem Chand also inflicted a dagger blow on the abdomen of PW1 Kuldeep Kumar. The testimony of eye witness of PW2 to this effect is also trust worthy, reliable and inspires confidence of the Court. There is no reason to disbelieve the testimony of PW2 Purshotam Lal.

Testimony of corroborative witnesses PW4 Sikandar Kumar, PW5 Rajender Kumar, PW6 Madan Lal, PW7 Prakash Chand, PW11 Rajesh Kumar, PW12 Kushal Dev, PW13 Sandeep Kumar, PW14 Shashi Kumar, PW15 Mohinder Singh, PW16 Pritam Singh and PW17 Ajay Rana are also fatal to appellant Prem Chand.

14. PW4 Sikander Kumar has stated in positive manner that blood stained soils and blood stained stones were recovered by the investigating agency in his presence. PW5 Rajender Kumar has stated in positive manner that as per disclosure statement stick was recovered in his presence vide seizure memo Ext PW5/B. PW6 Madan Lal has stated in positive manner that dagger was recovered as per disclosure statement given by appellant Prem Chand in his presence. PW7 Prakash Chand has stated in positive manner that blood stained shirt Ext P6 was produced by appellant Prem Chand and the same was took into possession vide memo Ext PW7/A. PW11 HC Rajesh Kumar has specifically

stated in positive manner that parcel was deposited and he sent the parcels for chemical examination to FSL Junga. PW12 HC Kushal Dev has stated in positive manner that he deposited parcel in the office of FSL Junga. PW13 HC Sandeep Kumar has stated in positive manner that report No. 17 dated 29.5.2005 Ext PW13/A was recorded. PW14 HC Shashi Kumar has stated in positive manner that he took the photographs of incident and dead body of deceased Karnail Singh. PW15 ASI Mohinder Singh has stated in positive manner that he registered FIR on the basis of the statement recorded under Section 154 Cr PC. PW16 Inspector Pritam Singh has specifically stated in positive manner that compromise deed Ext PA was took into possession vide memo Ext PW3/B placed on record. PW17 Inspector Ajay Rana has stated in positive manner that appellant Prem Chand had given disclosure statement. Testimonies of above stated prosecution witnesses are trust worthy, reliable and inspires confidence of the Court. There is no reason to disbelieve the testimony of above stated corroborative prosecution witnesses.

Testimonies of medical officer PW8 Dr. V.K.Raizada and PW9 Dr. G.Upadhyaya are also fatal to appellant Prem Chand

15. PW8 Dr. V.K.Raizada has specifically stated that he had examined injured Kuldeep Kumar. He has stated that injured Kuldeep Kumar has sustained incised wound over the left side of upper abdomen. He has further stated that size of the wound was 8 cm in length and 3 cm in width in the middle. He has stated that width of the wound was more at the centre than the periphery. He has stated in positive manner that wound was deep as the muscles were visible through opening of the wound. He has stated in positive manner that injured was bleeding. He has stated in positive manner that injury was caused with sharp edged weapon and he proved report MLC Ext PW8/A. The testimony of PW8 Dr V.K.Raizada qua injury sustained by injured Kuldeep Kumar is also trust worthy, reliable and inspires confidence of the Court. There is no reason to disbelieve the testimony of PW8 Dr. V.K.Raizada. There is no evidence on record in order to prove that PW8 Dr V.K.Raizda has hostile animus against appellant Prem Chand at any point of time.

Testimony of PW9 Dr. G.Upadhaya is fatal to appellant Prem Chand

16. PW9 Dr.G.Upadhaya has specifically stated in positive manner that he has conducted post mortem of deceased Karnail Singh. He has stated in positive manner that there was an obliquely placed cut wound on the left side of the back of deceased and it was between 9th and 10th rib. He has specifically stated in positive manner that the size of the wound was 3x2 cm and the depth was reaching up to the vertebrae bones and tear of the size of 3x3 cm was found present in diaphragm. He has further stated that wound was 20 cm away from the anterior superior lilac spine and 4 cm from midline. He has stated in positive manner that thoracic cavity was full of blood and the descending thoracic aorta was found ruptured. He has stated that about 750 ml blood was found present in the thoracic cavity. He has stated in positive manner that cause of death of deceased was rupture of the descending thoracic aorta leading to profuse hemorrhage and hemorrhagic shock. He has specifically stated that death was caused between 5 to 30 minutes and he proved post mortem report Ext PW9/A. Testimony of PW9 Dr.G.Upadhyaya is also trust worthy, reliable and inspires confidence of the Court. There is no reason to disbelieve the testimony of PW9. There is no evidence on record in order to prove that PW9 Dr.G.Upadhyaya has hostile animus against appellant Prem Chand at any point of time.

Even disclosure statement given by appellant Prem Chand under Section 27 of the Indian Evidence Act is also fatal to the appellant

17. Appellant Prem Chand has given disclosure statement Ext PW6/A placed on record under Section 27 of the Indian Evidence Act and as per disclosure statement given by appellant Prem Chand dagger was recovered at the instance of appellant Prem Chand. Even post mortem report Ext PW9/A clearly mentioned that deceased Karnail Singh aged 23 years died on dated

29.5.2005 due to rupture of the descending thoracic aorta leading to profuse hemorrhage and hemorrhagic shock. Even inquest report Ext PW17/C and site plan Ext PW17/D and Ext PW17/E placed on record proved the case against appellant Prem Chand beyond reasonable doubt.

18. Submission of learned Advocate appearing on behalf of appellant Prem Chand that as per prosecution story the incident took place near a flour mill and prosecution did not examine the owner of the mill and appellant Prem Chand be acquitted on this ground is rejected being devoid of any force for the reason hereinafter mentioned. It is not the case of the prosecution that owner of the said mill was the eye witness of the incident. It is well settled law that facts can be proved by a single witness only as per Section 134 of the Indian Evidence Act 1872. As per Section 134 of the Indian Evidence Act 1872 no particular number of witnesses shall be required for the proof of any fact. It was held in case reported in AIR 2003 SC 854 titled Lalu Manjhi and another Vs. State of Jharkhand that law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. It was held that oral testimony of the witness can be divided into three categories (1) Wholly reliable (ii) Wholly un-reliable (iii) Neither wholly reliable nor wholly unreliable. It was held that in first two categories there will be no difficulty in accepting or discarding the testimony of single witness. It was held that difficulty arises in the third category of cases.

19. Submission of learned Advocate appearing on behalf of appellant Prem Chand that complainant party had assaulted co-accused Prem Chand and co-accused Ashwani Kumar who have received injury on their person due to assault and appellant Prem Chand is liable to be acquitted on this ground is also rejected being devoid of any force for the reason hereinafter mentioned. There is positive, cogent and reliable evidence on record in order to prove that appellant Prem Chand had given dagger blow upon deceased Karnail Singh and upon injured Kuldeep Kumar. The testimonies of eye witness PW1 and PW2 are trust worthy, reliable and inspire confidence of the Court. The testimonies of PW1 and PW 2 are also corroborated by documentary evidence placed on record. Co-accused Prem Chand and Co-accused Ashwani Kumar have sustained abrasion injures only upon their person.

20. Another submission of learned Advocate appearing on behalf of the appellant that prosecution did not explain the injury sustained by co-accused Prem Chand and co-accused Ashwani Kumar in the incident and on this ground appellant Prem Chand be acquitted is rejected being devoid of any force for the reason hereinafter mentioned. Learned trial Court had acquitted co-accused Ashwani Kumar in the present case and co-accused Prem Chand had sustained abrasion injuries only. Abrasion injuries upon person of appellant Prem Chand are not fatal to prosecution in view of fact that Karnail Singh had died due to injuries sustained by him from dagger and in view of fact that Kuldeep Kumar had sustained incised injuries with sharp edged weapon.

21. Another submission of learned Advocate appearing on behalf of appellant Prem Chand that as per prosecution story the clash lasted for about fifteen minutes and deceased as well as injured have received only one injury on their person and on this ground appellant Prem Chand be acquitted is also rejected being devoid of any force for the reason hereinafter mentioned. As per MLC Ext PW8/A placed on record injured Kuldeep Kumar has sustained incised wound over left side of his upper abdomen and the size of the wound was 8 cm in length and 3 cm in width in the middle with sharp edged weapon and as per post mortem report the death of deceased Karnail Singh caused due to rupture of the descending thoracic aorta leading to profuse hemorrhage and hemorrhagic shock. Hence it is held that both deceased and injured have received injury upon their vital part of their body inflicted by appellant Prem Chand with sharp edged weapon.

22. Another submission of learned Advocate appearing on behalf of appellant Prem Chand that genesis of the occurrence has been concealed by the prosecution and on this ground appeal filed by appellant Prem Chand be accepted is also rejected for the reason hereinafter mentioned. There is no positive, cogent and reliable evidence on record in order to prove that deceased Karnail Singh and injured Kuldeep Kumar have inflicted injury upon the person of appellant Prem Chand. Appellant Prem Chand had stated when his statement was recorded by learned trial Court that he was rescued by Joginder Singh and Lali. But appellant did not examine Joginder Singh and Lali in the Court in order to prove his defence. Story alleged by prosecution remained un-rebuttal through positive, cogent and reliable oral as well documentary evidence. There is no oral evidence on record in order to prove that deceased Karnail Singh and injured Kuldeep Kumar have inflicted injury upon the person of appellant Prem Chand.

23. Another submission of learned Advocate appearing on behalf of appellant Prem Chand that learned trial Court has acquitted other co-accused persons and on this ground appellant Prem Chand be also acquitted is also rejected for the reason hereinafter mentioned. It is well settled law that conviction in criminal cases is imposed according to proved oral as well as documentary evidence adduced by prosecution. In the present case there are positive, cogent and reliable oral eye witness as well as medical evidence and corroborative documentary evidence against appellant Prem Chand for the commission of crime as alleged by the prosecution.

24. Another submission of learned Advocate appearing on behalf of appellant Prem Chand that conviction cannot be sustained upon the testimonies of PW1 and PW2 in the present case upon appellant Prem Chand is also rejected being devoid of any force for the reason hereinafter mentioned. It was held in case reported in AIR 1973 SC 944 titled Jose Vs. The State of Kerla that conviction can be sustained on the solitary evidence of the witnesses in a criminal case if testimony of the witness is trust worthy, reliable and inspires confidence of the Court. See AIR 1957 SC 614 titled Vadivelu Thevar Vs. The State of Madras and also see AIR 1965 SC 202. It was held in case reported in AIR 1987 SC 1328 titled Dalbir Singh and others Vs. State of Punjab that there is no hard and fast rule which could be laid down for appreciation of evidence and it was held that each case should be decided as per proved facts. In view of the above stated facts it is held that learned trial Court had convicted the appellant strictly as per oral as well as documentary evidence placed on record and it is held that there is no infirmity in the judgment passed by learned trial Court against appellant Prem Chand.

<u>Findings in Criminal Appeal No. 32 of 2008 titled State of HP Vs. Pawan Kumar and others</u>

25. Submission of learned Additional Advocate General appearing on behalf of appellant State that learned trial Court has not properly appreciated the testimony of PW1 Kuldeep Kumar and PW2 Purshotam Lal qua co-accused Pawan Kumar, Surat Ram and Ashwani Kumar is rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that there is no evidence on record in order to prove that in which part of the body co-accused Pawan Kumar, Surat Ram and Ashwani Kumar have inflicted injuries upon deceased Karnail Singh and complainant Kuldeep Kumar. It is also proved on record vide MLC Ext PW10/A that co-accused Ashwani Kumar has also sustained two simple injuries upon his body with blunt weapon.

26. Another submission of learned Additional Advocate General appearing on behalf of appellant State that it is proved on record that all the accused persons shared common intention to commit the offence in furtherance of common motive and on this ground co-accused Pawan Kumar, Surat Ram and Ashwani Kumar be convicted is also rejected being devoid of any force for

the reason hereinafter mentioned. We have carefully perused oral as well as documentary evidence placed on record. It is well settled law that common intention means a pre oriented plan. It is well settled law that common intention must exist prior to the commission of the act in a point of time. See AIR 2012 SC 3539 titled Shyamal Ghosh Vs State of West Bengal. There is no positive, cogent and reliable evidence placed on record by the prosecution in the present case that there was pre oriented plan between the accused persons and prosecution did not adduce any positive, cogent and reliable evidence on record in order to prove common intention prior to the commission of the act. It was held in case reported in AIR 1993 (1) Crimes 294 titled Hariom and others Vs. State of Uttar Pradesh that in order to bring a case under Section 34 of the Indian Evidence Act it is necessary that there must be prior conspiracy or pre meeting of minds. See AIR 1999 SC 3830 titled Ramashish Yadav and others Vs. State of Bihar. Prosecution did not adduce any proper cogent and reliable evidence on record in order to prove that there was prior meeting of mind between the accused persons in order to commit criminal offence. It was held in case reported in AIR 2003 SC 2978 titled Krishnan and another Vs State that constructive liability under Section 34 IPC would arise in three well defined cases (i) That common intention of all to commit such an offence (ii) That co-accused being a member of such conspiracy to commit such an offence (iii) That co-accused knew that an offence was likely to be committed. It was held in case reported in AIR 2000 SC 2212 titled Narinder Singh and another Vs. State of Punjab that a person could be convicted under Section 34 IPC when ingredients of offence are present. It was held in case reported in AIR 2001 SC 1344 titled Suresh and another Vs. State of UP that to attract Section 34 IPC two conditions should be proved (i) Criminal act should have been done not by one person but more than one person (ii) Criminal act should have been done in furtherance of common intention of all such persons. It was held that merely because co-accused was present at or near the scene would not sufficient to convict the person with the aid of Section 34 IPC .

27. Another submission of learned Additional Advocate General appearing on behalf of appellant State that acquittal of co-accused Pawan Kumar, Surat Ram and Ashwani Kumar had resulted in the gross failure of justice in the present case is also rejected for the reason hereinafter mentioned. We have carefully perused oral as well as documentary evidence adduced by the prosecution. There is no positive, cogent and reliable evidence against co-accused Pawan Kumar, Surat Ram and Ashwani Kumar for conviction. There is no positive, cogent and reliable evidence on record that co-accused Pawan Kumar, Surat Ram and Ashwani Kumar have constituted a conspiracy to commit criminal offence. It is well settled principle of law that vested right accrued in favour of the accused with the judgment of acquittal by learned trial Court. (See (2013) 2 SCC 89 titled Mookkiah and another Vs. State. See 2011 (11) SCC 666 titled State of Rajashthan Vs. Talevar and another. See AIR 2012 SC (Supp) 78 titled Surendra Vs. State of Rajasthan. See 2012 (1) SCC 602 titled State of Rajasthan Vs. Shera Ram @ Vishnu Dutt). It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned trial Court failed to take into consideration any admissible fact (iv) That learned trial court took into consideration evidence brought on record contrary to law. (See AIR 1974 SC 2165 titled Balak Ram and another Vs. State of UP, See (2002) 3 SCC 57 titled Allarakha K. Mansuri Vs. State of Gujarat, See (2003) 1 SCC 398 titled Raghunath Vs. State of Haryana, See AIR 2007 SC 3075 State of U.P Vs. Ram Veer Singh and others, See AIR 2008 SC 2066, (2008) 11 SCC 186 S.Rama Krishna Vs. S. Rami Raddy (D) by

his LRs. & others. Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, See (2009) 10 SCC 206 titled Arulvelu and another Vs. State, See (2009) 16 SCC 98 titled Perla Somasekhara Reddy and others Vs. State of A.P,See:(2010) 2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh).

28. In view of the above stated facts and case law cited supra Criminal Appeal No. 368 of 2007 titled Prem Chand Vs. State of HP and Criminal Appeal No. 32 of 2008 titled State of HP Vs. Pawan Kumar and others are dismissed and we affirmed the judgment and sentence passed by learned trial Court. It is held that learned trial Court has properly appreciated oral as well as documentary evidence placed on record. Certify copy of judgment be placed in Criminal Appeal No. 32 of 2008 titled State of HP Vs. Pawan Kumar and others. File of the learned trial Court along with certified copy of the judgment be sent back forthwith. Pending application(s) if any are also disposed of.

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

Suresh Kumar ...Appellant/defendant.
Vs.
Smt. Sarla Vaidya .....Respondent/Plaintiff.

RSA No.402 of 2003.
Reserved on: 19th November, 2014.
Decided on:24th November, 2014.

Specific Relief Act, 1963- Section 38- Plaintiff claimed to be a tenant – she further alleged that the defendant had broken the lock and had removed the articles- defendant was threatening to dispossess the plaintiff forcibly from the premises- hence, injunction was sought- defendant asserted that plaintiff had vacated the shop after six months of the death of her husband and a false suit was filed – held, that evidence of the defendant did not prove the date, month and year when the possession was handed over by the plaintiff to the landlord- even, the name of the landlord to whom the possession was handed over was not mentioned- name of the husband of the plaintiff was recorded in the jamabandi- no efforts were made by the defendant to seek the deletion of his name- therefore, in these circumstances, the version of the defendant that the plaintiff had handed over the possession to the landlord was not acceptable and the version of the plaintiff that she was forcibly dispossessed was to be accepted as correct on the balance of probability. (Para- 8 to 10)

For the Appellant: Mr. Raman Sethi, Advocate.
For the Respondent: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

This appeal is directed against the impugned judgment and decree, rendered on 14.7.2003 by the learned District Judge, Mandi, H.P., in Civil Appeal No. 60 of 2001, whereby, the learned District Judge dismissed the

appeal preferred, by the appellant/defendant and affirmed the findings of the learned trial Court rendered on 10.8.2001 in Civil Suit No. 207 of 1997.

2. The brief facts of the case are that the plaintiff/respondent filed a suit for permanent prohibitory and mandatory injunction against the defendant/appellant. It has been averred by the plaintiff that she is tenant of the premises located in the ground floor comprised in khasra No. 1519, measuring 18.60 sq. meters situated in Muhalla Bhagwahan 366/4, Tehsil Sadar, Mandi town. It has been further averred that previously Bhupinder Singh husband of the plaintiff was a tenant of the premises on payment of rent and had been doing the business in the premises in question. After the death of Bhupinder Singh the plaintiff inherited the tenancy rights and came in possession and had been running the business and paying rent to the landlords. It has been averred that for the last two months the plaintiff was not fit and has closed the shop, locked the same and had kept her articles in the shop. The sons of the plaintiff was away from Mandi town. On 5.11.1997, the defendant taking advantage of the illness of the plaintiff broke open the lock of the shop, broke the outer door and dismantled the back wall of the shop. The defendant removed the articles of the plaintiff lying in the shop for which a report was lodged with the police. It was alleged that the defendant is intending to demolish the first floor of the premises in question and to forcibly dispossess the plaintiff from the suit premises. Hence the suit.

3. The defendant/appellant contested the suit and filed the written statement wherein he has taken the preliminary objection that the suit was not maintainable since the plaintiff was not in possession of the suit property. It was denied that the plaintiff was tenant of the suit property. However, it was admitted that the husband of the plaintiff was tenant and had been doing karyana business and he had died in the year 1988. It has been further averred that after his death, after 6 months, the plaintiff vacated the shop and handed over its possession to the defendant in accordance with the wishes of her husband. It was denied that the plaintiff had been doing her business in the shop or that she was ill and the possession was taken after breaking the locks. It was pleaded that in 1997 a private partition took place between the owners and the shop in question fell in the share of the defendant, who wanted to reconstruct his property including the suit property and the work was started in 1997. It is averred that taking benefit of the entries in the jamabandi the plaintiff filed the suit wrongly.

4. The plaintiff/respondent filed replication to the written statement of the defendant/appellant, wherein, she denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiff is in possession of the suit premises as tenant?.....OPP
2. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction?OPP
3. Whether the plaintiff is also entitled to the relief of mandatory injunction? OPP
4. Relief.

6. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent. In appeal, preferred against the judgment and decree of the learned trial Court by the appellant/defendant before the learned first Appellate Court, the learned first Appellate Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendant/appellant has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeal came up for admission on 07.05.2004, this Court, admitted the appeal instituted by the defendant/appellant against the judgment and decree rendered by the learned first Appellate Court on the hereinafter extracted substantial question of law:-

1. Whether there has been gross misreading and mis-appreciation of evidence leading to total injustice?

Substantial question of Law No.1.

8. The deceased husband of the plaintiff/respondent Bhupinder Singh was a tenant in the disputed/suit premises. The aforesaid Bhupinder Singh, original tenant in the demised premises died in the year 1988. On his demise, the defendant/appellant contended that the possession of the suit premises was handed over to the land owner by the plaintiff/respondent. The learned counsel appearing for the defendant/appellant has concerted to contend that when the plaintiff/respondent had handedover the possession of the suit premises to the owners, as such, both the learned Courts below fell into error in affording the relief as prayed for by the plaintiff/respondent. Both the learned Courts below while decreeing the suit of the plaintiff/respondent had decreed it, in consonance with the rendition of an order by the learned District Judge, Mandi comprised in Ex.PB which order preceded the rendition of the judgment and decree by the learned trial Court. The learned Courts below had concluded that the plaintiff/respondent had not voluntarily handed over the possession of the suit premises to the defendant/appellant, as such, when the suit premises came to be reconstructed within the period stipulated in Ex.PB which portrays the decision rendered in appeal preferred by the defendant/appellant before the learned District Judge, Mandi, against the order of ad interim injunction granted in favour of the plaintiff/respondent by the learned trial Court, she in consonance with the directions comprised in Ex.PB was held entitled to the reliefs as were ultimately afforded in her favour by both the learned Courts below. However, during the course of arguments, the learned counsel for the defendant/appellant has vigorously strived to sway this Court to conclude that given the rendition of findings in paragraph No.6 of Ex.PB portraying the fact that the plaintiff/respondent is not in possession of the shop/suit premises, hence, when the according of relief of mandatory as well as permanent prohibitory injunction, is bedrocked upon hers being in possession of the suit premises at the time of institution of the suit, hers having been portrayed in paragraph No.6 of the Ex.PB to be not in possession of the suit premises ought to have goaded both the learned Courts below to refuse relief as untenably afforded in her favour. The above submission is highly illusory and has no foundation in the face of the evidence as exist on record. Even though in paragraph No.6 of Ex.PB, there is a finding of the plaintiff/respondent not being in possession of the suit premises, nonetheless, the occurrence of the fact aforesaid therein would not per se constrain a conclusion from this Court that, hence, she had abdicated the possession of the suit premises in favour of the landowners and that too volitionally. Rather only when on an incisive perusal of the evidence on record, it upsurges that at the time of institution of the suit at her instance she was not forcibly dispossessed or her dispossession from the suit premises at the instance of the defendant/appellant was in accordance with law, in that event, it would warrant the conclusion that she had volitionally abdicated the possession of the suit premises, as a corollary, then the effect of the findings in paragraph No.6 of Ex. PB would not fade rather would gain significance in determining the rights of the plaintiff/respondent qua the suit premises.

9. The learned counsel appearing for the appellant/defendant though has relied upon the testimonies of the defendant's witnesses portraying the factum of possession of the suit premises having been handed over by the plaintiff/respondent to the land owners. Nonetheless, the factum of absence of adduction of precise evidence qua the date, month and year when the possession of the suit premises was handed over by the plaintiff/respondent to the land owner, renders the evidence adduced by the defendant/appellant qua the purported volitional abdication of possession of the suit premises by the plaintiff/respondent in favour of land owner to not acquire any probative worth. Furthermore, the frail evidence of the defendant qua the purported volitional handing over of possession of the suit premises by the plaintiff/respondent to the land owner becomes all the more infirm in the face of their being absence of evidence adduced by the defendant/appellant portraying with specificity the name of the land owner to whom the possession of the suit premises was purportedly handed over by the plaintiff/respondent. For absence of the aforesaid pieces of evidence the fortifying conclusion which ensues is that there is abysmal lack of potent evidence adduced by the defendant to constrain a conclusion qua the volitional abdication of possession of the suit premises by the plaintiff/respondent in favour of the landowner. Preponderantly, what further enfeebles the espousal of the plaintiff/respondent having volitionally handed over the possession of the suit premises to the landowner, is the absence of proof of execution of a relinquishment deed inter se the plaintiff/respondent and the land owner portraying the factum of volitional handing over of possession of the suit premises by the plaintiff/respondent to the landowner. Rather on the other hand, when the jamabandi qua the suit premises comprised in Ex.PA to which a presumption of truth is attached and when such presumption has remained un-rebutted for lack of adduction cogent evidence to dislodge it, as such, to be concluded to be truthfully portraying the factum of the suit premises to be in possession of Bhupinder Singh as a tenant. When the jamabandi for the year 1991-92 comprised in Ex.PA and its reflecting Bhupinder Singh to be a tenant over the suit premises, who rather died earlier in the year 1988, yet when obviously till the preparation of Ex.PA in the year 1991, there is a palpable marked absence of concerted endeavour on the part of the defendant/appellant to on his demise seek deletion of the said entry in the jamabandi aforesaid, portrays acquiescence by the defendant/appellant to the factum of the plaintiff/respondent on demise of her predecessor-in-interest having succeeded to the tenancy rights of the former in the suit premises, besides she having continued in possession of the suit premises. Moreover, the further absence of any entry in the rapat rojnamcha of the Patwari reflecting the fact of handing over of possession of the suit premises by the plaintiff/respondent to the defendant/appellant forcefully conveys that, hence, the plaintiff/respondent did not volitionally handedover the possession of the suit premises to the defendant/appellant. What fortifies the aforesaid conclusion is the fact of the plaintiff/respondent having asserted that locks of the suit premises were broken open at the instance of the defendant/appellant and in consequence thereto, the defendant/appellant took forcible possession of the suit premises. When the said fact finds corroboration from the fact of the plaintiff/respondent having registered a criminal case in the police station concerned against the defendant/appellant for committing the offence of criminal trespass, hence, prods this Court to with aplomb conclude that the plaintiff/respondent never volitionally abdicated the possession of the suit premises in favour of the defendant/appellant. With the formation of the aforesaid inference by this Court, the sequelling effect is that the defendant/appellant cannot capitalize upon the factum of his having involitionally gained possession of the suit premises from the plaintiff/respondent nor such involitional possession gives leverage to him to canvass a relief from this Court that, hence, he is in lawful possession of the suit premises and that concomitantly, the relief as accorded in favour of the plaintiff/respondent has been unwarrantedly afforded. Therefore in the

backdrop of the aforesaid factual martrix the enduring conclusion is that the plaintiff/respondent was in lawful possession of the suit premises and was forcibly dispossessed therefrom at the instance of the defendant/appellant. The forcible dispossession of the plaintiff/respondent from the suit premises at the instance of the defendant/appellant to the considered mind of this Court constitutes her to be rather in symbolic lawful possession of the suit premises. As a corollary, then her lawful symbolic possession of the suit premises has to be vindicated. In aftermath, the relief as afforded by both the learned Courts below in consonance with Ex.PB in favour of the plaintiff/respondent cannot at all be construed to be legally frail. If, this Court condones the unauthorized or unlawful taking over of possession of the suit premises by the defendant/appellant and declines the relief as afforded to the plaintiff/respondent by both the learned Courts below, it would unwarrantedly result in condonation of the unauthorized and legally invinidcable acts on the part of the defendant/appellant to secure the possession of the suit premises and to permit him, despite his retaining unlawful possession of the suit premises, to deny the relief as tenably granted in the favour of the plaintiff/respondent by both the learned Courts below.

10. Even though, the learned counsel for the defendant/appellant concerted to rely upon the findings recorded in Ex.PB in paragraph No.6 portraying the factum of the plaintiff being not in possession of the suit premises. Nonetheless, in the face of this Court at the out set having calibrated the effect thereof on the anvil of proof emanating and its loudly pronouncing upon the factum of the plaintiff/respondent having not volitionally abdicated the possession of the suit premises in favour of the defendant/appellant, consequently, when the discussion hereinabove markedly displays the factum of the plaintiff/respondent having not volitionally handed over the possession of the suit premises to the defendant/appellant pales the effect of the findings existing in Ex.PB as relied upon by the learned counsel for the appellant/defendant to succor his argument that in face thereof the rendition of decrees by both the learned Courts below in favour of the plaintiff/defendant is legally infirm. Also when it has been concluded with aplomb hereinabove that the symbolic lawful possession of the suit premises remained with the plaintiff/respondent, hence, necessitating its legal vindication comprised in this Court affirming the judgments and decrees of both the learned Courts below besides prod this Court to render a relief in consonance with Ex.PB. Consequently, the findings in Ex.PB qua the plaintiff/respondent not being in possession of the suit premises on the date preceding to the rendition of the judgment and decree by the learned trial Court would not countervail not detract the effect of the findings recorded at the stage of the rendition of judgment and decree by the learned trial Court. Besides when in compliance of the mandate in Ex.PB, the defendant/appellant reconstructed the suit premises and when the plaintiff/respondent has been held to be in lawful symbolic possession of the suit premises which finding sprouts from the inference of hers having been illegally dispossessed therefrom, too besides spurs the inevitable conclusion that she, hence, was to be clothed with the protection of the decrees as rendered in her favour by both the learned Courts below in consonance with Ex.PB. The plaintiff/respondent not having cogently proved the fact of hers running business in the demised premises or she having not obtained the registration certificate qua the suit premises on demise of her husband are inconsequential and may constitute good ground for the plaintiff/respondent being evicted from the demised premises in accordance with law. However, the defendant/appellant cannot derive any leverage therefrom to contend that the plaintiff/respondent never acquired the possession of the suit premises nor was dispossessed therefrom in accordance with law. The findings as recorded by both the learned Courts below are based upon a mature and balanced appreciation of evidence on record and do not necessitate interference, rather

merit vindication. Accordingly, the substantial question of law is answered against the defendant/appellant and in favour of the plaintiff/respondent.

11. The result of the above discussion is that the appeal preferred by the defendant/appellant is dismissed and the judgments and decrees rendered by the learned Courts below are affirmed and maintained. Record of the learned Courts below be sent back forthwith. All pending applications, if any, are also disposed of. No costs.

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

Vijay Amrit Raj .....Petitioner
Versus
State of H.P. and others. ..... Respondents

CWP No. 2422 of 2014.
Date of decision: 24.11.2014

Constitution of India, 1950- Article 226- Respondents admitted that the petitioner was wrongly denied the appointment and the appointment would be offered shortly - in view of this statement, respondents No.1 and 3 directed to offer appointment to the petitioner within a period of four weeks and to grant seniority from the date of wrongful denial of the appointment.

For the petitioner: Mr.Dalip K. Sharma and Mr.Pardeep Kumar, Advocates.
For the respondents: Mr.Shrawan Dogra, Advocate General with Mr.Romesh Verma & Mr.Anup Rattan, Additional Advocate Generals & Mr. J.K. Verma, Deputy Advocate General for respondents-State.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

At the very outset, Mr.Anup Rattan, Additional Advocate General, stated at the Bar that the petitioner has been wrongly denied the appointment to the post in question and that respondents No.1 to 3 are offering appointment to the petitioner within a short period. His statement is taken on record.

2. In view of the above, the writ petition is disposed of with a direction to respondents No.1 to 3/comptent Authority to offer appointment to the writ petitioner within a period of four weeks from today. As far as the issue of seniority is concerned, the same shall be governed by the judgment rendered by this Court in **LPA No.170 of 2014**, titled as **Shri Balak Ram vs. State of Himachal Pradesh and others**, on 19.11.2014.

3. The petition stands disposed of accordingly, so also the pending CMPs, if any. Copy dasti.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Brig. S.C.Kuthiala .....Applicant/Plaintiff.
Versus
Sh.Radha Krishan Kuthiala and another .... Non-applicants/Defendants.

OMP No. 339 of 2014 in
Civil Suit No.137 of 2012.
Order reserved on : 14.11.2014.
Date of decision:25th November, 2014.

Code of Civil Procedure, 1908- Order 18 Rule 3-A- An application was filed for seeking permission to examine the plaintiff after the examination of other witnesses on the ground that most of the witnesses referred in the list of witnesses are witnesses of record and it is not possible to record the statement of the plaintiff without proving the document by the examination of official witnesses- held, that plaintiff is required to prove the relinquishment deed and the power of attorney- he is required to lead evidence regarding the manner of execution of these documents and the relationship between the parties- plaintiff may be required to prove the document from the witnesses- therefore, application allowed subject to the condition that plaintiff will step into witness box immediately after the examination of the witnesses of the record. (Para- 7 to 9)

Case referred:
Smt.Uma Devi versus Smt.Raj Kumari (1981) 10 Indian Law Reports (Himachal Series) 16

For the Applicant/ Plaintiff.	:	Mr.K.D.Sood, Senior Advocate with Mr.Dushyant Dadwal, Advocate.
For the Non-Applicants/ Defendants.	:	Mr.Ajay Kumar Sood, Senior Advocate with Mr.Dheeraj K.Vashisht, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The plaintiff-applicant has preferred this application under Order 18 Rule 3A read with Section 151 CPC for grant of permission to examine himself after the examination of other witnesses. It is averred that the case had been fixed on 1st April, 2014 for recording the statements of witnesses on behalf of the plaintiff and on such date only one official witness appeared, who had not brought the summoned record but then the defendants had objected that the plaintiff be first examined as per the provisions of Order 18 Rule 3A CPC. It is claimed that most of the witnesses referred to in the list of witnesses filed on behalf of the plaintiff are witnesses of record and, therefore, the statement of the plaintiff cannot be recorded till and so long these documents are not exhibited.

2. The defendants/non-applicants have filed reply wherein it has been stated that the evidence of the official witnesses in the case has no relevance with the statement of the plaintiff because the plaintiff has not to prove any document summoned from the witnesses. Under the law, the plaintiff has to open his case, but in the present case, he is abusing the process of the Court by summoning such witnesses, whose statements have no relevance to the issues framed in the case. According to the defendants, the only issue involved in the case is whether so-called relinquishment deed/release deed is a

genuine document or a forged and fabricated document manufactured on the basis of a forged and fabricated alleged Power of Attorney. The plaintiff by introducing family history is trying to complicate the matter.

3. This Court on 14.08.2013 framed the following issues:-

1. Whether the plaintiff is exclusive owner of the suit property on the basis of relinquishment deed dated 04.05.2010, said to have been executed in his favour by defendant No.1 through his power of attorney, Sh. Lakhwinder Singh son of Sh. Charan Singh? OPP
2. In case issue No.1 is proved in affirmative, whether sale deed dated 07.08.2012, executed by defendant No.1 in favour of defendant No.2, is illegal, null and void and not binding on the rights of the plaintiff, as alleged? OPP
3. In case issue No.2 is proved in affirmative, whether the plaintiff is entitled for grant of a decree for declaration along with consequential relief, as prayed for? OPP
4. Whether the power of attorney on the basis of which relinquishment deed dated 04.05.2010 has been executed by Sh.Lakhwinder Singh son of Sh. Charan Singh, is a fake and forged document, as alleged and if so, its effect? OPD.5. Relief.

4. The learned counsel for the plaintiff strenuously argued that in order to prove the issues, the plaintiff would be required to give some background as to how the relinquishment deed dated 04.05.2010 came to be executed in his favour by defendant No.1 through his power of attorney Sh.Lakhwinder Singh son of Sh. Charan Singh and the issue(s) cannot be proved simply by making a reference to the document. While, on the other hand, the learned counsel for the defendants/non-applicants has vehemently opposed the claim of the plaintiff by saying that in terms of the mandate of Order 18 Rule 3A CPC, a party is required to appear in the witness box before the other witnesses are examined.

5. Order 18 Rule 3A CPC reads as follows:-

> ***"3A Party to appear before other witnesses.-Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage."***

6. The question as to whether this rule is mandatory or directory came up for consideration before a Division Bench of this Court in ***Smt.Uma Devi*** *versus* ***Smt.Raj Kumari (1981) 10 Indian Law Reports (Himachal Series) 16*** wherein it was held as under:-

> ***"2. Whether a party who wishes to appear as a witness is required to obtain the permission of the court to appear at a later stage before any other witness on his behalf has been examined or the party can ask for the permission at any stage before concluding his evidence? Is the question which falls for determination in these revisions. The facts are not relevant. Suffice it to say that in all the cases either the plaintiff or the defendant did not ask for permission to examine himself at a later stage before examining his witnesses. The trial court has refused permission in view of the judgment of a learned single Judge of this Court in Civil Revision No. 197 of 1979, Chet Ram v. Rajinder Kaur, decided on 7th May, 1980, where the learned Judge, following a judgment of a learned single Judge of the Orissa High Court in Jagannath Nayak v. Laxminarayan Thakur, AIR 1978 Orissa 1 held, that rule 3 A of Order 18 of the Code of Civil Procedure requires a party to obtain the requisite permission before examining his witnesses. As a Division Bench of Orissa High Court has since overruled the case of***

Jagannath Nayak, the matter has been referred to a Division Bench of this Court.

3. In the trial of civil suits a practice had grown up to examine the party after the party had examined his witnesses. This perhaps was done in order to fill up the lacuna left by the witnesses. This practice was, from time to time, frowned upon but since the law gave a right to the party to produce and examine his witnesses in the manner he liked the practice could not be curbed. The Law Commission in order to curb this practice, in its 54th Report recommended :

> ***"18.3. The Fourteenth Report had recommended that ordinarily, a party who wishes to be examined as a witness should offer himself first, before the other witnesses are examined. The Commission, in its Report on the Code, however, considered it unnecessary to make any such statutory provision. It noted that this should be the ordinary rule, but thought that a rigid provision on the subject would not be desirable.***
>
> ***18.4. We think that the amendment recommended in the 14th Report should be carried out. Since the proposed rule will be confined to ordinary cases, the hardships arising from special features of the case, should not present a problem. Having regard to the persistent and notorious malpractice indulged in by litigants in this respect- malpractice which borders on dishonesty -we think that the time has come to insert a statutory provision."***

4. The result of the recommendation was the addition of rule 3A in Order 18 of the Code of Civil Procedure.

> ***Rule 3A reads ;***
>
> ***"Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage."***

5. No doubt this rule is mandatory. It enjoins upon a party, who wishes to appear as a witness, to examine himself first before examining any other witness on his behalf. However, an exception has been made. The court has been given the discretion to allow a party to examine himself later on after examining one or more witnesses on his behalf. But we do not find anything in this rule which compels a party to ask for the requisite permission from the court before he examines his first witness. We cannot overlook the fact that the rule is a procedural one. It is meant to curb a particular evil for the enhancement of justice. It has to be interpreted in such a manner that while the evil is curbed, it does not lead to any injustice.

8. We, therefore, hold that a party who wishes to examine himself at a later stage is not bound to ask for the permission of the court before examining his first witness, and that the party can ask for the permission at a later stage. However, we must emphasise that the trial courts should remember that it is the duty of a party to examine himself first in case the party wishes to appear as his own witness. The discretion which has been given by the exception has not to be exercised lightly. It is for this reason that it is enjoined upon the courts to record their reasons in writing while allowing the party to examine himself at a later stage. It is neither possible nor desirable to lay down any hard and fast rules for the exercise of this discretion. The facts of each case are bound to

vary. But the party must have some weighty reasons to convince the court for not examining himself first before the court exercises its discretion in favour of the party. It may be repeated that rule 3A has been framed to curb the evil practice of a party examining himself last."

7. In view of the aforesaid exposition of law, there is no gain saying that a party can always be permitted to examine its witnesses before stepping into the witness box subject to the condition that the party seeks permission of the Court. This is only an exception and not a rule and, therefore, the discretion has not to be exercised lightly.

8. I find considerable force in the submissions of the learned counsel for the plaintiff that the issues cannot be simply answered in 'Yes' or 'No' or by a mere reference to the relinquishment deed or by making a reference to the power of attorneys which documents alone find mention in the issues framed. The plaintiff-applicant will have to build an edifice upon which his structure would stand. How and in what manner the relinquishment deed came into existence and how and in what manner the power of attorney came to be executed, what was the relationship interse parties and how the same was carried forward, would be certain essential questions which will have to be introduced by the plaintiff while proving the issues the onus of which has been fastened upon him. In this process, it can happen that certain documents may also be required to be proved from the witnesses.

9. In view of the aforesaid discussion, there is merit in this application and the same is allowed subject to the condition that the plaintiff shall step into the witness box immediately after the witnesses of record are examined. The application is disposed of with no order as to costs.

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

Hans Raj (died) through LRs. ...Appellants.
Versus
Bilwamangal and others. ...Respondents.

RSA No. 390 of 2001
Reserved on : 12.11.2014
Decided on: 25.11. 2014

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 2(10)- Defendant claimed to be a tenant who had become the owner under the provision of H.P. Tenancy and Land Reforms Act- Jamabandi for the year 1987-88 showed the defendant to be a Gair Maurusi Tehat Murtan (tenant under the mortgagee) - held, that tenant inducted by mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act. (Para-11 and 12)

Code of Civil Procedure, 1908- Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff and the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court. (Para-14)

Cases referred:

Kanta Devi versus Khushia, 1996 (2) Sim.L.C.

Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148

For the Appellants: Mr. R.K. Gautam, Sr. Advocate with
Mr. Vikrant Chandel, Advocate.
For the Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 3.4.2001 rendered by the Additional District Judge (1) Kangra at Dharmashala in Civil Appeal No. 94-K/98.

2. "Key facts" necessary for the adjudication of this Regular Second Appeal are that predecessor-in-interest of respondents-plaintiffs, Sandhya Devi (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit for declaration and in the alternative for possession against the appellants-defendants (hereinafter referred to as the "defendants" for convenience sake). The suit was filed to the effect that plaintiff was owner in possession of the land as detailed in the head note of the plaint and entries of tenancy in favour of defendants in the revenue record were wrong, illegal and unauthorized. The defendants or their predecessors were never inducted as tenant by the plaintiff. The suit land was under mortgage and redeemed by the plaintiff vide Rapat Roznamcha No.27 dated 18.9.1992 on the basis of order of Senior Sub Judge, Dharamshala. In the alternative, plaintiff also prayed that in case it was found that plaintiff is not entitled to the decree as per prayer 'A" then he be granted a decree for possession in respect of the suit land. The suit land was under mortgage with mortgagee and the same was got redeemed vide judgment dated 31.7.1991 rendered by the Senior Sub Judge, Dharamshala in Civil Suit No. 158/74. The possession was also delivered to the plaintiff on 18.9.1992 by the Senior Sub Judge, Dharamshala on the spot vide rapat roznamcha No.27. Mutation No.417 was entered to this effect. Neither the defendants nor their ancestors were inducted as tenant, hence, the entry of tenancy after redemption of the mortgage was stated to be wrong, illegal and null void.

3. Suit was contested by the defendants. According to them, the land was under the tenancy prior to the inception of the mortgage. The defendants had acquired the proprietary rights under the provisions of H.P. Tenancy and Land Reforms Act. They have become owners of the suit land.

4. Plaintiff filed replication. Sub-Judge 1st Class framed issues on 17.3.1997 and 30.12.1997. The suit was decreed by the Sub-Judge 1st Class on 20.8.1998. Defendants feeling aggrieved by the judgment and decree dated 20.8.1998 preferred an appeal before the Additional District Judge (1), Kangra at Dharmashala. He dismissed the same on 3.4.2001. Hence, the present Regular Second Appeal. It was admitted on the following substantial questions of law on 27.8.2001.

1. **"Whether the courts below have failed to appreciate evidence on its proper and legal sense and specially has failed to take into consideration the documentary evidence pertaining to the revenue record Ex. D-1 to D-6?**

2. **Whether the courts below have failed to take adverse inference of the fact that plaintiff has not examined himself as a witness and has not put himself for cross-examination. Therefore, adverse inference was required to be taken as per the settled law decided in cases (1) Kamla Devi Vs. Dev Raj- RSA No. 531 of 2000 decided on 13.11.2000, (2) Harswaroop Vs. Ramlok Sharma, Civil Revision No. 272 of 1996 decided on 30.5.2000, (3) Gurdev Vs. Gulabo R.S.A. No. 302 of 1992 decided on**

24.4.2000 and (4) Vidya Dhar Vs. Mankikro & others, AIR 1999 SC 1441?"

5. Mr. R.K. Gautam, learned Senior Counsel for the appellants, on the basis of the substantial questions of law, has vehemently argued that both the courts below have misconstrued the evidence led by the parties. He has also argued that the defendant was tenant under the mortgagor.

6. Mr. Ajay Sharma, has supported the judgments and decrees passed by both the courts below.

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

8. Since both the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Amar Chand has produced copy of power of attorney Ext. PW1/A. He has specifically deposed that he was well conversant with the facts of the case. The land in question was 16 Kanals and 7 marlas. The land was mortgaged with Kuldeep Singh and others. The suit was filed for redemption of the suit land. Decree was passed in favour of the plaintiff. The party was put in possession on 18.9.1992. Defendants were never inducted as tenants. The entries to the contrary were wrong. The suit for redemption was filed in the year 1968. Plaintiff has tendered in evidence Ex.P-1 to Ex.P-5 and mark 'A'.

10. Defendant No.1 Hans Raj has appeared as DW-1. He has deposed that he is son of original defendant No.1. He has simply deposed that his father was cultivating the suit land and they have been paying the rent also.

To the similar effect is the statement of PW-2 Raghubir Singh.

12. According to Jamabandi for the year 1987-88, Ext. P-1 defendants were shown to be tenant *gair marausi* tehat murtan (tenants under the mortgagee). According to Jamabandi for the year 1971-72, defendants have been shown as tenants under mortgagee. It is not discernible from the Jamabandi for the year 1965-66 whether the defendants were tenants under the mortgagee or mortgagor. According to Jamabandi Ex.D-3 for the year 1917-18 and Ex.D-4 for the year 1891-92 neither the defendants nor their ancestors have been inducted as tenant under the original owners such as Chaudhary Hardyal etc. According to Jamabandi Ex.P-1 for the year 1987-88, status of the defendants has been shown as tenants under the mortgagee. The plaintiff was put in possession on the spot vide Rapat Rojnamcha dated 18.9.1992.

13. This Court in ***Kanta Devi*** versus ***Khushia***, 1996 (2) Sim.L.C. has held as under:

> **"18. Section 2 (10) of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 defines "land owner" as meaning a person defined as such in the Himachal Pradesh Land Revenue Act, 1953 or the Punjab Land Revenue Act, 1887, as the case may be and shall include the predecessor or successor in interest of the land owner'. The definition of the word "land owner" as contained in section 4 (9) of the Himachal Pradesh Land Revenue Act, 1953 as well as in section 3 (2) of the Punjab Land Revenue Act, 1887 is practically the same. Both the sections provide that "land owner" does not include a tenant or an assignee of land revenue but does include a person to whom a holding revenue or of a sum recoverable as such an arrear, and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any share or portion thereof, or in the enjoyment of any part of the profits of an estate. This definition, prima facie, does not include a mortgagee. Therefore, a**

person holding the land as a tenant under the mortgagee cannot be deemed to be a tenant under a landowner. Therefore, the protection which was available to the tenant inducted by the mortgagee in Bhagat Ram's case (supra), cannot be extended to the defendant in the present case.

19. Similarly in Prabhu v, Ramdeo and others, AIR 1966 SC 1721, the protection to the tenant inducted by the mortgagee was extended by virtue of section 15 of the Rajasthan Tenancy Act, 1955, which had come into force before the redemption of the mortgage by the mortgagor The statutory benefit was thus extended to the tenant inducted by the mortgagee in view of the relevant provisions of the Rajasthan Tenancy Act, 1955 and it was held that the tenant inducted by the mortgagee would become a tenant under the owner-mortgagor after the redemption of the mortgage. No such statutory protection, as stated above, is available to the defendant in the present case under any provision of the law as inforce at the time of the redemption of the mortgage."

CMP No. 636/2010

14. Appellant has also filed an application under Order 41 Rule 27 Code of Civil Procedure, plaintiff has filed the detailed reply to the same. Appellant wanted to produce on record copy of proceedings conducted by Land Reforms Officer, Kangra dealing with form No. L.R.-V under the H.P. Land Reforms Act and Rules. According to the appellant, plaintiff has admitted that defendant is tenant and had applied for redemption of land under H.P. Tenancy and Land Reforms Act. The Civil Suit was instituted on 2.3.1993 and the application filed is belated. These documents are not necessary for the adjudication of the matter.

15. Their Lordships of the Hon'ble Supreme Court in ***Union of India*** vs. ***Ibrahim Uddin and another***, (2012) 8 SCC 148 have held that party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court. There must be satisfactory reasons for non-production of the evidence in trial court for seeking production thereof in appellate court. Their Lordships have held as under:

"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).

37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not

entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).

38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.

44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336).

45. In The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:

> **"We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence."**
>
> **(Emphasis added)**

A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad and Ors., AIR 2008 SC 1108.

46. A Constitution Bench of this Court in K. Venkataramiah (Supra), while dealing with the same issue held:

> **"It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore,**

be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."

(Emphasis added)

In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.

48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

Stage of Consideration :

49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053)."

16. Therefore, the present application is dismissed.

17. The substantial questions of law are answered accordingly.

18. 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 RAJIV SHARMA, J.

Madho (died) through LRs. ...Appellants.
Versus
Bilwamangal. ...Respondent.

RSA No. 375 of 2001
Reserved on : 12.11.2014
Decided on: 25.11. 2014

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 2(10) - Defendant claimed that tenant of mortgagee was a tenant for all intents and purpose- jamabandi for the year 1987-88 showed the defendant to be a tenant Gair Maurusi Tehat Murtan- held, that tenant inducted by mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act. (Para-11 and 12)

Code of Civil Procedure, 1908- Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff and the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court. (Para-14)

Cases referred:
Kanta Devi versus Khushia, 1996 (2) Sim.L.C
Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148

For the Appellants: Mr. R.K. Gautam, Sr. Advocate with
Mr. Vikrant Chandel, Advocate.
For the Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 3.4.2001 rendered by the Additional District Judge (1) Kangra at Dharmashala in Civil Appeal No. 96-K/98.

2. "Key facts" necessary for the adjudication of this Regular Second Appeal are that predecessor-in-interest of respondent-plaintiff, Sandhya Devi (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit for declaration and in the alternative for possession against the predecessor-in-interest of the appellants-defendants Madho (hereinafter referred to as the "defendant" for convenience sake). The suit was filed to the effect that plaintiff was owner in possession of the land as detailed in the head note of the plaint and entries of tenancy in favour of defendant in the revenue record were wrong, illegal and unauthorized as defendant or his predecessors were never inducted as tenant by the plaintiff. The suit land was under mortgage and redeemed by the plaintiff vide Rapat Roznamcha No.27 dated 18.9.1992 on the basis of order of Senior Sub Judge, Dharamshala. In the alternative, plaintiff also prayed that in case it was found that plaintiff is not entitled to the decree as per prayer 'A" then he be granted a decree for possession in respect of the suit land. The suit

land was under mortgage with mortgagee and the same was got redeemed vide judgment dated 31.7.1991 rendered by the Senior Sub Judge, Dharamshala in Civil Suit No. 158/74. The possession was also delivered to the plaintiff on 18.9.1992 by the Senior Sub Judge, Dharamshala on the spot vide rapat roznamcha No.27 and mutation No.417 was entered to this effect. Neither the defendant nor his ancestors was inducted as tenant, hence, the entry of tenancy after redemption of the mortgage was stated to be wrong, illegal and null void.

3. Suit was contested by the defendant. According to him, the land was under the tenancy prior to the inception of the mortgage. He had acquired the proprietary rights under the provisions of H.P. Tenancy and Land Reforms Act. He has become owner of the suit land. Since the defendant was not party to the civil suit No.158/74 on the basis of which possession was delivered on 18.9.1992, hence the decree did not affect his legal rights.

4. Plaintiff filed replication. Sub-Judge 1st Class framed issues on 19.1.1996. The suit was decreed by the Sub-Judge 1st Class on 20.8.1998. Defendant feeling aggrieved by the judgment and decree dated 20.8.1998 preferred an appeal before the Additional District Judge (1), Kangra at Dharmashala. He dismissed the same on 3.4.2001. Hence, the present Regular Second Appeal. It was admitted on the following substantial questions of law on 23.8.2001.

1. **"Whether the courts below have failed to appreciate evidence in its proper and legal sense and specifically has failed to take into consideration the documentary evidence comprising of the revenue records Ex.D-1 to D-6?**
2. **Whether the courts below have erred in not taking adverse inference of the fact of failure of the plaintiff to have stepped into the witness box in support of his case and subjected himself to cross-examination?**

5. Mr. R.K. Gautam, learned Senior Counsel for the appellants, on the basis of the substantial questions of law, has vehemently argued that both the courts below have misconstrued the evidence led by the parties. He has also argued that the defendant was tenant under the mortgagor.

6. Mr. Ajay Sharma, has supported the judgments and decrees passed by both the courts below.

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

8. Since both the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Amar Chand has produced copy of power of attorney Ext. PW1/A. He has specifically deposed that he was well conversant with the facts of the case. The total land was 5 kanal 2 marlas. The land was in possession of the plaintiff. It was mortgaged with Kuldip and others. The suit was filed for redemption of the suit land. Decree was passed in favour of the plaintiff and possession was handed over to the plaintiff on 18.9.1992. The land was never given for cultivation to Madho.

PW-2 Roshan Lal has deposed that plaintiff was the owner. She was put in possession of the suit land in the year 1992. Plaintiff has tendered in evidence Ex.P-1 to Ex.P-9.

10. Defendant Madho Singh has appeared as DW-1. He has deposed that he was in possession of the suit land. He did not know who was cultivating the land before him.

DW-2 Mangat Ram has deposed that Madho cultivated the suit land for the last so many years.

11. DW-3 Om Prakash has deposed that Madho Ram was cultivating the land.

12. Defendant has tendered in evidence the documents Ex. D-1 to Ex.D-2.

12. According to Jamabandi for the year 1987-88, Ext. P-1 defendants were shown to be tenant *gair marausi* tehat murtan (tenants under the mortgagee). According to Jamabandi for the year 1971-72, defendants have been shown as tenants under mortgagee. It is not discernible from the Jamabandi for the year 1965-66 whether the defendants were tenants under the mortgagee or mortgagor. The plaintiff was put in possession on the spot vide Rapat Rojnamcha dated 18.9.1992.

13. This Court in ***Kanta Devi*** versus ***Khushia***, 1996 (2) Sim.L.C. has held as under:

> **"18. Section 2 (10) of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 defines "land owner" as meaning a person defined as such in the Himachal Pradesh Land Revenue Act, 1953 or the Punjab Land Revenue Act, 1887, as the case may be and shall include the predecessor or successor in interest of the land owner'. The definition of the word "land owner" as contained in section 4 (9) of the Himachal Pradesh Land Revenue Act, 1953 as well as in section 3 (2) of the Punjab Land Revenue Act, 1887 is practically the same. Both the sections provide that "land owner" does not include a tenant or an assignee of land revenue but does include a person to whom a holding revenue or of a sum recoverable as such an arrear, and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any share or portion thereof, or in the enjoyment of any part of the profits of an estate. This definition, prima facie, does not include a mortgagee. Therefore, a person holding the land as a tenant under the mortgagee cannot be deemed to be a tenant under a landowner. Therefore, the protection which was available to the tenant inducted by the mortgagee in Bhagat Ram's case (supra), cannot be extended to the defendant in the present case.**
>
> **19. Similarly in Prabhu v, Ramdeo and others, AIR 1966 SC 1721, the protection to the tenant inducted by the mortgagee was extended by virtue of section 15 of the Rajasthan Tenancy Act, 1955, which had come into force before the redemption of the mortgage by the mortgagor The statutory benefit was thus extended to the tenant inducted by the mortgagee in view of the relevant provisions of the Rajasthan Tenancy Act, 1955 and it was held that the tenant inducted by the mortgagee would become a tenant under the owner-mortgagor after the redemption of the mortgage. No such statutory protection, as stated above, is available to the defendant in the present case under any provision of the law as inforce at the time of the redemption of the mortgage."**

<u>CMP No. 630/2010</u>

14. Appellant has also filed an application under Order 41 Rule 27 Code of Civil Procedure; plaintiff has filed the detailed reply to the same. Appellant wanted to produce on record copy of proceedings conducted by Land Reforms Officer, Kangra dealing with form No. L.R.-V under the H.P. Land Reforms Act and Rules. According to the appellant, plaintiff has admitted that defendant is tenant and had applied for redemption of land under H.P. Tenancy

and Land Reforms Act. The Civil Suit was instituted on 2.3.1993 and the application filed is belated. These documents are not necessary for the adjudication of the matter.

15. Their Lordships of the Hon'ble Supreme Court in ***Union of India*** vs. ***Ibrahim Uddin and another***, (2012) 8 SCC 148 have held that party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court. There must be satisfactory reasons for non-production of the evidence in trial court for seeking production thereof in appellate court. Their Lordships have held as under:

> **"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).**
>
> **37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).**
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> **38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].**
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> **39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower**

court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.

44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It

ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336).

45. In The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:

> **"We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence."**
>
> **(Emphasis added)**

A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad and Ors., AIR 2008 SC 1108.

46. A Constitution Bench of this Court in K. Venkataramiah (Supra), while dealing with the same issue held:

> **"It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."**
>
> **(Emphasis added)**

In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.

48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required

to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

Stage of Consideration :

49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053)."

16. Therefore, the present application is dismissed.

17. The substantial questions of law are answered accordingly.

18. 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 RAJIV SHARMA, J.

Partap Chand. ...Appellant.

Versus

Bilwamangal and another. ...Respondents.

RSA No. 391 of 2001
Reserved on : 12.11.2014
Decided on: 25.11. 2014

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 2(10) - Defendant claimed to be a tenant who had become the owner under the provision of H.P. Tenancy and Land Reforms Act- Jamabandi for the year 1987-88 showed the defendant to be a Gair Maurusi Tehat Murtan (tenant under the mortgagee) - held, that a tenant inducted by mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act. (Para-11 and 12)

Code of Civil Procedure, 1908- Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the

plaintiff and the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court. (Para-14)

Cases referred:

Kanta Devi versus Khushia, 1996 (2) Sim.L.C

Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148

For the Appellants:	Mr. R.K. Gautam, Sr. Advocate with Mr. Vikrant Chandel, Advocate.
For the Respondent:	Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 3.4.2001 rendered by the Additional District Judge (1) Kangra at Dharmashala in Civil Appeal No. 100-K/98.

2. "Key facts" necessary for the adjudication of this Regular Second Appeal are that predecessor-in-interest of respondent-plaintiff, Sandhya Devi (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit for declaration and in the alternative for possession against the predecessor-in-interest of the appellant-defendant Jeetu (hereinafter referred to as the "defendant" for convenience sake) and proforma respondent. The suit was filed to the effect that plaintiff was owner in possession of the land as detailed in the head note of the plaint and entries of tenancy in favour of defendant in the revenue record were wrong, illegal and unauthorized as defendant or his predecessors were never inducted as tenant by the plaintiff. The suit land was under mortgage and redeemed by the plaintiff vide Rapat Roznamcha No.27 dated 18.9.1992 on the basis of order of Senior Sub Judge, Dharamshala. In the alternative, plaintiff also prayed that in case it was found that plaintiff is not entitled to the decree as per prayer 'A" then he be granted a decree for possession in respect of the suit land. The suit land was under mortgage with mortgagee and the same was got redeemed vide judgment dated 31.7.1991 rendered by the Senior Sub Judge, Dharamshala in Civil Suit No. 158/74. The possession was also delivered to the plaintiff on 18.9.1992 by the Senior Sub Judge, Dharamshala on the spot vide rapat Rojnamcha No.27 and mutation No.417 was entered to this effect. Neither the defendants nor their ancestors was inducted as tenant, hence, the entry of tenancy after redemption of the mortgage was stated to be wrong, illegal and null void.

3. Suit was contested by the defendants. According to them, the land was under the tenancy prior to the inception of the mortgage. They acquired the proprietary rights under the provisions of H.P. Tenancy and Land Reforms Act. They have become owner of the suit land. Since the defendants were not party to the civil suit No.158/74 on the basis of which possession was delivered on 18.9.1992, hence the decree did not affect their legal rights.

4. Plaintiff filed replication. Sub-Judge 1st Class framed issues on 14.3.1996. The suit was decreed by the Sub-Judge 1st Class on 20.8.1998. Defendants feeling aggrieved by the judgment and decree dated 20.8.1998 preferred an appeal before the Additional District Judge (1), Kangra at Dharmashala. He dismissed the same on 3.4.2001. Hence, the present Regular Second Appeal. It was admitted on the following substantial questions of law on 27.8.2001.

1. **"Whether the courts below have failed to appreciate evidence on its proper and legal sense and specially has failed to take into consideration the documentary evidence pertaining to the revenue record Ex. D-1 to D-6?**

2. **Whether the courts below have failed to take adverse inference of the fact that plaintiff has not examined himself as a witness and has not put himself for cross-examination. Therefore, adverse inference was required to be taken as per the settled law decided in cases (1) Kamla Devi Vs. Dev Raj- RSA No. 531 of 2000 decided on 13.11.2000, (2) Harswaroop Vs. Ramlok Sharma, Civil Revision No. 272 of 1996 decided on 30.5.2000, (3) Gurdev Vs. Gulabo R.S.A. No. 302 of 1992 decided on 24.4.2000 and (4) Vidya Dhar Vs. Mankikro & others, AIR 1999 SC 1441?"**

5. Mr. R.K. Gautam, learned Senior Counsel for the appellant, on the basis of the substantial questions of law, has vehemently argued that both the courts below have misconstrued the evidence led by the parties. He has also argued that the defendant was tenant under the mortgagor.

6. Mr. Ajay Sharma, has supported the judgments and decrees passed by both the courts below.

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

8. Since both the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Amar Chand has produced copy of power of attorney Ext. PW1/A. He has specifically deposed that he was well conversant with the facts of the case. The suit land was 28 Kanals and 17 Marlas. The suit land was mortgaged. Suit was filed for the redemption of the suit land. The possession was delivered to the plaintiff on 18.9.1992. Plaintiff was in possession of the same. Plaintiff has tendered in evidence Ex.P-1 to Ex.P-9.

DW-1 Partap has produced copy of general power of attorney Ex.DW-1/A. He has deposed that he was cultivating the suit land alongwith his fore-fathers.

DW-2 Roomi Chand has deposed that the land was cultivated by Jeetu Ram.

12. According to Jamabandi for the year 1987-88, Ext. P-1 defendant was shown to be tenant *gair marausi* tehat murtan (tenants under the mortgagee). In the *missal hakiyat bandobast jadid*, Ext. D-1, defendant's predecessor has been recorded in possession of the suit land as a tenant under the mortgagee. In the Jamabandi for the year 1971-72, defendant has been shown as tenant of the mortgagee. In the Jamabandi for the year 1965-66, it is not discernible whether defendant was tenant under the mortgagee or mortgagor. Moreover, it was a stray entry. According to Rapat Rojnamcha, Ext. D-2 dated 18.9.1995, possession of the suit land was handed over to the plaintiff/mortgagor. Defendant has not filed any appeal against the judgment dated 31.7.1991. According to Jamabandi for the year 1959-60 Ext. D-3 and Ext. D-4 Jamabandi for the year 1891-92 neither the defendant nor his predecessor-in-interest was inducted as a tenant under the original owner such as Chaudhary Hardyal. In Ext. P-1, copy of Jamabandi for the year 1987-88, status of the defendant has specifically been shown as under the mortgagee. The final decree for redemption of the suit land was granted by the Learned Sub Judge vide Ext. P-3, on 31.7.1991. The possession was given to the plaintiff as per Rapat Rojnamcha No. 27, dated 18.9.1992, Ext. P-2. There is overwhelming evidence produced by the plaintiff that defendant was tenant under the

mortgagee and not under the mortgagor. The plaintiff was put in possession on the spot vide Rapat Rojnamcha dated 18.9.1992.

13. This Court in ***Kanta Devi*** versus ***Khushia***, 1996 (2) Sim.L.C. has held as under:

> **"18. Section 2 (10) of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 defines "land owner" as meaning a person defined as such in the Himachal Pradesh Land Revenue Act, 1953 or the Punjab Land Revenue Act, 1887, as the case may be and shall include the predecessor or successor in interest of the land owner'. The definition of the word "land owner" as contained in section 4 (9) of the Himachal Pradesh Land Revenue Act, 1953 as well as in section 3 (2) of the Punjab Land Revenue Act, 1887 is practically the same. Both the sections provide that "land owner" does not include a tenant or an assignee of land revenue but does include a person to whom a holding revenue or of a sum recoverable as such an arrear, and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any share or portion thereof, or in the enjoyment of any part of the profits of an estate. This definition, prima facie, does not include a mortgagee. Therefore, a person holding the land as a tenant under the mortgagee cannot be deemed to be a tenant under a landowner. Therefore, the protection which was available to the tenant inducted by the mortgagee in Bhagat Ram's case (supra), cannot be extended to the defendant in the present case.**
>
> **19. Similarly in Prabhu v, Ramdeo and others, AIR 1966 SC 1721, the protection to the tenant inducted by the mortgagee was extended by virtue of section 15 of the Rajasthan Tenancy Act, 1955, which had come into force before the redemption of the mortgage by the mortgagor The statutory benefit was thus extended to the tenant inducted by the mortgagee in view of the relevant provisions of the Rajasthan Tenancy Act, 1955 and it was held that the tenant inducted by the mortgagee would become a tenant under the owner-mortgagor after the redemption of the mortgage. No such statutory protection, as stated above, is available to the defendant in the present case under any provision of the law as inforce at the time of the redemption of the mortgage."**

CMP No. 635/2010

14. Appellant has also filed an application under Order 41 Rule 27 Code of Civil Procedure, plaintiff has filed the detailed reply to the same. Appellant wanted to produce on record copy of proceedings conducted by Land Reforms Officer, Kangra dealing with form No. L.R.-V under the H.P. Land Reforms Act and Rules. According to the appellant, plaintiff has admitted that defendant is tenant and had applied for redemption of land under H.P. Tenancy and Land Reforms Act. The Civil Suit was instituted on 2.3.1993 and the application filed is belated. These documents are not necessary for the adjudication of the matter.

15. Their Lordships of the Hon'ble Supreme Court in ***Union of India*** vs. ***Ibrahim Uddin and another***, (2012) 8 SCC 148 have held that party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court. There must be satisfactory reasons for non-production of the evidence in trial court for seeking production thereof in appellate court. Their Lordships have held as under:

> **"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27**

CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).

37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).

38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.

44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336).

45. In The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:

> **"We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence."**
>
> **(Emphasis added)**

A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad and Ors., AIR 2008 SC 1108.

46. A Constitution Bench of this Court in K. Venkataramiah (Supra), while dealing with the same issue held:

> **"It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."**
>
> **(Emphasis added)**

In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.

48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

Stage of Consideration :

49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the

Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053)."

16. Therefore, the present application is dismissed.

17. The substantial questions of law are answered accordingly.

18. 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 RAJIV SHARMA, J.

Pritam Chand (died) through LRs. ...Appellants.
Versus
Bilwamangal. ...Respondent.

RSA No. 374 of 2001
Reserved on : 12.11.2014
Decided on: 25.11. 2014

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 2(10) - Defendant claimed that tenant of mortgagee was a tenant for all intents and purpose- jamabandi for the year 1987-88 showed the defendant to be a tenant Gair Maurusi Tehat Murtan- held, that tenant inducted by mortgagee does not fall within the definition of a tenant and is not entitled to the benefit of the Act. (Para-11 and 12)

Code of Civil Procedure, 1908- Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff - the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court. (Para-14)

Cases referred:
Kanta Devi versus Khushia, 1996 (2) Sim.L.C
Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148

For the Appellants: Mr. R.K. Gautam, Sr. Advocate with
Mr. Vikrant Chandel, Advocate.
For the Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 3.4.2001 rendered by the Additional District Judge (1) Kangra at Dharmashala in Civil Appeal No. 98-K/98.

2. "Key facts" necessary for the adjudication of this Regular Second Appeal are that predecessor-in-interest of respondent-plaintiff, Sandhya Devi (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit for declaration and in the alternative for possession against the appellants-defendants (hereinafter referred to as the "defendants" for convenience sake). The suit was filed to the effect that plaintiff was owner in possession of the land as detailed in the head note of the plaint and entries of tenancy in favour of defendants in the revenue record were wrong, illegal and unauthorized. The defendants or their predecessors were never inducted as tenant by the plaintiff. The suit land was under mortgage and redeemed by the plaintiff vide Rapat Roznamcha No.27 dated 18.9.1992 on the basis of order of Senior Sub Judge, Dharamshala. In the alternative, plaintiff also prayed that in case it was found that plaintiff is not entitled to the decree as per prayer 'A" then he be granted a decree for possession in respect of the suit land. The suit land was under mortgage with mortgagee and the same was got redeemed vide judgment dated 31.7.1991 rendered by the Senior Sub Judge, Dharamshala in Civil Suit No. 158/74. The possession was also delivered to the plaintiff on 18.9.1992 by the Senior Sub Judge, Dharamshala on the spot vide rapat roznamcha No.27. Mutation No.417 was entered to this effect. Neither the defendants nor their ancestors were inducted as tenant, hence, the entry of tenancy after redemption of the mortgage was stated to be wrong, illegal and null void.

3. Suit was contested by the defendant. According to him, the land was under the tenancy prior to the inception of the mortgage and if it was not so proved then the tenant of the mortgagee was a tenant for all intents and purposes and in that event also, the defendant was tenant over the suit land. He has become owner of the suit land.

4. Plaintiff filed replication. Sub-Judge 1st Class framed issues on 3.1.1994. The suit was decreed by the Sub-Judge 1st Class on 20.8.1998. Defendants feeling aggrieved by the judgment and decree dated 20.8.1998 preferred an appeal before the Additional District Judge (1), Kangra at Dharmashala. He dismissed the same on 3.4.2001. Hence, the present Regular Second Appeal. It was admitted on the following substantial questions of law on 20.8.2001.

1. **"Whether the courts below have failed to appreciate evidence on its proper and legal sense and specially has failed to take into consideration the documentary evidence pertaining to the revenue record Ex. D-1 to D-6?**

2. **Whether the courts below have failed to take adverse inference of the fact that plaintiff has not examined himself as a witness and has not put himself for cross-examination. Therefore, adverse inference was required to be taken as per the settled law decided in cases (1) Kamla Devi Vs. Dev Raj- RSA No. 531 of 2000 decided on 13.11.2000, (2) Harswaroop Vs. Ramlok Sharma, Civil Revision No. 272 of 1996 decided on 30.5.2000, (3) Gurdev Vs. Gulabo R.S.A. No. 302 of 1992 decided on 24.4.2000 and (4) Vidya Dhar Vs. Mankikro & others, AIR 1999 SC 1441?"**

5. Mr. R.K. Gautam, learned Senior Counsel for the appellants, on the basis of the substantial questions of law, has vehemently argued that both the courts below have misconstrued the evidence led by the parties. He has also argued that the defendant was tenant under the mortgagor.

6. Mr. Ajay Sharma, has supported the judgments and decrees passed by both the courts below.

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

8. Since both the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Amar Chand has produced copy of power of attorney Ext. PW1/A. He has specifically deposed that he was well conversant with the facts of the case. Plaintiff was owner of the suit land. The suit was filed for redemption of the suit land. Decree was passed in favour of the plaintiff. The land was 10 kanals 7 marlas. He has tendered in evidence Ex.PA to Ex.PC.

10. Defendant Pritam has appeared as DW-1. He did not know when the tenancy was created. He has simply stated that his father had been paying rent to the original owner. He has produced in evidence Ex.D-1 to Ex.D-4.

11. According to Jamabandi for the year 1987-88 Ex.P-1, defendant is shown to be tenants "Gair Murusi Tehat Murtan". According to Jamabandi for the year 1992-93 Ex.D-2, the same position is reflected. It is not discernible from the Jamabandi Ex.D-4 for the year 1965-66 whether the defendants were tenants under the mortgagee or mortgagor. According to Jamabandi for the year 1917-18 Ex.D-6 and for the year 1990-91 Ex.D-7 neither the defendant nor his ancestors were inducted as tenant under the original owners such as Chaudhary Hardyal etc. The plaintiff was put in possession vide rapat rojnamcha dated 18.9.1992.

12. This Court in ***Kanta Devi*** versus ***Khushia***, 1996 (2) Sim.L.C. has held as under:

> **"18. Section 2 (10) of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 defines "land owner" as meaning a person defined as such in the Himachal Pradesh Land Revenue Act, 1953 or the Punjab Land Revenue Act, 1887, as the case may be and shall include the predecessor or successor in interest of the land owner'. The definition of the word "land owner" as contained in section 4 (9) of the Himachal Pradesh Land Revenue Act, 1953 as well as in section 3 (2) of the Punjab Land Revenue Act, 1887 is practically the same. Both the sections provide that "land owner" does not include a tenant or an assignee of land revenue but does include a person to whom a holding revenue or of a sum recoverable as such an arrear, and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any share or portion thereof, or in the enjoyment of any part of the profits of an estate. This definition, prima facie, does not include a mortgagee. Therefore, a person holding the land as a tenant under the mortgagee cannot be deemed to be a tenant under a landowner. Therefore, the protection which was available to the tenant inducted by the mortgagee in Bhagat Ram's case (supra), cannot be extended to the defendant in the present case.**
>
> **19. Similarly in Prabhu v, Ramdeo and others, AIR 1966 SC 1721, the protection to the tenant inducted by the mortgagee was extended by virtue of section 15 of the Rajasthan Tenancy Act, 1955, which had come into force before the redemption of the mortgage by the mortgagor The statutory benefit was thus extended to the tenant inducted by the mortgagee in view of the relevant provisions of the Rajasthan Tenancy Act, 1955 and it was held that the tenant inducted by the mortgagee would become a tenant under the owner-mortgagor after the redemption of the mortgage. No such statutory protection, as stated above, is available to the defendant**

in the present case under any provision of the law as inforce at the time of the redemption of the mortgage."

CMP No. 626/2010

13. Appellant has also filed an application under Order 41 Rule 27 Code of Civil Procedure, plaintiff has filed the detailed reply to the same. Appellant wanted to produce on record copy of proceedings conducted by Land Reforms Officer, Kangra dealing with form No. L.R.-V under the H.P. Land Reforms Act and Rules. According to the appellant, plaintiff has admitted that defendant is tenant and had applied for redemption of land under H.P. Tenancy and Land Reforms Act. The Civil Suit was instituted on 2.3.1993 and the application filed is belated. These documents are not necessary for the adjudication of the matter.

14. Their Lordships of the Hon'ble Supreme Court in ***Union of India*** vs. ***Ibrahim Uddin and another***, (2012) 8 SCC 148 have held that party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court. There must be satisfactory reasons for non-production of the evidence in trial court for seeking production thereof in appellate court. Their Lordships have held as under:

> **"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).**
>
> **37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).**
>
> **38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that**

the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.

44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the

fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336).

45. In The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:

> **"We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence."**
>
> **(Emphasis added)**

A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad and Ors., AIR 2008 SC 1108.

46. A Constitution Bench of this Court in K. Venkataramiah (Supra), while dealing with the same issue held:

> **"It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."**
>
> **(Emphasis added)**

In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.

48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

Stage of Consideration :

49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053)."

15. Therefore, the present application is dismissed.

16. The substantial questions of law are answered accordingly.

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

CWP Nos. 4654 and 4708 of 2013.
Judgement reserved on: 19.11.2014.
Date of decision: 26.11.2014.

1. CWP No. 4654 of 2013.

Avtar Singh Dyal ..... Petitioner
Vs.
H.P. State Electricity Board Ltd. ..... Respondent.

2. CWP No. 4708 of 2013.

Salinder Singh ..... Petitioner
Vs.
H.P. State Electricity Board Ltd. & ors. ..... Respondents.

Constitution of India, 1950- Article 226- Petitioners were appointed as Junior Engineers in general open category - they belonged to ex-servicemen category and their case was not being considered in the category of ex-serviceman- respondent contended that the case of the petitioners could not be considered against the vacancy of ex-serviceman in view of direction of Hon'ble High Court in ***V.K. Behal vs. State of H.P & ors.*** reported in ***Latest HLJ 2009 (HP) 402*** - Rule 5(1) of the Demobilized Armed Forces Personnel (Reservation of vacancies in the Himachal Pradesh State Non- Technical Services) Rules, 1972 has two parts- first pertains to counting of services for fixation of the pay and second pertains to counting of service for the purpose of seniority- held, that in V.K. Behal case, Court had only considered the case for the seniority and not for fixation of the pay- therefore, respondents were not in position to say that petitioners are not entitled for the benefit of the military service for fixation of the pay. (Para-7 to 11)

Case referred:

V.K.Behal vs. State of H.P & ors. Latest HLJ 2009 (HP) 402

For the petitioner(s) : Mr. Ajay Sharma, Advocate, for the petitioner in CWP No. 4654 of 2013.
Mr. P.P.Chauhan, Advocate, for the petitioner in CWP No. 4708 of 2013.

For the respondents : Ms. Richa Sharma, Advocate, for the respondents.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioners have sought directions against the respondents for considering their case for appointment as Junior Engineers from the date of their appointment against the vacancy meant for Ex-serviceman alongwith all consequential benefits.

2. It is not disputed that the petitioners are Ex-servicemen and came to be appointed as Junior Engineers with the respondent-department in general open category. Now the grievance of the petitioners is that despite

available vacancies reserved for Ex-serviceman, their cases are not being considered against these vacancies. This action on the part of the respondent is stated to be illegal, arbitrary and contrary to the provisions of instructions contained in the Handbook on Personnel Matters, more particularly Para 18.4.6. which reads as under:-

> ***"18.4.6. Consideration of an ex-serviceman for recruitment against un-reserved posts and benefits as consequence thereof.*** *An ex-serviceman can also be recruited to non-reserved posts in the normal course. At the time of such appointment he should be required to opt whether he would like to be considered against the reserved vacancy as and when it arises. If he does so then the benefit of seniority, pay fixation etc. will be available under the Rules when the vacancy in question arises, and the reserved vacancy will be deemed to have been filled accordingly. If however, he does not so opt, the benefits of pay and seniority under the Rules will not be available to him and the next reserved vacancy will be filled by an ex-serviceman as per the procedure. This benefit of option is to be allowed to incumbents appointed against unreserved posts after the coming into force of the rules /instructions regarding availability of option for ex-serviceman in Non-Technical and Technical services/ posts and not from earlier dates."*

3. The respondents have filed their reply. However, the long and the short of it is that there were no vacancies of ex-serviceman quota available during 2008, 2009, 2010 and 2011 and the case of the petitioners was being considered against the vacancies against ex-serviceman quota which may fall vacant during the year 2012 against which the claim of the petitioners could be considered. But in the meantime, the respondents received a letter from the government informing them that a provision of Rule 5 (1) of Demobilized Indian Armed Forces Personnel Rules, 1974 had been quashed and the matter was now sub-judice before the apex court.

4. The petitioners filed rejoinders, wherein it is stated that as per information received under the Right to Information Act, in all, the names of 26 persons had been sponsored by the Ex-serviceman Cell, but three out of them did not join and many of those who had joined the service against the reserved posts stand superannuated from service and therefore, the cases of the petitioners could conveniently be considered against these vacancies.

5. When the matter came up for consideration before this Court on 20.11.2013, the respondents were directed to file a supplementary affidavit in CWP No. 4654 of 2013 meeting out the averments made in the rejoinder. The respondents filed supplementary affidavit wherein it is stated that a requisition to fill up 34 vacancies of Junior Engineers from the Ex-serviceman quota was sent to the Ex-serviceman Cell, Hamirpur against which 26 candidates were sponsored by the Ex-serviceman Cell. Subsequently, the Ex-serviceman Cell, Hamirpur directed the official respondents not to consider the candidature of the persons appearing at Serial Nos. 1, 8 and 23. However, vide letter dated 9.9.2008, it again sponsored the names of three candidates in their place. Out of aforesaid 26 persons one person namely Rasila Ram Bhardwaj did not join and the said post could not be filled in and given by the respondents to the Ex-serviceman recruited against general category. The person at Serial No. 31 also did not join, while the person listed at Serial No. 32 of Annexure P-6 vacated the post on his retirement on 30.6.2011. Besides these seven persons recruited through the Ex-serviceman quota were promoted and the said vacancies became available during 6/2012. Another vacancy became available on the retirement of person at Serial No. 33 on 31.8.2012 and yet again another vacancy became available on retirement of person at Serial No. 36 Sh. Kashmir Chand, who retired on 31.12.2011. The petitioners could not be appointed since there were four persons senior to them, who were waiting for their turn and consideration against these posts. Two vacancies which became available during the year

2011 would go to Salinder Singh and Tilak Raj who were senior to the petitioners and against the vacancies, which became available during 6, 2012, the claim of the persons at Serial Nos. 3 to 6 would be considered.

6. It was then submitted that this court in its judgement dated 29.12.2008 in ***CWP No. 488 of 2001 titled V.K.Behal vs. State of H.P & ors.*** reported in ***Latest HLJ 2009 (HP) 402*** has held that the Ex-servicemen, who are recruited during emergency alone are entitled for counting the service rendered in the military and the Ex-servicemen who joined the Indian Army as a career are not entitled for counting of service and the matter is now pending before the Hon'ble apex court.

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

7. Indisputedly the respondents were ready to consider the cases of the petitioners against the vacancy of ex-serviceman which would have arisen in the year 2012 but for the decision rendered by this court in ***V.K.Behal's*** case (supra), where this court held as follows:-

> "17. In view of the above discussion, the writ petition is allowed. The Provision of Rule 5(1) of the Rules are read down and they are held to be unconstitutional in so far as they give benefit of counting the past army service towards seniority in civil employment in case of ex-servicemen who have not joined the Armed forces during the period of emergency. It is also held that the benefit of such service can not be given from a date prior to the date when the ex-serviceman attains the minimum educational eligibility criteria prescribed in the rules. Consequently, the seniority list Annexure P-3 is held to be illegal and is accordingly quashed and the respondents are directed to re-frame the same in accordance with the directions issued hereinabove. There shall be no order as to costs."

Rule 5(1) of the Demobilized Armed Forces Personnel (Reservation of vacancies in the Himachal Pradesh State Non- Technical Services) Rules, 1972, reads thus:

> *"(1) Only the period of approved military service rendered after attaining the minimum age prescribed for appointment to the service concerned by the candidates appointed against reserved vacancies under the relevant rules, shall count towards fixation of pay and seniority in that service. This benefit shall however be allowed at the time of first civil employment only and it shall not be admissible in subsequent appointments of ex-servicemen who are already employed under the State/Central Govt. against reserved posts."*

8. In case the aforesaid rule is minutely analyzed, it would be seen that it comprises of two parts, 1st pertains to counting of service for the purpose of fixation of pay and 2nd pertains to counting of service for the purpose of seniority.

9. The question therefore, required to be determined is as to whether this court while deciding **V.K.Behal's** case (supra) declined all the benefits provided under Rule 5(1) (supra) to those ex-servicemen, who admittedly had joined the Armed Forces as a career. In our humble and considered opinion the court has only adjudicated upon the benefit of counting of past army service towards seniority in civil employment and has not adjudicated upon the conferment of benefit of past army service in so far it pertains to fixation of pay. In fact this claim was neither agitated by the petitioners therein nor adjudicated upon by this court. Rather what appears from the perusal of judgment is that even the petitioners therein had no

objection in case financial benefit like fixation of pay was granted to the ex-servicemen, as would be clear from para-3 of report, which reads as follows:-

> *"3. The main contention raised on behalf of the petitioners by Sh.Dalip Sharma is that the Rules are unconstitutional because they give benefit of even those ex-servicemen who had not joined service in the armed forces during the period of emergency. According to the petitioners, the persons who join the armed forces when the situation in the Country is normal do not do anything extra-ordinary and they join the armed forces like any other career and therefore, there is no rationale for giving them benefit of the service rendered by them in the armed forces for the purposes of pay and seniority. Sh. Dalip Sharma, learned counsel for the petitioners had urged that he is not in any manner arguing that the ex-servicemen do not form a separate class. He submits that to satisfy the tests of Article 14 not only should the classification be justified but there should be a reasonable nexus with the object sought to be achieved. It is his submission that if the object is to rehabilitate the ex-serviceman this object is served by providing reservations to them. However, according to him, there is no justification in granting them the benefit of seniority by adding the period of service rendered by them in the Army. He submits that once the persons are recruited from various sources and become members of one service no further distinction can be made between them on the ground of the past service rendered in a totally unrelated employment. In the alternative he submits that the benefit, if any, should be restricted to grant of financial benefits like fixation of pay only and the rights of other individuals who joined service much before the ex-servicemen cannot be jeopardized by giving the ex-servicemen benefit of adding the service rendered by them in the armed forces for reckoning their seniority. According to him, the case of ex-servicemen who joined armed forces during the period of emergency when the Nation was facing foreign aggression or when the sovereignty and integrity of the Country was at stake, stands on a completely different footing and the ex-servicemen who joined during emergency have to be treated as a different class. The benefit given to such ex-servicemen who joined during emergency cannot be extended to the person who joined service during normalcy. In the alternative it is urged that even if the Rule is held to be valid the deemed date of appointment cannot be from a date prior to such persons acquiring the minimum educational eligibility criteria prescribed in the Rules."*

10. Notably even this court did not find any illegality in so far as the pay of ex-servicemen was protected, as would be clear from the following observations:-

> *"10. There may exist an intelligible criteria for providing reservation to ex-servicemen. The object is also reasonable i.e.. to rehabilitate the ex-servicemen but this object can be achieved by providing reservations to them.Nobody is against such reservation. Their pay can also be protected. The problem arises when there is a conflict between persons from the civil society who have joined service much earlier than the ex-servicemen but then they are placed lower when the ex-servicemen who are given benefit of their past service regardless* of the fact whether they have joined during emergency or not."

11. Once this is the position, the respondents cannot under pretext of judgment in ***V.K.Behal's*** case (supra), being sub-judice before the Hon'ble Supreme Court, deny to the petitioners the benefit of approved military service for counting the same towards fixation of pay.

12. In so far as the question of counting the same towards the seniority is concerned, the same shall essentially have to abide by the decision of the apex court in ***V.K.Behal's*** case. In the event of the Hon'ble Supreme

Court ultimately deciding in favour of the ex-servicemen, then needless to say that the same benefit shall also have to be extended to the petitioners.

13. With these observations, the petitions are partly allowed. The respondents are directed to grant the benefit of approved military service towards fixation of pay after considering their cases against the vacancies of ex-servicemen, which have arisen in the year 2012.

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.

Dilbag Singh son of late Shri Bhoda Ram ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1280 of 2014
Order Reserved on 13th November,2014
Date of Order 26th November, 2014

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offence punishable under Section 306 read with Section 34 IPC - prima facie, the name of the applicant was mentioned in the suicide note of the deceased- custodial interrogation of the applicant is necessary keeping in view the gravity- grant of bail would affect the investigation adversely, therefore, application rejected. (Para- 7 to 9)

Cases reffered:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

Parvinderjit Singh and another vs. State (Union Territory Chandigarh) and another, AIR 2009 SC 502

For the Applicant: Mr. Surinder Saklani, Advocate.
For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General, Mr. J.S. Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 182 of 2014 dated 31.10.2014 registered under Section 306/34 IPC in Police Station Dehra District Kangra Himachal Pradesh.

2. It is pleaded that FIR was registered against the deceased in theft case. It is pleaded that deceased and applicant have cordial relations for years. It is pleaded that applicant has deposed in the theft case against the deceased and deceased had kept a grudge against the applicant. It is further pleaded that due to grudge name of applicant has been mentioned in the suicide note. It is pleaded that applicant will not abscond and will not tamper with prosecution evidence and will join the investigation. It is further pleaded that applicant will abide all conditions imposed by the Court. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. As per police report case under Section 306/34 IPC is registered against the applicant in P.S. Dehra vide FIR No. 182 of 2014 dated 31.10.2014. There is recital in police report that on dated 31.10.2014 statement of Shri Kushal Singh son of Rai Singh resident of VPO Gheori P.S. and Tehsil Dehra District Kangra (HP) was recorded. There is recital in police report that deceased Rai Singh son of Munshi Ram Age 52 years resident of VPO Gheori P.S. Dehra District Kangra H.P. was working as Secretary in the society. There is recital in police report that case under Section 420 IPC was registered and deceased was accused in that case. There is further recital in police report that deceased had obtained the interim anticipatory bail from Hon'ble High Court of H.P. Shimla which was pending for disposal. There is recital in police report that accused Dilbag Singh, accused Tilak Raj and accused Bhajan Singh were harassing the deceased since 10-15 days. There is also recital in police report that deceased committed suicide through rope of plastic. There is recital in police report that suicide note was also obtained. There is further recital in police report that post mortem of deceased was conducted at CHC Dehra and cause of death was mentioned as asphyxia as a result of ante mortem hanging. There is further recital in police report that statements of prosecutions witnesses were also recorded. There is also recital in police report that report of RFSL is still awaited and in case applicant is released on anticipatory bail applicant will threat the prosecution witnesses and will influence the investigation. 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 bail application filed under Section 438 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of anticipatory bail application?

Point No. 2

Final Order.

Findings upon Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that name of applicant was figured in the suicide note due to ill-will and grudge against the applicant and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. The fact whether the name of applicant was mentioned in the suicide note due to ill-will or grudge cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

8. Another submission of learned Advocate appearing on behalf of the applicant that applicant will abide all conditions imposed by the Court and on this ground anticipatory bail application filed by applicant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial

or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In present case there is prima facie suicide note against the applicant and case is at the initial stage of investigation. Court is of the opinion that custodial interrogation of applicant is essential in present case in view of the gravity of criminal offence registered against the applicant under Section 306 IPC. Court is of the opinion that if anticipatory bail is granted to the applicant at this stage then investigation of the case will be adversely affected. Court is also of the opinion that if anticipatory bail is granted to the applicant at this stage then interest of State and general public will also be adversely affected.

9. Submission of learned Additional Advocate General appearing on behalf of the State that investigation is in initial stage and allegations made against the applicant are grave in nature qua commission of criminal offence under Section 306 IPC and if applicant is released on anticipatory bail at this stage investigation will be adversely affected is accepted for the reasons hereinafter mentioned. It was held in case reported in ***AIR 2009 SC 502 titled Parvinderjit Singh and another vs. State (Union Territory Chandigarh) and another*** that order under Section 438 Cr.P.C. is neither a passport to the commission of crimes nor a shield against any kind of accusations.

10. In view of gravity of offence under Section 306 IPC and in view of the fact that investigation is at the initial stage and in view of suicide note against the applicant it is held that custodial interrogation is essential in present case. Point No.1 is answered in negative.

Point No. 2

Final Order

11. In view of my findings upon point No. 1 anticipatory bail application filed under Section 438 Cr.P.C. is rejected. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this anticipatory bail application filed under Section 438 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. AND HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

Karam Singh ...Appellant.
Versus
State of H.P. ...Respondent.

Cr.Appeal No.305 of 2011.
Reserved on: 21.11.2014.
Decided on: 26th November, 2014.

N.D.P.S. Act, 1985- Section 20- As per prosecution case, accused was found in possession of 4.85 kg. of charas- police officials carrying out the search were posted at different places- according to them, they had stayed in hotel- however, prosecution had not placed on record the registers of hotel located at Sunder Nagar or Karsog, which shows that prosecution version regarding this fact could not be relied upon- further, police officials had arrived in the private vehicle of Head Constable 'L' – in the absence of hotel record the whole version that police had stayed in

the hotel and had arrived in the vehicle became doubtful which makes the genesis of the incident suspicious. (Para-20)

N.D.P. S. Act, 1985- Section 55- Column No. 1 to 8 of NCB Form were filled up by I.O. – column No. 9 to 12 were filled by ASI Mohan Lal- however, he was not posted as SHO- therefore, he was not competent to sign the column No. 9 to 12- no Roznamcha was produced to prove that he was discharging duty of SHO or that SHO was absent from the police Station, which leads to an inference that the case property was not brought to the police station and the exercise was completed at a place other than Police Station. (Para-21)

For the Appellant: Mr.Harish Sharma, Advocate.
For the Respondent: Mr.P.M.Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed against the judgment, rendered on 10th June, 2011, by the learned Special Judge, Mandi, District Mandi, H.P., in Sessions Trial No.55 of 2010, whereby, the accused/appellant has been convicted and sentenced to undergo rigorous imprisonment for twelve years and to pay a fine of Rs.1,20,000/- under Section 20(b)(ii)(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein-after referred to as the 'NDPS Act') and in default of payment of fine, he has been sentenced to further undergo simple imprisonment for a period of two years.

2. The brief facts of the case are that on 28th July, 2010, Head Constables Laxman Dass, Tek Chand, Constables Vinod Kumar and Jitender Kumar were going towards Karsog to Kotlu. The accused was found coming from Teban when they reached Teban. He was carrying a polythene bag Ext.P-2 in his hand. He got frightened on seeing the police and tried to return. He was apprehended by the police. He revealed his name as Karam Chand son of Budhi Singh on inquiry. The polythene bag smelled of charas and the police became suspicious about the presence of Charas in the polythene bag. HC Laxman Dass informed the accused in writing that he was suspecting the possession of charas by the accused and the search of the accused was conducted. The accused also informed about his legal right to be searched before a Magistrate or a Gazetted Officer. The accused consented to be searched by the police at the spot. Memo Ext.PW-1/A was prepared. It was signed by HC Tek Chand, constable Vinod Kumar and the accused. HC Laxman Dass gave his personal search to the accused in presence of the witnesses. Memo Ext.PW-1/B was prepared. Polythene bag Ext.P-2 was checked and it was found to be containing black coloured substance in the shape of spheres and sticks. The substance was found to be charas on smelling. It was weighed and its weight was found to be 4.850 kilograms. Charas was put in the polythene bag and the bag was wrapped in a piece of cloth. The parcel was sealed with six impressions of seal 'D'. Sample seal was taken on separate pieces of cloths and one such impression is Ext.PW-1/C. NCB-1 form Ext.PW-8/A was filled in triplicate and seal impression was taken on NCB-1 form. The seal was handed over to witness Tek Chand after the use. Charas was seized vide seizure memo Ext.PW-1/D, which was signed by Tek Chand and C.Vinod Kumar. Copy of seizure memo was supplied to the accused and his signatures were also obtained. Ruka Ext.PW-14/A was prepared and it was sent to police station through constable Vinod Kumar. C. Vinod Kumar carried it to P.S.Karsog and handed it over to H.C. Gian Chand PW-3. Gian Chand recorded F.I.R. Ext.PW-3/A and handed over the case file to C. Vinod Kumar with the direction to carry it to the spot. Investigation was carried out by HC. Laxman Dass who prepared

site plan Ext.PW-1/B and recorded the statements of witnesses as per their version. The accused was arrested and memo of his arrest Ext.PW-1/E was prepared. The police party went towards P.S.Karsog in the vehicle of H.C. Laxman Dass. C.Vinod Kumar met the police party at Kelo Dhar and handed over the case file to H.C. Laxman Dass. H.C. Laxman Dass recorded his statement and proceeded to police station. The case property, case file and accused were produced before ASI Mohan Lal PW-8 who was working as SHO on that day. ASI Mohan Lal resealed the parcel with three impressions of seal C. He prepared memo of resealing Ext.PW-1/F. Sample seal was taken separately on separate pieces of cloths and one such impression is Ext.PW-1/G. NCB-1 form Ext.PW-8/A was filled in triplicate and seal impression was put on NCB-1 form. Seal was handed over to HC Tek Chand after the use. The case property sealed with three impressions of seal C and six impressions of seal D, NCB-1 form in triplicate, seal impressions C and D were handed over to MHC Gian Chand for depositing these in Malkhana. MHC Gian Chand made an entry in the register of malkhana, the copy of which is Ext.PW-3/B and deposited all these articles in Malkhana. He handed over all these articles to PW-4 C. Bhaskar Bhanu alongwith docket on 29.07.2010 with the direction to carry these to FSL Junga vide RC No. 119/10, the copy of which is Ext.PW-3/C. C. Bhaskar Bhanu deposited all these articles at FSL Junga and handed over the receipt to MHC on his return. Special report, the copy of which is Ext.PW7/A was handed over to Raj Kumar SDPO, who handed it over to his Reader PW-7 HC Ram Lal on the same day. HC Ram Lal made an entry in the register of special report, copy of which is Ext.PW-7/A and filed the special report in the record. Result of chemical analysis Ext.PW-5/A was issued in which it was shown that the sample was of charas, which was containing 27.62% of resin in it. Affidavit of Raj Kumar Ext.PW-6/A was taken into possession. On conclusion of investigation into the offences, allegedly committed by the appellant/accused, challan was filed under Section 173 of the Code of Criminal Procedure.

3. The accused was charged for his having committed offences punishable under Section 20 of the NDPS Act by the learned trial Court, to which he pleaded not guilty and claimed trial.

4. In proof of the prosecution case, the prosecution examined as many as 14 witnesses. On closure of the prosecution evidence, statement of appellant/accused under Section 313 Cr.P.C. was recorded by the Court in which the accused claimed false implication and pleaded innocence. In defence, the appellant/accused examined two witnesses.

5. On appraisal of evidence on record, the learned trial Court convicted and sentenced the accused for his having committed the offence, aforesaid.

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

7. On the other hand, the learned Deputy Advocate General, appearing for the respondent-State, has, with considerable force and vigour, contended that the findings of conviction, recorded by the Court below, are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The first witness, who stepped into the witness box, in support of the prosecution case, is, PW-1 Tek Chand. He, in his deposition, deposes a version in square tandem to the prosecution story, referred to herein-above. In his cross-examination he deposes that HC Lachhman Dass had recorded his statement on 28.7.2010. He further deposes that C. Vinod Kumar met the police party at Kelodhar. He continues to depose that HC Lachhman Das was posted in S.I.U on 28.7.2010. Constable Jitender Kumar and C. Vinod Kumar were probably posted in Police Line Mandi at that time. He further deposes that C.Vinod Kumar, H.C. Lachman and C. Jitender Kumar met him in P.S. Sundernagar. He further deposes that they proceeded in a private vehicle of H.C.Lachhman Dass and stayed in Kumar Hotel during the night at Karsog. He further deposes that people were going from that place after the completion of investigation but no person went to during the investigation. I.O. had not sent any police official to call independent person.

10. Constable Vinod Kumar (PW-2), in his deposition, deposes a version in square tandem to the prosecution story, referred to herein-above and as also in corroboration to the testimony of PW-1. In his cross-examination, he deposes that his statement was recorded at Kelodhar on 28.7.2010 in a private vehicle of HC Lachhman Dass. He further deposes that MHC of PL Mandi asked him to accompany H.C. Lachhman Dass towards Karsog and Sundernagar. He further deposes that they stayed in a hotel at Sundernagard during the night and did not remember the name of the hotel. He further deposes that he had not report his arrival at P.S.Karsog. He further deposes that he do not know the name of the hotel in which they stayed at Karsog. He proceeds to depose that there is a market at Kotlu. He feigns ignorance about the name of the place where the accused was apprehended. He goes on to depose that the search of polythene bag was conducted first. Ext.PW-1/A was prepared after the search was conducted by the Investigating Officer and Ext.PW-1/D was prepared by the Investigating Officer at the spot while he was sitting. NCB-I form is stated to be filled at the spot in the presence of this witness. He feigns ignorance that which columns were filled in by Investigating Officer. Investigating Officer had taken the seal impression only on one piece of cloth. He denies the suggestion, put to him, that H.C. Laxman Dass and Constable Jitender Kumar were present at Kotlu on 27.7.2010 and he was never associated with the raiding party. He proceeds to depose that ASI was discharging the duties of S.H.O. at that time and did not remember his name.

11. PW-3 (HC Gian Chand) deposes that Constable Vinod Kumar brought one Ruqua (Mark A) to Police station on 28.7.2010 on which this witness recorded the F.I.R. Ext.PW-3/A in the official computer of the Police Station, print out of which is deposed to have been signed by ASI Mohan Lal. He further deposes that the case file was prepared and handed over to Constable Vinod Kumar with a direction to carry it to the spot. ASI/SHO Mohan Lal handed over one parcel sealed with six impressions of seal 'D' and three impressions of seal 'E'. This witnesses further deposes that he made an entry at Sr.No.403 in the register of Malkhana, the copy of which is Ext.PW-3/B and deposited these articles in the Malkhana. He proceeds to depose that he took all these articles from Malkhana on 29.7.2010 and handed over to Constable Bhaskar Bhanu with a direction to deposit the same at FSL Junga vide RC No.119/10, copy of which is Ext.PW-3/C. He admits the suggestion that he had not made an engtry regarding the time of deposit in the Malkhana register and the NCB-1 Form in triplicate was written subsequently.

12. PW-4 (Constable Bhaskar Bhanu) deposes that MHC Gian Chand handed over one parcel sealed with six impressions of seal 'D' and three impressions of seal 'C' along with NCB-1 Form in triplicate, docket number

5516, sample seals on 29.7.2010 with a direction to carry these to FSL, Junga vide RC No.119/10. He further deposes that he deposited all the articles at FSL, Junga and handed over the receipt to MHC on his return.

13. PW-5 (Constable Devu Ram) deposes that he brought the result Ext.PW-5/A and a parcel sealed with seal impressions of FSL-II from FSL, Junga on 21.8.2010 and deposited all these articles with MHC on 22.8.2010.

14. PW-6 (Constable Vijay Kumar) deposes that Constable Devu Ram handed over one sealed parcel sealed with seven impressions of FSL-II on 22.8.2010 along with one sealed envelope containing the result of Chemical analysis Ext.PW-5/A and NCB-I Form and handed over the result and NCB-I Form to Investigating Officer ASI Mohan Lal and deposited the parcel in Malkhana. He further deposes that an entry was made at Sr.No.403, the copy of which is stated to be Ext.PW-3/B. He proceeds to depose that he conducted the investigation in this F.I.R. and took the copy of special report from the Reader to SDPO, Sundernagar and the copy of the register regarding special report. In his cross-examination, he deposes that ASI Mohan Lal was discharging the duties of SHO on 27.7.2010 to 28.7.2010. He denies the suggestion, put to him, that Amar Chand Sharma was discharging the duties of SHO during those days.

15. PW-7 (HC Ram Lal) deposes that Raj Kumar Chandel, SDPO Sundernagar handed over the special report, copy of which is stated to be Ext.PW-7/A, to him on 29.7.2010 at 12.40 p.m. and made an entry in the register of special report at Sr.No.115. The endorsement and signatures of SDPO are stated by this witness to be inside the red circle of Ext.PW-7/A.

16. PW-8 (ASI Mohan Lal) deposes that Constable Vinod Kumar brought one ruqua Mark-K on 28.7.2010 at 10:25 a.m. to Police Station and F.I.R. Ext.PW-3/A was recorded on the basis of said ruqua which is stated by this witness to be signed by him. He further deposes that HC Laxman Dass brought one parcel sealed with six impressions of seal 'D' in the Police Station at 2 p.m. on the same day along with the sample seal 'D'. NCB-I Form in triplicate, case file and the accused were produced before him. He further deposes that he re-sealed the parcel with three impressions of seal 'C' in the presence of HC Tek Chand, MHC Gian Chand and HC Laxman Dass and the sample seal was taken separately on a piece of cloth and one such impression is Ext.PW-1/G. Seal was handed over to HC Tek Chand after its use. He proceeds to depose that the specimen of seal was taken on the NCB-I Form Ext.PW-8/A. He further deposes that he handed over all these three articles to MHC Gian Chand for depositing the same in the Malkhana. He proceeds to depose that he prepared the re-sealing memo Ex.PW1/F and also recorded the statements of Constable Devu Ram, H.C. Vijay Kumar, Constable Virender Kumar, MHC Gian Chand and Constable Bhaskar Bhanu.

17. PW-9, (SHO Amar Chand Sharma), prepared the challan in this case and presented it before the learned trial Court. PW-10 Constable Virender Kumar carried the special report to SDPO Sunder Nagar and handed over it to SDPO on the same day at 12.30 P.M. PW-11 H.C. Kamal Deep deposes that Ex.PW-11/A is the true copy of the original register brought by him in Court. PW-12 HHC Manoj Kumar, proved the report No.10 of 26.7.2010, Ex.PW12/A. PW-13 H.C. Tak Chand deposes that the name of the Court in entry No.11(A) of 27.7.2010 was wrongly mentioned as Addl. Sessions Court whereas he had proceeded to the Court of Ld. JMIC, Karsog, vide DD No.12 dated 25.7.2010.

18. PW-14 H.C. Laxman Dass, in his deposition deposes a version in square tandem to the prosecution story, as referred to hereinabove, as also in corroboration to the testimonies of PW-1 and PW-2. In cross-examination he deposes that he cannot tell the distance between Kotlu and Teban is eight kilometers. He admitted the suggestion that he was having any authority letter

to carry out the search. He denied the suggestion that he was having sufficient time to intimate his superior. He deposes that there were chances of escape of the accused. He further deposes that he has not sent any police official to call any independent witness. He has denied the suggestion that father of the accused had visited the police station at 10.00 a.m. He further deposes that he had not sent the information under Section 57 to his superior officer because he had handed over the case file and case property to the SHO and left the Police Station. He has denied the suggestion that he had not visited the spot. He has denied the suggestion that Tek Chand was not accompanying them.

19. The proceedings, relating to search, seizure and recovery of contraband from the alleged conscious and exclusive possession of the accused, were purportedly concluded at place Kotlu falling under Police Station, Karsog. However, the police party, comprising Head Constable Tek Chand, Head Constable Laxman Dass, Constables Vinod Kumar and Jitender Kumar, all are police officials not of Police Station, Karsog, rather PW-1 Head Constable Tek Chand was posted at Police Station, Sundernagar, whereas, Head Constable Laxman Dass and Constable Jitender Kumar were posted in Police Line, Mandi at the relevant time. Head Constable Laxman Dass, Constable Vinod Kumar and Constable Jitender Kumar of Police Line, Mandi had met Head Constable Tek Chand at Sundernagar. They stayed overnight in a Hotel at Sundernagar. They proceeded for Karsog in a private vehicle of Head Constable Laxman Dass along with the latter. On 28.7.2010, when they were performing patrolling duty, then at some distance ahead of Kotlu at about 6.15 a.m. the alleged occurrence took place. However, preceding theirs having allegedly recovered contraband from the purported exclusive and conscious possession of the accused as is apparent on a reading of the cross-examination of PW-1, they stayed overnight at Kumar Hotel, Karsog. The prosecution has not placed on record potent material comprised in the adduction into evidence of Hotel Registers of the Hotel at Sundernagar where the police officials other than Head Constable Tek Chand stayed overnight before proceeding there-from to Karsog nor also there is adduction into evidence of the Hotel Register of Kumar Hotel Karsog where on the arrival of the police officials there, they had stayed there overnight before on the succeeding day, proceeding to the place of occurrence. The absence of adduction into evidence of the Hotel Registers of the Hotels situated both at Sundernagar and Kumar Hotel, Karsog with their concomitantly displaying therein entries of the factum of the police officials having stayed respectively at both the places spurs a conclusion that the prosecution has been unable to unfailingly and convincingly bring forth unflinching evidence conveying the fact of stay overnight of the police officials other than PW-1 at Sundernagar before their departure to Karsog or also qua the fact of theirs having subsequent to their departure from Sundernagar to Karsog theirs having stayed overnight at the latter destination. Absence of the above evidence rids the prosecution version qua the aforesaid factum of departure of police officials from Sundernagar to Karsog as also qua their stay overnight at Karsog with the malady of prevarication. Furthermore, the police officials had purportedly traveled in a private vehicle of Head Constable Laxman Dass. The defence has put suggestions to the prosecution witnesses of Laxman Dass being unavailable at the site of occurrence. The factum of absence of HC Laxman Dass at the site of occurrence gains succor in the face of non adduction into evidence of Hotel Registers of Hotels at Sundernagar and at Karsog with entries therein marking and portraying the factum of Head Constable Laxman Dass, then while accompanying the police officials having stayed there overnight along with them at Sundernagar and at Karsog wherefrom the latter place, they departed for the site of occurrence. Consequently, it has to be invincibly concluded, even if the police officials, other than Head Constable Laxman Dass, had traveled from Sundernagar to Karsog in a mode other than the vehicle of Head Constable Laxman Dass of the latter being unavailable with them at the site of occurrence, besides as a corollary, the aforesaid discussion marking the absence of HC

Laxman Dass at the site of occurrence along with the other police officials ingrains with doubt the prosecution version, of the entire proceedings at the site of occurrence having taken place in his presence. However, with the prosecution pressing the fact of HC Laxman Dass being present along with other police officials at the site of occurrence stands to, hence render its version bereft of veracity. In aftermath, the genesis of the prosecution version of Head Constable Laxman Dass having accompanied the other police officials to the site of occurrence when suffering from prevarication, also concomitantly erodes the genesis of the prosecution version.

20. Furthermore, a perusal of the NCB Form, as existing on record, displays that Columns No.1 to 8 were filled in by the Investigating Officer, SIU Mandi. He being the Investigating Officer, Special Investigation Unit, Mandi, was competent to fill Columns No.1 to 8, the columns existing at Sr.Nos.9, 10, 11 and 12 of the NCB Form, pertaining to re-sealing, have, however, been signatured by PW-8 ASI Mohan Lal of Police Station, Karsog. A legal obligation, however, was cast upon the SHO of the police station concerned for rendering legal sacrosanct the filling of Columns existing at Sr.Nos.9, 10, 11 and 12 of the NCB form that they be filled up and signatured by him. PW-8 being not the S.H.O. did not enjoy the legal competence to signature the Columns existing at Sr.Nos.9, 10, 11 and 12 of the NCB Form. His being dis-empowered to signature the entries in Columns No.9, 10, 11 and 12 of the NCB Form renders the factum of entries recorded against Columns No.9, 10, 11 and 12 to be hence enjoying no legal sanctity besides belying the authenticity of the portrayals against Column Nos.9, 10, 11 and 12 of the NCB form. The effect thereof, is, that the factum of re-sealing of the seized contraband from the purported conscious and exclusive possession of the accused comes to be smeared with a taint of suspicion and spuriousness devolving upon its authenticity. Even though, the prosecution contends that since the S.H.O. was not present at the relevant date, hence, PW-8 was discharging the duties in his absence, as such, the entries in Column Nos.9, 10, 11 and 12 of the NCB Form signatured by PW-8 are not deprived of their authenticity. However, in the face of omission of adduction of cogent evidence comprised in the Roznamcha of the Police Station concerned and its manifesting the fact of PW-9 the S.H.O. of Police Station, Karsog having departed there from on the relevant date on account of leave or his being busy elsewhere, leaves scope for an inference that PW-9 was not either on leave nor had proceeded elsewhere for performing public duty on the relevant date, rather was in the Police Station, as such, he alone when competent to signature the entries in Column Nos.9, 10, 11 and 12 of the NCB Form, his having omitted to do so, rather PW-8 having proceeded to do so, displays that the recovered contraband was not as portrayed by the prosecution brought to the Police Station, Karsog for carrying out the exercise of re-sealing or its being deposited in the Malkhana, rather the exercise was completed at a place other than Police Station, Karsog rendering suspect, hence, the factum of re-sealing of the contraband. Cumulatively the conclusion with aplomb which can be formed is that the entries in Column Nos.9, 10, 11 and 12 are suspect and do not carry forth the prosecution case that the contraband allegedly recovered from the conscious and exclusive possession of the accused was seized in the legally ordained manner. The formation of the above conclusion leads to a further apt conclusion that the property as allegedly recovered from the conscious and exclusive possession of the accused and sent for examination to FSL, Junga was not the property as recovered from the conscious and exclusive possession of the accused, rather when may have been tampered with, hence, was not the property recovered from the alleged conscious and exclusive possession of the accused, besides, abundant space is left open for an inference that the opinion rendered on the case property as sent to FSL, Junga was not an opinion rendered on the case property recovered from the conscious and exclusive possession of the accused, rather was qua some other case property. In aftermath, the opinion as rendered by the FSL comprised in Ext.PW-5/A is to

be concluded to be not linkable to the accused. In other words, the consummate link in the chain of circumstances comprised in the opinion of the FSL gets unerringly broken and severed, prodding this Court to give the benefit of doubt to the accused.

21. The infirmities, aforesaid, noticed by this Court erode the substratum and bed-rock of the prosecution version as the infirmities are pervasive and major. Furthermore, even though the testimonies of the prosecution witnesses would not lose their veracity on the solitary score of non association of independent witnesses, if otherwise they are credible. However, when for reasons afforded herein-above, their testimonies are bereft of truth, therefore, when entwined with the fact of non association of independent witnesses by the Investigating officer in the proceedings relating to search, seizure and recovery despite availability, as pronounced in the testimony comprised in the cross examination of PW-2 of a small market being available at Kotlu inhabitants whereof / residents whereof could well have been joined as witnesses to lend a hue of impartisanship as well as transparency to the prosecution case. In sequel, omission of concerted efforts on the part of the Investigating Officer to join them in the proceedings relating to search, seizure and recovery of contraband despite availability constrains this Court to conclude that such omission was prompted by no reason other than the Investigating Officer carrying out a slanted and tainted investigation, besides smothering the truth of the investigation. Obviously, then a smothered, slanted and tainted investigation is not to be imputed credibility.

22. In view of the above discussion, the appeal is allowed and the impugned judgment, rendered on 10th June, 2011, by the learned Special Judge, Mandi, H.P., in Sessions Trial No.55 of 2010, is set aside. The appellant is acquitted of the offence charged. He be set at liberty forthwith, if not required in any other case. The fine amount, if any, deposited by the accused/appellant be refunded to him.

23. The Registry is directed to prepare the release warrant of the appellant and send it to the Superintendent of the Jail concerned, in conformity with this judgment forthwith. Records of the trial Court be sent down forthwith.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Ramesh Chand ....Appellant.
Vs.
Kamli Ram and others ....Respondents.

FAO No.115 of 2014
Reserved on : 21.11.2014.
Date of Decision: November 26, 2014.

Code of Civil Procedure, 1908- Order 41- Appellate Court framed additional issues and remanded the case for trial - held, that Appellate Court should not have remanded whole matter for consideration on all issues but should have obtained the findings on additional issues so framed by it. (Para- 6 to 9)

Code of Civil Procedure, 1908- Order 43 Rule 1- An appeal against the order of wholesale remand would lie under Order 41 Rule 1(u) of CPC. (Para-11 to 15)

Cases referred:

Nagar Mal and another v. Bimal Kumar and another, Latest HLJ 2005(HP) 679

Prem Kumar and others v. Parkash Chand and others, 2002(3) SLC 358
Jabbar Singh v. Shanti Swaroop, 2006 (3) SLC 58
Mangluram Dewangan v. Surendra Singh and others, (2011) 12 SCC 773
Jegannathan v. Raju Singamani and another, (2012) 5 SCC 540
Shanmugam v. Ariya Kshatriay Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, (2012) 6 SCC 430
Narayanan v. Kumaran and others, (2004) 4 SCC 26

For the Appellant : Mr. Sanjeev Kuthiala, Advocate.
For the Respondents : Mr. G.S. Rathore, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

In the instant appeal, following points arise for consideration:

1. As to whether after framing of additional issues, the lower Appellate Court was right in remanding the matter for consideration afresh on all issues, by setting aside the judgment and decree so passed by the trial Court or not?
2. As to whether the present appeal so filed under the provisions of Order 43 Rule 1-A of the Code of Civil Procedure, assailing the order of remand, is legally maintainable or not?

2. Having heard learned counsel for the parties as also perused the record, this Court is of the considered view that the issues arising for consideration are no longer res-integra.

3. Appellant Ramesh Chand, hereinafter referred to as the plaintiff, filed a suit for permanent prohibitory injunction against the defendants-respondents, hereinafter referred to as the defendants. Based on respective pleadings of the parties, trial Court framed the following issues:

1. Whether the plaintiff is entitled for injunction? OPP
2. Whether the plaintiff has no locus-standi to file the present suit? OPD
3. Whether the suit is not maintainable in the present form? OPD
4. Whether there is no cause of action to file the present suit? OPD.
5. Relief.

4. After appreciation of evidence on record, trial Court found favour with the evidence so led by the plaintiff and decided the issues in his favour, decreed the suit vide judgment and decree dated 27.11.2013, passed in Civil Suit No.145 of 2009, titled as *Ramesh Chand versus Kamli Ram and others*, restraining the defendants from interfering in the function of Kardar of Devta Markandey Rishi Ji and also taking away the Devta for the function from temple Percha without permission of the Kardar.

5. Lower Appellate Court, vide impugned order dated 11.3.2014, passed in Civil Appeal No.114 of 2013, titled as *Kamli Ram and others v. Ramesh Chand,* set aside said judgment and decree, and by framing the following additional issues, remanded the matter for consideration afresh, on all the issues:

4(a) Whether plaintiff is Kardar of Devta Markandey Rishi? OPP

4(b) Whether defendant No.1 has been authorized by the District Magistrate, Kullu as duly appointed Kardar of Devta Markandey Rishi? OPD

Operative portion of the impugned order reads thus:

> "For the reasons, recorded herein above, the appeal filed by the appellants is allowed and the judgment and decree passed by the learned trial Court in civil suit No.145 of 2009 dated 27.11.2013 is hereby set aside. The case is remanded to the learned trial court with the directions to give opportunity to both the par5ties to lead evidence on the aforesaid amended issues framed by this court and, thereafter, to take into account all the evidence together and decide the suit afresh. Parties shall bear their own costs. However, parties through counsel are directed to appear before the learned trial Court on 25.03.2014. The record of the learned trial Court be returned with a copy of this judgment and the file of this Court after due completion be consigned to record room."

6. In somewhat similar circumstances, this Court in ***Nagar Mal and another v. Bimal Kumar and another,*** **Latest HLJ 2005(HP) 679,** deprecated the practice of wholesale remand of the case by the appellate Court, more so keeping in view the provisions of Order 41 of the Code of Civil Procedure.

7. A Division Bench of this Court in ***Prem Kumar and others v. Parkash Chand and others,*** **2002(3) SLC 358,** while dealing with an identical issue, held that:-

> "6. Learned Counsel for the appellants contended that the directions issued by the learned Additional District Judge are not in accordance with the provisions of Rules 23, 23-A or 25 of Order 41, Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code'). He submitted that the appellate Court can make an order of remand either under Rule 23 or 23-A or Rule 25 of Order 41 of the Code.
>
> 7. So far as Rule 23 is concerned, the said provision obviously is not applicable to the case in hand in view of the fact that the trial Court had not disposed of the suit on a preliminary point. The question, therefore, is either the order is passed by the first appellate Court under Rule 23-A or Rule 25 of Order 41 of the Code. But, in either case, contended the learned Counsel, it was obligatory on the part of the first appellate Court to frame issue(s). If the first appellate Court was of the view that the decree passed by the trial Court was liable to be reversed which had been passed on merits, it was open to the appellate Court if it thought fit to remand the matter by directing what issue or issues should be framed in the case so remanded and by sending a copy of the judgment or order to the Court from whose decree the appeal was preferred, i.e., to the trial Court. But the said course has not been adopted by the first appellate Court. Similarly, Rule 25 has also not been invoked inasmuch as it was incumbent upon the first appellate Court to frame issue or issues and refer the same to the trial Court from whose decree the appeal is preferred by directing the said Court to take additional evidence if required, proceed to try such issue or issues and return the evidence to the appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the appellate Court. That is, however, not done. Hence, in either case, the order passed by the first appellate Court deserves to be quashed and set aside.
>
> 8. We find considerable force in the argument of the learned Counsel for the appellants. In our opinion, in either case, i.e. either under Rule 23-A

or under Rule 25 of Order 41 of the Code, the first appellate Court ought to have framed additional issue(s) and ought to have issued necessary directions. In our considered opinion, the order passed by the first appellate Court is not in conformity with law. It is, therefore, liable to be quashed and set aside. Accordingly, the appeal filed by the appellants stands allowed. The order passed by the Additional District Judge, Mandi, dated 30th June, 2001 is hereby quashed and set aside by directing the appellate Court to pass an appropriate order by framing necessary issue(s) and by making necessary directions to the trial Court. In the facts and circumstances of the case, no order as to costs."
(Emphasis supplied)

8. Lower appellate Court, rather than setting aside the judgment and decree, without adjudicating the issues on merit and remanding the matter for trial and consideration of all issues, ought to have resorted to the provisions of Order 41 Rule 25 of the Code of Civil Procedure. (See: ***Jabbar Singh v. Shanti Swaroop,* 2006 (3) SLC 58**).

9. Thus, in the instant case, order of wholesale remand is legally unsustainable. Point No.1 is thus answered accordingly.

10. While contending that the impugned order dated 11.3.2014, passed by the lower appellate Court, is not a decree, so as to fall within the ambit and scope of 'decree', so defined in Section 2(2) of the Code of Civil Procedure, Mr. Sanjeev Kuthiala, learned counsel for the plaintiff, has rightly invited attention of this Court to the decision rendered by the Hon'ble the Supreme Court of India in ***Mangluram Dewangan v. Surendra Singh and others*, (2011) 12 SCC 773**, wherein it has been held as under:

"11. We may next consider the remedies available to an applicant whose application under Order 22 Rule 3 of the Code, for being added as a party to the suit as legal representative of the deceased plaintiff, has been rejected. The normal remedies available under the Code whenever a civil court makes an order under the Code are as under:

(i) Where the order is a 'decree' as defined under section 2(2) of the Code, an appeal would lie under section 96 of the Code (with a provision for a second appeal under section 100 of the Code).

(ii) When the order is not a 'decree', but is an order which is one among those enumerated in section 104 or Rule 1 of Order 43, an appeal would lie under section 104 or under section 104 read with order 43, Rule 1 of the Code (without any provision for a second appeal).

(iii) If the order is neither a 'decree', nor an appealable 'order' enumerated in section 104 or Order 43 Rule 1, a revision would lie under section 115 of the Code, if it satisfies the requirements of that section.

12. When a party is aggrieved by any decree or order, he can also seek review as provided in Section 114 subject to fulfillment of the conditions contained in that section and Order 47 Rule 1 of the Code. Be that as it may. The difference between a 'decree' appealable under section 96 and an 'order' appealable under section 104 is that a second appeal is available in respect of decrees in first appeals under section 96, whereas no further appeal lies from an order in an appeal under section 104 and Order 43, Rule 1 of the Code. The question for consideration in this case is whether the order dated 31.8.1996 of the trial court dismissing an application under Order 22 Rule and consequently dismissing the suit is an order amenable to the remedy of appeal or revision. If the remedy is by way of appeal, the incidental question would be whether it is under section 96, or under section 104 read with Order 43, Rule 1 of the Code.

13. Section 96 of the Code provides that save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decision of such court. The word 'decree' is defined under section 2(2) of the Code thus:

> "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include -
>
> > (a) any adjudication from which an appeal lies as an appeal from an order, or
> >
> > (b) any order of dismissal for default.
>
> Explanation.--A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

14. A reading of the definition of decree in Section 2(2) shows that the following essential requirements should be fulfilled if an order should be treated as a 'decree' :

> (i) there should be an adjudication in a suit;
>
> (ii) the adjudication should result in a formal expression which is conclusive so far as the court expressing it;
>
> (iii) the adjudication should determine the rights of parties with regard to all or any of the matters in controversy in the suit; and
>
> (iv) the adjudication should be one from which an appeal does not lie as an appeal from an order (under section 104 and order 43 Rule 1 of the Code) nor should it be an order dismissing the suit for default. (emphasis supplied)"

11. In fact, while dealing with identical issue, the said Court in ***Jegannathan v. Raju Singamani and another*, (2012) 5 SCC 540**, has held that an appeal against an order of wholesale remand would lie under clause (u) of Rule 1 Order 43 of the Code of Civil Procedure.

12. While opposing maintainability of the appeal, Mr. G.S. Rathore, learned counsel for the respondents, has referred to and relied upon decisions rendered by Hon'ble the Supreme Court of India in *A*. ***Shanmugam v. Ariya Kshatriay Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam*, (2012) 6 SCC 430;** and ***Narayanan v. Kumaran and others*, (2004) 4 SCC 26**. I have perused the same. The ratio of law laid down therein is squarely inapplicable to the given facts and circumstances.

13. In fact, Court had the occasion to deal with *Narayanan (supra)* in *Jegannathan (supra)*, and observed as under:

> "11. The High Court relied upon a decision of this Court in the case Narayanan Vs. Kumaran & Ors. (2004) 4 SCC 26 in holding that Civil Miscellaneous Appeal from the order of remand was not maintainable. The High Court was clearly in error. What has been held by this Court in Narayanan is that an appeal under Order 43 Rule 1 Clause (u) should be heard only on the ground enumerated in Section 100 of the Code. In other words, the constraints of Section 100 continue to be attached to an appeal under Order 43 Rule 1(u). The appeal under Order 43 Rule 1(u)

can only be heard on the grounds a second appeal is heard under Section 100.

12. There is a difference between maintainability of an appeal and the scope of hearing of an appeal. The High Court failed to keep in view this distinction and wrongly applied the case of Narayanan in holding that miscellaneous appeal preferred by the appellant was not maintainable."

14. The appeal is legally sustainable. Point No.2 is answered accordingly.

15. Thus, for the aforesaid reasons, appeal is allowed and the impugned order dated 11.3.2014, passed in Civil Appeal No.114 of 2013, titled as *Kamli Ram and others v. Ramesh Chand,* is quashed and set aside. Matter is remanded back to the lower appellate Court with a direction to pass a fresh order, in compliance of provisions of Order 41 of the Code of Civil Procedure. Parties are directed to appear before the lower appellate Court on 22.12.2014. Records of the Courts below be returned immediately.

16. Assistance rendered by Mr. Sanjeev Kuthiala, Advocate, is highly appreciated. Appeal stands disposed of, so also the pending application(s), if any.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Ramesh Chand and others .....Petitioners.
Versus
Trilok Chand .....Respondent.

CMPMO No.142 of 2014.
Judgment reserved on : 13.11.2014.
Date of decision: 26th November, 2014.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Applicant filed an application seeking mandatory injunction directing the respondents to remove the lock put on the gate- record showed that the applicant had constructed a house and a path adjoining the Kuhal to his house- respondent had put a gate on the path- applicant produced a certificate from Gram Panchayat showing that he had started construction work about 11 years ago and had carried material from the path through vehicle – this was the only path available to the applicant to go to his house – a compromise in another suit also showed that there was a path which was four meters wide and it was being used for going to the house of the applicant- held, that in these circumstances, the mandatory injunction was rightly granted. (Para-10 to 18)

Cases referred:

M.Gurudas and others versus Rasaranjan and others (2006) 8 SCC 367

Surya Dev Rai versus Ram Chander Rai and others (2003) 6 SCC 675

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

For the Respondent : Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition under Article 227 of the Constitution of India is directed against the order dated 13.01.2014 passed by the learned Additional District Judge-III, Kangra at Dharamshala, Camp at Baijnath, in Civil Misc. Appeal No.32-B/XIV/13/08, whereby he dismissed the appeal preferred by the petitioners/appellants and affirmed the order dated 14.11.2008 passed by the learned Civil Judge (Senior Division), Baijnath, in CMA No.103/2008 under Order 39 Rules 1 and 2 CPC.

The facts, in brief, may be noticed thus.

2. Respondent herein has filed a suit for mandatory and permanent prohibitory injunction against the petitioners herein in which an application under Order 39 Rules 1 and 2 read with Section 151 CPC was filed and prayed for issuance of ad interim mandatory injunction against the petitioners directing them to remove the lock unauthorizedly and illegally put on the gate of respondent in land comprising Khata No.315min, Khatauni No.612, Khasra No. 1834, situate in Mohal Dharehrr, Mauza Deol, Tehsil Baijnath, District Kangra, whereby the passage 'IJKL' shown in site plan passing through the land comprising Khata No.315min, Khasra Nos.1834, 1838 and 1839, has been permanently blocked. It is averred that the petitioners be restrained from creating any sort of obstacle/obstruction in the use of said passage leading from main Baijnath-Phatahar Road to the land and house of the respondent situate in Khasra No.1836 and 1838 of Khata No.315 min. The land comprising Khasra No.1836 measuring 0-41-68 hectares is exclusively owned and possessed by the respondent as the same has been purchased from Bishan Dass, son of Kunda Ram vide registered sale deed dated 02.02.1996. The respondent is a co-owner in possession to the extent of 280/3472 share of the land comprising Khata No. 315, Khatauni No.614, Khasra No. 1838 measuring 0-37-72 hectares i.e. 0-02-80 hectares, situate in Mohal Dharehrr, Mauza Deol, Tehsil Baijnath, District Kangra. The said land has been purchased vide sale deed dated 13.01.2004. The land comprising Khata No.315, Khatauni No.640, Khasra No.1835 measuring 0-05-00 hectares described as 'Gair Mumkin Kuhal' is recorded in the column of possession as 'Aabpash-Kunindgaan'. There was existing one metre wide passage abutting the said 'kuhal' on its southern side and the same was in use of the respondent, his predecessor-in-interest and other right holders since the time of their forefathers.

3. It is also averred that the respondent after purchase of the above lands with the consent of the owners of Khasra No.1834, 1838 and 1839 extended the existing width of said path to three metres from PWD road up to the land comprising Khasra No.1836 and the said passage in the site plan is depicted as 'IJKL' and this passage was constructed by the respondent in the year 1997. After construction of the said passage, the respondent started construction work of his house shown as H1 in the site plan in the year 1997 and completed the same in October, 1999. The entire construction material was carried by the respondent through trucks and tractors through the said passage and the said passage is used by the respondent and his family members as access for coming and going to from their house from the main road without any hindrance or objection. The gate as depicted as GI in the site plan was constructed just adjacent to the main PWD road in September, 2004, in the land comprising Khasra No.1834 with the consent of the owners through which passage has been constructed. An agreement to sell 32/120299 share of the land comprising Khata No.315min, Khatauni No.612, Khasra Kita 92, measuring 12-02-99 hectares i.e. measuring 0-00-32 hectares on 07.05.2008 has been entered into by Mani Ram with the respondent and entire sale

consideration has been paid by the respondent to Mani Ram and the possession of land in Khasra No. 1834 abutting main Baijnath-Phatahar Road has been delivered to him.

4. The petitioners in order to cause inconvenience and harassment to the respondent and his family members illegally put their lock on the main gate G1 on 24.07.2008 thereby depriving them from its use. The respondent purchased a car in the year 2005 and the same was in use of the said passage but now the same is lying stranded in his courtyard. The respondent and his family members now have to cross a four feet high retaining wall abutting the said gate in order to have access to their house and road. The said act of putting lock on the gate is illegal and unlawful on the part of the petitioners and the respondent requested the petitioners to remove the same but in vain, hence this application was filed.

5. The petitioners filed reply wherein it is averred that the land comprising Khata No.315min, Khatauni No.623min, Khasra Nos.1839 and 1841 measuring 0-25-88 hectares situate in Mohal Dharehrr, Mauza Deol, Tehsil Baijnath, District Kangra, is exclusively owned and possessed by the petitioners since the time of their predecessor-in-interest and the petitioners have constructed a passage therein to go to their fields. The petitioners have also installed an iron gate over the same in the year 2003 with a safety measure to save the crops from the stray animals. The Khasra No.1835 is recorded in the column of possession as 'Aabpashi Kunindgaan' but there does not exist any path in this Khasra Number.

6. It is further averred that the respondent has a separate passage which leads to his house on the Southern side and he carried the construction material by mules through this separate passage and he along with his family members is using the same. The respondent till 20.07.2008 used to park his car somewhere else but on the said date the petitioners had gone to Village Patti to attend the funeral of their close relative, the respondent by opening the gate drove his vehicle to his house through their lands. The petitioners protested this unlawful act of the respondent and put lock on the gate as the respondent has no right, title or interest in the said land of the petitioners.

I have heard the learned counsel for the parties and also gone through the record of the case.

7. The learned trial Court after going through the pleadings and the documents placed on record by each of the parties allowed the application and directed the petitioners/defendants to remove the lock placed on the gate and further restrained them from causing interference with the passage.

8. Aggrieved against such findings, the petitioners/defendants preferred an appeal before the learned lower appellate Court, who too after detailed findings dismissed the appeal. Undeterred, the petitioners have come up before this Court in this petition under Article 227 of the Constitution of India questioning the orders passed by the learned Courts below.

9. What factors have to be borne in mind while granting or refusing an injunction have been succinctly dealt with by the Hon'ble Supreme Court in ***M.Gurudas and others*** *versus* ***Rasaranjan and others (2006) 8 SCC 367*** in the following manner:-

> ***"18.While considering an application for injunction, it is well-settled, the courts would pass an order thereupon having regard to:***
>
> ***(i) Prima facie case***
>
> ***(ii) Balance of convenience***
>
> ***(iii) Irreparable injury.***

19. A finding on 'prima facie case' would be a finding of fact. However, while arriving at such finding of fact, the court not only must arrive at a conclusion that a case for trial has been made out but also other factors requisite for grant of injunction exist. There may be a debate as has been sought to be raised by Dr. Rajeev Dhawan that the decision of House of Lords in American Cyanamid v. Ethicon Ltd. (1975) 1 All ER 504 would have no application in a case of this nature as was opined by this Court in Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.(1999) 7 SCC 1 and S.M. Dyechem Ltd. v. Cadbury (India) Ltd. (2000) 5 SCC 573, but we are not persuaded to delve thereinto.

20. We may only notice that the decisions of this Court in Colgate Palmolive (supra) and S.M. Dyechem Ltd (supra) relate to intellectual property rights. The question, however, has been taken into consideration by a Bench of this Court in Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd. (2006) 1 SCC 540 stating: (SCC pp. 552-53, paras 36-40)

> ***"36.The Respondent, therefore, has raised triable issues. What would constitute triable issues has succinctly been dealt with by the House of Lords in its well-known decision in American Cyanamid Co. v. Ethicon Ltd.(1975)1 All ER 504 holding: (All ER p.510 c-d)***
>
> > ***'Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expression as 'a probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.'***
>
> ***It was further observed (All ER pp.511 b-c & 511j)***
>
> > ***'Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.***
>
> > * * *
>
> > ***The factors which he took into consideration, and in my view properly, were that Ethicon's sutures XLG were not yet on the market; so that had no business which would be brought to a stop by the injunction; no factories would be closed and no workpeople would be thrown out of work. They held a dominant position in the United Kingdom market for absorbable***

> ***surgical sutures and adopted an aggressive sales policy.'***

37.We are, however, not oblivious of the subsequent development of law both in England as well as in this jurisdiction. The Chancery Division in Series 5 Software v. Clarke (1996) 1 All ER 853] opined: (All ER p.864 c-e)

> ***'In many cases before American Cyanamid the prospect of success was one of the important factors taken into account in assessing the balance of convenience. The courts would be less willing to subject the plaintiff to the risk of irrecoverable loss which would befall him if an interlocutory injunction was refused in those cases where it thought he was likely to win at the trial than in those cases where it thought he was likely to lose. The assessment of the prospects of success therefore was an important factor in deciding whether the court should exercise its discretion to grant interlocutory relief. It is this consideration which American Cyanamid is said to have prohibited in all but the most exceptional case. So it is necessary to consider with some care what was said in the House of Lords on this issue.'***

38. In Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd. (1999) 7 SCC 1, this Court observed that Laddie, J. in Series 5 Software (supra) had been able to resolve the issue without any departure from the true perspective of the judgment in American Cyanamid. In that case, however, this Court was considering a matter under Monopolies and Restrictive Trade Practices Act, 1969.

39.In S.M. Dyechem Ltd. v. Cadbury (India) Ltd. (2000) 5 SCC 573, Jagannadha Rao, J. in a case arising under Trade and Merchandise Marks Act, 1958 reiterated the same principle stating that even the comparative strength and weaknesses of the parties may be a subject matter of consideration for the purpose of grant of injunction in trade mark matters stating : (SCC p.591, para 21)

> ***'21.....Therefore, in trademark matters, it is now necessary to go into the question of "comparable strength" of the cases of either party, apart from balance of convenience. Point 4 is decided accordingly.'***

40.The said decisions were noticed yet again in a case involving infringement of trade mark in Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.(2001) 5 SCC 73."

21.While considering the question of granting an order of injunction one way or the other, evidently, the court, apart from finding out a prima facie case, would consider the question in regard to the balance of convenience of the parties as also irreparable injury which might be suffered by the plaintiffs if the prayer for injunction is to be refused. The contention of the plaintiffs must be bona fide. The question sought to be tried must be a serious question and not only on a mere triable issue.(See Dorab Cawasji Warden v. Coomi Sorab Warden and Others , (1990) 2 SCC 117, Dalpat Kumar v. Prahlad Singh(1992) 1 SCC 719, United Commercial Bank v. Bank of India (1981) 2 SCC 766, Gujarat Bottling Co. Ltd. v. Coca Cola Co. (1995) 5 SCC 545, Bina

***Murlidhar Hemdev v. Kanhaiyalal Lokram Hemdev* (1999) 5 SCC 222 and Transmission Corpn. of A.P. Ltd (supra)."**

10. Now, reverting to the case in hand, it would be seen that the learned Courts below have discussed the pleadings and the documents in detail and it is only after that an injunction order has been passed in favour of the respondent/plaintiff. The learned Courts below on the basis of the revenue record have come to the conclusion that Khasra No.1836 had been purchased by the respondent, who thereafter had constructed a house over this land. Khasra No.1835 is classified as 'Gair Mumkin Kuhal' and this fact was recorded to have been admitted by both the parties. The respondent/plaintiff had constructed the path adjoining this 'kuhal' to go to his house and the path has been mentioned as 'IJKL' in the attached site plan. It is over this path that the respondent has installed an iron gate over Khasra No.1834. Though, the petitioners/defendants have disputed this position and claim to have installed the gate, but then they have not produced any document on the file which could show or prove this fact. Only a bill in the name of Parkash Chand showing that some gate was prepared has been produced.

11. On the contrary, the respondent/plaintiff has produced on record certificate issued by the vice President of Gram Panchayat, Dharer dated 01.11.2008 in which it has been mentioned that the respondent had started the construction work of his house about 11 years back and he had carried the construction material from the path in question through vehicle. He has also mentioned that the link road was open which was being used by the respondent/plaintiff and now the gate has been blocked. This was the only path available to the respondent/plaintiff for going to his house. No document whatsoever has been produced by the petitioners/defendants to rebut this document. It is on the basis of this certificate that the learned Courts below have concluded that the disputed path was in use for the last more than 11 years.

12. Besides, the aforesaid documents, compromise deed dated 21.07.2008 has also been produced on the file which was made in Civil Suit titled Trilok Chand versus Kolto Devi wherein also it has been admitted that there is house of the respondent on Khasra No.1836 and the path goes to his house from Khasra Nos. 1834, 1839 and 1838. It has been mentioned in this compromise that the respondent has installed an iron gate. The path on the spot is four metres wide which is being used by the respondent for going to his house for the last 11 years. The learned Courts below on the basis of such evidence have concluded that the documents produced by the respondent, prima facie, show that there is a disputed path which path alone is available to the respondent to go to his house from the main road over which the respondent had installed the gate by the side of the road but the petitioners had illegally put their lock over the same.

13. The other question required to be determined is as to what is the scope of interference with the orders concurrently passed by the learned Courts below in exercise of jurisdiction under Article 227 of the Constitution of India. In ***Surya Dev Rai*** *versus* ***Ram Chander Rai and others (2003) 6 SCC 675***, the Hon'ble Supreme Court discussed the entire case law and culled out the following principles:-

> ***"38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-***
>
> > ***(1) Amendment by Act No.46 of 1999 with effect from 01.07.2002 in Section 115 of Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.***

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction- by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step into exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal

to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

14. After culling out the aforesaid broad principles and working rules, it was cautioned that these should not be tied down in a strait-jacket formula or rigid rules. But then, it would be clear from the reading of conclusion of paragraph 38 (4) to (9) (supra) that mere error in exercise of jurisdiction by the learned Courts below is not sufficient to interfere in the absence of showing of failure of justice resulted therefrom; without which jurisdiction under Article 227 of the Constitution of India is not available.

15. Moreover, this Court in exercise of its supervisory jurisdiction will not convert itself into a Court of appeal and indulge in reappreciation and evaluation of evidence or correct errors in drawing inference or correct errors of mere formal and technical character.

16. Lastly, this Court cannot be unmindful of the fact that the suit is pending trial for the last more than six years having been instituted on 19.09.2008 and, therefore, at this stage, this Court has to act with due care, caution and circumspection to ensure that the rights of the parties are balanced. Even if, it is assumed that there is error calling for correction, I feel the same is capable of being corrected at the conclusion of the proceedings in an appeal preferred there against and entertaining a petition under the supervisory jurisdiction of this Court would obstruct the smooth flow and disposal of the suit. This is not one of those cases where this Court must intervene at this very moment.

17. In view of the aforesaid, I find no merit in this petition and the same is dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

18. However, taking into consideration that the suit has been instituted on 19.09.2008 and is on the dockets of the learned trial Court for the last more than six years, it is expected that the trial of the suit shall be expedited and the learned trial Court shall make every endeavour to decide the suit as expeditiously as possible and in no event later than **30th June, 2015.**

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

Sanjay Sharma son of Om Parkash and others. ....Applicants.
Versus:
State of Himachal Pradesh and others. ...Non-applicants.

Cr.MMO No. 119 of 2014
Order reserved on:14.11.2014.
Date of Order: November 26, 2014.

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420 and 120-B IPC read with Section 34 IPC- applicant claimed that matter was settled between the parties- complainant had received amount of Rs. 1,35,000/- on 15.5.2014 and had compromised the matter - accordingly, a prayer was made for quashing the FIR- held, that the offence punishable under Section 120-B IPC is non-compoundable offence- power to quash the FIR should be exercised sparingly and not to stifle the prosecution- offence of criminal conspiracy is against the society and to maintain public peace and tranquility, offence punishable under Section 120-B IPC cannot be allowed to be compounded even if the parties had compromised the same- petition rejected. (Para-6)

For the applicant:	Mr. Ashwani Sharma, Advocate.
For Respondent 1 to 3.	Mr.M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana Asstt. Advocate General.
For respondent No.4.	Mr. Arun Raj, Advocate

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 482 of the Code of Criminal Procedure 1973 for quashing FIR No. 202 of 2013 dated 21.10.2013 registered under Sections 420, 120B read with Section 34 IPC at Police Station Sadar Shimla.

2. It is pleaded that FIR was registered at the instance of Maheswar Dutt Sharma. It is pleaded that complainant Maheswar Dutt Sharma and accused persons have amicably settled the dispute by way of executing compromise deed duly attested by Oath Commissioner in the presence of two independent witnesses on dated 15.5.2014. It is pleaded that complainant had received the amount of Rs. 1,35,000/- (One lac thirty five thousand) on dated 15.5.2014. It is further pleaded that offence punishable under Sections 420, 120B read with Section 34 IPC are compoundable offences under Section 320 Cr PC with prior permission of the Court. Prayer for acceptance of petition filed under Section 482 Cr PC sought.

3. Per contra reply and police report filed. There is recital in reply and police report that FIR No. 202 of 2013 dated 21.10.2013 has been registered against the applicants under Sections 420, 120B read with Section 34 IPC at Police Station Sadar Shimla District Shimla HP. There is further recital in police report that applicants joined the investigation of the case. There is further recital in police report that during the investigation accused persons did not disclose anything about cheque book, pass book and ATM cards. There is further recital in police report that recoveries of cheque book, pass book and ATM card are still to be recovered from the accused persons. There is further recital in police report that accused persons are residing outside the State of Himachal Pradesh.

There is further recital in police report that accused persons have given advertisement in the news paper 'Amar Ujala' that they would install telephone tower and they would also provide employment and hand some salary. There is further recital in police report that thereafter accused persons demanded an amount of Rs.1,35,000/- (one lac thirty five thousand) from the complainant and complainant paid Rs.1,35,000/- (one lac thirty five thousand) to the accused persons. It is further pleaded that criminal offence is committed against State and not against complainant Maheshwar Dutt Sharma individually. It is pleaded that offence under Section 120B is not compoundable criminal offence. There is further recital in police report that despite receiving an amount of Rs. 1,35,000/- (One lac thirty five thousand) by the accused persons, they did not execute the promise as has been assured by them. Prayer for rejection of application filed under Section 482 of the Code of Criminal Procedure sought. Per contra separate reply filed on behalf of complainant Maheshwar Dutt Sharma pleaded therein that he had received amount to the tune of Rs.1,35,000/- (One lac thirty five thousand) on dated 15.5.2014 and he has no objection if FIR No.202 of 2013 dated 21.10.2013 registered at Police Station Sadar Shimla District Shimla is quashed.

4. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of non-applicant.

5. Following points arise for determination in the present application.

(1) Whether petition filed under Section 482 of the Code of Criminal Procedure is liable to be accepted as mentioned in memorandum of grounds of application.

(2) Final Order.

Finding upon point No.1.

6. Submission of learned Advocate appearing on behalf of the applicants that a compromise has been executed inter se the parties and permission to compound the present case be granted and FIR be quashed are rejected being devoid of any force for the reason hereinafter mentioned. FIR has been registered against the applicants under Sections 420, 120B read with Section 34 IPC. Although offence under Section 420 IPC is compoundable but offence under Section 120B IPC is not compoundable. The allegations against the applicants are that applicants have committed cheating and dishonestly received an amount of Rs.1,35,000/- (One lac thirty five thousand) from complainant Maheswar Dutt Sharma and applicants have also committed criminal conspiracy. It is held that criminal offence under Section 120B IPC is non-compoundable offence. Case is in the stage of investigation. It was held in case reported in AIR 2014 SC 3352 titled Mosiruddin Munshi Vs. Md.Siraj and another that quashing of FIR at the stage of investigation is pre mature. It was held in case reported in 2014 (3) Him. L.R 1654 titled TT Siddarth Vs. State of HP and others that power to quash the FIR should not be exercised in order to stifle or scuttle a legitimate prosecution. It was held that power should be used sparingly and with abundant caution. Also see (2009) 1 SCC 516 titled R.Kalyani Vs. Janak C.Mehta and others and (2006) 6 SCC 736 titled Indian Oil Corporation Vs. NEPC India Ltd and others. Court is of the opinion that criminal offence under Section 120B criminal conspiracy by four accused in order to grab Rs.1,35,000/- (One lac thirty five thousand) is offence against State and State had not consented compromise deed dated 15.5.2014 and State had also not signed compromise deed dated 15.5.2014. Offence of criminal conspiracy is offence against society and effect public peace and tranquility. Court is of the opinion that payment of Rs.1,35,000/- (One lac thirty five thousand) on dated 15.5.2014 subsequently by accused persons to Maheshwar Dutt Sharma will

not automatically discharge the accused persons qua criminal offence under Sections 420, 120B read with Section 34 IPC which was alleged to be committed on dated 2.9.2013. It was held in case reported in 2011(3) SLJ 1537 titled Gulab Dass and others Vs. State of HP that criminal offences which are not compoundable under Section 320 of the Code of Criminal Procedure could not be allowed to be compounded even if there is settlement between complainant and accused. In the present case criminal offence under Section 120B IPC is not compoundable criminal case. In view of the above stated facts point No.1 is answered in negative against the applicants.

Final Order.

7. In view of the above finding application filed under Section 482 Cr. PC for quashing of FIR No. 202 of 2013 dated 21.10.2013 registered under Sections 420, 120B read with Section 34 IPC is rejected. Observation made hereinabove is strictly for the purpose of deciding the present application filed under Section 482 of the Code of Criminal Procedure and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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

Sanjay Sharma son of Om Parkash. .....Applicant.
Versus:
State of Himachal Pradesh. ...Non-applicant.

Cr.MP(M) No.671 of 2014
Order reserved on:14.11.2014.
Date of Order: November 26 ,2014.

Code of Criminal Procedure, 1973- Section 438- An FIR for commission of offences punishable under Sections 420 and 120-B read with Section 34 IPC was registered against the petitioner- dispute was settled between the parties after the registration of the FIR- held, that while granting the bail, the Court has to keep in view nature and seriousness of offence, character of the evidence, circumstances which are peculiar to the accused, possibility of the presence of the accused at the trial or investigation, reasonable apprehension of witnesses being tampered with and the larger interests of the public or the State- Bail is rule and jail is the exception- bail could not be denied on the ground that cheque book, pass book and ATM Card are to be recovered from the applicant. (Para-6 to 8)

For the applicant: Mr. Ashwani Sharma, Advocate.
For Respondent. Mr.M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana Asstt. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present petition filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 202 of 2013 dated 21.10.2013 registered under Sections 420, 120B read with Section 34 Indian Penal Code at Police Station Sadar Shimla.

2. It is pleaded that during the pendency of the investigation the disputes between complainant Maheswar Dutt Sharma and applicant have been amicably settled down and a compromise has been executed inter se the complainant and applicant. It is further pleaded that offences punishable under Sections 420, 120B read with Section 34 IPC are compoundable offences under Section 320 Cr PC with prior permission of the Court. It is further pleaded that applicant will abide by the terms and conditions imposed by the Court. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. There is recital in police report that FIR No. 202 of 2013 dated 21.10.2013 has been registered against the applicant under Sections 420, 120B read with Section 34 IPC at Police Station Sadar Shimla District Shimla HP. There is further recital in police report that applicant joined the investigation of the case after the grant of interim anticipatory bail by the Court. There is further recital in police report that cheque book, pass book and ATM card are still to be recovered from the applicant. There is further recital in police report that if anticipatory bail application is allowed then applicant will threat the prosecution witness. There is further recital in police report that applicant is residing outside the State of Himachal Pradesh. Prayer for rejection of anticipatory bail application sought.

4. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of non-applicant.

5. Following points arise for determination in the present anticipatory bail application.

(1) Whether anticipatory bail application filed under Section 438 of the Code of Criminal Procedure is liable to be accepted as mentioned in memorandum of grounds of bail application.

(2) Final Order.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant will join investigation of the case as and when directed by the Investigating Officer and any condition imposed by the Court will be binding upon the applicant and on this ground anticipatory bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that 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 titled Sanjay Chandra Vs. Central Bureau of Investigation that the object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. It is well settled law that accused is presumed to be innocent till convicted by the competent Court of law. In the present case as per police report that cheque book, pass book and ATM card are to be recovered from the applicant. It is well settled law that anticipatory bail application should not be declined only on the ground that some recovery is to be effected from the accused persons. Court is of the opinion that if anticipatory bail application is

granted to the applicant at this stage then investigation of the case and the interest of general public will not be adversely effected.

7. Submission of learned Additional Advocate General appearing on behalf of the non-applicant that if anticipatory bail is granted to the applicant then applicant will induce and threat the prosecution witness and on this ground anticipatory bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that applicant will not induce and threat the prosecution witness in any manner. If the applicant will induce and threat the prosecution witness then prosecution will be at liberty to file application for cancellation of bail in accordance with law.

8. Another submission of learned Additional Advocate General appearing on behalf of the non-applicant that cheque book, pass book and ATM card are still to be recovered from the applicant and on this ground anticipatory bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that bail could not be declined on the ground that some recovery is to be effected from the applicant. See. 1982 SLJ (HP) 415 titled Miss Nirmal Walia and another Vs State It is held that it is expedient in the ends of justice to allow anticipatory bail application filed by the applicant. Hence point No.1 is answered in affirmative.

Final Order

9. In view of the finding in point No.1 anticipatory bail application filed by the applicant is allowed in the ends of justice. In the event of arrest, the applicant will be released on bail on following terms and conditions on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of Investigating Officer. (i) That applicant will join investigation of case as and when called for by the Investigating Officer in accordance with law. (ii) That applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That applicant will not leave India without 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 to the Investigating Officer in written manner.(vi) That applicant will hand over cheque book, pass book and ATM card to the Investigating Officer forthwith. (vii) That applicant will attend proceedings of learned trial Court regularly. Application filed under Section 438 of the Code of Criminal Procedure 1973 disposed of. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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

Tilak Raj Sharma, son of late Sh. Harish Chand ....Applicant
Vs.
State of H.P. ....Non-applicant

Cr.MP(M) No. 1279 of 2014
Order Reserved on 13th November,2014
Date of Order 26th November, 2014

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offence punishable under

Section 306 read with Section 34 IPC - prima facie, the name of the applicant was mentioned in the suicide note of the deceased- custodial interrogation of the applicant is necessary keeping in view the gravity- grant of bail would affect the investigation adversely, therefore, application rejected. (Para- 7 to 9)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179

The State Vs. Captain Jagjit Singh AIR 1962 SC 253.

Parvinderjit Singh and another vs. State (Union Territory Chandigarh) and another AIR 2009 SC 502

For the Applicant: Mr. Surinder Saklani, Advocate.
For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General, Mr. J.S. Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 182 of 2014 dated 31.10.2014 registered under Section 306/34 IPC in Police Station Dehra District Kangra Himachal Pradesh.

2. It is pleaded that FIR was registered against the deceased in theft case. It is pleaded that applicant is a heart patient and is in continuous treatment from Nehru Hospital PGI MER Chandigarh and even stunts were also inserted to the applicant and till date applicant is under treatment. It is further pleaded that deceased had obtained interim anticipatory bail from the Hon'ble High Court of H.P. Shimla but before the confirmation of ad-interim orders deceased committed suicide on dated 31.10.2014. It is further pleaded that there is some interpolation as name of applicant has been named without anything on part of applicant. It is further pleaded that deceased felt irritated against the applicant that he accompanied the boys who were named by deceased in theft case and this is only reason which irked the deceased against the applicant otherwise there is nothing against the applicant. It is pleaded that applicant will not abscond and will not tamper with prosecution evidence and will join the investigation. It is further pleaded that applicant will abide all conditions imposed by the Court. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. As per police report case under Section 306/34 IPC is registered against the applicant in P.S. Dehra vide FIR No. 182 of 2014 dated 31.10.2014. There is recital in police report that on dated 31.10.2014 statement of Shri Kushal Singh son of Rai Singh resident of VPO Gheori P.S. and Tehsil Dehra District Kangra (HP) was recorded. There is recital in police report that deceased Rai Singh son of Munshi Ram Age 52 years resident of VPO Gheori P.S. Dehra District Kangra H.P. was working as Secretary in the society. There is recital in police report that case under Section 420 IPC was registered and deceased was accused in that case. There is further recital in police report that deceased had obtained the anticipatory bail from Hon'ble High Court of H.P. Shimla which was pending. There is recital in police report that accused Dilbag Singh, accused Tilak Raj and accused Bhajan Singh were harassing the deceased since 10-15 days. There is also recital in police report that deceased committed suicide through rope of plastic. There is recital in police report that suicide note was also obtained. There is further recital in police report that post mortem of deceased was conducted at CHC Dehra and

cause of death was mentioned as asphyxia as a result of ante mortem hanging. There is further recital in police report that statements of prosecutions witnesses were also recorded. There is also recital in police report that report of RFSL is still awaited and in case applicant is released on anticipatory bail applicant will threat the prosecution witnesses and will influence the investigation. 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 and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that name of applicant figured in the suicide note due to ill-will and grudge against the applicant and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. The fact whether the name of applicant was mentioned in the suicide note due to ill-will or grudge cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

8. Another submission of learned Advocate appearing on behalf of the applicant that applicant will abide all conditions imposed by the Court and on this ground anticipatory bail application filed by applicant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In present case there is prima facie suicide note against the applicant and case is at the initial stage of investigation. Court is of the opinion that custodial interrogation of applicant is essential in present case in view of the gravity of criminal offence registered against the applicant under Section 306 IPC. Court is of the opinion that if anticipatory bail is granted to the applicant at this stage then investigation of the case will be adversely affected. Court is also of the opinion that if anticipatory bail is granted to the applicant at this stage then interest of State and general public will also be adversely affected.

9. Submission of learned Additional Advocate General appearing on behalf of the State that investigation is in initial stage and allegations made against the applicant are grave in nature qua commission of criminal offence

under Section 306 IPC and if applicant is released on anticipatory bail at this stage investigation will be adversely affected is accepted for the reasons hereinafter mentioned. It was held in case reported in ***AIR 2009 SC 502 titled Parvinderjit Singh and another vs. State (Union Territory Chandigarh) and another*** that order under Section 438 Cr.P.C. is neither a passport to the commission of crimes nor a shield against any kind of accusations.

10. In view of gravity of offence under Section 306 IPC and in view of the fact that investigation is at the initial stage and in view of suicide note against the applicant it is held that custodial investigation is essential in present case. Point No.1 is answered in negative.

Point No. 2

Final Order

11. In view of my findings upon point No. 1 anticipatory bail application filed under Section 438 Cr.P.C, is rejected. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

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

Bakshi Ram son of Achharu resident of village and PO Ropari, Tehsil Barsar,District Hamirpur H.P. ....Appellant/Plaintiff

Versus

Mandro Devi widow of Karam Chand and others Resident of Tika Ropri Tappa Lohdar, Tehsil Barsar, District Hamirpur HP

....Respondents/Defendants

RSA No. 147 of 2003
Judgment Reserved on 13th November,2014
Date of Judgment: 27th November, 2014

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Copy of jamabandi for the year 1984-85 shows B to be the owner to the extent of 1/3rd share, and in possession as tenant of 2/3rd share- one L is shown to be the owner of remaining 2/3rd share- held, that entries are not based upon the order of any competent authority, therefore, it is void ab-initio- a person cannot acquire the status of ownership as well as status of tenancy simultaneously. (Para-10)

Cases referred:

Sant Ram Nagina Ram vs. Daya Ram Nagina Ram and others AIR 1961 Punjab 528
Lal Chand and others vs. Pala 1998 (2) SLJ 1526 (H.P.)
Durga vs. Milkhi Ram 1969 Punjab Law Journal (Apex Court of India Full Bench)
Jai Kishan and others vs. Saran Dass and others 1998(1) Shimla Law Cases page 398
Jattu Ram vs. Hakam Singh and others 1994(1) S.L.J. 68 (SC)
Guru Amarjit Singh vs. Rattan Chand and others, AIR 1994 SC 227 DB
Chander Bhan vs. Hari Ram and another, 1996(1) SLJ 696 (P&H)
Milkha vs. Makhan, 2009(1) SLJ (P&H) page 205
Savtri Devi and Santa 1981 ILR 563 (HP)

Om Parkash vs. State of H.P. AIR 2001 HP 18
Santosh Hazari vs. Purushottam Tiwari (2001)3 SCC 179
Krishan Chand vs. Mohinder (2008)2 S.L.J. 1145 (HP)
Madhukar and others vs. Sangram and others AIR 2001 SC 2171
State of Rajasthan vs. Harphool Singh (dead) through his LRs (2000)5 SCC 652
United India Insurance Co. Ltd. vs. Kanwal Nain Sachdeva and others (1999)9 SCC 193 (1969) 71 P.L.R. Delhi High Court
Lalagar vs. Shiv Ram, Himachal Bench at Shimla Vol. LXXI-1969 page 276
Karnataka Board of Wakf vs. Anjuman-E-Ismail Madris-Un-Niswanm AIR 1999 SC 3067
Bismillah Begum (dead) through LRs. vs. Rahmatullah Khan (dead) through LRs AIR 1998 SC 970

For the Appellant: Mr. K.D. Sood, Sr. Advocate with Mr. Mukul Sood, Advocate.
For the Respondents: Mr. K.S. Kanwar, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure by the appellant against the judgment and decree dated 22.2.2003 passed by learned Additional District Judge Hamirpur H.P. in Civil Appeal No. 26/95 (RBT) No. 133 of 2002 titled Bakshi Ram vs. Indri Devi and others and against the judgment and decree passed by learned Civil Judge Hamirpur in Civil Suit No. 96/89 titled Bakshi Ram vs. Indri Devi and others.

2. Brief facts of the case as pleaded are that Shri Bakshi Ram plaintiff filed a suit for declaration with consequential relief of injunction and in alternative relief of possession pleaded therein that plaintiff is tenant over 2/3rd share of land comprised in Khata No. 23 Khatauni No. 23 Khasra Nos. 13, 14, 15, 16, 20 and Khata No. 23 Khatauni No. 25 Khasra Nos. 5, 18 and 19 situated in Suphan Tappa Lohdar Tehsil Barsar District Hamirpur H.P. as per jamabandi for the year 1984-85. It is pleaded that land was under the tenancy of plaintiff Bakshi Ram since long time and deceased defendant Lachhman through his LRs has no concern with suit land. It is pleaded that deceased defendant Lachhman was very aggressive and quarrelsome person and he threatened to reap the crop from the suit land forcibly sown by the plaintiff. It is pleaded that plaintiff requested the deceased defendant Lachhman several time to accept and acknowledge the status of plaintiff as tenant over suit property but he did not accept the request of plaintiff. It is further pleaded that relief as sought in relief clause of plaint be granted to plaintiff.

3. Per contra written statement filed on behalf of contesting defendant pleaded therein that suit is not maintainable and plaintiff is estopped from filing the suit by his act and conduct. It is pleaded that plaintiff has no cause of action. It is further pleaded that suit land is joint between the parties and entry of non-occupancy tenant is wrong and contrary to law in favour of the plaintiff. It is pleaded that plaintiff was wrongly entered as non-occupancy tenant upon 2/3rd share under deceased defendant Lachhman. It is pleaded that plaintiff and defendant are co-owners of suit land and further pleaded that plaintiff has only 1/3rd share on the suit land. It is pleaded that deceased defendant through his LRs is in settled possession of 2/3rd share at the spot. It is pleaded that defendant has also filed a correction application before the LRO Barsar for correction of Khasra Girdawari of suit property and same was allowed by learned Land Reforms Officer vide case No. 109/92 titled Smt. Indri Devi widow of Lachhman and others vs. Shri Bakshi Ram on dated 17.7.1993 w.e.f.

Kharif 1992. Prayer for dismissal of suit sought. During pendency of suit sole defendant Lachhman died and his LRs brought on record.

4. As per the pleadings of parties learned trial Court framed following issues on dated 7.9.1989:-

1. Whether the plaintiff is tenant in possession of 2/3 share of suit land as alleged?...OPP
2. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction? ...OPP
3. Whether the suit is not maintainable in present form? .....OPD
4. Whether the plaintiff is estopped from filing the suit by his act and conduct? ..OPD
5. Whether the plaintiff has not cause of action? .....OPD
6. Whether entries in the revenue record showing plaintiff to be tenant of 2/3rd share are wrong and illegal? ....OPD.
7. Relief.

5. On dated 23.1.1995 learned trial Court decided issues Nos. 1 and 2 in negative and learned trial Court held that issues No. 3, 4 and 5 became redundant. Learned trial Court decided issue No. 6 in favour of the defendant and suit filed by the plaintiff was dismissed.

6. Feeling aggrieved against judgment and decree passed by learned trial Court dated 23.1.1995 appellant Bakshi Ram preferred Civil Appeal No. 26/1995 (RBT 133/02) titled Bakshi Ram vs. Indri Devi and others and learned Additional District Judge Hamirpur (H.P.) on dated 22.2.2003 dismissed the appeal filed by Bakshi Ram.

7. Thereafter feeling aggrieved by judgments and decrees passed by learned trial Court and affirmed by learned first Appellate Court appellant Bakshi Ram filed present Regular Second Appeal and Hon'ble High Court admitted present appeal on the following substantial questions of law on dated 22.4.2003:-

1. Whether the findings of the Courts below are perverse, based on misreading of oral and documentary evidence and disregard to the jamabandi entries Ext.P1 to Ext.P3 and statements of DW2 and DW3 which have vitiated the findings?
2. Whether the judgment of the Additional District Judge which was a court of fact is vitiated for not examining critically the oral and documentary evidence and is not a judgment within Order 20 Rule 5 CPC and is liable to be set aside?
3. Whether the judgments of the Courts below are vitiated for non-consideration of evidence and the pleas of the appellant and the judgment of the District Judge deserves to be set aside in view of the decision in AIR 2001 HP 18?

8. Court heard learned Advocates appearing on behalf of the parties and also perused the entire record carefully.

Evidence adduced by parties

9. PW1 Bakshi Ram has stated that area of suit land is 6 kanals and 7 marlas and he is tenant over the suit land. He has stated that his father Achroo was inducted as tenant. He has stated that deceased defendant Lachhman has inducted his father Achroo as tenant. He has stated that his father Achroo died in the year 1983 and he has further stated that he used to

pay rent to the deceased defendant Lachhman. He has stated that his father Achroo used to pay rent of 1/3 share of suit land to the deceased defendant Lachhman. He has stated that plaintiff is in settled possession of suit land since 1965 and he is cultivating the land. He has stated that he is Kabir Panthi by caste. He has further stated that defendant is Rajput by caste and in the year 1965 the family partition was effected. He has stated that he is not co-sharer in the suit land but is tenant over the suit property. He has stated that he personally did not pay any rent to the deceased defendant Lachhman. He has stated that there was no custom of obtaining rent receipt. He has further stated that there is no eye witness of payment of rent. He has stated that his father Achroo had purchased the land in the year 1965 measuring 5 kanals. He has admitted that correction application was filed before the Land Reforms Officer. He has denied suggestion that Field Kanungo had visited the spot. He has stated that consolidation was effected in the village. He has denied suggestion that defendant is in possession of 11 kanals of land at the spot. Plaintiff tendered documents Ext.P1 to Ext.P3 in evidence and closed the evidence in affirmative. Plaintiff did not adduce any independent oral evidence in support of induction of tenancy in suit property.

9.1. DW1 Karam Singh has stated that suit land is 15 kanals and further stated that deceased defendant through his LRs is in settled possession of 10 kanals of land and plaintiff is in possession of 5 kanals of land. He has stated that contesting defendants have cultivated the land and sown wheat crop. He has stated that Land Reforms Officer has decided that 2/3rd share of land would remain in possession of contesting defendants and 1/3rd share of land would remain in possession of plaintiff. He has stated that plaintiff and his father were not inducted as tenants at any point of time. He has stated that no tenancy rent was received from the plaintiff or predecessor-in-interest at any point of time. He has denied suggestion that plaintiff is in cultivating possession of suit property and also denied suggestion that plaintiff is paying tenancy rent. He has also denied suggestion that plaintiff is in possession of entire suit property at the spot.

9.2 DW2 Kashmir Singh has stated that parties are known to him and he has seen the suit property. He has stated that contesting defendants are in possession of 10 kanals of land and plaintiff is in possession of 5 kanals of land. He has stated that he has seen the possession of parties since his childhood. He has stated that plaintiff is not tenant in the suit land and further stated that both plaintiff and deceased defendant through his LRs are owners of the suit property. He has stated that deceased defendant did not induct the father of plaintiff as tenant at any point of time. He has stated that Land Reforms Officer also visited the spot and further stated that at the spot Land Reforms Officer had recorded the statements of witnesses.

9.3 DW3 Bhagwan Dass has stated that parties are known to him and he has seen the suit property. He has stated that he was Up-Pardhan of Panchayat and plaintiff and defendant are residents of his Panchayat. He has stated that 10 kanals of land is in settled possession of contesting defendants and remaining land is in possession of plaintiff. He has stated that deceased defendant did not induct plaintiff's father as tenant at any point of time and further stated that contesting defendants have sown the wheat crop upon 10 kanals of land. He has denied suggestion that plaintiff is tenant over the suit property. Defendant tendered in evidence documents Ext.D1 and Ext.D2 and closed the evidence. Plaintiff did not adduce any rebuttal evidence.

Findings upon Substantial Question of law No.1 framed by Hon'ble High Court:-

10. Submission of learned Advocate appearing on behalf of the appellant that findings of learned trial Court and learned first Appellate Court are perverse and based on misreading of oral and documentary evidence i.e.

jamabandi entries Ext.P1 to Ext.P3 and statements of DW2 and DW3 is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the entries of jamabandi Ext.P1 to Ext.P3 and Court has also carefully perused the statements of DW2 and DW3. Document Ext.P1 is jamabandi for the year 1984-85 relating to suit property. In the ownership column of jamabandi Ext.P1 placed on record name of Bakshi Ram son of Achroo Ram has been recorded as 1/3rd share and name of Lachhman son of Nihala has been recorded as 2/3rd share. In cultivation column of jamabandi for the year 1984-85 it has been shown that Bakshi Ram is in cultivating possession of 1/3rd share as owner of suit property and is recorded as non-occupancy tenant qua 2/3rd share of Lachhman. It is proved on record that suit land is joint inter se the parties and same has not been partitioned in accordance with law. Ext.P1 and Ext.P2 are the same documents i.e. jamabandi for the year 1984-85 and same entries have been recorded in both documents as mentioned above. Ext.P3 is jamabandi for the year 1973-74 and Achroo son of Kharkoo has been shown as owner of 1/3rd share in suit property and Lachhman has been shown as owner of 2/3rd share in suit property in ownership column. In possession column of Jamabandi for the year 1973-74 Achroo has been shown as non-occupancy tenant over 2/3rd share of Lachhman son of Nihala in join immovable suit property and has been shown as possession of 1/3rd share as co-sharer. It is well settled law that a person cannot acquire two status at the same time i.e. status of ownership and status of tenancy in joint immovable property. In jamabandi Ext.P3 for the year 1973-74 Achroo father of plaintiff has been shown as owner of 1/3rd share in the ownership column of suit property and Shri Lachhman has been shown as owner of 2/3rd share and in cultivation column it has been shown that Achroo Ram is in possession as tenant qua share of Lachhman. It is proved on record that suit land is joint inter se the parties. It is held that a person cannot acquire two status at the same time in joint immovable property simultaneously i.e. (1) Status of ownership (2) Status of tenancy. Right and liability of a co-owner has been defined in ruling ***AIR 1961 Punjab 528 titled Sant Ram Nagina Ram vs. Daya Ram Nagina Ram and others.*** Operative part is quoted. (1) A co-owner has an interest in the whole property and also in every parcel of it. (2) Possession of the joint property by one co-owner is in the eye of law possession of all even if all but one are actually out of possession. (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all. (4) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property. (5) Every co-owner has a right to use the joint property in a husband like manner. There is no order of competent authority on record in order to prove that plaintiff Bakshi Ram or Achroo Ram father of plaintiff or Kharkoo grandfather of plaintiff were ordered to be inducted as tenant under co-owner Lachhman Dass. Entries of tenancy mentioned in documents Ext.P1 to Ext.P3 are not based upon any order of competent authority of law. It is well settled law that any entry in the revenue record which is recorded without any order of competent authority of law is void abinitio. It was held in case reported in ***1998(2) SLJ 1526 (H.P.) titled Lal Chand and others vs. Pala*** that change in revenue entries without any competent authority automatically loose legal entity. ***(Also see 1969 Punjab Law Journal (Apex Court of India Full Bench) titled Durga vs. Milkhi Ram. Also see 1998(1) Shimla Law Cases page 398 titled Jai Kishan and others vs. Saran Dass and others.)*** Hence it is held that entry of Achroo Ram as non-occupancy tenant under Lachhman is void abinitio entry because same was recorded without order of any competent authority of law in joint immovable property. It was held in case reported in ***1994(1) S.L.J. 68 (SC) titled Jattu Ram vs. Hakam Singh and others*** that -----jamabandi entries are only for fiscal purpose and they did not create any title in favour of any party. It was held in case reported in ***AIR 1994 SC 227 DB titled Guru Amarjit Singh vs. Rattan Chand and others*** that entries in jamabandi are not proof of title. Hence it is

held that jamabandis entries Ext.P1 to Ext.P3 are not helpful to the plaintiff qua tenancy in any manner and it is held that entries of jamabandis Ext.P1 to Ext.P3 did not give any status of tenant to the plaintiff. Even plaintiff did not produce any receipt of payment of rent on record and plaintiff also did not examine any independent witness in order to prove the induction of tenancy in his favour or in favour of father of the plaintiff namely Achroo or in favour of grandfather of plaintiff namely Kharkoo qua 2/3rd share of deceased Lachhman in joint immovable property. Even no document of any family partition duly signed by Lachhman placed on record. Even family partition not recorded in revenue record. Even there is no evidence on record in order to prove that family partition was sanctioned by revenue officer. It was held in case reported in ***1996(1) SLJ 696 (P&H) titled Chander Bhan vs. Hari Ram and another*** that if family partition not sanctioned by revenue officer same could not be considered final family partition. ***(Also see 2009(1) SLJ (P&H) page 205 titled Milkha vs. Makhan.)***

11. Another submission of learned Advocate appearing on behalf of the appellant that in view of testimonies of DW2 and DW3 placed on record tenancy in favour of the plaintiff is proved is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the testimonies of DW2 and DW3 placed on record. DW2 has stated that defendant has filed correction application before LRO because plaintiff was tenant. It is well settled law that testimony of a witness should be read as a whole and should not be read in isolation. Court has perused the testimony of DW2 carefully. DW2 has specifically stated that plaintiff or his father was not inducted as tenant over the suit land at any point of time and DW2 has also stated in positive manner that no rent was paid by plaintiff to the deceased defendant at any point of time. In view of contradictory testimony of DW2 in examination in chief and cross examination it is not expedient in the ends of justice to grant status of tenant to the plaintiff in present suit on the contradictory testimony of DW2 in examination in chief and in cross examination.

12. Submission of learned Advocate appearing on behalf of the appellant that in view of testimony of DW3 that plaintiff was tenant over the suit land in cross examination this regular second appeal be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has perused the testimony of DW3 carefully. It is well settled law that evidence of a witness should not be read in isolation but should be read as a whole as per Indian Evidence Act because as per Indian Evidence Act evidence is complete when examination in chief and cross examination is completely recorded. In examination in chief DW3 has specifically stated that deceased defendant was in settled possession of 10 kanals of land and he has further stated that plaintiff is in settled possession of 5 kanals of land. He has also specifically stated in examination in chief that deceased defendant did not induct any person as tenant at any point of time. DW3 has also stated in positive manner in examination in chief that deceased defendant during his life time has sown wheat crop over 10 kanals of suit land. In view of conflicting testimony of DW3 in examination in chief and cross examination it is not in the ends of justice to grant the status of tenancy to the plaintiff on the testimony of DW3 in cross examination. Hence point No.1 of substantial question of law is answered in negative against the appellant.

Findings upon Substantial question of law No. 2 framed by Hon'ble High Court.

13. Submission of learned Advocate appearing on behalf of appellant that findings of learned District Judge which was a court of fact is vitiated for not examining critically oral and documentary evidence and same is not a judgment as mentioned under Order 20 Rule 5 CPC is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has perused the

judgment passed by learned first Appellate Court carefully. First appeal was filed from original decree under Section 96 of Code of Civil Procedure 1908 and as per Order 41 of Code of Civil Procedure 1908. As per Order 41 Rule 31 of Code of Civil Procedure 1908 the judgment of appellate Court shall be in writing and shall state (1) Points for determination. (2) Decision thereon (3) Reason for decision (4) where the decree appealed from is reversed or varied the relief to which the appellant is entitled. In present case learned first Appellate Court has framed the point for determination in para 6 of judgment and learned Appellate Court has also mentioned the decision in para 13 of relief clause and in other paras learned first Appellate Court has given reasons in brief manner. It is held that reasons given in brief manner by learned first Appellate Court in its judgment has not caused any miscarriage of justice to the appellate because learned first Appellate Court has affirmed the judgment and decree passed by learned trial Court. It is held that judgment of first Appellate Court should state ingredients mentioned in Order XLI Rule 31 of Code of Civil Procedure 1908. Point No. 2 of substantial question of law is decided in negative against the appellant.

Findings upon Substantial question of law No. 3 framed by Hon'ble High Court:-

14. Submission of learned Advocate appearing on behalf of the appellant that findings of learned first Appellate Court are vitiated for non-consideration of evidence and pleas of the appellant in view of ruling reported in AIR 2001 HP 18 titled Om Parkash vs. State of H.P. Court has perused the judgment reported in AIR 2001 SC 18 titled Om Parkash vs. State of H.P. carefully. Facts of present case and facts of case reported in AIR 2001 HP 18 are distinguishable. Learned First Appellate Court had given brief reasons in its judgment. It is held that brief reasons given by learned first Appellate Court in judgment had not caused any miscarriage of justice to appellant because induction of tenancy is not proved on record. It is well settled law that tenancy is a bilateral agreement and induction of tenancy should be proved by way of positive, cogent and reliable evidence when tenancy is disputed by adverse party.

15. Submission of learned Advocate appearing for the appellant that predecessor of plaintiff was also recorded as tenant as per jamabandi for the year 1955-56 and he has acquired proprietary rights qua entire share of Lachhman Dass as per Section 104 of Tenancy and Land Reforms Act is rejected being devoid of any force for the reasons hereinafter mentioned. In present case it is proved on record that father of the plaintiff namely Achroo Ram has purchased 1/3rd share of suit land along with house for a consideration amount of Rs. 2000/- (Rupees two thousand only) as per sale deed Ext.DY dated 3.10.1964 placed on record and he became co-owner of 1/3rd share of suit property after purchase of portion of suit land from Mola Ram. It is proved on record that Achroo Ram has acquired 1/3rd ownership title of share in ownership through testamentary document Ext.DY i.e. sale deed placed on record over the suit land on dated 3.10.1964. It is proved on record that father of plaintiff became co-owner of suit property through testamentary document Ext.DY placed on record after sale deed dated 3.10.1964 for the first time. There is no evidence on record in order to prove that father of plaintiff Achroo Ram or grandfather of plaintiff namely Kharkoo Ram were recorded as tenant over suit property even prior to 3.10.1964. Court has also perused jamabandi for the year 1955-56 Ext.DX placed on record. In jamabandi Ext.DX placed on record in ownership column name of Lahnoo son of Inder qua 1/3rd share has been shown as mortgagor and name of Ganga son of Chowdry has been shown as mortgagee and Lachhman predecessor in interest of defendants has been shown as owner of 2/3rd share in suit property. In possession column Lahnoo mortgagor has been shown as non-occupancy tenant under mortgagee and under co-sharer Lachhman. There is no evidence on record in order to prove

that Lahnoo Ram was ancestor of plaintiff Bakshi Ram or father of plaintiff namely Achroo Ram or grandfather of plaintiff Kharkoo as per jamabandi Ext.DX for the year 1955-56 placed on record. It is proved that vide mutation No. 78 property of Lehnu after his death was devolved upon Mola Ram and mutation was attested on dated 9.4.1961. There is also recital in jamabandi for the year 1955-56 Ext.DX in remarks column that vide mutation No. 81 the mortgaged land of 1/3rd share of Lehnu was redeemed on dated 20.8.1962. There is further recital in Ext.DX jamabandi for the year 1955-56 placed on record that vide mutation No. 84 Mola Ram has executed a sale deed in favour of Achroo Ram father of plaintiff qua 05 kanals one marlas of land through sale deed dated 3.10.1964. It is proved on record that Achroo Ram father of plaintiff became owner of suit property for the first time after purchase of 1/3rd share from Mola Ram on dated 3.10.1964. Prior to 1964 there is no entry of tenancy in favour of plaintiff Bakshi Ram or Achroo Ram father of plaintiff or in favour of Kharkoo grandfather of plaintiff. Father of plaintiff namely Achroo son of Kharkoo had acquired only proprietary rights of 1/3rd share in suit property as per sale deed Ext.DY on dated 3.10.1964 for the first time because there is recital in sale deed Ext.DY dated 3.10.1964 that Achroo father of plaintiff would get only 1/3rd share in suit property. There is no reference of any tenancy rights in sale deed Ext.DY dated 3.10.1964 in favour of Achroo father of plaintiff. Hence it is held that father of plaintiff Achroo had acquired only ownership rights in the suit property to the extent of 1/3rd share only on the basis of testamentary document i.e. sale deed Ext.DY dated 3.10.1964. It is held that plaintiff or father of plaintiff namely Achroo or grandfather of plaintiff Kharkoo did not acquire any tenancy rights over suit property qua 2/3rd share of Lachhman or his LRs. Facts of case laws cited by learned counsel appearing for the appellant i.e. ***1981 ILR 563 (HP) titled Savtri Devi and Santa, AIR 2001 HP 18 titled Om Parkash vs. State of H.P., (2001)3 SCC 179 titled Santosh Hazari vs. Purushottam Tiwari (2008)2 S.L.J. 1145 (HP) titled Krishan Chand vs. Mohinder, AIR 2001 SC 2171 titled Madhukar and others vs. Sangram and others, (2000)5 SCC 652 titled State of Rajasthan vs. Harphool Singh (dead) through his LRs, (1999)9 SCC 193 titled United India Insurance Co. Ltd. vs. Kanwal Nain Sachdeva and others and (1969) 71 P.L.R. Delhi High Court Himachal Bench atShimla Vol. LXXI-1969 page 276 titled Lalagar vs. Shiv Ram*** and facts of present case are entirely different. Hence case law cited by learned Advocate appearing on behalf of appellant are not applicable in present case and are distinguishable. It was held in case reported in ***AIR 1999 SC 3067 titled Karnataka Board of Wakf vs. Anjuman-E-Ismail Madris-Un-Niswanm*** that High Court should not interfere with the concurrent finding of fact in routine and casual manner by substituting its subjective satisfaction in place of lower Court. It was held in case reported in ***AIR 1998 SC 970 titled Bismillah Begum (dead) through LRs. vs. Rahmatullah Khan (dead) through LRs*** that findings of fact arrived by Court below are binding in second appeal. In view of the fact that Achroo Ram father of plaintiff or Kharkoo grandfather of plaintiff were not recorded as non-occupancy tenant over the suit land as per jamabandis placed on record prior to 1964 when Achroo Ram father of plaintiff became co-owner of suit property to the extent of 1/3rd share on the basis of sale deed dated 3.10.1964 point No. 3 of substantial question of law framed by Hon'ble High Court of H.P. is answered in negative against the appellant.

16. In view of above stated facts appeal is dismissed. Judgment and decree passed by learned trial Court in Civil Suit No. 96 of 1989 decided on 23.1.1995 and judgment and decree passed by learned Additional District Judge Hamirpur in Civil Appeal No. 26/1995 (RBT 133/02) decided on 22.2.2003 are affirmed. Sale deed Ext.DY dated 3.10.1964 will form part and parcel of decree sheet. Decree shee be prepared strictly as per provisions of Section 100 of Code of Civil Procedure 1908. No order as to costs. Record of learned trial Court and learned first Appellate Court be sent back forthwith along with certified copy of

this judgment and decree sheet prepared as per provision of Section 100 of Code of Civil Procedure. Appeal stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

The Baghal Land Loosers Transport Co-operative Societies Ltd. and others ...Petitioners

Versus

State of H.P. and others ....Respondents

CMPMO No. 362 of 2014.
Judgment reserved on: 21.11.2014
Date of decision: November 27, 2014.

Constitution of India, 1950, Article 226- H.P. Co-operative Act- Section 94- A revision is not maintainable before the State Government against an administrative order passed by registrar. (Para-7)

Constitution of India, 1950- Article 226- The act of drawing of the election program and the act of dividing the area of operation into zones cannot be termed to be an administrative act- they would be termed as quasi judicial function which are to be performed after hearing parties or making an inquiry- such decision would affect the rights and obligations of the parties. (Para-11 and 12)

Case referred:

State of Maharashtra and others etc.etc. vs. Saeed Sohail Sheikh etc. AIR 2013 Supreme Court 168

For the Petitioners	:	Mr. Sanjeev Bhushan, Advocate.
For the Respondents	:	Mr. V.K.Verma, Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals, for respondents No. 1 to 3. Mr. J.L. Bhardwaj, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This petition under Article 227 of the Constitution of India is directed against the order dated 31.10.2014 passed by respondent No.2, whereby he ordered the rectification of the zones as approved by respondent No.3 vide order dated 18.10.2014 with the prayer to quash and set-aside the same being illegal and without jurisdiction.

2. The facts giving rise to the present petition are that at the end of the completion of the term of the committee of the petitioner No.1-Society, a schedule was prepared and after preparing the zones, which were prepared after calling the objections, the election programme was sent to respondent No.3 for approval. Certain persons filed objections before respondent No.3, who after hearing the concerned parties, decided the objections and gave his final approval for conducting the elections vide order dated 18th October, 2014. He also appointed the Returning Officer, Registration Officer and Election Manager.

3. Respondents No. 4 to 10 filed revision petition under Section 94 of the Himachal Pradesh Co-operative Societies Act (for short 'Act') before

respondent No.2 seeking rectification of the zones by challenging the aforesaid order of respondent No.3. The revision petition was allowed by respondent No.2 on 31.10.2014.

The petitioner has assailed this decision as being unjust, unfair and without jurisdiction.

4. During the pendency of the petition, an application for amendment of the petition was preferred wherein the following prayer was sought to be incorporated:

> *"and also the order dated 10.11.2014 may very kindly be ordered to be quashed and set aside by ordering the respondents to restore the zones as these were approved by AR, CS originally".*

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

6. The petitioner though not in many words has questioned the jurisdiction of respondent No.2 to entertain the revision petition, however, during the course of argument, he vehemently argued that the revision petition was not maintainable as the order passed by respondent No.3 was purely an administrative order against which no revision was competent. In support of his proposition, learned counsel for the petitioner has relied upon the Division Bench judgment of this Court in ***CWP No. 533 of 2000 titled K.D.Sharma and others*** vs. ***Financial Commissioner-cum-Secretary (Co-operation) to the Govt. of H.P. and others,*** decided on 6th June, 2001, wherein the Court held:

> ***"6. On the other hand, the Bank in its reply has pointed out various infirmities. It has been pointed out that the Registrar had no powers to review his earlier order dated 8.9.1998 passed by his predecessor without the bank making any request in this regard. The Bank has also tried to find fault not only in the decree and judgment dated 16.1.1997 but also in its own decisions and actions taken for the appointment of the petitioners as Mobile Guides. But in the present petition the controversy is limited to the extent whether the revision petition filed by the Bank against the order dated 27.6.2000 passed by the Registrar before respondent No. 1 is maintainable under Section 94 (1) of the Act or not? Reference to Section 94 of the Act is desirable. It is:-***
>
> > ***"94. Review and Revision: (1) The State Government except in a case in which an appeal is preferred under Section 93 may call for and examine the record of any inquiry or inspection held or made under this Act or any proceedings of the Registrar or of any person subordinate to him or acting on his authority, and may pass thereon such orders as it thinks fit.***
> >
> > ***(2). The Registrar may at any time, -***
> >
> > ***(a) review any order passed by himself; or***
> >
> > ***(b) call for and examine the record of any inquiry or inspection held or made under this Act or the proceedings of any person subordinate to him or acting on his authority and if it appears to him that any decision, order or award or any proceedings so called or should for any reason be modified, annulled or reversed, may pass such order thereon as he thinks fit ;***
> >
> > ***Provided that, before any order is made under sub-section (1) and (2), the State Government or the Registrar as the case may be***

shall afford to any person likely to be affected adversely by such orders an opportunity of being heard.

Provided further that every application under sub-section (1) and (2), to the State Government or the Registrar, as the case may be shall be made within ninety days from the date of the communication of the order sought to be reviewed or revised."

7. The perusal of Section 94 (1) of the Act makes it clear that State Government has the revisional powers in respect of any inquiry or inspection held or made under the Act and also any proceedings of the Registrar or of any person subordinate to him or acting on his authority. So far the case in hand is concerned, it is to be examined whether the order dated 29.6.2000 passed by the Registrar can be considered 'the proceedings of the Registrar'. If the answer is in positive, the State Government has the revisional powers to examine the said order and pass such orders as it thinks fit. But if the answer is in negative, the revision against the order dated 29.6.2000 presently pending before respondent No.1 is without jurisdiction and not maintainable. The answer depends upon the interpretation of the word 'proceedings of the Registrar'.

8. In Black's Law Dictionary 6th Edition the word 'proceeding' means:

> ***"In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before agencies, tribunals, bureaus, or the like.***
>
> ***An act which is done by the authority or direction of the court, agency, or tribunal, express or implied; an act necessary to be done in order to obtain a given and a prescribed mode of action for carrying into effect a legal right.....***
>
> ***'Proceeding means any action, hearing investigation, inquest or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given."***

9. In Babu Lal v. M/s Hazari Lal Kishori Lal and others, (1982) 1 SCC 525, learned Judges of Supreme Court while interpreting the words at any stage of the proceedings 'occurring in proviso to sub section (2) of Section 22 of the Specific Relief Act which provides for the amendment of the plaint on such terms as may be just for including a claim for possession' at any stage of the proceedings have observed in para 17:

> ***"The word 'proceeding' is not defined in the Act. Shorter Oxford Dictionary defines it as "carrying on of an action at law, a legal action or process, any act done by authority of a court of law; any step taken in a cause by either party". The term 'proceeding' is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. It indicates***

> ***a prescribed mode in which judicial business is conducted. The word 'proceeding' in Section 22 includes execution proceedings also....."***
>
> ***9. In M/s K.J. Lingan and A.V. Mahayalam and others v. Joint Commercial Tax Officer, AIR 1968 Madras 76, the learned Judge held the notice of compounding under Section 46 of the Madras General Sales Tax Act as proceedings under the said Act treating it a step in aid or action taken by the concerned authority in the whole process of assessing a dealer on his turnover. For coming to this conclusion the learned Judge has referred to the earlier judgments of his Court in re: Ramanathan Chettiar AIR 1942, Mad. 390; Ganga Naicken v. Sunderam Aiyar, AIR 1956 Mad. 597 and Kochadai Naidu v. Nagayasami Naidu, AIR 1961 Mad. 247.***
>
> ***10. Following the above quoted judgments of the Madras High Court, the learned Judges of the Calcutta High Court in Sm. Reba Sircar and others v. Bisweswar Lal Sharma alias B.L.Sharma, AIR 1980 Calcutta 328, have held that a proceeding is a prescribed course of action for the enforcement of a legal right.***
>
> ***11. Therefore, as per the dictionary meaning and the interpretation given by the Supreme Court and the High Courts the term 'proceedings' is comprehensive one. It does not have a definite meaning and its scope will depend upon the context in which it is used. If its meaning in the general sense is taken, it is a prescribed course of action for enforcing a legal right or the requisite steps by which judicial action is invoked. So far the case in hand is concerned, against 'proceedings of the Registrar' revisional powers have been given to the State. In other words, the 'proceedings of the Registrar' would be his prescribed course of action whereby the Registrar will exercise powers conferred on him under the various provisions of the Act and pass orders. The orders against which appeal lies are prescribed under Section 93 of the Act and the remaining orders are subjected to revision by the State; for example, appeal lies against the order of the Registrar made under Section 8 (4) of the Act refusing to register a Society but if somebody is aggrieved by the order registering a Society or any other order passed during the course of passing the final order of the Registration, it may file revision against the said order. The perusal of Section 93 of the Act shows that number of the orders passed by the Registrar in exercise of his powers under various provisions of the Act are made appellable but we can easily comprehend many more orders passed or actions taken by the Registrar in discharge of his statutory functions which may entail decisions on the rights of parties, against which the remedy provide is the revision and review under Section 94 of the Act."***

7. There is no quarrel with the exposition of law laid down by the Division Bench in the aforesaid case because there the Court was dealing with an order passed by the Registrar which was purely an administrative order. However, a bare perusal of the underlined portion would clearly go to show that this Court has clearly held that the proceedings of the Registrar would be his prescribed course of action whereby the Registrar will exercise powers conferred on him under the various provisions of the Act and pass orders. The orders against which appeal lies are prescribed under Section 93 of the Act and the remaining order are subjected to revision by the State. The perusal of Section 93 of the Act would show that number of the orders passed by the Registrar in exercise of his powers under various provisions of the Act are made appealable but all orders passed or actions taken by the Registrar in discharge of his

statutory functions may not attract the applicability of the revision or review under Section 94 of the Act. Thus, where only an administrative power is exercised by the Registrar, a revision petition would not be maintainable before the State Government. I may emphasis at the cost of repetition that most of the functions of the Registrar, in terms of the Act and Rules are in the sphere of administration and governance with few additional duties having quasi-judicial character.

8. Rule 37 of the Himachal Pradesh Co-operative Societies Rules, 1971 (for short 'Rules') provides for election of the Committee and reads thus:

> ***"37. Election of Committee – Notwithstanding anything contained in the foregoing rules, the members of the managing committee of a Co-operative Society shall be elected in accordance with the rules given in Appendix 'A'. Appendix 'A' contends the Rule of election of the Committee wherein Rule-4 reads thus:***
>
> ***"4. Election – (1) The Manager shall draw up a detailed programme of election in accordance with the instructions issued by the Registrar from time to time.***
>
> ***(2) The Manager , shall, when so required by the Registrar for the purpose of such election, divide the area of operation of the co-operative society into such number of zones, as there are members to be elected, or into such lesser number as may be specified by the Registrar and communicate the zones so constituted to the Registrar for his prior approval. The members residing in the zone concerned shall from the general body for purpose of election of the Committee member/members for that zone and one third of the membership of the zone or 30 whichever is less, shall form the quorum for such general meeting.***
>
> ***(3) Notwithstanding anything contained in rule 28, the notice of the general meeting for the election together with the zones constituted, if any , shall be exhibited not less than 10 days before the date fixed for such general meeting at the registered office of the society and at some common place in the area of operation of the co-operative society for intimation of all the members of the co-operative society indicating :-***
>
> ***(a) the number of members to be elected zone-wise if any;***
>
> ***(b) the date, hour and place of holding the general meeting and polling;***
>
> ***(c) the last date of making nominations, which shall not be later than seven days before the date fixed for holding the said meeting;***
>
> ***(d) the date on which, the place at which, and hours between which the scrutiny of nomination papers shall be made; and***
>
> ***(e) the last date for the withdrawal of candidatures.***
>
> ***This could be in addition to any other mode of notice which may be laid down these rules, or the bye-laws of the society, or laid down in a resolution of the Committee, or as may be specified by the Registrar by a general or special order***
>
> ***.(4) The nomination papers duly completed on the forms prescribed by the Registrar and supplied by the co-operative society to its members on demand shall reach the head office of the society by such date and time as may be specified by the Manager in the programme drawn up in sub-rule (1) or this rule.***

(5) A candidate shall not be entitled to file his nomination paper for more than one office of the Committee. If nomination paper , for more than one office are filed, the nomination paper filed for the first office shall only be considered, and the nomination papers for the other office/offices shall be deemed to be rejected.

(6) The person who is to receive the nomination paper under sub-rule (4), shall on receiving the nomination paper, enter thereon the serial number of its receipt and shall endorse thereon the date on which, and the hour at which the nomination was delivered to him. Nomination papers received after the date and time fixed under clause (b) of sub-rule (3) shall not be valid. The person submitting nomination paper shall be entitled to a receipt in writing from the person who is to receive nomination papers as an acknowledgement of having it received by the later.

(7) After the nomination papers are scrutinised by the Returning Officer , the list of the validly nominated candidates for election shall be announced, where necessary zonewise, four days before the general meeting is held.

(8) The Registrar may by general or special order grant exemption from the provisions of the rule 3 and 4 to any co-operative society or any class of co-operative societies."

9. The question which would arise for determination is as to whether the process of dividing the area of operation of the co-operative society into zones can be termed to be merely an administrative exercise or is it in the nature of quasi judicial function.

10. However, before answering this question, the Court would be required to determine the difference between the quasi judicial act and an administrative act. This question has been elaborately dealt with by the Hon'ble Supreme Court in recent judgment in ***State of Maharashtra and others etc.etc.*** vs***. Saeed Sohail Sheikh etc.etc. AIR 2013 Supreme Court 168*** in the following manner:

"29. "Prof. De Smith in his book on 'Judicial Review' (Thomson Sweet &Maxwell, 6th Edn. 2007) refers to the meaning given by Courts to the terms 'judicial', 'quasi-judicial', 'administrative', 'legislative' and 'ministerial' for administrative law purposes and found them to be inconsistent. According to the author 'ministerial' as a technical legal term has no single fixed meaning. It may describe any duty the discharge whereof requires no element of discretion or independent judgment. It may often be used more narrowly to describe the issue of a formal instruction, in consequence of a prior determination which may or may not be of a judicial character. Execution of any such instructions by an inferior officer sometimes called ministerial officer may also be treated as a ministerial function. It is sometimes loosely used to describe an act that is neither judicial nor legislative. In that sense the term is used interchangeably with 'executive' or 'administrative'. The tests which, according to Prof. De Smith delineate 'judicial functions', could be varied some of which may lead to the conclusion that certain functions discharged by the Courts are not judicial such as award of costs, award of sentence to prisoners, removal of trustees and arbitrators, grant of divorce to petitioners who are themselves guilty of adultery etc. We need not delve deep into all these aspects in the present case. We say so because pronouncements of this Court have over the past decades

made a distinction between quasi-judicial function on the one hand and administrative or ministerial duties on the other which distinctions give a clear enough indication and insight into what constitutes ministerial function in contra-distinction to what would amount to judicial or quasi-judicial function.

30. In Province of Bombay v. Khusaldas Advani (AIR 1950 SC 222) this Court had an occasion to examine the difference between a quasi-judicial order and an administrative or ministerial order. Chief Justice Kania, in his opinion, quoted with approval an old Irish case on the issue in the following passage:

> ***".....the point for determination is whether the order in question is a quasi-judicial order or an administrative or ministerial order. In Regina (John M' Evoy) v. Dublin Corporation [1978] 2 L.R. Irish 371, 376, May C.J. in dealing with this point observed as follows:***
>
> > ***"It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection, the term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."***
> >
> > ***This definition was approved by Lord Atkinson in From e United Breweries Co. v. Bath Justices [1926] A.C. 586, 602, as the best definition of a judicial act as distinguished from an administrative act."***

31. In Khushaldas Advani's case (supra) the Court was examining whether the act in question was a ministerial/administrative act or a judicial/quasi-judicial one in the context of whether a writ of certiorari could be issued against an order under Section 3 of the Bombay Land Requisition Ordinance, 1947. The Court cited with approval the observation of L.J. Atkin in The King v. The Electricity Commissioner [1924] 1 K.B. 171that laid down the following test::

> ***"Whenever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."***

32. "The Court quoted with approval the decision in The King v. London County Council [1931] 2 K.B. 215 according to which a rule of certiorari may issue; wherever a body of persons

> ***(1) having legal authority***
>
> ***(2) to determine questions affecting rights of subjects and***
>
> ***(3) having the duty to act judicially***
>
> ***(4) act in excess of their legal authority-a writ of certiorari may issue.***

33. Justice Fazl Ali, in his concurring opinion in Khushaldas' case (supra) made the following observations as regards judicial and quasi-judicial orders:

> ***"16. Without going into the numerous cases cited before us, it may be safely laid down that an order will be a judicial or quasi- judicial order if it is made by a court or a judge, or by some person or authority who is legally bound or authorised to act as if he was a court or a judge.To act as a Court or a judge necessarily involves giving an opportunity to the party who is to be affected by an order to make a representation, making some kind of enquiry, hearing and weighing evidence, if any, and considering all the facts and circumstances bearing on the merits of the controversy before any decision affecting the rights of one or more parties is arrived at. The procedure to be followed may not be as elaborate as in a court of law and it may be very summary, but it must contain the essential elements of judicial procedure as indicated by me.***
>
> ***xxx xxx xxx***
>
> ***xxx xxx xxx.***
>
> ***.....The mere fact that an executive authority has to decide something does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference and the real test is: Is there any duty to decide judicially?***

34. The detailed concurrent opinion of Justice Das, in the same case, also agreed with the above test for determining whether a particular act is a judicial or an administrative one. Das J., observed:

> ***"The real test which distinguishes a quasi-judicial act from an administrative act is the third item in Atkin L.J.'s definition, namely the duty to act judicially."***

35. In State of Orissa v. Dr. Binapani Dei (AIR 1967 SC 1269) Justice Shah, speaking for the Court observed that the duty to act judicially arose from the very nature of the function intended to be performed. It need not be shown to be superadded. The Court held:

> ***"If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power."***

36. In A.K. Kraipak v. Union of India (1969) 2 SCC 262, Hegde, J., as His Lordship then was, recognised that the dividing line between an administrative power and a quasi-judicial power was fast vanishing. What was important, declared the Court, was the duty to act judicially which implies nothing but a duty to act justly and fairly and not arbitrarily or capriciously. The Court observed:

> ***"13. The dividing line between an administrative power and a quasi- judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule***

of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power."

37. To the same effect is the decision of this Court in Mohinder Singh Gill. v. Chief Election Commission (1978) 1 SCC 405 : (AIR 1978 SC 851) where Krishna Iyer, J. speaking for the Court observed:

"48. Once we understand the soul of the rule as fair play in action - and it is so - we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation: nothing more - but nothing less. The "exceptions" to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Text-book excerpts and ratios from rulings can be heaped, but they all converge to the same point that audi alter am partem is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation.

38. "Recently this Court in Jamal Uddin Ahmad v. Abu Saleh Najmuddin (2003) 4 SCC 257 dealt with the nature of distinction between judicial or ministerial functions in the following words:

"14. The judicial function entrusted to a Judge is inalienable and differs from an administrative or ministerial function which can be delegated or performance whereof may be secured through authorization."The judicial function consists in the interpretation of the law and its application by rule or discretion to the facts of particular cases. This involves the ascertainment of facts in dispute according to the law of evidence. The organs which the State sets up to exercise the judicial function are called courts of law or courts of justice. Administration consists of the operations, whatever their intrinsic nature may be, which are performed by administrators; and administrators

> ***are all State officials who are neither legislators nor judges." (See Constitutional and Administrative Law, Phillips and Jackson, 6th Edn., p. 13.) P. Ramanatha Aiyar's Law Lexicon defines judicial function as the doing of something in the nature of or in the course of an action in court. (p. 1015) The distinction between "judicial" and "ministerial acts" is: If a Judge dealing with a particular matter has to exercise his discretion in arriving at a decision, he is acting judicially; if on the other hand, he is merely required to do a particular act and is precluded from entering into the merits of the matter, he is said to be acting magisterially. (pp. 1013-14). Judicial function is exercised under legal authority to decide on the disputes, after hearing the parties, maybe after making an enquiry, and the decision affects the rights and obligations of the parties. There is a duty to act judicially. The Judge may construe the law and apply it to a particular state of facts presented for the determination of the controversy. A ministerial act, on the other hand, may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done. (Law Lexicon, ibid., p. 1234). In ministerial duty nothing is left to discretion; it is a simple, definite duty."***

11. Now, in case the provisions of Rule 4 are minutely scrutinized, it would be seen that the drawing up of the election programme and the act of dividing the area of operation into zones cannot be termed to be an administrative act simpliciter because while doing so, the members of the Society have a right to object and such right cannot be curtailed on the ground that the Registrar was only performing administrative duties when he assigned the Manager the task of drawing up a detailed programme of election. It is the members of the Society, who ultimately would be affected by drawing up of the election process, more particularly, when it pertains to the carving of zones and when a grievance is made by any member(s) challenging the constitution of the zones in terms of Rule 4 (supra), the same shall have to be adjudicated by exercising quasi judicial powers and would therefore not be an administrative act.

12. Now, when the functions required to be performed by an authority while exercising the powers under the provisions of Rule 4 are tested on the exposition of law laid down in *Saeed Sohail's* case (supra), it can safely be concluded that respondent No.3 while determining the validity of the objections regarding carving out of zones, was essentially acting as a quasi judicial authority because he was required to adjudicate on the dispute after hearing the parties and may be after making an inquiry. Obviously, this decision would affect the rights and obligations of the parties. Moreover, while adjudicating upon the dispute, there was a duty cast upon respondent No.3 to act judicially. Manifestly this was not merely a ministerial act where one was to perform his duty in a given state of facts in a prescribed manner or in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act done. Respondent No.3 had wide discretion to accept or reject the objections and, therefore, was essentially performing judicial functions.

13. The next question now required to be determined is regarding the validity of the order passed by respondent No.2. The only direction passed by respondent No.2 in the impugned order reads as under:

".....Thus, to suffice the interest of justice, the Assistant Registrar Cooperative Societies Solan is directed to ensure that the zones are constituted in such a way that members from contiguous areas are included in a particular zone and the provisions of Rule 4 (2) of the Rules have been complied with in letter as well as in spirit. While doing so, he will take the zones of 2009 as base and thereafter add the newly enrolled members in a particular zone in such a way that contiguity of area is maintained as per provisions of the law. He will complete this exercise on or before 10.11.2014 without disturbing the already approved election schedule. It must be ensured that election process should not be stopped. It is also noticed that election programme has been approved in cursory and hasty manner and the election programme has been approved for one ward only, for this, he is directed to correct the mistake and also advise to be careful and cautious in future in dealing such matters."

14. I fail to understand as to how the petitioner can be aggrieved by such an innocuous order which only directs the authorities to ensure that the zones are constituted in such a manner that members from contiguous areas are included in a particular zone and the provisions of Rule 4 (2) of the Rules are complied with in letter as well as in spirit.

15. The learned counsel for the petitioner would then argue that though the order may appear to be an innocuous one, but the authorities below are not implementing it in its letter and spirit and that is why he has moved an application for amendment whereby he has questioned the order passed by respondent No.3 on 10.11.2014. I am afraid that as per the provisions of the Act the remedy to question the order passed by respondent No.3 on 10.11.2014 lies elsewhere and not before this Court.

16. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed, so also the pending application(s) if any. The parties are left to bear their own costs.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.

Oriental Insurance Company Ltd. ...Appellant.
VERSUS
Smt. Indira Devi and others ...Respondents.

FAO (MVA) No. 35 of 2010.
Judgment reserved on: *21st November, 2014.*
Decided on:28th November, 2014.

Motor Vehicle Act, 1988, Section 149- It is for the insurer to plead and prove that the deceased was travelling in the vehicle as a gratuitous passenger and the owner had committed willful default but when no evidence was led by the insurer to prove this fact, Insurance Company cannot be absolved of its liability to pay the compensation. (Para-12)

Motor Vehicle Act, 1988- Section 166- Claimant had filed a petition before Workmen Compensation Commissioner which was dismissed on the ground that deceased was not a workman- held, that the claimants are not debarred from filing the claim petition on the ground that deceased was travelling in the vehicle as owner of the goods. (Para-17)

Case referred:

National Insurance Co. Ltd. versus Swaran Singh & others, reported in AIR 2004 SC 1531

For the Appellant: Mr. Lalit K. Sharma, Advocate.
Mr.G.R. Palsara, Advocate, for respondent No. 1 to 7.
Nemo for respondent No.8.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This appeal is directed against the judgment and award dated 5.11.2009, passed by the Motor Accident Claims Tribunal, Mandi, in Claim Petition No. 82 of 2007, (hereinafter referred to as "the Tribunal", for short") whereby the claim petition filed by the claimants came to be allowed and compensation to the tune of Rs.5,33,400/- came to be awarded in favour of the claimants and insurance company was saddled with the liability, for short, "the impugned award", on the grounds taken in the memo of appeal.

2. The claimants and insured have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insurer/appellant has questioned the impugned award on the ground that the Tribunal has fallen in error in saddling the insurance company with the liability and has prayed for setting aside the impugned award and dismissal of the claim petition, on the ground taken in the memo of appeal.

BRIEF FACTS.

4. Khem Raj was travelling in a Mahindra Pick-up bearing registration No. HP-07-5359 on 23.4.2004 at about 10 a.m., became victim of the road accident, which was caused by its driver, namely, Prem Singh who has driven the said Mahinder Pick-up rashly and negligently.

5. The claimants, who are widow, minor daughters and parents, had invoked the jurisdiction of the Tribunal, in terms of Section 166 of the Motor Vehicles Act, for short "the Act", for the grant of compensation, on the ground that they have lost the bread earner of the family. It is averred that he was travelling in the said offending vehicle as a coolie-cum-clerk and as care taker of the fruits.

6. The respondents, i.e., insurer, driver and owner contested the claim petition and following issues came to be framed by the Tribunal:

(i) *Whether on 23.4.2004 at about 10.00 at Baglyara the respondent No.3 was driving Mahindra Pick-up bearing No. HP-07-5359 rashly and negligently and as such caused the death of one Sh. Khem Raj? ……OPP*

(ii) *If issue No. 1 is proved, to what amount of compensation, the petitioner is entitled to and from whom? OPP*

(iii) *Whether the driver of Mahindra Pick-up NO. HP-07-5359 was not having any valid and effective driving licence at the time of the accident? OPR*

(iv) *Whether the deceased was travelling in the vehicle as a gratuitous passenger? OPR.*

(v) *Relief.*

7. The claimants have examined Suresh Kumar (PW1), Karam Singh (PW3), Om Prakash (PW4) and Indira Devi widow of deceased also stepped into the witness-box as PW2.

8. The insurer, owner and driver have not examined any witness. However, Desh Raj owner of the vehicle stepped as DW1 in the witness-box. The claimants have also placed on record, copies of FIR, (Ext. PA), copy of Pariwar Register (Ext. PB), copy of Post-mortem report (Ext. PC) and academic certificate of Diploma of the deceased (Ext.PD).

9. The Tribunal, after scanning the evidence held that the claimants have proved by leading oral as well as documentary evidence that the driver Prem Singh has driven the vehicle rashly and negligently, on the said date and has caused the accident in which deceased lost his life. Prem Singh has not questioned the findings returned by the Tribunal and even is not in dispute in this appeal. Accordingly findings on Issue No. 1 are upheld.

10. I deem it proper to deal with Issues No. 3 and 4 before I deal with Issue No. 2.

11. **Issue No. 3.** It was for the insurer to prove that the driver was not having a valid and effective driving licence. The insurer has not led any evidence thereby failed to discharge the onus. Thus, findings returned on issue No. 3 are accordingly upheld.

12. **Issue No. 4.** The insurer has to prove Issue No. 4 and discharge the onus, has not led any evidence. It is beaten law of the land that it is for the insurer to plead and prove that the deceased was traveling in the vehicle as a gratuitous passenger and owner has committed willful breach, has not led any evidence, thus failed to discharge the onus.

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 Insurance Company has to prove that deceased was travelling in the vehicle as a gratuitous passenger. Accordingly, findings returned on issue No. 4 are upheld.

15. **Issue No. 2**. The deceased was 28 years of age at the time of the accident and claimants have pleaded and proved that the deceased was earning Rs.10000/- per month. He was also earning some income from agriculture vocations. The Tribunal, after examining the record, evidence and after making a guess work held that the deceased was earning not less than 3600/- per moth and after making 1/3rd deduction, held that the claimants have lost source of dependency to the tune of Rs.2400/- per month. The Tribunal also rightly applied the multiplier of "12".

16. It appears that the Tribunal has fallen in error in assessing the income of the deceased. However, claimants have not questioned the same, is reluctantly upheld.

17. The learned counsel for the appellant has argued that the claimants had filed application before the Commissioner, under the workmen's

Compensation Act, which was dismissed. Thus, the claim petition was not maintainable. The claimants have admitted in the claim petition that they had filed petition before the Commissioner, under the Workmen's Compensation Act, which was dismissed on the ground that the deceased was not a workman, in terms of mandate of the Workmen's Compensation Act, 1923 are not estopped or precluded from filing the claim petition in terms of the provisions of Section 166 of the Act. The claimants have specifically averred that the deceased was coolie-cum-clerk and was also travelling in the vehicle as owner of the fruits, which stands admitted by PW5, driver, owner and finds mention in paras 28 and 32 of the impugned award. It is apt to reproduce paras 28 and 32 of the impugned award herein:

> *"28.Sh. Jassa Ram PW-5 by way of affidavit has testified that the deceased was working as coolie-cum- conductor with the Mahindra Pick-up No. HP07-5359 and was going to load vegetables at Thunag and deceased was carrying his 3 to 4 bags of peas when the vehicle met with an accident. He in cross-examinations stated that he did not know that in what capacity the deceased was sitting in the vehicle. Ext. PE was copy of order dated 27.11.2006 passed by the Commissioner, Gohar.*
>
> *29-31..... .....*
>
> *32.The respondent No. 3 on account of the fact that the claim of the petitioners under the Workmen Compensation Act was declined by the Commissioner, Gohar per Ext.PE on the ground that the deceased was not cleaner of the vehicle cannot contend that the deceased was travelling in the vehicle as gratuitous passenger. The Commissioner in the order has observed that the deceased was travelling in the jeep as dealer of the peas. This strengthens the case of the petitioners that the deceased was working as coolie-cum-cleaner and caretaker of the goods even if the capacity of the deceased as a cleaner is not considered."*

18. It is also a fact that the owner had filed a petition before the Commissioner under the Workmen's Compensation Act and that does not, in any way, affect the rights of the claimants and Tribunal has rightly recorded the findings on this issue in paras 30 and 33 of the impugned award. It is apt to reproduce paras 30 and 33 of the impugned award herein:

> *"30.The respondent Nos. 1 and 3 in rebuttal have adduced Ext. PA copy of order passed by the Consumer Disputes Redressal Forum Mandi dated 11.8.2005 and copy of complaint of the respondent No. Ext.RB dated 9.12.2004.*
>
> *31-32.*
>
> *33.The respondent No.2 before the learned Consumer Forum did not come up with the plea that the deceased was travelling in the vehicle as a gratuitous passenger and the complaint rather makes out that the respondent No. 1 has contested the repudiation of own damage claim filed by the respondent No.2 on account of travelling of gratuitous passenger. The learned Forum per order Ex. RA did not find any strength in the case of the respondent and the claim of the respondent No.1 was allowed. The respondents have adduced no evidence to substantiate that the deceased was travelling in the Mahindra Pick-up no.HP07-5359 as a gratuitous passenger. The respondent No. 3 has failed to substantiate that the deceased was travelling in Mahindra Pick-upno.HP07-5359 as a gratuitous passenger. This issue is decided against the respondent No.3."*

19. Having said so, no interference is called for. Accordingly, the appeal merits dismissal and is accordingly dismissed and the impugned award is upheld.

20. The Registry is directed to release the awarded amount in favour of the claimants, through payee's account cheque, strictly in terms of the conditions contained in the impugned award. Send down the record forthwith.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR,C.J.

Oriental Insurance Company Ltd. ...Appellant.
Versus
Smt. Mokshri Devi & others ...Respondents.

FAO No. 501 of 2007
Decided on: 28.11.2014

Motor Vehicle Act, 1988- Section 149- As per the testimony of Junior Assistant from the Office of R.T.O., Driving Licence was issued from Dehradun and was renewed from the Office of R.T.O. Kullu- held, that in these circumstances, the plea of the Insurance Company that driver did not have a valid driving license to drive the vehicle was not acceptable.

(Para-11 and 12)

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that deceased was travelling as a gratuitous passenger- claimants led the evidence to prove that deceased was travelling as owner of timber- no evidence was led by the Insurance Company to prove that the deceased was travelling as a gratuitous passenger- held, that in these circumstances the plea of the Insurance Company that deceased was travelling as a gratuitous passenger could not be relied upon and the Insurance Company was rightly held liable to pay the compensation.

(Para-14)

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 1 to 5.
Nemo for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Appellant-insurer has called in question the award, dated 22nd September, 2007, made by the Motor Accident Claims Tribunal, Kullu, District Kullu, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 75 of 2006, titled as Smt. Mokshri Devi & others versus Jagan Nath & others, whereby compensation to the tune of Rs. 3,75,000/- with interest @ 7% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants, as per the apportionment and against the owner-insured and the insurer came to be fastened with liability (hereinafter referred to as "the impugned award"), on the grounds taken in the memo of appeal.

2. The claimants, the owner-insured and the driver 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 the following two grounds:

(i) That the driver of the offending vehicle was not holding a valid and effective driving licence;

(ii) That the deceased was travelling in the offending vehicle as a gratuitous passenger.

4. In order to determine the issue, it would be profitable to give a brief resume of the case herein:

Brief facts:

5. The claimants, being the victims of the motor vehicular accident, invoked the jurisdiction of the Tribunal in terms of Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") for grant of compensation on the ground that their bread earner, deceased-Om Chand, met with an accident on 7th May, 2006, near GPS Barnout, District Kullu, which was caused by the driver, namely Shri Prem Bahadur, while driving Max Jeep, bearing registration No. HP-66-0780, rashly and negligently. He sustained multiple injuries, was taken to Zonal Hospital, Kullu and succumbed to the injuries. The claimants have sought compensation to the tune of Rs. 15,00,000/-, as per the break-ups given in the claim petition.

6. The owner-insured, the driver and the insurer contested the claim petition on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the Tribunal on 8th March, 2007:

"1. Whether the deceased Shri Om Chand died in a motor accident caused on 7.5.2006 near GPS Barnaut as a result of rash and negligent driving of Max Jeep bearing registration No. HP-66-0780 by its driver-respondent No. 2? OPP

2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled and from whom? OPP

3. Whether the driver of the vehicle in question was not holding a valid and effective driving licence at the time of accident? OPR-3

4. Whether the vehicle was being plied in violation of the terms and conditions of the insurance policy at the time of accident, as alleged? OPR-3

5. Whether the deceased was travelling as an unauthorised/gratuitous passenger in the vehicle in question at the time of accident? OPR-3

6. Relief."

8. The claimants have examined Dr. Rajesh Thakur as PW-1, HC Hari Singh as PW-2, Shri Hitesh Kumar as PW-4, Shri Alam Chand as PW-5 and one of the claimants, Smt. Mokshri Devi, has herself stepped into the witness box as PW-3. The owner has examined Miss Ashita Bodh, Criminal Ahlmad in the office of CJM Kullu as RW-1 and the driver-Prem Bahadur himself appeared as RW-2. The insurer has examined Shri Davinder Singh, Summary Clerk, CJM Kullu as RW-3; Shri Mohan Singh, Licence Clerk, SDM Office, Kullu, as RW-4, Shri Chander Mohan Rawat, Senior Assistant, RTO Dehradun as RW-5, Shri Krishan Sharma, Junior Assistant, RTO Kullu, as RW-6 and ASI Gangvir Singh as RW-7.

Issue No. 1:

9. There is no dispute about the findings returned on issue No. 1. However, I have gone through the impugned award and the record. The

claimants have proved by leading evidence that the driver had driven the offending vehicle rashly and negligently at the time of accident in which deceased-Om Chand sustained injuries and succumbed to the injuries. Accordingly, findings returned by the Tribunal on issue No. 1 are upheld.

10. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 to 5.

Issue No. 3:

11. Appellant-insurer had to discharge the onus, has not led any evidence to prove that the driver of the offending vehicle was not having a valid and effective driving licence. Admittedly, RW-6, Shri Krishan Sharma, Junior Assistant from the office of Regional Transport Office, Kullu, has stepped into the witness box and has deposed that the licence was renewed from their office and was issued from Dehradun. The Tribunal has rightly returned the findings in paras 15 and 16 of the impugned award.

12. Keeping the statement of RW-6 in view, one comes to an inescapable conclusion that the driver of the offending vehicle was having a valid and effective driving licence at the relevant point of time and the renewal of the same is not in dispute. Accordingly, findings returned on issue No. 3 are upheld.

Issue No. 4:

13. The appellant-insurer has also not proved, in order to seek exoneration, that the owner-insured has committed any willful breach. In view of findings returned by the Tribunal in para 16 of the impugned award and keeping in view the admitted fact that the driving licence was issued at Dehradun and renewed at Kullu, it cannot be said and held that the owner-insured has committed any willful breach. Hence, the findings returned on issue No. 4 are also upheld.

Issue No. 5:

14. It was for the insurer to lead evidence and prove that the deceased was travelling as a gratuitous passenger in the offending vehicle at the relevant point of time. There is evidence on the file led by the claimants and the documents to the effect that the deceased was travelling in the offending vehicle as owner of timber. The Tribunal has rightly recorded findings that the insurer has failed to prove that the deceased was travelling as a gratuitous passenger and the findings returned on issue No. 5 are also upheld.

Issue No. 2:

15. The Tribunal has rightly returned the findings and saddled the insurer with liability. The adequacy of the compensation is not in dispute. Accordingly, the findings returned on issue No. 2 are also upheld.

16. Viewed thus, the appeal merits to be dismissed. Accordingly, the appeal is dismissed and the impugned award is upheld.

17. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque.

18. Send down the record after placing copy of the judgment on Tribunal's file.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Raj Kumar & another ...Appellants.
Versus
Sukh Dev & others ...Respondents.

FAO No. 505 of 2007
Decided on: 28.11.2014

Motor Vehicle Act, 1988- Section 149- Accident was caused by Tata Bolero, whose gross vehicle weight is 2750 kg - it falls within the definition of light motor vehicle- driver possessed a license to drive light motor vehicle- held, that there was no requirement of having endorsement of PSV and the Tribunal had wrongly granted the right to recovery to the Insurance Company. (Para- 9 to 26)

Cases referred:

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

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

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

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

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

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

For the appellants: Mr. Rajesh Kumar, Advocate.
For the respondents: Mr. Dalip K. Sharma, Advocate, for respondent No. 1.
Nemo for respondent No. 2.
Mr. Praneet Gupta, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

By the medium of this appeal, the appellants-insured have called in question the award, dated 25th April, 2006, made by the Motor Accident Claims Tribunal, Solan (hereinafter referred to as "the Tribunal") in MAC Petition No. 33-S/2 of 2005, titled as Shri Sukhdev versus Shri Raj Kumar & others, whereby compensation to the tune of Rs. 88,000/- with interest @ 7.5% per annum from the date of institution of petition till deposit of the amount alongwith costs assessed at Rs. 1,000/- came to be awarded in favour of the claimant-injured and insurer came to be saddled with liability with right of recovery (hereinafter referred to as "the impugned award) on the grounds taken in the memo of appeal.

2. It is profitable to give a brief resume of the facts of the case herein.

Brief facts:

3. The claimant-injured became the victim of a motor vehicular accident, which was allegedly caused by the driver, namely Shri Pawan Kumar, on 14th October, 2004, at about 11.45 a.m., near Village Bakhalag, while driving Tata Bolero, bearing registration No. HP-12A-5234, rashly and negligently, hit

the claimant-injured, sustained injuries, was taken to PHC Arki, wherefrom was referred to Zonal Hospital, Solan, and remained admitted with effect from 14th October, 2004 to 20th October, 2004. The claimant-injured filed claim petition for grant of compensation to the tune of Rs. 5,50,000/-, as per the break-ups given in the claim petition.

4. The insurer, the driver and the owner-insured resisted the claim petition on the grounds taken in the memo of objections.

5. The Tribunal, after scanning the pleadings and the documents, framed the following issues on 10th November, 2005:

> *"1. Whether the petitioner suffered injuries and disability on account of rash/negligent driving of the vehicle by respondent No. 2? OPP*
>
> *2. If issue No. 1 is proved in affirmative what amount of compensation the petitioner is entitled to and from whom? OPP*
>
> *3. Whether the respondent No. 2 did not possess a valid and effective driving licence, if so its effect? OPR-3.*
>
> *4. Relief."*

6. The parties have led the evidence. The Tribunal, after scanning the evidence, oral as well as documentary, held the claimant-injured entitled to compensation to the tune of Rs. 88,000/- with interest @ 7.5% per annum from the date of institution of petition till deposit of the amount alongwith the costs assessed at Rs. 1,000/- and saddled the insured-appellants with liability.

7. The claimant-injured, the insurer and the driver have not questioned the impugned award on any count, thus, has attained finality so far it relate to them.

8. The appellants-insured have questioned the impugned award only to the extent whereby right of recovery has been granted to the insurer to recover the amount from them.

9. The only question to be determined in this appeal is – whether the Tribunal has rightly granted the right of recovery to the insurer? The answer is in negative for the following reasons:

10. Admittedly, the offending vehicle was Tata Bolero, the gross vehicle weight of which is 2750 kg, as per the registration certificate, Ext. RW-3/C, which falls within the definition of light motor vehicle.

11. I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:

> *"2. .....*
>
> *(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.*
>
> *xxx xxx xxx*
>
> *(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.*
>
> *xxx xxx xxx*

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.

xxx xxx xxx

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

12. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

13. At the cost of repetition, definition of "light motor vehicle" includes the words "transport vehicle" also. Thus, the definition, as given, mandates the "light motor vehicle" is itself a "transport vehicle", whereas the definitions of other vehicles are contained in Sections 2(14), 2 (16), 2 (17), 2 (18), 2 (22), 2 (23) 2 (24), 2 (25), 2 (26), 2 (27), 2 (28) and 2 (29) of the MV Act. In these definitions, the words "transport vehicle" are neither used nor included and that is the reason, the definition of "transport vehicle" is given in Section 2 (47) of the MV Act.

14. In this backdrop, we have to go through Section 3 and Section 10 of the MV Act. It is apt to reproduce Section 3 of the Act herein:

"3. Necessity for driving licence. *- (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.*

(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."

15. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

16. My this view is supported by Section 10 of the MV Act, which reads as under:

*"**10. Form and contents of licences to drive.*** *- (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

17. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, which was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stand deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

18. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgement hereunder:-

"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.

.....

17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise

> *that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."*
>
> *In the given circumstances of the case PSV endorsement was not required at all."*

19. The purpose of mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.*
>
> *20. .....*
>
> *21. .....*
>
> *22. .....*
>
> *23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle',*

'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

20. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. .....

10. .....

11. .....

12. .....

13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

21. The Apex Court in a latest judgment in the case titled as **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** held that endorsement is not required.

22. Having glance of the above discussions, I hold that the endorsement was not required.

23. The Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** has laid down principles, how can insurer avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment herein:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

24. In a case titled as **Lal Chand versus Oriental Insurance Co. Ltd.,** reported in **2006 AIR SCW 4832,** the owner had performed his job whatever he was required to do and satisfied himself that the driver was having valid driving licence. The Apex Court held the insurer liable. It is apt to reproduce paras 8, 9 and 11 of the judgment herein:

> *"8. We have perused the pleadings and the orders passed by the Tribunal and also of the High Court and the annexures filed along with the appeal. This Court in the case of United India Insurance Co. Ltd. v. Lehru & ors., reported in 2003 (3) SCC 338, in paragraph 20 has observed that where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). He will, therefore, have to check whether the driver has a driving licence and if the driver produces a driving licence, which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner*

would then take test of the driver, and if he finds that the driver is competent to drive the vehicle, he will hire the driver.

9. In the instant case, the owner has not only seen and examined the driving licence produced by the driver but also took the test of the driving of the driver and found that the driver was competent to drive the vehicle and thereafter appointed him as driver of the vehicle in question. Thus, the owner has satisfied himself that the driver has a licence and is driving competently, there would be no breach of Section 149(2)(a)(ii) and the Insurance Company would not then be absolved of its liability.

10. .....

11. As observed in the above paragraph, the insurer, namely the Insurance Company, has to prove that the insured, namely the owner of the vehicle, was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant point of time."

25. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

26. Having said so, I am of the considered view that the Tribunal has fallen in error in granting the right of recovery to the insurer.

27. Viewed thus, the appeal deserves to be allowed and the impugned award is to be modified. The appeal is allowed, the insurer is directed to satisfy the entire liability and the impugned award is modified accordingly.

28. Registry to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award.

29. Send down the records after placing copy of the judgment on Tribunal's file.

****

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

Sushil Kumar Dogra son of Sh. Balak Ram ...Petitioner.
Versus
State of HP and another. ....Respondents.

CWP No.508 of 2013.
Order reserved on: 13.11.2014.
Date of Order: November 28,2014.

Constitution of India, 1950- Article 226- Petitioner was compulsorily retired – he filed an application before Administrative Tribunal, which was transferred to High Court and was allowed- petitioner was permitted to make a representation against the finding of the Inquiry Officer-petitioner made a representation, which was rejected – petitioner claimed that order passed by the Disciplinary Authority rejecting the representation was incorrect- held, that the petitioner was given an opportunity to appear as defence evidence but he had failed to do so-petitioner had signed the statements of the witnesses which means that he was present during the time of recording the statements - he had failed to join the duty despite issuance of notice- employer had legal right to transfer the petitioner- as the petitioner had not joined the place of posting after transfer- therefore, he was rightly held guilty.

(Para-5 to 8)

For the petitioner: Mr.J.P.Upadhayaya with Mr. Sunil Bisht, Advocate.

For Respondents. Mr. M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present Civil Writ Petition is filed under Article 226 of the Constitution of India. It is pleaded that on dated 10.11.2006 OA No (D) 471 of 2006 was filed before HP Administrative Tribunal against compulsory retirement order dated 4.9.2002. It is pleaded that in the year 2008 OA No. 471 of 2006 was transferred to Hon'ble High Court of HP when HP Administrative Tribunal was scrapped. It is further pleaded that on dated 5.8.2011 CWP(T) No. 14534 of 2008 was decided by Hon'ble High Court of HP and the same was allowed. It is further pleaded that order of penalty Annexure A14 and order of Appellate Authority dismissing the appeal of the petitioner Annexure A20 were quashed. It is further pleaded that Hon'ble High Court of HP in CWP(T) 14534 of 2008 further directed that punishing authority shall pass appropriate orders on the basis of inquiry report after affording the petitioner an opportunity to make representation against the finding of Inquiry Officer. It is further pleaded that thereafter Director of Agriculture-cum-Disciplinary Authority vide order dated 1.8.2012 rejected representation of the petitioner to reinstate him. It is further

pleaded that impugned order No. 3-187/67-Ag.I- dated 1.8.2012 Annexure P4 passed by respondent No.2 in the capacity of Disciplinary Authority be declared as null and void. It is further pleaded that petitioner be declared in continuous service w.e.f. 4.9.2002 till date of his retirement i.e.30.4.2007 with all consequential service benefits. It is further pleaded that respondents be directed to release the pay and allowances of the petitioner w.e.f. 4.9.2002 to 30.4.2007. It is further pleaded that retired benefit such as pension, DCRG and leave encashment be also released with all arrears along with interest at the rate of 12% per annum. Prayer for acceptance of civil writ petition sought.

2. Per contra reply filed on behalf of the respondents pleaded therein that petitioner was transferred from the office of Deputy Director of Agriculture Palampur to the Directorate of Agriculture Shimla on dated 25.9.1997. It is further pleaded that petitioner was relieved by Deputy Director of Agriculture Palampur on dated 19.11.1997 but he did not join in the office of Directorate of Agriculture Shimla. It is further pleaded that petitioner willfully remained absent and was placed under suspension. It is further pleaded that thereafter petitioner was reinstated on dated 10.5.1999 with direction to resume duty in the Directorate of Agriculture Shimla and suspension period was treated as leave of the kind due and penalty of censure was imposed against the petitioner. It is further pleaded that even thereafter petitioner did not report for duty in the Directorate of Agriculture HP Shimla and remained absent without intimation. It is further pleaded that thereafter registered letter was issued to the petitioner and petitioner was informed that disciplinary action would be initiated against him. It is further pleaded that notice was also issued to the petitioner and same was published in the Indian Express on dated 29.7.1999 but despite the above stated facts petitioner did not resume the duty and behave in irresponsible manner and violated rules and office procedure. It is further pleaded that petitioner remained absent from duty without intimation and did not submit any leave application. It is further pleaded that thereafter Disciplinary Authority passed compulsory retirement order. It is further pleaded that thereafter OA No. (D) 471 of 2006 was filed by the petitioner before HP Administrative Tribunal and after scraped of the HP Administrative Tribunal the petition was transferred to Hon'ble High Court of HP and the same was registered as CWP(T) 14534 of 2008. It is further pleaded that petitioner submitted a representation and was afforded two opportunities to represent his case but he did not turn up. It is further pleaded that thereafter representation of the petitioner to reinstate from the date of compulsory retirement was again rejected. It is further pleaded that petitioner is not entitled for any relief. It is further pleaded that order dated 1.8.2012 Annexure P4 was issued after careful consideration by the Disciplinary Authority. It is further pleaded that Annexure P4 is legal document and the same be upheld. It is further pleaded that writ petition is devoid of any merit and the same be dismissed.

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

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

(1) Whether civil writ petition filed by the petitioner under Article 226 of the Constitution of India is liable to be accepted as mentioned in memorandum of grounds of civil writ petition.

(2) Final Order.

Finding upon Point No.1.

5. Submission of learned Advocate appearing on behalf of petitioner that impugned order No. 3-187/67-Agr.I dated 1.8.2012 Annexure P4 passed by respondent No.2 in the capacity of Disciplinary Authority be declared as null and void being contrary to law is rejected being devoid of any force for the

reason hereinafter mentioned. It is proved on record that on dated 5.8.2011 Hon'ble High Court of HP in CWP(T) No. 14534 of 2008 titled Sushil Kumar Dogra Vs. State of HP and another directed the Disciplinary Authority to pass an appropriate order on the basis of inquiry report after affording the petitioner an opportunity to make representation against the finding of Inquiry Officer. It is proved on record that in compliance to order of Hon'ble High Court of HP passed in civil writ petition cited supra Director of Agriculture Himachal Pradesh on dated 3.11.2011 directed petitioner to file representation against the findings of inquiry report within 20 days positively. It is proved on record that thereafter on dated 19.3.2012 Director of Agriculture Himachal Pradesh again directed the petitioner to file representation against the findings of inquiry report by way of personal hearing fixed on 28.3.2012 at 10.00 AM sharp in the chamber of Director of Agriculture Himachal Pradesh Shimla. It is proved on record that thereafter petitioner Sushil Kumar has submitted that date of hearing be fixed after 20.4.2012. It is also proved on record that thereafter again Director of Agriculture Himachal Pradesh directed the petitioner to file representation against the finding of inquiry report by way of personal hearing fixed on dated 25.4.2012 at 10.00 AM sharp in the chamber of Director of Agriculture Himachal Pradesh. It is proved on record that thereafter representation was filed by petitioner Sushil Kumar and petitioner further submitted in written manner that facts stated in his representation be treated as his statement in personal hearing. It is proved on record that despite several opportunities granted by the Disciplinary Authority petitioner did not appear before the Disciplinary Authority for his statement. On the contrary petitioner has specifically mentioned in his representation that representation qua compulsory retirement w.e.f. 4.9.2002 be treated as a statement in personal hearing. It is well settled law that there is difference between the pleading and oral testimony. It is also well settled law that facts can be proved by way of oral testimony or by way of documentary evidence. No sufficient reason has been mentioned by the petitioner for non-appearance before the Disciplinary Authority. Petitioner did not place on record any medical certificate in order to prove his health problem.

6. Submission of learned Advocate appearing on behalf of the petitioner that Inquiry Officer has not permitted the petitioner to examine himself as defence witness is rejected being devoid of any force for the reason hereinafter mentioned. Petitioner was asked by the Inquiry Officer on dated 27.11.2001, 2.2.2002 and 15.2.2002 to give statement in his defence but petitioner failed to do so.

7. Another submission of learned Advocate appearing on behalf of the petitioner that written briefs dated 20.4.2002 and 24.5.2002 stated to have been given to the Inquiry Officer was not received by the Inquiry Officer is also rejected being devoid of any force for the reason hereinafter mentioned. There is no evidence on record in order to prove that written briefs dated 20.4.2002 and 24.5.2002 given to the Inquiry Officer. This appears to be after thought story of the petitioner.

8. Another submission of learned Advocate appearing on behalf of the petitioner that inquiry is vitiated is not substantive with records because petitioner has himself signed the statement given by the prosecution witness from page 52 to 55 and page 64 to 66. The concerned Assistant Director of Agriculture has also stated in his statement before the Inquiry Officer on dated 28.5.2001 during cross examination that letter A6, A21 and A22 were not received in the office of Directorate of Agriculture. In the present case it is proved on record through affidavit that petitioner was transferred from the office of Deputy Director Agriculture Palampur to the Directorate Agriculture Shimla on dated 25.9.1997 and it is also proved on record that petitioner was relieved by Deputy Director Agriculture Palampur on dated 19.11.1997 but petitioner did not join at his place of posting and petitioner remained willfully absent and was placed under suspension. It is also proved on record that petitioner was

reinstated on dated 10.5.1999 with direction to resume duty in the office of Directorate of Agriculture Shimla and the period of suspension was treated as leave of kind due. It is also proved on record that despite reinstatement of the petitioner on dated 10.5.1999 petitioner did not join the duty at his place of posting and willfully remained absent from duty. It is proved on record that thereafter notice was issued to the petitioner through registered letter dated 31.5.1999 and 21.6.1999 which was duly acknowledged by the petitioner but despite the above stated facts petitioner did not join at his place of posting. It is well settled law that employee cannot be permitted to flout the transfer order of appointing authority. No reason has been assigned by the petitioner as to why the petitioner did not join at the place of his posting. It is well settled law that employee has no legal right to be retained in a particular station. It is well settled law that employer has legal right to transfer the employee at a particular station as per exigency of the circumstances of service. In the present case keeping in view conduct of the petitioner for non joining posting station he is not legally entitled for any relief as sought in the writ petition because it is proved on record that petitioner had committed non-compliance of the order of appointing authority qua transfer order. It is proved on record that petitioner willfully did not join at the place of his posting. It is also proved on record that even after reinstatement on dated 10.5.1999 petitioner did not join at the place of his posting intentionally and voluntarily. Court is of the opinion that employee cannot be allowed to dictate the terms to the appointment authority qua place of posting. In view of the above stated facts point No.1 is answered in negative against the petitioner.

Point No.2.

Final Order.

9. In view of the findings in point No.1 civil writ petition filed under Article 226 of the Constitution of India is dismissed and relief(s) sought in relief clause from paras (a) to (h) are declined in the ends of justice keeping in view the fact that petitioner intentionally did not join at the place of his posting despite several opportunities granted by appointment authority. Writ petition is disposed of with no order as to costs. All miscellaneous application(s) are also disposed of.

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HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.

FAOs No. 339, 340, 460 & 461 of 2007
Decided on : 28.11.2014

	FAO No. 339 of 2007	
	United India Insurance Company Limited	...Appellant
	Versus	
	Smt. Poonam Sharma & others	...Respondents
2.	**FAO No. 340 of 2007**	
	United India Insurance Company Limited	...Appellant
	Versus	
	Smt. Sheela Devi & others	....Respondents
3.	**FAO No. 460 of 2007**	
	Smt. Sheela Devi	...Appellant
	Versus	
	Ashok Kumar & others	....Respondents
4.	**FAO No. 461 of 2007**	
	Smt. Poonam Sharma	...Appellant
	Versus	
	Ashok Kumar & others	....Respondents

Motor Vehicle Act, 1988- Section 149- Insurance Company claimed that driver did not have valid driving licence to drive the vehicle and that insured had committed willful breach of the terms and conditions of the insurance policy- however, no evidence was led to prove this fact- held, that insurer had to plead and prove that the owner of the vehicle has committed willful breach of the terms and conditions of the insurance policy and mere plea is not sufficient to seek exoneration. (Para- 12)

Case referred:
National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 SC 1531

FAOs No. 339 & 340 of 2007
For the appellant(s) : Mr. Ashwani K. Sharma, Advocate.
Mr. S.C. Sharma, Advocate, for respondent(s) No. 1.
Mr. Ajay Sharma, Advocate, for respondent(s) No. 2 & 3.

FAOs No. 460 & 461 of 2007
For the appellant(s) : Mr. S.C. Sharma, Advocate.
Mr. Ajay Sharma, Advocate, for respondent(s) No. 1 & 2.
Mr. Ashwani K. Sharma, Advocate, for respondent(s) No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral*

All these appeals are outcome of a common award dated 22.06.2007, made by the Motor Accident Claims Tribunal, Shimla, (hereinafter referred to as "the Tribunal") in M.A.C.C. No. 42-S/2 of 2003, titled *Smt. Poonam Sharma versus Shri Ashok Kumar & others* and M.A.C.C. No. 43-S/2 of 2003, titled as *Smt. Sheela Devi versus Shri. Ashok Kumar & others,* whereby compensation to the tune of Rs. 1,75,000/- and Rs.3,54,000/, came to be awarded in favour of the claimants in Claim Petition No. 42-S/2 of 2003, and Claim Petition No. 43-S/2 of 2003, respectively, with interest @ 7.5% per annum from the date of filing of the claim petitions till its realization and the United India Insurance Company, being the insurer of the vehicle, was saddled with liability, in both the claim petitions, for short the "impugned award".

BRIEF FACTS:

2. Claimants, Smt. Poonam Sharma in M.A.C.C. No. 42-S/2 of 2003 and Smt. Sheela Devi in M.A.C.C. No. 43-S/2 of 2003, have invoked the jurisdiction of the Tribunal, for grant of compensation to the tune of Rs.5,00,000/- and Rs.10,00,000/- respectively, with interest @ 18% per annum, as per the break-ups given in the claim petitions, on the ground that driver, namely, Jeet Ram, was driving vehicle-bus bearing registration No. HP-19-4870, rashly and negligently, on 09.12.1999, at about 6.50 p.m., at Kinnu, Police Station, Amb; caused the accident; Akash Kumar and Sanjeev Kumar sustained injuries and succumbed to the injuries and the claimants have lost their bread-earners.

3. The respondents have resisted the claim petitions on the grounds taken in the memo of objections.

4. Common issues came to be framed by the Tribunal in both the petitions on 27.10.2004. It is apt to reproduce the issues framed in claim petition No. 42-S/2 of 2003:-

"i) Whether the death of Akash Kumar took place due to rash and negligent driving of Bus No. HP-19-4870 by the respondent Jeet Ram? ..OPP

ii) In case Issue No. 1 is proved in affirmative to what amount of compensation the petitioner is entitled to? ...OPP

iii) Whether the vehicle in question at the time of accident was being driven by a person not holding a valid and effective driving licence and in violation of terms and conditions of the Insurance Policy?

iv) Whether the petition is filed by the petitioner in collusion with the respondents No. 1 and 2? OPR-3

v) Whether the petition is bad for mis-joinder of necessary parties? OPR-3

vi) *Relief."*

5. The parties led evidence. The Tribunal after examining the pleadings and scanning the evidence on record, held that the deceased sustained injuries; succumbed to the injuries in a vehicular accident, which was caused by driver Jeet Ram, while driving the offending bus, rashly and negligently; the claimants are entitled to compensation to the tune of Rs.1,75,000/- and Rs.3,54,000/- in claim petitions No. 42-S/2 of 2003 and 43-S/2 of 2003, respectively, with interest at the rate of 7.5% per annum from the date of filing of the claim petitions till its realization and saddled the insurer with liability.

6. The insured-owner and the driver have not questioned the impugned award, on any count. Thus, it has attained finality so far as it relates to them.

7. The Insurer-United India Insurance Company has questioned the impugned award on the ground that the Tribunal has fallen in error in saddling it with liability.

8. The claimants have also questioned the impugned award on the ground of adequacy of compensation.

Issue No. 1

9. The findings returned by the Tribunal on this issue are not in dispute. However, I have gone through the impugned award, pleadings and the evidence on the record. The claimants have proved by leading oral as well as documentary evidence that the driver had driven the offending vehicle in a rash and negligent manner on the fateful day and caused the accident, in which the deceased sustained injuries and succumbed to the injuries. Thus, the findings returned by the Tribunal on this issue are upheld.

Issues No. 4 & 5

10. There is no dispute regarding these issues. Accordingly, the findings returned by the Tribunal on these issues are upheld.

Issue No. 3.

11. The onus to prove this issue was upon the insurer-Insurance Company, but it has failed to discharge the same.

12. It is beaten law of the land that insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms and conditions of the insurance policy and mere plea here and there cannot be a ground for seeking exoneration.

13. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 SC 1531.** It is apt to reproduce relevant portion of para 105 of the aforesaid judgment**,** herein:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) .....*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

14. The insurer-insurance company has failed to prove this issue, thus the Tribunal has rightly recorded the findings on this issue. Accordingly, the findings returned by the Tribunal on this issue are also upheld.

Issue No. 2

15. The claimants have also sought the enhancement of compensation on the ground that the award amount is inadequate. The Tribunal has made discussion in para 40 of the impugned judgment in claim petition No. 42-S/2 of 2003 and paras 41 to 45 of the judgment, *supra,* in claim petition No. 43-S/2 of 2003, about the grant of compensation. The Tribunal has rightly assessed the compensation, which cannot be said to be inadequate, in any way. Accordingly, the findings returned by the Tribunal on this issue are also upheld.

16. Having said so, I am of the considered view that the Tribunal has rightly assessed the adequate and just compensation and saddled the insurer-United India Insurance Company with liability to satisfy the award and all these appeals merit to be dismissed; are dismissed as such and the impugned award is upheld accordingly.

17. Registry is directed to release the awarded amount in favour of the claimants, strictly as per the terms and conditions, contained in the impugned award.

18. Send down the records after placing copy of the judgment on the record.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Sh. Vipan Kumar .....Appellant

Versus

Naushad Ahmed and another .....Respondents.

FAO (MVA) No. 164 of 2007
Date of decision: 28.11.2014.

Motor Vehicle Act, 1988- Sections 149 and 157- Unless and until the transfer is effected in the registration certificate and the other documents, registration certificate continues to be in the name of the owner and the transferee in whose name the vehicle has been transferred cannot be said to be the registered owner. (Para-7)

For the appellant:	Mr. Jagdish Thakur, Advocate.
For the respondents:	Nemo for respondent No.1. Ms. Sunita Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award dated 28.2.2007, passed by the Motor Accident Claims Tribunal-II Sirmaur District at Nahan, H.P. in MAC Petition No. 33-N/2 of 2002, titled *Sh. Vipan Kumar versus Sh. Naushad Ahmed and others*, whereby claim petition of the claimant came to be dismissed, for short "the impugned award", on the grounds taken in the memo of appeal.

2. The claimant being the victim of a vehicular accident filed claim petition before the Tribunal for the grant of compensation, on the grounds taken in the memo of claim petition.

3. The respondents resisted and contested the claim petition and following issues came to be framed:

(i) *Whether petitioner Vipan Kumar sustained grievous injuries in a motor accident caused by rash and negligent driving of a Maruti Car (No.UGX-4001) by its driver (who also died) near Paonta Sahib Tehsil on January 15,2002, as alleged? ……. OPP*

(ii) If the issue 1 is proved, whether the petitioner is entitled to compensation? If so, to what amount and from whom? ……..OPP

(iii) Whether the Maruti Car driver (deceased) had no valid driving licence at the relevant time. If so, its effect? …….OPR-2.

(iv) Whether the petition is bad for mis-joinder and non-joinder of necessary parties, as alleged? OPR-2.

(v) Whether the Car involved in the accident was being plied in violation of the terms and conditions of the insurance policy.OPR-2.

(vi) Relief.

4. The parties led the evidence.

5. Issue No. 1 came to be decided in favour of the claimant by holding that driver had driven the offending vehicle rashly and negligently.

6. Before I deal with Issue No. 2, I deem it proper to deal with Issues No. 3, 4 and 5. Respondent No. 2- insurer has failed to lead any evidence on Issues No. 3 and 5. However, I have gone through the record. The respondents have not discharged the onus to prove these issues, came to be rightly decided by the Tribunal.

7. The Tribunal has fallen in error in deciding Issue No. 4. It is beaten law of the land that unless and until the transfer is effected in the Registration certificate and other documents, registration continues to be in the name of the owner of the vehicle and so called transferee in whose name the vehicle was to be transferred, cannot be said to be registered owner.

8. I, while dealing with the issue of the same and similar nature in **FAO No. 7 of 2007** titled *Ashok Kumar & another Versus Smt. Kamla Devi & others* decided on 5.9.2014, in terms of the apex court judgments laid down the same principles. It is apt to reproduce paras 15 to 19 of the said judgment herein:

> "15. Section 157 of the Act reads as under:
>
> ***"Transfer of certificate of insurance.***
>
> *(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.*
>
> *[Explanation.—For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.]*
>
> *(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."*
>
> While going through the aforesaid provision, one comes to an inescapable conclusion that transfer of a vehicle cannot absolve insurer from third party liability and the insurer has to satisfy the award.
>
> 16. Admittedly, on the date of accident, i.e. 05.06.2000, the offending vehicle was not transferred in the name of appellant-Ashok Kumar. It was transferred in his name w.e.f. 17.06.2000. Thereafter, the appellant-respondent No. 1 Ashok Kumar was supposed to give information regarding transfer of the vehicle to the insurer-Insurance Company. The vehicle was not transferred on the date of accident, thus the question of informing the insurer about the transfer of the vehicle does not arise, at all. If the offending vehicle would have been transferred on the date of accident, i.e. 5th June, 2000, that can not be a ground to defeat the rights of the third party. As per the mandate of the Section (*supra)*, the insurance policy shall be deemed to have been issued in favour of the transferee.
>
> 17. My this view is fortified by the Apex Court Judgment in case titled as **G. Govindan versus New India**

Assurance Company Ltd. and others, reported in **AIR 1999 SC 1398.** It is apt to reproduce paras-10, 13 & 15 of the aforesaid judgment herein:

" 10. This Court in the said judgment held that the provisions under the new Act and the old Act are substantially the same in relation to liability in regard to third party. This Court also recognised the view taken in the separate judgment in Kondaiah's case that the transferee-insured could not be said to be a third party qua the vehicle in question. In other words, a victim or the legal representatives of the victim cannot be denied the compensation by the insurer on the ground that the policy was not transferred in the name of the transferee.

11. .....

12. .....

13. In our opinion that both under the old Act and under the new Act the Legislature was anxious to protect the third party (victim) interest. It appears that what was implicit in the provisions of the old Act is now made explicit, presumably in view of the conflicting decisions on this aspect among the various High Courts.

14. .....

15. As between the two conflicting views of the Full Bench judgments noticed above, we prefer to approve the ratio laid down by the Andhra Pradesh High Court in Kondaiah's case (AIR 1986 Andh Pra 62) as it advances the object of the Legislature to protect the third party interest. We hasten to add that the third party here will not include a transferee whose transferor has not followed procedure for transfer of policy. In other words in accord with the well-settled rule of interpretation of statutes we are inclined to hold that the view taken by the Andhra Pradesh High Court in Kondaiah's case is preferable to the contrary views taken by the Karnataka and Delhi High Courts (supra) even assuming that two views are possible on the interpretation of relevant sections as it promotes the object of the Legislature in protecting the third party (victim) interest. The ratio laid down in the judgment of Karnataka and Delhi High Courts (AIR 1990 Kant 166 (FB) and AIR 1989 Delhi 88) (FB) (supra) differing from Andhra Pradesh High Court is not the correct one."

18. The Apex Court in case titled as **Rikhi Ram and another** versus **Smt. Sukhrania and others,** reported in **AIR 2003 SC 1446** held that in absence of intimation of transfer to Insurance Company, the liability of Insurance Company does not cease. It is apt to reproduce paras 5, 6 & 7 of the judgment, *supra,* herein:-

"5. The aforesaid provision shows that it was intended to cover two legal objectives. Firstly, that no one who was not a party to a contract would bring an action on a contract; and secondly, that a person who has no interest in the subject matter of an insurance can claim the benefit of an insurance. Thus, once the vehicle is insured, the owner as well as any other person can use the vehicle with the

consent of the owner. Section 94 does not provide that any person who will use the vehicle shall insure the vehicle in respect of his separate use.

6. On an analysis of Ss. 94 and 95, we further find that there are two third parties when a vehicle is transferred by the owner to a purchaser. The purchaser is one of the third parties to the contract and other third party is for whose benefit the vehicle was insured. So far, the transferee who is the third party in the contract, cannot get any personal benefit under the policy unless there is a compliance of the provisions of the Act. However, so far as third party injured or victim is concerned, he can enforce liability undertaken by the insurer.

7. For the aforesaid reasons, we hold that whenever a vehicle which is covered by the insurance policy is transferred to a transferee, the liability of insurer does not ceases so far as the third party/victim is concerned, even if the owner or purchaser does not give any intimation as required under the provisions of the Act."

19. The Apex Court in latest judgment titled as **United India Insurance Co. Ltd., Shimla** versus **Tilak Singh and others,** reported in **(2006) 4 SCC 404** has held the same principle. It is apt to reproduce paras- 12 & 13 of the said judgment herein:

"*12. In Rikhi Ram v. Sukhrania [(2003) 3 SCC 97 : 2003 SCC (Cri) 735] a Bench of three learned Judges of this Court had occasion to consider Section 103-A of the 1939 Act. This Court reaffirmed the decision in G. Govindan case and added that the liability of an insurer does not cease even if the owner or purchaser fails to give intimation of transfer to the Insurance Company, as the purpose of the legislation was to protect the rights and interests of the third party.*

13. Thus, in our view, the situation in law which arises from the failure of the transferor to notify the insurer of the fact of transfer of ownership of the insured vehicle is no different, whether under Section 103-A of the 1939 Act or under Section 157 of the 1988 Act insofar as the liability towards a third party is concerned. Thus, whether the old Act applies to the facts before us, or the new Act applies, as far as the deceased third party was concerned, the result would not be different. Hence, the contention of the appellant on the second issue must fail, either way, making a decision on the first contention unnecessary, for deciding the second issue. However, it may be necessary to decide which Act applies for deciding the third contention. In our view, it is not the transfer of the vehicle but the accident which furnishes the cause of action for the application before the Tribunal. Undoubtedly, the accident took place after the 1988 Act had come into force. Hence it is the 1988 Act which would govern the situation."

9. Thus, the findings recorded are wrong and illegal. Even otherwise, the purpose of granting compensation is a social one and to save the victim of a vehicular accident from starvation and social evils. The claim petition cannot be dismissed in view of Section 158 (6) and 166 (4) of the Motor Vehicles Act, 1988.

10. Having said so, the findings on issue No. 4 are set aside.

11. Now coming to issue No. 2, the Tribunal has decided Issue No. 2 on the basis of the findings recorded on Issues No. 3 and 4. The question is, to what amount of compensation, the petitioner is entitled to. The Tribunal has made assessment and come to the conclusion that the claimant is entitled to Rs.3,14,659/- which is not in dispute in this appeal.

12. The question is who is to be saddled with the liability. This Issue has not been decided by the Tribunal. The insurer has not led any evidence to prove whether it is an "Act policy" or otherwise.

13. In the given circumstances, I deem it proper to remand the appeal by directing the Tribunal to decide the said issue, i.e., who is to be saddled with the liability. The insurer and owner are at liberty to lead evidence to that effect.

14. The parties are directed to cause appearance before the Tribunal on **20th December, 2014** and the Tribunal is directed to decide the matter by or before **20th February, 2015.**

15. Send down the record forthwith.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

M/s Ahluwalia Contracts (India) Ltd. .....Petitioner
Versus
HPSEB Limited & Another .....Respondents

Arb. Case No. 57 of 2014.
Decided on: 14th November, 2014

Arbitration and Conciliation Act, 1966- Section 11(6)- Petitioner contended that Chairman of the respondent, Company had not appointed an Arbitrator despite the demand raised by the petitioner- respondent stated that Arbitrator was appointed within stipulated period of 30 days from the date of issuance of the notice and the petition had become infructuous – record showed that an Arbitrator was appointed with the approval of the Chairman- merely because order of appointment was signed by Chief Engineer does not mean that Arbitrator was appointed by Chief Engineer- fairness and impartiality of arbitrator cannot be doubted at this stage and the petitioner will be at liberty to resort to the remedy in accordance with law- petition dismissed.

(Para- 9 to 14)

Case referred:
Indian Oil Corporation Limited & Others versus Raja Transport Private limited, (2009) 8 SCC, 520

For the petitioner : Mr. S.K. Maniktala & Mr. Ankush Dass, Advocates
For the respondents : Mr. J.S. Bhogal, Senior Advocate with Mr. Satish Sharma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

In this petition under Section 11(6) of the Arbitration and Conciliation Act, a prayer has been made for appointment of Arbitrator in terms of clause 4.41.1 of the contract agreement, Annexure P-4. The complaint is that the Chairman of the respondent-Company has not appointed the Arbitrator irrespective of the demand in this regard raised vide notice dated 4th August, 2014 (Annexure P-25) served upon the respondent-Company by the petitioner contractor.

2. In response to the petition on behalf of the respondent-Company, a question of maintainability on the ground that the arbitrator stands appointed well within the period of thirty days from the date of issuance of the notice vide order Annexure R-1 by the competent authority, has been raised. The petition therefore, has been sought to be dismissed on this score alone.

3. Mr. S.K. Maniktala Advocate assisted by Mr. Ankush Dass, Advocate has vigorously argued that the appointment of the arbitrator has not been made by the competent authority within thirty days from the date of issuance of notice Annexure P-25. Also that on the basis of order Annexure R-1, the Arbitrator has been appointed to resolve the dispute qua which no notice ever was served upon the petitioner-contractor. Mr. Maniktala, has further canvassed that the officer, Chief Engineer (Generation) HPSEB Limited Sundernagar, is under the direct control of Director Technical, who has rejected

the claims of the contractors sought to be referred for resolution to the Arbitrator. Mr. Maniktala, therefore, apprehends that the Arbitrator so appointed may not conduct the proceedings in a fair and impartial manner.

4. Mr. J.S. Bhogal, Senior Advocate, assisted by Mr. Satish Sharma, Advocate while reiterating the stand of the respondent-Company in reply to the petition has urged that the appointment has been made by the competent authority i.e. the Chairman strictly in accordance with the terms of contract agreement. Mr. Bhogal has fairly submitted that during the course of the proceedings by the Arbitrator, the claims as referred to in the notice Annexure P-25 certainly will be looked into by the arbitrator. Also that the recital in the order of appointment that "for non completion of the Turnkey Project by M/s Ahluwalia Contracts (India) Ltd." should not be misconstrued to infer that the claims of the petitioner-contractor will not be entertained or looked into. It has further been canvassed that the respondent-Company has appointed the arbitrator and any grouse in this behalf of the petitioner-contractor can be taken care of under the provisions in the Arbitration and Conciliation Act by the Arbitrator so appointed.

5. On analyzing the submissions made on both sides and also the record including the original one pertaining to the appointment of the arbitration make it crystal clear that "Circle Head Draughtsman" (CHDM) in the office of Superintendent Engineer (P&M), Shimla has prepared note dated 28.8.2011 with regard to the appointment of the arbitrator for perusal and order by the competent authority. Para 6 of the note reads as follows:

> " The Firm's Advocate (Maniktala & Associates) vide letter No.SKM/Gen/14-2303/R dated 09.08.2014 (Annexure-A) has forwarded the copy of their letter No.SKM/Gen/14-2303 dated 04.08.2014 wherein the firm has issued notice and requested to appoint Arbitrator. The reply of notice is annexed as Annexure-B"

6. The CHDM has suggested the following for being appointed as Arbitrator:-

> " The Chief Engineer (PCA), HPSEBL, Vidyut Bhawan, Shimla-04.
>
> Or
>
> The Chief Engineer (MM), HPSEBL, Vidyut Bhawan, Shimla-04.
>
> Or
>
> The Chief Engineer (SO & P), HPSEBL, Vidyut Bhawan, Shimla-04.
>
> Or
>
> The Chief Engineer (Gen.), HPSEBL, Sundernagar.
>
> Or
>
> The Chief Engineer (Comm.), HPSEBL, Shimla-04."

7. The papers were routed through proper channels i.e. right from the Assistant Executive Engineer upto the Chairman of the respondent-Corporation on 28.8.2014 itself. The Chief Engineer (P&M) in his note at Sl. No.11 has given the following proposal for appointment of Arbitrator:-

> " May appoint by designation, Chief Engineer (Generation) as Arbitrator and concerned ASE/Sr. Xen (Designs) o/o

S.E. (Designs) E.S. Hamirpur as presenting officer in the matter please."

8. The papers were further routed to the Chairman of the respondent-Company through the Managing Director and the Chairman has approved the proposal reproduced supra. This has resulted in issuance of office order Annexure R-1, dated 30.8.2014.

9. The original record amply demonstrates that the appointment of Arbitrator vide Annexure R-1 has approval of the Chairman. Merely that the order Annexure R-1 has been signed by Chief Engineer (P&M), Shimla should not be taken to infer that it is the Chief Engineer, who has appointed the Arbitrator. The Arbitrator rather has been appointed by a competent authority i.e. Chairman well within thirty days from the date of issuance of the notice Annexure P-25 by the petitioner-contractor.

10. It cannot also be said that the Arbitrator so appointed will not adjudicate the claims of the petitioner-contractor detailed in the notice Annexure P-25 for the reasons that the notice was placed before the authorities at the time of submission of papers for appointment of arbitrator. The arbitrator has, therefore, been appointed after taking into consideration the notice and the claims laid therein by the petitioner-contractor. It is for this reason that the copy of the order of appointment of arbitrator has been endorsed to the petitioner-contractor through Shri S.K. Maniktala, Advocate as it is he who issued the notice to the respondent-Company on behalf of the petitioner-contractor.

11. The words in the order "for non completion of the Turnkey Project by M/s Ahluwalia Contracts (India) Ltd." denote to the name of the work awarded to the petitioner-contractor and non completion thereof and should not be made to understand that the Arbitrator has not been appointed consequent upon the issuance of notice by the petitioner-contractor and rather on the request of respondent-Company without serving the petitioner-contractor with a notice in this behalf. There should be no doubt qua the adjudication of the claims of the petitioner-contractor raised in the legal notice Annexure P-25 by the Arbitrator, of course taking into consideration the counter claims, if any, of the respondent-Company also. Mr. Bhogal, therefore, is absolutely justified in claiming that the petition is not maintainable in view of the appointment of the arbitrator made by the competent authority well within the time prescribed therefor. The petitioner-contractor, if aggrieved, in any manner whatsoever, by such appointment is at liberty to set into motion the machinery provided under the Arbitration and Conciliation Act itself.

12. If coming to the apprehension of Mr. Maniktala that the fair and impartial proceedings are not expected from the arbitrator so appointed, irrespective of this Court has held that this petition is not maintainable, it would not be improper to conclude that such apprehension is not well founded particularly when the agreement to which the petitioner-contractor is one of the parties provides for appointment of an arbitrator atleast in the rank of Chief Engineer by the Chairman of the respondent-Company. This also deals with other grounds of the petitioner-contractor that the Arbitrator has not been appointed by name but by designation for the reasons that in the agreement there is no requirement of appointment of the Arbitrator by name.

13. The fairness and impartiality of the Arbitrator cannot be doubted at this stage and in the event of an instance of partiality and biasness comes to the notice of the petitioner-contractor; he will be at liberty to resort to the

remedy in this regard available to him in accordance with the provisions contained under the Act. The apex Court in para 39 of the judgment rendered in ***Indian Oil Corporation Limited & Others*** versus ***Raja Transport Private limited***, ***(2009) 8 SCC, 520*** no doubt has observed that the Government/Statutory authorities have to reconsider their policy of appointment of employee Arbitrator in deference to the specific provisions of the new Act reiterating the need for independence and impartiality in the arbitration proceedings, however, at the same time it has further been observed by the apex Court in the judgment supra that the independence or impartiality of an Arbitrator, a Senior Officer, should not be doubted in the absence of any specific evidence.

14. In view of what has been said hereinabove, the petition is dismissed. Pending application(s), if any, shall also stand disposed of.

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

CWP No. 6735 of 2014 & connected matters.
Reserved on: 16.10.2014.
Decided on: 17.11.2014.

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1. CWP No. 6735 of 2014.
Sunil Singh .....Petitioner.
Versus
State of H.P. & others. .....Respondents.

2. CWP No. 6736 of 2014.
Sunil Singh .....Petitioner.
Versus
State of H.P. & others. .....Respondents.

3. CWP No. 6743 of 2014.
Sunil Singh .....Petitioner.
Versus
State of H.P. & others. .....Respondents.

4. CWP No. 6768 of 2014.
Sunil Singh .....Petitioner.
Versus
State of H.P. & others. .....Respondents.

5. CWP No. 6770 of 2014.
Sunil Singh .....Petitioner.
Versus
State of H.P. & others. .....Respondents.

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 104- Widow has a right during her life time - vestment/conferment of the proprietary rights upon the tenant is automatic after the death of widow- proprietary rights cannot be conferred on the basis of Will. (Para-11)

For the petitioner(s): Mr. B.S.Attri, Advocate in all the petitions.

For the respondents: Mr. Ashok Chaudhary, Addl. Advocate General-for respondent-State.

Mr. V.S.Rathore, Advocate, for private respondents in all the petitions.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these petitions, these are taken up together for being disposed of by a common judgment. However, in order to maintain clarity, the facts of each petition have been considered separately.

CWP No. 6735 of 2014.

2. The Assistant Collector Ist Grade, Shahpur, District Kangra on 28.3.2001 conferred proprietary rights in favour of respondents No. 4 to 7 vide Annexure P-3, mutation No. 352. The petitioner filed an appeal before the Collector bearing appeal No. 34 of 2001. The appeal was dismissed by the Collector on 6.8.2003. The petitioner filed an appeal before the learned Divisional Commissioner bearing appeal No. 278 of 2003 against the order dated 6.8.2003. The Divisional Commissioner Kangra at Dharamshala accepted the appeal on 20.3.2006. Respondents No. 4 to 7 filed the revision before the Financial Commissioner bearing No. 145 of 2006. The learned Financial Commissioner allowed the revision on 14.1.2009 and the order passed by the Divisional Commissioner on 20.3.2006 was set aside. The petitioner assailed the order dated 14.1.2009 by filing CWP No. 1329 of 2009. It was decided by the learned Single Judge of this Court on 22.4.2013. The order dated 14.1.2009 was set aside. The Financial Commissioner (Appeals), was directed to decide the matter afresh within three months. The Financial Commissioner (Appeals), decided the revision alongwith the analogous matters on 15.7.2014. The learned Financial Commissioner (Appeals) held that his predecessor has rightly set aside the order passed by the learned Commissioner, Kangra dated 20.3.2006. The revision petitions were accepted and order dated 28.5.2001 of the learned A.C. Ist Grade, conferring proprietary rights on the tenants was found to be in accordance with law vide order dated 15.7.2014.

CWP No. 6736 of 2014.

3. The Assistant Collector Ist Grade, Shahpur, District Kangra on 28.3.2001 conferred proprietary rights in favour of the respondents No. 4 & 5. The petitioner filed an appeal before the Collector bearing appeal No. 30 of 2001. The appeal was dismissed by the Collector on 6.8.2003. The petitioner filed an appeal before the learned Divisional Commissioner bearing appeal No. 275 of 2003 against the order dated 6.8.2003. The Divisional Commissioner Kangra at Dharamshala accepted the appeal on 20.3.2006. Respondents No. 4 & 5 filed the revision before the Financial Commissioner bearing No. 142 of 2006. The learned Financial Commissioner allowed the revision on 14.1.2009. The petitioner challenged the order dated 14.1.2009 by filing CWP No. 1302 of 2009. It was decided by the learned Single Judge of this Court on 22.4.2013. The order dated 14.1.2009 was set aside. The Financial Commissioner (Appeals), was directed to decide the matter afresh within three months. The Financial Commissioner (Appeals), decided the revision alongwith the analogous matters on 15.7.2014. The learned Financial Commissioner (Appeals) held that his

predecessor has rightly set aside the order passed by the learned Commissioner, Kangra dated 20.3.2006. The revision petitions were accepted and order dated 28.5.2001 of the learned A.C. Ist Grade, was upheld.

CWP No. 6743 of 2014.

4. Proprietary rights were conferred upon the private respondents and predecessor-in-interest by the Assistant Collector Ist Grade, Shahpur, District Kangra vide order dated 28.3.2001. The petitioner filed an appeal against the conferment of proprietary rights on the private respondents bearing appeal No. 31 of 2001. The appeal was dismissed by the Collector on 6.8.2003. The petitioner filed an appeal before the learned Divisional Commissioner bearing appeal No. 276 of 2003 against the order dated 6.8.2003. The Divisional Commissioner Kangra at Dharamshala accepted the appeal on 20.3.2006. The private respondents filed the revision before the Financial Commissioner bearing No. 143 of 2006. The learned Financial Commissioner allowed the revision on 14.1.2009. The petitioner challenged the order dated 14.1.2009 by filing CWP No. 1330 of 2009. It was decided by the learned Single Judge of this Court on 22.4.2013. The order dated 14.1.2009 was set aside. The Financial Commissioner (Appeals), was directed to decide the matter afresh within three months. The Financial Commissioner (Appeals), decided the revision alongwith the analogous matters on 15.7.2014.

CWP No. 6768 of 2014.

5. Proprietary rights were conferred upon respondent No.4 by the Assistant Collector Ist Grade, Shahpur, District Kangra vide order dated 28.3.2001. The petitioner filed an appeal against the conferment of proprietary rights bearing No. 33 of 2001. The appeal was dismissed by the Collector on 6.8.2003. The petitioner filed an appeal before the learned Divisional Commissioner bearing appeal No. 277 of 2003 against the order dated 6.8.2003. The Divisional Commissioner Kangra at Dharamshala accepted the appeal on 20.3.2006. The private respondent No.4 filed the revision before the Financial Commissioner bearing No. 144 of 2006. The learned Financial Commissioner allowed the revision on 14.1.2009. The petitioner challenged the order dated 14.1.2009 by filing CWP No. 1328 of 2009. It was decided by the learned Single Judge of this Court on 22.4.2013. The order dated 14.1.2009 was set aside. The Financial Commissioner (Appeals), was directed to decide the matter afresh within three months. The Financial Commissioner (Appeals), decided the revision alongwith the analogous matters on 15.7.2014. The earlier order passed by the Financial Commissioner (Appeals) on 14.1.2009 was upheld.

CWP No. 6770 of 2014.

6. Proprietary rights were conferred upon respondents No.4 to 7 by the Assistant Collector Ist Grade, Shahpur, District Kangra vide order dated 28.3.2001. The petitioner filed an appeal against the conferment of proprietary rights bearing No. 32 of 2001. The appeal was dismissed by the Collector on 6.8.2003. The petitioner filed an appeal before the learned Divisional Commissioner bearing appeal No. 274 of 2003 against the order dated 6.8.2003. The Divisional Commissioner Kangra at Dharamshala accepted the appeal on 20.3.2006. The private respondent No.4 filed the revision before the Financial Commissioner bearing No. 141 of 2006. The learned Financial Commissioner allowed the revision on 14.1.2009. The petitioner challenged the order dated 14.1.2009 by filing CWP No. 1302 of 2009. It was decided by the learned Single Judge of this Court on 22.4.2013. The order dated 14.1.2009 was set aside. The Financial Commissioner (Appeals), was directed to decide the matter afresh

within three months. The Financial Commissioner (Appeals), decided the revision alongwith the analogous matters on 15.7.2014. The earlier order passed by the Financial Commissioner (Appeals) on 14.1.2009 was upheld.

7. Mr. B.S.Attri, Advocate, for the petitioners has vehemently argued that the proprietary rights could not be conferred upon the private respondents. According to him, Phoolan Devi has executed 'Will' dated 28.9.2000 in favour of his client. He also contended that his client was in the armed forces and was minor when the 'Will' was executed. On the other hand, Mr. Ashok Chaudhary, learned Addl. Advocate General has supported the order passed by the learned Financial Commissioner (Appeals) passed on 15.7.2014. According to him, the widow has only limited right till her death. He also contended that the proprietary rights could not be conferred by way of 'Will' dated 28.9.2000. Mr. V.S.Rathore, Advocate, appearing for the private respondents has also supported the orders of the Financial Commissioner (Appeals) dated 15.7.2014.

8. We have heard the learned counsel for the parties and also gone through the orders very carefully.

9. The private respondents and their predecessor-in-interest were tenants of one Sh. Kirpa Ram. Late Sh. Kirpa Ram died issueless. The entire property was inherited by his widow Smt. Phoolan Devi. She executed a 'Will' dated 28.9.2000 in favour of the petitioner. The private respondents were conferred proprietary rights qua the entire land under their tenancy and the mutations No. 350, 351, 352, 354 and 355 were attested in their favour on 28.3.2001. The petitioner has challenged the orders whereby the proprietary rights were conferred upon the private respondents before the Collector. The Collector has dismissed the appeals on 6.8.2003. The petitioner challenged the order dated 6.8.2003 before the Divisional Commissioner, Kangra at Dharamshala, by filing appeals. The appeals were allowed by the Divisional Commissioner, Kangra Division Kangra on 20.3.2006. The private respondents have challenged the order dated 20.3.2006 rendered in appeals preferred by the petitioner before the Financial Commissioner. The learned Financial Commissioner vide a detailed order dated 14.1.2009 set aside the order passed by the Divisional Commissioner, Kangra Division Kangra in appeal No. 145 of 2006 and analogous appeals. The petitioner challenged the order passed by the Financial Commissioner dated 14.1.2009, as noticed by us hereinabove, before this Court. The learned Single Judge of this Court remanded the matter to the Financial Commissioner (Appeals). The Financial Commissioner (Appeals) reiterated the earlier order dated 14.1.2009 of the Financial Commissioner (Appeals).

10. Section 104 (8) and (9) of the H.P. Tenancy and Land Reforms Act, 1972 reads as under:

> "**104. Right of tenant other than occupancy tenant to acquire interests of landowner. (8)-** Save as otherwise provided in sub-section (9), nothing contained in sub-section (1) to (6) shall apply to a tenancy of landowner owner during the period mentioned for each category of such landowners in sub-section (9), who,-
>
> (a) is a minor or unmarried woman, or if married, divorced or separated from husband or widow; or
>
> (b) is permanently incapable of cultivating land by reason of any physical or mental infirmity; or
>
> (c) is a serving member of the Armed Forces; or

(d) is the father of the person who is serving in the Armed Forces, up to the extent of inheritable share of such a member of the Armed Forces on the date of his joining the Armed Forces, to be declared by his father in the prescribed manner.

(9) In the case of landowners mentioned in clauses (a) to (d) of sub-section (8), the provisions of sub-sections (1) to (6) shall not apply:-

(a) in case of minor during his minority and in case of other persons mentioned in clauses (a) and (b) of sub-section (8) during their life time;

(b) in case of persons mentioned in clauses (c) and (d) sub-section (8) the period of their service in the Armed Forces subject to resumption of land by such persons to the extent mentioned in first proviso to clauses (d) and (dd) of sub-section (1) of section 34.

"Provided that nothing contained in this section shall apply to such land which is either owned by or is vested in Government under any law, whether before or after the commencement of this Act, and is leased out to any person.""

11. It is evident from the combined reading of sub-sections (8) and (9) of Section 104 that the widow has only limited right during her life time and thereafter the vestment/conferment of proprietary rights upon the tenants is automatic as per language of Section 104 (1)(iii) of the Act. In the instant case(s), Sh. Kirpa Ram has died issueless. The widow of late Sh. Kirpa Ram has inherited his estate. She also died on 5.3.2001. The land of the widow could not be vested in favour of tenants during her life time. However, the proprietary rights were to be conferred upon the respondents immediately after the death of widow. The proprietary rights could not be conferred upon the petitioner on the basis of 'Will' dated 28.9.2000. The H.P. Tenancy and Land Reforms Act, 1972 is an agrarian reform. The enactment has been made to confer ownership on the tillers. The rights of the private respondents could not be defeated by way of 'Will' dated 28.9.2000. Rather, it would be against the public policy. Since the rights could not be conferred by Phoolan Devi on the petitioner at all on the basis of 'Will' dated 28.9.2000, whether the petitioner was minor or member of armed forces would be of no consequence. The orders passed by the Financial Commissioner (Appeals) dated 14.1.2009 and 15.7.2014 are strictly in conformity with law. The Financial Commissioner has discussed the entire evidence and legal issues involved in the Revision petitions while setting aside the order dated 20.3.2006, passed by the Divisional Commissioner, Kangra, at Dharamshala. It is reiterated that Phoolan Devi could not alienate the land in favour of the petitioner by way of 'Will' dated 28.9.2000 since she had the right to retain the land during her life time only as per law.

12. Mr. B.S.Attri, Advocate, for the petitioner has also argued that the petitioner was not heard at the time of attestation of mutations on 28.3.2001. The petitioner was not at all required to be heard at the time of attestation of the mutations since he has no legal right. The proprietary rights have rightly been conferred upon the private respondents vide mutations attested on 28.3.2001.

13. Accordingly, there is no merit in these petitions and the same are dismissed. Pending application(s), if any, shall also stand disposed of.

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

Daulat Ram Thakur. ...Appellant.
Versus
State of Himachal Pradesh. ...Respondent.

RSA No. 440 of 2002
Reserved on : 17.11.2014
Decided on: 19.11.2014

Indian Evidence Act, 1872- Section 91- When a piece of land is sold with definite boundaries- boundaries will prevail against the measurement. (Para-17 to 19 and 21)

Cases referred:

Subhayya Chakkiliyan vs. Manjam Muthia Goundan and another, AIR 1924 Madras 493
Shailendranath Mitra vs. Girijabhushan Mukherji, AIR 1931 Calcutta 596
K.S. Nanji and Co. vs. Jatashankar Dossa and others, AIR 1961 SC 1474
Piyunglan Devi vs. Kashmir Chand, 1991 (a) Current Law Journal (H.P.) 412

For the Appellant: Mr. Neeraj Gupta, Advocate.
For the Respondent: Mr. R.P. Singh, Asstt. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 20.7.2002 rendered by the District Judge, Solan in Civil Appeal No. 9-S/13 of 2001.

2. "Key facts" necessary for the adjudication of this Regular Second Appeal are that appellant-plaintiff (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit for declaration against the respondent-defendant (hereinafter referred to as the "defendant" for convenience sake). According to the plaintiff, the suit land was purchased by him from Raja Durga Singh, the then owner of the suit land at village Kather, Solan. The Musabi and Aks of the lands of village were torn. Thus, the land was purchased as described by boundaries in the registered sale deed dated 12.1.1971 Ext. PW1/A. The land was mentioned as Khasra No. 227/470/2014/2001 min measuring 109-19 and 227/471/1991 as 6 biswas and the boundaries were specifically mentioned. According to the plaintiff, Khasra Nos. 676, 677, 678, 679 and 660 were owned and possessed by him. According to him, as per law the boundaries were to prevail over area as Musabi and Aks being torn and the actual area was mentioned by guess work.

3. The suit was contested by the defendant. According to the defendant, plaintiff has purchased land measuring 110 bighas 5 biswas vide registered sale deed No.6 dated 16.1.1971. The mutation was attested. Land was sold to the plaintiff by annexing Tatima with the sale agreement. Defendant has specifically denied that the plaintiff has purchased suit land bearing Khasra Nos. 676, 677, 678, 679 and 660. Defendant has also denied possession of the plaintiff over the suit land. The initiation of the proceedings, under Section 163

of the H.P. Land Revenue Act, was also justified. The plea of adverse possession was specifically denied.

4. Learned Senior Sub Judge framed issues on 11.8.1994. He decreed the suit on 15.12.2000. Defendant preferred an appeal before the District Judge, Solan against the judgment and decree dated 15.12.2000. He allowed the same on 20.7.2002. Hence, the present Regular Second Appeal. It was admitted on 26.9.2002 on the following substantial questions of law:

1. **"Whether the impugned judgment and decree of the first appellate court is against the settled principle of law that in case of conflict in area and boundary of the land in dispute, the boundary would prevail?**

2. **Whether the first appellate court relied upon inadmissible evidence which if excluded would have resulted in opposite view?**

3. **Whether the first appellate court erred and misread the revenue record to hold that the land, subject matter of dispute, fell in allotable pool?"**

5. Mr. Neeraj Gupta, learned counsel for the appellants has supported the judgment and decree dated 15.12.2000 passed by the learned Senior Sub Judge, Solan. According to him, in case of conflict in area and boundary dispute, the boundaries must prevail as against the measurement.

6. Mr. R.P. Singh, learned Assistant Advocate General has supported the judgment and decree dated 20.7.2002 passed by the learned District Judge.

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

8. Since all the substantial questions of law are interconnected and interlinked, the same are taken together for determination to avoid repetition of discussion of evidence.

9. Plaintiff has appeared as PW-1. According to him, he has purchased the land from Raja Durga Singh in the year 1971 vide sale deed. The Musabi, Latha and Aks were torn. The possession was delivered to him. He has proved copy of sale deed Ex. PW-1/A. In the settlement proceedings wrong entries were recorded. He has filed an application before the Tehsildar qua wrong entries recorded by the settlement authorities. The entries qua four Khasra Numbers were decided in his favour and qua many Khasra numbers, i.e. Khasra numbers 676, 677, 678, 679, 660, he was directed to file a suit. He was in possession of the suit land. He was never dispossessed. He has proved copy Ext. 1/B and copy of Aks Shajra Ext. PW-1/C. In his cross-examination, he has deposed that he has purchased land measuring 110 bigha 5 biswas of land by way of sale deed. The land was not demarcated at any point of time. He has also admitted that adjoining to this land, the boundaries of the common land are situated.

10. PW-2 Shamsher Singh has testified that he has seen the suit land. The suit land was owned by Raja Durga Singh. The state has no legal right, title or interest over the suit land. He was not aware about the settlement proceedings. He has admitted that his father was tenant of Raja Durga Singh.

11. PW-3 Dr. P.C. Sharma has deposed that he has seen the suit land. His land was adjoining to the suit land measuring 9 bighas. According to him, Lathha and Musabi were torn.

12. PW-4 Joginder Singh has testified that he was General Attorney of Raja Durga Singh. The land was sold to plaintiff. The Musabi and Latha were torn. The suit land was described by boundaries and the plaintiff was also put in possession of the suit land. The plaintiff has not encroached upon the government land.

13. PW-5 Mansa Ram has testified that he remained Field Kanungo from 1976 to 1979. The application was filed before him for demarcation by Hira Nand. He went to the spot. He inspected the spot. The revenue record was torn and Tatima and Musabi were not available. Thus, the demarcation could not be carried out.

14. According to Ext. PW-1/A, the plaintiff has purchased Khasra No. 2014/2001 min measuring 109 bighas and 19 biswas and Khasra No. 1991 measuring 6 biswas. It is stated in Ext. PW-1/A that shajra and musabi were torn. There is no reference of Khasra Nos. 676, 677, 678, 679 and 660 in the sale deed Ext. PW-1/A. The plaintiff has not led any tangible evidence to show that Khasra Nos. 676, 677, 678, 679 and 660 were the new Khasra numbers of old Khasra numbers 2014/2001 min or 1991.

15. Mr. R.P. Singh, learned Assistant Advocate General has drawn attention of the Court to Ext. PX-12. According to Ext. PX-12, old Khasra numbers of Khasra Nos. 660, 676, 677, 678 and 679 were 2014/2001 min, 2109/2003/2 min, 2109/2003/2 min, 2109/2002/2 min and 2109/2002/2 min. None of the PWs have deposed about the old and new Khasra numbers of the suit land. Rather it is established from PW-1/B Jamabandi for the year 1989-90 that defendant is owner in possession of the suit land. The total area sold to the plaintiff was 110 bighas and 5 biswas as per Ext. PW-1/A. PW-1 to PW-5 have not stated about the Khasra numbers which were in possession of the plaintiff.

16. The plaintiff has not led any tangible evidence to prove adverse possession. The ingredients of adverse possession are required to be pleaded and proved. None of the witnesses has deposed that when possession of plaintiff became hostile to the true owner. It was necessary for the plaintiff to prove that his possession was hostile to the true owner by leading cogent and reliable evidence. The plaintiff has rather not led any evidence to rebut entries in Ext. PW-2/B. It was necessary for him to prove that his possession was peaceful, uninterrupted, hostile, and open to the knowledge of true owner.

17. Learned Single Judge of Madras High Court in ***Subhayya Chakkiliyan*** vs***. Manjam Muthia Goundan and another***, AIR 1924 Madras 493, has held that ordinarily when a piece of land is sold with definite boundaries, unless it is very clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurements.

18. The Division Bench of Calcutta High Court in ***Shailendranath Mitra*** vs. ***Girijabhushan Mukherji***, AIR 1931 Calcutta 596, have held that where there is a seeming inconsistency as between boundaries and the area stated in the instrument, it is permissible to have recourse to extrinsic evidence and evidence of user by acts of parties for the purpose of gathering the real intention of the parties to the instrument.

19. Their Lordships of the Hon'ble Supreme Court in ***K.S. Nanji and Co.*** vs. ***Jatashankar Dossa and others***, AIR 1961 SC 1474 have held that a map referred to should be treated as incorporated in the lease and as forming part of the document. Where the map is drawn to scale and the boundary is clearly demarcated, the Courts are right in accepting the boundaries drawn in the plan without embarking upon and attempt to correct them with reference to the revenue records.

20. Mr. Neeraj Gupta has also strongly relied upon ***Piyunglan Devi*** *vs.* ***Kashmir Chand***, 1991 (a) Current Law Journal (H.P.) 412. There is no dispute with the proposition that when there is conflict in area and boundary dispute, boundary prevails. However, in the instant case, plaintiff has failed to link that the suit land was purchased vide Ex.PW-1/A. Thus, this abstract principle of law is not applicable in the present case.

21. In the present case, Khasra numbers alongwith boundaries have been given. According to recital in Ext. PW-1/A, the land was measured at the time of giving possession to the plaintiff. The judgment cited by Mr. Neeraj Gupta, learned counsel for the plaintiff are not applicable to the facts and circumstances of the present case for the simple reason that plaintiff could not succeed in proving that Khasra Nos. 676, 677, 678, 679 and 660 were purchased by him vide Ext. PW-1/A. The stand of the plaintiff is contrary to the revenue record Ext. PX-12. The judgments cited by Mr. Neeraj Gupta could be applicable in case plaintiff had succeeded in establishing that he has purchased these Khasra numbers alongwith Khasra nos. 2014/2001 and 1991. It is also not the case of the plaintiff that he is in possession of land measuring less than 110 bighas.

22. The first appellate Court has correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgment passed by first appellate Court below. The substantial questions of law are answered accordingly.

23. 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 RAJIV SHARMA, J.

Satish Kumar .....Appellant.
Versus
Shakuntla Devi .....Respondent.

FAO No. 400 of 2014.
Reserved on: 17.11.14
Decided on: 19.11.2014.

Hindu Marriage Act, 1955- Sections 13 (1) (ia) & (ib)- Husband filed a petition for divorce claiming that wife resided with him only for 15 days and thereafter went to the house of her parents- wife claimed that she resided with the husband for 4-5 months and she was harassed by her husband and his family members for bringing insufficient dowry- she had gone to the house of her sister with her husband to attend the Mundan ceremony where husband asked her not to visit her matrimonial

home- RW-2 and RW-3 tried to settle the matter- wife was not properly treated when she had gone back and had stayed with the husband- held that husband had deserted the wife, he had not looked after her- husband cannot be allowed to take advantage of his own wrong.

(Para-11)

Cases referred:

Bipinchandra Jaisinghbai Shah versus Prabhavati, AIR 1957 SC 176
Lachman Utamchand Kirpalani versus Meena alias Mota, AIR 1964 SC 40
Smt. Rohini Kumari versus Narendra Singh, AIR 1972 SC 459
Shobha Rani v. Madhukar Reddi AIR 1988 SC 121
Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511
Manisha Tyagi vs. Deepak Kumar 2010(1) Divorce & Matrimonial Cases 451
Ravi Kumar vs. Julumidevi (2010) 4 SCC 476
Pankaj Mahajan vs. Dimple Alias Kajal (2011) 12 SCC 1
Vishwanath Agrawal vs. Sarla Vishwanath Agrawal (2012) 7 SCC 288

For the appellant: Mr. Nipun Sharma, Advocate.
For the respondent: Ms. Soma Thakur, Advocate, vice counsel.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This FAO is directed against the judgment dated 14.8.2013, rendered by the learned Addl. District Judge (III), Kangra at Dharamshala, in HMA Petition No. 7-N/III/06.

2. Key facts, necessary for the adjudication of this appeal are that the appellant has filed the petition under Section 13 (1) (ia) & (ib), of the Hindu marriage Act, 1955 for dissolution of marriage on the grounds of desertion and cruelty. The marriage between the appellant and the respondent was solemnized on 7.10.2002 according to Hindu rites, customs and ceremonies. The respondent resided with the appellant only for about 15 days and thereafter she went to the house of her parents. The respondent started behaving indifferently with the petitioner and she insisted not to stay with him as her marriage was not solemnized with her consent by her parents. The appellant tried to make the respondent understand, but she did not adhere to the appellant. He had also gone on 2.3.2003 and 6.7.2003 to the respondent to bring her back. The parents of the respondent wanted to keep the appellant as ***'Khana Damad'*** in their house. However, the appellant refused to do so. The respondent subjected the appellant with cruelty. She has deserved him. She had deliberately killed the child of the appellant in her womb by illegal abortion with malafide intention not to settle with the appellant.

4. The petition was contested by the respondent by filing reply. According to the averments contained in the reply, the respondent stayed with the appellant for 4-5 months. The appellant and his mother started torturing her. They used to taunt her for dowry articles and cash. The appellant used to come daily in the state of intoxication. He used to give beatings to the respondent. The respondent has categorically denied that she has left the company of the appellant. The Mundan ceremony in the house of the sister of the respondent was solemnized. The appellant accompanied the respondent to attend the ceremony. After attending the ceremony, the appellant directed the

respondent not to come back to his house. Thereafter, the appellant never went to the respondent's house to bring her back and settle the matter. She gave birth to a child on 30.7.2003. The female child was born dead. No maintenance was provided to the respondent. She has moved application under Section 125 Cr.P.C. A sum of Rs. 800/- per month was granted as maintenance to the respondent. However, during the course of execution proceedings, the Court asked the appellant to take the respondent back with him. The appellant agreed for that and on 18.11.2006 the respondent was taken back. However, after 5-6 months, the appellant used to show a photograph of one girl and forced the respondent to give him in writing to bring that girl to his house. When the respondent refused to do so, the appellant started maltreating the respondent. When she was 6-7 months pregnant, she was forced by the appellant to go to her parental house. She gave birth to another child in the year 2007.

5. The rejoinder was filed by the appellant. The issues were framed by the learned Addl. District Judge (III), Kangra at Dharamshala on 13.7.2010. The learned Addl. District Judge (III), Kangra at Dharamshala, dismissed the petition on 14.8.2013.

6. I have heard the learned counsel for the parties and also gone through the record and judgment dated 14.8.2013 carefully.

7. What emerges from the evidence placed on record is that the marriage was solemnized between the appellant and the respondent on 7.10.2002 according to Hindu rites and customs.

8. According to the appellant, the respondent has treated him with cruelty and also deserted him. The appellant has appeared as PW-1. In his cross-examination, he has admitted that he alongwith the respondent had gone to attend '*mundan ceremony*' at the house of the sister of the respondent. They remained there during night. He also deposed that he left the respondent in the house of her sister. He has also admitted that he has never gone to the respondent's house to take her back. He has also admitted that the respondent has given birth to female child in her parental house. He has never gone to see respondent and even the child. He had shown his ignorance about the birth given to dead child by the respondent on 30.7.2003. In the petition, it is stated that respondent had herself killed the child in the womb. However, when he appeared in the Court, he had shown ignorance about this fact that dead child was born to the respondent. He was not providing maintenance to the respondent.

9. Respondent has appeared as RW-1. She has corroborated the facts stated in the reply. RW-2 Prem Singh is the father of the respondent. He has testified that the appellant has left the respondent in the house of her sister when the parties had gone to attend the '*mundan ceremony*'. RW-3 Balbir Singh, deposed that he had gone to the house of the appellant with the father of the respondent. However, he found that the appellant did not want to keep the respondent as his wife. The mother of the appellant wanted to keep another lady with the appellant.

10. The respondent was constrained to move an application under Section 125 Cr.P.C. She was awarded maintenance of Rs. 800/- per month. However, in order to avoid the payment of maintenance, he agreed to bring back the respondent. The respondent stayed with him for 5-6 months. Thereafter, the appellant again created adverse circumstances and forced the respondent to go to her parental house. The girl child was born in the year 2007. He has not gone even to see respondent or newly born child. The appellant has also

admitted that the respondent wanted to live with him but he himself did not want to reside with the respondent.

11. Mr. Nipun Sharma, Advocate, for the appellant has also argued that the appellant infact had gone to the house of the respondent to bring her back. However, no evidence to this effect has been produced. RW-2 Prem Singh and RW-3 Balbir Singh have tried to settle the matter amicably by visiting the house of the appellant. Respondent was not decently treated when she had gone back and stayed with the appellant for 5-6 months. The respondent always wanted to live in the company of the appellant. It is the appellant who has deserted the respondent. He cannot be permitted to take advantage of his own fault. The respondent has never treated the appellant with cruelty. The appellant's behavior rather towards respondent was abnormal. He has not looked after the respondent. She was forced to file petition for maintenance. He had agreed to bring the respondent back only to avoid the payment of maintenance as ordered by the Court. He has not even cared to see his wife at the time of delivery in the year 2007. The respondent has been neglected by the appellant.

12. Their Lordships of the Hon'ble Supreme Court in ***Bipinchandra Jaisinghbai Shah*** *versus* ***Prabhavati***, AIR 1957 SC 176 have held that two essential conditions must be there to prove the desertion: (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Their Lordships have held that desertion is a matter of inference to be drawn from the facts and circumstances of each case. Their Lordships have held as under:

> "What is desertion? "Rayden on Divorce" which is a standard work on the subject at p.128 (6th Edn.) has summarized the case-law on the subject in these terms:-
>
> "Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".
>
> The legal position has been admirably summarized in paras 453 and 454 at pp. 241. to 243 of Halsbury's Laws of England (3rd Edn.), VoL 12, in the following words:-
>
> "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated. The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".

Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances to each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co- exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the (animus deserendi) coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end, and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted

spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard CJ. in the case of Lawson v. Lawson, 1955-1 All E R 341 at p. 342(A), may be referred to :-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution..... "

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

13. Their Lordships of the Hon'ble Supreme Court in ***Lachman Utamchand Kirpalani*** *versus* ***Meena alias Mota***, AIR 1964 SC 40 have held that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. Their Lordships have further held that the burden of proving desertion - the 'factum' as well as the 'animus deserendi' is on the petitioner and he or she has to establish beyond reasonable doubt to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. Their Lordships have held as under:

"The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal for Bombay where the Court had to consider the provisions of S. 3(1) of the Bombay Hindu Divorce Act, 1947 whose language is in pari materia with that of S. 10(1) of the Act. In the judgment of this Court in Bipin Chandra v. Prabhavati, 1956 SCR 838; ((S) AIR 1957 SC 176) there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion were considered and the following summary of the law in Halsbury's Laws of England (3rd Edn.) Vol. 12 was cited with approval :

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the order without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases." The position was thus further explained by this Court. "If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently the cease cohabitation, it will not amount to desertion. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention of bring cohabitation permanently to an end (animus deserndi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.. . . . .

Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi coexist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time." Two more matters which have a bearing on the points in dispute in this appeal might also be mentioned. The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. It is settled Law that the burden of proving desertion -

the "factum" as well as the "animus deserendi" - is on the petitioner; and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause. As Dunning, L. observed : (Dunn v. Dunn

(1948) 2 All ER 822 at p. 823) :

"The burden he (Counsel for the husband) said was on

her to prove just cause (for living apart). The argument

contains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a failure to distinguish between a legal burden of proof laid down by law and a provisional, burden raised by the state of the evidence . . . . . The legal burden throughout this case is on the husband, as petitioner, to prove that this wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal; and, indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the Court has still, at the end of the case, to ask itself: Is the legal burden discharged? Has the husband proved that she deserted him without cause? Take this case. The wife was very deaf, and for that reason could not explain to the Court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herself stated that they operated on her mind. Counsel for the husband says that the judge ought not to have done that. If there were a legal burden on the wife he would be right, but there was none. The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himself at the end of the case: Has that burden been discharged?"

14. Their Lordships of the Hon'ble Supreme Court in ***Smt. Rohini Kumari versus Narendra Singh***, AIR 1972 SC 459 have explained the expression 'desertion' to mean the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage.

> "Under Section 10 (1) (a) a decree for judicial separation can be granted on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. According to the Explanation the expression "desertion" with its grammatical variation and cognate expression means the desertion of the petitioner by the
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> other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage. The argument raised on behalf of the wife is that the husband had contracted a second marriage on May 17, 1955. The petition for judicial separation was filed on August 8, 1955 under the Act which came into force on May 18, 1955. The burden under the section was on the husband to establish that the wife had deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition. In the presence of the Explanation it could not be said on the date on which the petition was filed that the wife had deserted the husband without reasonable cause because the latter had married Countess Rita and that must be regarded as a reasonable cause for her staying away from him. Our attention has been invited to the statement in Rayden on Divorce, 11th Edn. Page 223 with regard to the elements of desertion According to that statement for the offence of desertion there must be two elements present on the side of the deserting spouse namely, the factum, i.e. physical separation and the animus deserendi i.e. the intention to bring cohabitation permanently to an end. The two elements present on the side of the deserted spouse should be absence of consent and absence of conduct reasonably causing the deserting spouse to form his or
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> her intention to bring cohabitation to an end. The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be
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> subject to the qualification that if without just cause or excuse a man persists in doing things which he knows his wife probably will not tolerate and which no ordinary woman would tolerate and then she leaves, he has deserted her whatever his desire or intention may have been. The doctrine of "constructive desertion" is discussed at page 229. It is stated that desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves the wife and the case of a man who with the same intention compels his wife by his conduct to leave him."

15. Their Lordships of the Hon'ble Supreme Court in the case of **Shobha Rani v. Madhukar Reddi** reported in **AIR 1988 SC 121** have explained the term "cruelty" as under:

> "4. Section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in elation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.
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> 5. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, [1966] 2 All E.R. 257 (259) "the categories of cruelty are not closed." Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacityor incapability to tolerate the conduct complained of. Such is the wonderful/realm of cruelty."

16. Their Lordships of the Hon'ble Supreme Court in **Samar Ghosh vs. Jaya Ghosh** reported in **(2007) 4 SCC 511**, have enumerated some instances of human behaviour, which may be important in dealing with the cases of mental cruelty, as under:

> "98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost mpossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger

or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

17. Their Lordships of the Hon'ble Supreme Court have held in **Manisha Tyagi vs. Deepak Kumar** reported in **2010(1) Divorce & Matrimonial Cases 451**, as under:

"24. This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonable be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension that would be harmful or injurious to continue the cohabitation with the other spouse. Therefore, to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However, in this case even with aforesaid standard both the Trial Court and the Appellate Court had accepted that the conduct of

the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce."

18. Their Lordships of the Hon'ble Supreme Court have held in **Ravi Kumar vs. Julumidevi** reported in (2010) 4 SCC 476, as under:

"19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial case can be of infinite variety – it may be subtle or even brutal and may be by gestures and word. That possible explains why Lord Denning in Sheldon v. Sheldon held that categories of cruelty in matrimonial case are never closed.

21. This Court is reminded of what was said by Lord Reid in Gollins v. Gollins about judging cruelty in matrimonial cases. The pertinent observations are (AC p.660)

> ".. In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."

22. " About the changing perception of cruelty in matrimonial cases, this Court observed in Shobha Rani v. Madhukar Reddi at AIR p. 123, para 5 of the report: (SCC p.108, para 5)

> "5. It will be necessary to bear in mind that there has been (a) marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which

> they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties."

19. Their Lordships of the Hon'ble Supreme Court have held in **Pankaj Mahajan vs. Dimple Alias Kajal** reported in (2011) 12 SCC 1, as under

> "36. From the pleadings and evidence, the following instances of cruelty are specifically pleaded and stated. They are:
>
> i. Giving repeated threats to commit suicide and even trying to commit suicide on one occasion by jumping from the terrace.
>
> ii. Pushing the appellant from the staircase resulting into fracture of his right forearm.
>
> iii. Slapping the appellant and assaulting him. iv. Misbehaving with the colleagues and relatives of the appellant causing humiliation and embarrassment to him.
>
> v. Not attending to household chores and not even making food for the appellant, leaving him to fend for himself.
>
> vi. Not taking care of the baby.
>
> vii. Insulting the parents of the appellant and misbehaving with them.
>
> viii. Forcing the appellant to live separately from his parents.
>
> ix. Causing nuisance to the landlord's family of the appellant, causing the said landlord to force the appellant to vacate the premises.
>
> x. Repeated fits of insanity, abnormal behaviour causing great mental tension to the appellant.
>
> xi. Always quarreling with the appellant and abusing him.
>
> xii. Always behaving in an abnormal manner and doing weird acts causing great mental cruelty to the appellant."

20. Their Lordships of the Hon'ble Supreme Court have held in **Vishwanath Agrawal vs. Sarla Vishwanath Agrawal** reported in **(2012) 7 SCC 288** as under:

> "22. The expression 'cruelty' has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.
>
> 28. In Praveen Mehta v. Inderjit Mehta, AIR 2002 SC 2582 it has been held that mental cruelty is a state of mind and feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment, and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The facts and circumstances are to be assessed emerging from the evidence on record and thereafter, a fair

inference has to be drawn whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other."

21. In the instant case, the appellant has failed to prove that the respondent has deserted him. The appellant has also failed to prove that the respondent has treated him with cruelty.

22. Accordingly, there is no merit in this appeal, the same is dismissed. No costs.

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

Sita Devi .....Petitioner.
Versus
State of H.P & others ....Respondents

CWP No. 5089 of 2014-F
Reserved on : 13.11.2014.
Decided on : 19.11.2014

Constitution of India, 1950- Article 226- Respondent No. 7 was selected for the post of Aaganwari Worker- petitioner asserted that respondent no. 7 was ineligible as her income was more than Rs. 8,000/- per month specified in the rules-Tehsildar, Mandi had conducted an inquiry in which he found that income of petitioner and respondent No.7 was more than the prescribed limit- consequently, he quashed the income certificate - an appeal was filed before Sub Divisional Collector, Sadar, District Mandi, who accepted the appeal and held the certificate to be in order- further appeals were dismissed- no material was brought on record to show that any legal impropriety was committed or there was non-application of mind- appeal dismissed. (Para-2)

For the Petitioner: Mr. Vinod Thakur, Advocate.
For the Respondents: Mr. Anup Rattan, Additional Advocate General with Mr. Ramesh Thakur, Assistant Advocate General for respondents No. 1 to 6.
Mr. Vijay Chaudhary, Advocate, for respondent No. 7.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Respondent No. 7 was selected for appointment to the post of Anganbadi worker in Anganbadi Centre Gadhraur. Subsequent to her selection for appointment as Anganbadi worker, she secured her appointment in the capacity aforesaid. However, the writ petitioner is aggrieved by the appointment of respondent No. 7 in the capacity aforesaid. The petitioner prays for quashing and setting aside the appointment of respondent No. 7 as Anganbadi worker. In trite the grievance ventilated against the appointment of respondent No. 7 is couched in the factum of hers being ineligible in as much as her income in infraction of the apposite guidelines governing the selection and appointment of

Anganbadi worker by the respondents No. 1 to 6, falling above the maximum ceiling of Rs.8000/- per annum. The rendition of pronouncements comprised in Annexure P-12 of 10.12.2013 and P-14 of 24.6.2014 by the competent authority seized with the matter qua the selection of respondent No. 7 have been assailed to be anvilled upon both mis-appreciation or non-appreciation of apposite material on record. Consequently, a prayer for both Annexures P-12 and P-14 being quashed and set aside is voiced in the writ petition.

2. Even though, previous to the rendition of orders comprised in Annexure P-12, the Tehsildar, Sadar, Mandi, had in his report of 21.4.2011, qua fulfillment of income criteria by both the petitioner and respondent No. 7 enunciated therein that since both the petitioner and respondent No. 7 had in the relevant year an income more than the prescribed limit, hence he proceeded to cancel the income certificates issued earlier by his office. In his report the Tehsildar Sadar, Mandi of 21.4.2011, had hence pronounced the ineligibility of both the petitioner and respondent No. 7 for being considered for selection and consequent appointment to the post of Anganbadi worker on the score of their income falling outside/above the maximum ceiling of income per annum prescribed in the apposite rules. The same had come to be challenged by the aggrieved before the Sub Divisional Collector, Sadar, District Mandi, who accepted their appeal. Consequently, the Reports of the Tehsildar, Sadar, Mandi of 21.4.2011 and 3.7.2012 were set aside. The concomitant effect thereof was that the certificates issued to both the petitioner and the respondent No. 7 qua their income were held to be in order at the stage when the authority who rendered Annexure P-11 came to be seized of the matter. On an appeal having been preferred by the petitioner herein before the learned Deputy Commissioner, he under Annexure P-12, on an incisive consideration of the material as laid before him had concluded that the order rendered by the Sub Divisional Collector comprised in Annexure P-11, whereby he set aside the report of 3.7.2012 pronounced by the Tehsildar Sadar, Mandi, whereby the latter had cancelled the income certificate, was anvilled upon a circumspect as well as an in-depth analysis of the material in consonance with the apposite guidelines. The petitioner herein was aggrieved by the order comprised in Annexure P-12, hence, came to institute an appeal before the Divisional Commissioner, Mandi, District Mandi, H.P. The Divisional Commissioner, Mandi in his orders comprised in Annexure P-14 dismissed the appeal preferred by the petitioner herein. Consequently, the appeal preferred by the petitioner herein against the impugned order rendered by the Deputy Commissioner, was dismissed. The authority aforesaid in the penultimate paragraph of his pronouncement has magnifyingly portrayed therein the factum of existence of a patent mistake committed by the Tehsildar Sadar in recalculating the income of both the parties and the actual size of the family on an appropriate reckonable date for computing and assessing the income of the petitioner and respondent No. 7. The conclusions as well as inferences as arrived at by the authority who pronounced and rendered the order comprised in Annexure P-14 while affirming the order rendered in Annexure P-12 are anvilled upon an appropriate assessment of the material on record. The learned counsel for the petitioner has been unable to portray before this Court that the findings and inferences arrived at by the authority who rendered Annexure P-14 in as much as it having inferred that the Tehsildar had committed an apparent and patent mistake in recalculating income of both the petitioner and the respondent No. 7 as well as the actual size of their families as it stood on the appropriate reckonable date i.e. 1.1.2004 are infirmed on the score of both the authorities who rendered Annexure P-12 and P-14 having omitted to consider the apposite/germane material on record or theirs having been prodded to record such a finding or

having arrived at findings and inferences aforesaid while mis-appreciating the apposite material on record. In the absence of material on record forthrightly pronouncing the factum of the authorities who rendered Annexures P-12 and P-14 having committed a legal impropriety comprised in theirs excluding germane and apposite material and including discardable material, the inevitable conclusion which ensues is that hence the orders comprised in Annexure P-12 of 10.12.2013 and P-14 of 24.6.2014, cannot be construed to have acquired any taint or blemish of non-application of mind. Consequently, this Court is constrained to uphold the orders comprised in Annexures P-12 of 10.12.2013 and P-14 of 24.6.2014. Hence, the present petition stands dismissed, as also pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Mrs. Bahar Murtaza Ali and others ...Non-applicants/Plaintiffs
Versus
Mrs. Rohini Wahi alias Roohani ...Applicant/Defendant

OMP No. 122 of 2014 In
C.S. No. 4084 of 2013
Reserved on: 20.11.2014.
Decided on: December 09, 2014.

Code of Civil Procedure, 1908 - Section 10 - One civil suit is pending before Civil Judge, Palampur, District Kangra - another suit is pending before Delhi High Court- third suit has been filed before the High Court – an application for staying the proceeding before the High Court filed- held, that Section 10 is applicable only if the first Court is competent to grant the relief claimed in the second suit- suit filed before the high Court is valued at Rs. 2 crores - Civil Judge, Palampur is not competent to grant the relief claimed in the second suit as his pecuniary jurisdiction is restricted to Rs. 10 lacs- therefore, proceedings before High Court cannot be stayed. (Para- 7, 8 and 13)

Code of Civil Procedure, 1908- Order 8 Rule 6(A) - Counter-claim- Counter claim, which is beyond pecuniary jurisdiction of the Court, cannot be filed before the Court. (Para-9 to 11)

Cases referred:

Barthels and Luders GmbH versus M.V. 'Dominique' AIR 1988 Bombay 380
Cofex Exports Ltd. versus Canara Bank AIR 1977 Delhi 355,
Gurbachan Singh versus Bhag Singh and others AIR 1996 SC 1087
Jag Mohan Chawla and anther versus Dera Radha Swami Satsang and others AIR 1996 SC 2222.

For the Non-applicants/	:	Ms. Anu Tuli and Mr. K.B.
Plaintiffs	:	Upadhyay, Advocates.
For the Applicant/Defendant:		Mr. Rajnish Maniktala, and Ms.Shreya Chauhan, Advocates.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The applicant/defendant has preferred this application under Section 10 of the Code of Civil Procedure for staying the present suit.

2. The facts as detailed in this application are that till date there are three civil suits filed by the parties before different Courts. These suits have been filed after death of Faiz Murtaza Ali, the details of these civil suits are given as under:

(a) Civil Suit No. 920 of 2013 is pending before the Civil Judge, Palampur, District Kangra, H.P. and was filed on 6.8.2013. This suit was filed by the defendant because the plaintiffs wanted to take the forcible possession of the suit property armed with an illegal order passed by the Deputy Commissioner, Kangra at Dharamshala, who had no jurisdiction to pass any such orders. The pleadings of the parties will go to show that the replying defendant claims the ownership of the property on the basis of Will dated 14.4.2013 and conferring of this property on the defendant by virtue of mehar. The factum of marriage between the defendant and the deceased Faiz Murtaza Ali has been denied by the plaintiffs. It is alleged that Faiz Murtaza Ali never executed the Will dated 14.4.2013.

(b) Civil Suit No. 1815/2013, "Mrs. Bahar Murataza Ali and others vs. Rohini Wahi alias Roohani and others" is pending before Hon'ble Delhi High Court. This suit has been filed on 11.9.2013. In this suit, the Will dated 14.4.2013 alongwith another Will dated 19.6.2013 has been challenged. It is stated by the plaintiffs that the deceased Faiz Murtaza Ali has never executed these Wills and they are absolute owners of the properties alongwith a prayer for permanent injunction.

(c) Civil Suit No. 4048 of 2013 "Mrs. Bahar Murtaza Faiz Ali vs. Rohani Ali alias Roohani" has been filed before this Hon'ble court i.e. present suit. Though the present suit has been titled as the suit for possession, declaration, permanent and mandatory injunction but essentially in terms of the prayers and pleadings, the plaintiffs have challenged the Will dated 14.4.2013 and have alleged that the defendant was never married to the deceased Faiz Murtaza Ali and that the plaintiffs are the only heirs of deceased Faiz Murtaza Ali.

As per the applicant, the matter directly and substantially in issue in all these three suits are:

(i) Whether the defendant is legally wedded wife of deceased, Faiz Murtaza Ali ?

(ii) Whether the defendant was given the present suit property by virtue of mehar?

(iii) Whether the deceaed, Faiz Murtaza Ali, had executed the Will dated 14.4.2013?

(iv) Whether the plaintiffs and defendant would be entitled to inherit the properties of the deceased, Faiz Murtaza Ali, being his heirs in accordance with the Muslim Law.

As such, the present suit, according to the applicant, is required to be stayed in terms of Section 10 of Civil Procedure Code because the matter in issue in the present suit is directly and substantially in issue in previously instituted suits between the parties.

3. The non-applicants/plaintiffs in their reply submitted that the provisions of Section 10 of the Code of Civil Procedure were not at all attracted to the facts of the present case because of the following reasons:

> "3. That Civil Suit No. 820 of 2013 is pending before the Civil *Judge, Palampur, District Kangra, H.P. wherein the parties are as follows: Rohini Wali – the plaintiff and Shahnaz Ali, Seher Ali Saini and Bhisham Saini – the defendants, however, in the present suit (Civil Suit No. 4084/13) Bhisham Saini is not a party. Plaintiff No.1 herein is also not a party to Civil Suit No. 820 of 2013. Further, it is relevant to mention here that the Ld. Civil Judge, Palampur has no jurisdiction with regard to declaration of right, title and possession of the suit property due to lack of pecuniary jurisdiction.*
>
> *4. That CS (PS) No. 1815 of 2013 filed by the plaintiffs is pending before the Hon'ble High Court of Delhi at New Delhi wherein the plaintiffs seek declaration of purported WILLS dated 14.04.2013 & 19.06.2013 as null and void and wherein all the beneficiaries of the purported WILLS dated 14.4.2013 and 19.6.2013 including the defendant herein Rohini Wali @ Rophani have been made defendants. Again in CS (OS) No. 1815/2013, Mr. Bhisham Saini is not a party. Further, the suit property is not within the jurisdiction of the Delhi High Court and also no relief has been claimed in respect of the suit property before the Hon'ble Delhi High Court, therefore, the Hon'ble Delhi High Court has no jurisdiction to pass any order in respect of right, title and possession of the suit property."*

4. It is further submitted that it is only this Court which has jurisdiction to pass the decree in respect of the right, title and possession of the suit property, whereas the relief claimed in the other suits are entirely different and only some of the parties are common. It is further contended that in the suit pending before the Civil Judge, Palampur, the parties are different and above-all that Court has no jurisdiction with regard to declaration of right, title and possession of the suit property due to lack of pecuniary jurisdiction. It was lastly submitted that the plaintiffs alone are the natural heirs of late Sh. Faiz Murtaza Ali and have challenged the legal status of the defendant, who is simply a trespasser in the suit property.

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

6. Section 10 of the Code of Civil Procedure (for short 'Code') reads thus:-

> ***"10. Stay of suit.- No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in [India] having jurisdiction to grant the relief claimed, or in any Court beyond the limits of [India] established or continued by [the Central Government][***] and having like jurisdiction, or before [the Supreme Court].***
>
> ***Exlanation.- The pendency of a suit in a foreign Court does not preclude the Courts in [India] from trying a suit founded on the same cause of action."***

The applicability of this provision would be attracted if;

> Firstly, the matter in issue in the suit is directly and substantially in issue in a previously instituted suit between the same parties;

Secondly, the previously instituted suit is pending-

i) in the same Court in which the subsequent suit is brought; or

ii) in any other Court in India (whether superior, inferior or co-ordinate); or

iii) in any Court beyond the limits of India established or continued by the Central Government; or

iv) before the Supreme Court; and

Thirdly, where previously instituted suit is pending in any of the Courts mentioned in clause (b) or clause (c), such Court is a Court of jurisdiction competent to grant the relief claimed in the subsequent suit.

7. One of the essential ingredients of applicability of Section 10 of the Code is the competency of the first Court to grant the reliefs claimed in the second suit. Now it would be seen that the suit filed before this Court has been valued at Rs.2 crores and is, therefore, admittedly not triable by the Civil Judge, Palampur, whose jurisdiction in terms of the notification No.HHC/PJ/93-I—dated 03.10.2013 is only to try the suit whose pecuniary jurisdiction is Rs.10,00,000/-. The relevant portion of the notification is extracted below:-

"The High Court of Himachal Pradesh, in exercise of the powers vested under Section 29 read with Section 10 and 11 of the Himachal Pradesh Courts Act, 1976 as well as in supersession of the Notification dated, 8.4.2009, has been pleased to pass the following orders :-

I. District Judges/Addl. District Judge

The court of District Judge/Additional District Judge shall have the pecuniary jurisdiction in all original Civil Suits the value of which exceeds Rs. 20,00,000/- (Rupees twenty lacs) but does not exceed Rs.30,00,000/-(Rupees Thirty lacs).

II. Civil Judge (Senior Division)

The Court of Civil Judge (Senior Division) shall exercise the Jurisdiction in all original Civil Suits the value of which exceeds Rs.10,00,000/-(Rupees Ten Lacs) but does not exceed Rs.20,00,000/-(Rupees Twenty lacs).

III. Civil Judge (Junior Division)

The court of civil Judge (Junior Division) shall exercise the jurisdiction in all original Civil Suits the value of which does not exceed Rs.10,00,000/-(Rupees ten lacs)."

8. It would also be clear from a bare reading of the aforesaid notification that all suits valued above Rs.30 lacs would only be triable and adjudicated by this Court. It cannot be disputed that the jurisdiction would include both pecuniary as well as territorial. It is also a trite that jurisdiction with reference to the subject-matter of a claim depends only upon the allegations in the plaint and not upon the allegations in the written statement. It is also equally settled that a counter-claim for all purposes has to be treated as an independent suit and is governed by the rules as are applicable to the plaint. A reference to the counter claim is being made only because the case law cited by the plaintiffs-respondents relates to cases where counter-claim had

been filed beyond pecuniary jurisdiction of the Courts and were held to be not maintainable.

9. The learned counsel for the plaintiffs-respondents has vehemently contended that in case a counter claim which is in the nature of a plaint is filed outside the pecuniary jurisdiction of the Court, the same cannot be allowed to be introduced. In support of his submissions, he has placed reliance upon the judgment of the Bombay High Court in ***Barthels and Luders GmbH*** *versus* ***M.V. 'Dominique' AIR 1988 Bombay 380*** relevant portion whereof reads thus:-

> ***"6.Under Order 8, R.6A of the Code of Civil Procedure a defendant in a suit may set up by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not. The proviso set out that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court. Under O.8, R.6, therefore, once a suit has been filed the defendant can set up by way of counter-claim any right or claim against the plaintiff which arises before the defendant has delivered his defence or before the time limited for delivering his defence has expired. This counter-claim may be a claim in the nature of damages also. The only restriction as set out in the provision is that the counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court. There is no restriction regarding territorial jurisdiction of the Court. This is because the suit and the counter-claim are in many ways not two independent proceedings but a united proceeding. Although O.8, R.6A provides that the counter-claim is to be treated as a plaint and is to be governed by the rules applicable to plaints, it is not to be treated as a completely separate suit. Infact O.8, R.6A sub-rule(2) the counter-claim is to be treated as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim, so that both the proceedings can be disposed of by a common judgment."***

10. In **Cofex Exports Ltd.** versus **Canara Bank AIR 1977 Delhi 355**, the following observations have been made:-

> ***"34. The following things are in common in set off and counter claim:***
>
> ***(1) None should exceed the pecuniary limits of the jurisdiction of the Court;***
>
> ***(2) Both are pleaded in the written statement, if the law governing the Court permits such plea being raised by the defendant in the written statement;***
>
> ***(3) The plaintiff is expected to file a written statement in answer to a claim for set off or to a counter claim;***
>
> ***(4) Even if permitted to be raised, the Court may in appropriate cases direct a set off or counter claim being tried separately;***
>
> ***(5) A defendant cannot be compelled to plead a set off nor a counter claim; he may as well maintain an***

independent action for enforcing the claim forming subject matter of set off or counter claim;

(6) Both are liable to payment of court-fee under sch.1 Art. 1 of Court-fees Act, 1870;

(7) Dismissal of suit or its withdrawal would not debar a set off or counter claim being tried, may be followed by a decree against the plaintiff."

11. I find considerable force in the contentions raised by the plaintiffs-respondents because the Hon'ble Supreme Court in ***Gurbachan Singh*** *versu***s Bhag Singh and others AIR 1996 SC 1087** has clearly held that though the counter claim for possession by defendant can be entertained in a suit filed for injunction by the plaintiff by virtue of Order 8 Rule 6(A) (1) but the same should not exceed pecuniary jurisdiction of the Court. Relevant para thereof reads as follows:-

"3. It is true that Rule 6A(a) was introduced by Amendment Act of 1976. Preceding the amendment it was settled law that except in a money claim counter claim or set off cannot be set up in other suits. The Law Commission of India had recommended, to avoid multiplicity of the proceedings, right to the defendants to raise the plea of set off in addition to a counter claim in Rule 6 in the same suit irrespective of the fact whether the cause of action for counter claim or set off had accrued to defendant either before or after the filing of the suit. The limitation was that the counter claim or set off must be pleaded by way of defence in the written statement before the defendant filed his written statement or before the time limit for delivering the written statement has expired, whether such counter-claim is in the nature of a claim for damages or not. Further limitation was that the counter-claim should not exceed the pecuniary limits of the jurisdiction of the Court. In other words, by laying the counter claim pecuniary jurisdiction of the Court cannot be divested and the power to try the suit already entertained cannot be taken away by accepting the counter claim beyond its pecuniary jurisdiction. Thus considered, we hold that in a suit for injunction, the counter-claim for possession also could be entertained by operation of Order 8 Rule 6(A)(1) of C.P.C."

12. This position of law was reiterated in ***Jag Mohan Chawla and anther*** *versus* ***Dera Radha Swami Satsang and others AIR 1996 SC 2222.***

13. Thus, in view of what has been discussed above, it can safely be concluded that since the Court at Palampur does not have the pecuniary jurisdiction to entertain the subsequent suit which has been filed before this Court and has been valued at `2 crores for the purpose of jurisdiction, the proceedings in the present suit cannot be stayed. Accordingly this application being without merit is dismissed.

14. Before parting, it may be observed that a number of decisions have been cited by the parties, however, the same deal with the general principles regarding applicability of Section 10 of the Code and do not deal with the specific cases as are applicable to the facts of the present case and, therefore, the judgment is not being burdened by citing and discussing those decisions.

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

RFA Nos. 163 to 172 of 2008
Reserved on: 24.11.2014.
Decided on: 25.11.2014.

1. RFA No. 163 of 2008
General Manager, Northern Railway .....Appellant.
Versus
Gian Chand & others .....Respondents.

2. RFA No. 164 of 2008
General Manager, Northern Railway .....Appellant.
Versus
Kishna & others .....Respondents.

3. RFA No. 165 of 2008
General Manager, Northern Railway .....Appellant.
Versus
Mahi Ram & others .....Respondents.

4. RFA No. 166 of 2008
General Manager, Northern Railway .....Appellant.
Versus
Tirath Ram & another .....Respondents.

5. RFA No. 167 of 2008
General Manager, Northern Railway .....Appellant.
Versus
Gian Chand & others .....Respondents.

6. RFA No. 168 of 2008
General Manager, Northern Railway .....Appellant.
Versus
Santosh Devi & others .....Respondents.

7. RFA No. 169 of 2008
General Manager, Northern Railway .....Appellant.
Versus
Kashav Chander & others .....Respondents.

8. RFA No. 170 of 2008
General Manager, Northern Railway .....Appellant.
Versus
Ram Singh & anr. .....Respondents.

9. RFA No. 171 of 2008
General Manager, Northern Railway .....Appellant.
Versus
Dev Raj & others .....Respondents.

10. RFA No. 172 of 2008
General Manager, Northern Railway .....Appellant.
Versus
Roshan Lal & ors. .....Respondents.

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of Nangal-Talwara Rail Line- notification under Section 4 was issued on 21.4.1998- reference Court had taken into consideration the sale deed dated 22.8.1998- held, that sale deed was proximate to the notification and was rightly taken into consideration- subsequent transaction can be relied upon when there were no fluctuations in the

prices since the preliminary notification and the date of subsequent transaction. (Para- 17 to 22)

Cases referred:

Administrator General of West Bengal vrs. Collector, Varanasi, (1988) 2 SCC 150

Periyar and Pareekanni Rubbers Ltd. vrs. State of Kerala, (1991) 4 SCC 195

Karan Singh and others. vrs. Union of India, (1997) 8 SCC 186

A. Natesam Pillai vrs. Special Tahsildar, Land Acquisition, Tiruchy, (2010) 9 SCC 118

Rishi Pal Singh and others vrs. Meerut Development Authority and another, (2006) 3 SCC 205

Trishala Jain and another vrs. State of Uttaranchal and another, (2011) 6 SCC 47,

Bilkis and others vrs. State of Maharashtra and others, (2011) 12 SCC 646

R. Sarangapani vrs. Special Tahsildar Karur Dindigul Broadguage Line, (2011) 14 SCC 177

Digamber and others vrs. State of Maharashtra and others, (2013) 14 SCC 406

For the appellant(s): Mr. Rahul Mahajan, Advocate.

For the respondents: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG and Mr. J.S.Guleria, Asstt. AG, for respondent-State.

Mr. G.R.Palsra and Mr. T.S. Chauhan, Advocates, for the respective respondents.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these RFAs, these are taken up together for being disposed of by a common judgment.

2. These regular first appeals are directed against the common award dated 29.9.2007, whereby the learned Addl. District Judge, Una, H.P., has enhanced the compensation.

3. Key facts, necessary for the adjudication of these regular first appeals are that the notification under Section 4 of the Land Acquisition Act was issued for acquiring the land for the construction of Nangal-Talwara Rail Line from Una to Churaru on 21.3.1998. The notification under Sections 6 & 7 of the Act was issued by the Land Acquisition Collector, Una on 18.11.1998. The Land Acquisition Collector made the award for acquiring 3-74-68 hectares of land. The respondents-claimants, feeling aggrieved by the award made by the Land Acquisition Collector, Una filed references under Section 18 of the Act for making reference to the Court on the grounds that the land acquired by the appellants was of great potential value. The land was situated near Una city. The land was situated at Una to Dhamandari road. According to the claimants, the market value of the land was not less than 25,000/- per marla. The land acquired was fertile. The land was also situated in the vicinity of Dera Baba Rudru and Jhalehra town.

4. According to the appellants, the land acquired was situated far away from the Una town as well as from Una Dhamandari road. The issues

were framed by the learned Addl. District Judge, Una on 14.2.2006. The learned Addl. District Judge, Una, partly allowed the land references and claimants were held entitled to enhanced market value at the uniform rate of Rs. 25,000/- per kanal for all categories of the acquired land as per their respective shares recorded in the statement recorded under Section 19 of the Act alongwith the statutory benefits. Hence, these regular first appeals.

5. Mr. Rahul Mahajan, Advocate, has vehemently argued that the learned Addl. District Judge, Una, has wrongly relied upon Ext. PW-2/A for enhancing compensation. According to him, the market value of the land vide Ext. RW-1/A to RW-1/K was less than what has been awarded by the learned Addl. District Judge, Una. He lastly contended that the learned Addl. District Judge, Una has taken into consideration the sale deeds pertaining to small plots of land though the land acquired was big chunk of land. On the other hand, Mr. G.R.Palsra, Advocate, has supported the award dated 29.9.2007.

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

7. The notification under Section 4 of the Act was published in the H.P. Gazettee on 21.3.1998. The notifications under Sections 6 & 7 were published on 18.11.1998. The land has been acquired for the construction of Railway Line. The learned Addl. District Judge, Una, has clubbed the matters and has recorded common evidence on all these petitions.

8. PW-1 Piare Lal has proved copy of location plan Ext. PW-1/A and PW-1/B, site plan. He has proved these documents after visiting the spot. PW-2 Jugal Kishor, Registration Clerk, has proved sale deed Ext. PW-2/A. PW-3 Suram Singh, deposed that he has sold land measuring 0-01-12 hect. for a sum of Rs. 10,000/- to Jagtar Singh son of Sh. Amar Nath. The copy of sale deed is Ext. PW-2/A. He has put his signatures on the same. He has received a sum of Rs. 10,000/- from Jagtar Singh. In his cross-examination, he deposed that the money was required by him for the marriage of his daughter. PW-4 Jagtar Singh deposed that in the year 1998, he has purchased land measuring 0-01-12 hect. About 6 marlas from Sh. Suram Singh for a sum of Rs. 10,000/- vide sale deed Ext. PW-2/A. He has signed the same. He has paid a sum of Rs. 10,000/- to Suram Singh. PW-5 Shamsher Singh deposed that in the year 2005, he has purchased 6 marlas of land from Gian Chand for a sum of Rs. 60,000/- as per Ext. PW-2/B. This land was situated near the railway track. One of the claimants Gian Chand has appeared as PW-6. He has led his evidence by filing an affidavit. According to the averments contained in his affidavit, the acquired land was capable of raising two crops. It was irrigated, however, in the revenue record entry to this effect was not made. The map was prepared by P.L. Bains. This land is situated near Una-Takka road, Jhalera Takka road and Dangehra Takka road. The potential of the land is on the higher side since it abuts this road and suitable for construction of shops, hotel and industry etc. The land is situated near Una town. They used to earn livelihood by cultivating the same. The compensation paid by the Land Acquisition Collector was meager. The Una was fast developing town. They were entitled to Rs. 25,000/- per kanal. In his cross-examination, he has denied the suggestion that the land was not abutting the road. He denied the suggestion that one portion of the acquired land was '*banjar kadim*' and remaining '*birani avval*'.

9. RW-1 Joginder Singh, Naib Tehsildar, has produced the record of the Land Acquisition Collector. The award was made by the Land Acquisition Collector on 18.9.2000 after completing all the formalities.

10. The notification under Section 4 of the Act was issued on 21.4.1998. The learned Addl. District Judge, Una, has rightly taken into consideration Ext. PW-1/A dated 22.7.1998. it was proximate to the notification dated 21.4.1998. According to this sale deed Ext. PW-1/A, PW-3 Suram Singh has sold land measuring 0-01-12 hect. for a sum of Rs. 10,000/- to Jagtar Singh. He has proved copy of sale deed Ext. PW-2/A. He has received the consideration amount for 10,000/- from PW-4. PW-4 Jagtar Singh has deposed in his examination-in-chief that he has purchased land measuring 0-01-12 hect. about 6 marlas from PW-3 Suram Singh PW-2/A for a consideration of Rs. 10,000/-. PW-1 Pyare Lal has proved Ext. PW-1/A and Ext. PW-1/B, location plan and site plan, respectively. PW-2 Jugal Kishor, Registration Clerk has brought the original record and he has proved sale deed Ext. PW-2/A. Now, as far as statement of PW-5 Shamsher Singh is concerned, it cannot be taken into consideration for the simple reason that PW-5 Shamsher Singh has purchased the land from Gian Chand in the year 2005.

11. Mr. Rahul Mahajan, Advocate, has also argued that the large chunk of land has been acquired but the learned Addl. District Judge, Una, has taken into consideration exemplar Ext. PW-1/A of small piece of land. The appellant has not placed on record copy of any sale deed in proximity to before and after the notification dated 21.4.1998. It is now well settled that the exemplars of small plots can be taken into consideration but the suitable deductions are required to be made while determining the market price of the land.

12. Their lordships of the Hon'ble Supreme Court in the case of ***Administrator General of West Bengal vrs. Collector, Varanasi,*** reported in ***(1988) 2 SCC 150,*** have held that subsequent transactions which are not proximate in point of time to the acquisition can be taken into account for purposes of determining whether as on the date of acquisition there was an upward trend in the prices of land in the area. Further, under certain circumstances where it is shown that the market was stable and there were no fluctuations in the prices between the date of the preliminary notification and the date of such subsequent transaction, the transaction could also be relied upon to ascertain the market value. However, this principle would be applicable to only where there is evidence to the effect that there was no upward surge in the prices in the interregnum. In the instant case, the appellant has not put any suggestion that there was any fluctuation in the prices from the date of preliminary notification and the date of subsequent notification. Their lordships have held as under:

> "13. The sale transaction at Ext. 24 was an year later. Such subsequent transactions which are not proximate in point of time to the acquisition can be taken into account for purposes of determining whether as on the date of acquisition there was an upward trend in the prices of land in the area. Further under certain circumstances where it is shown that the market was stable and there were no fluctuations in the prices between the date of the preliminary notification and the date of such subsequent transaction, the transaction could also be relied upon to ascertain the market value. This Court in State of U. P. v. Maj. Jitender Kumar, (See AIR 1982 SC 876 (877)) observed :
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> > ".....It is true that the sale deed Ext. 21 upon which the High Court has relied is of a date three years later than the Notification under S. 4 but no material was produced before the Court to suggest that there was any fluctuation in the market rate at

> Meerut from 1948 onwards till 1951 and if so to what extent. In the absence of any material showing any fluctuation in the market rate the High Court thought it fit to rely upon Ex. 21 under which the Housing Society itself had purchased land in the neighbourhood of the land (in) dispute. On the whole we are not satisfied that any error was committed by the High Court in relying upon the sale deed Ex. 21..."

But this principle could be appealed to only where there is evidence to the effect that there was no upward surge in the prices in the interregnum. The burden of establishing this would be squarely on the party relying on such subsequent transaction. In the present case appellant did not endeavour to show that between the date of preliminary notification i.e. 4-7-1959 and the date of Ext. 24 i. e. 18-8-1960 there was no appreciation in the value of land in the area. Therefore, Ext. 24 cannot be relied upon as affording evidence of the market value as on 4-7-1959. We cannot accept the argument that the price indicated in Ext. 24 should be accepted after allowing an appropriate deduction for the possible appreciation of the land values during the period of one year. Apart from other difficulties in this exercise, there is no evidence as to the rate and degree of appreciation in the values of land so that the figure could be jobbed backwards from 14-7-1960 to 4-7-1959."

13. Their lordships of the Hon'ble Supreme Court in the case of ***Periyar and Pareekanni Rubbers Ltd. vrs. State of Kerala,*** reported in ***(1991) 4 SCC 195,*** have held that the compensation should be fair and reasonable and not arbitrary and unreasonable. Their lordships have held that when the courts are called upon to fix the market value of the land the best evidence of the value of the property is the sale of acquired land to which claimant himself is a party, in its absence the sales of the neighbouring lands. The underlying principle to fix a fair market value with reference to comparable sale is to reduce the element of speculation. In a comparable sale the features are: (1) it must be within a reasonable time of the date of the notification; (2) it should be a bonafide transaction; (3) it should be a sale of the land acquired or land adjacent to the land acquired and (4) it should possess similar advantages. Their lordships have held as under:

> "10. Therefore, the transaction relating to the acquired land of recent dates or in the neighbourhood lands that possessed of similar potentiality or fertility or other advantageous features are relevant pieces of evidence. When the Courts are called upon to fix the market value of the land in compulsory acquisition, the best evidence of the value of property is the sale of the acquired land to which the claimant himself is a party, in its absence the sales of the neighbouring lands. In proof of the sale transaction, the relationship of the parties to the transaction, the market conditions, the terms of the sale and the date of the sale are to be looked into. These features would be established by examining either the vendor or vendee and if they are not available, the attesting witnesses who have personal knowledge of the transaction etc. The original sale deed or certified copy thereof should be tendered as evidence. The underlying principles to fix a fair market value with reference to comparable sales is to reduce the element of speculation. In a comparable sales the features are: (1) it must be within a reasonable time of the date of the notification; (2) it should be a bona fide transaction; (3) it should be a sale of the land acquired or land adjacent to the land acquired; and (4) it should possess similar advantages. These should be

established by adduction of material evidence by examining as stated above the parties to the sale or persons having personal knowledge of the sale transactions. The proof also would focus on the fact whether the transactions are genuine and bona fide transactions. As held by this Court in Collector, Rajgarh v. Hari Singh Thakur, (1979) 2 SCR 183 : (AIR 1979 SC 472) that fictitious and unreal transactions of speculative nature brought into existence in quick succession should be rejected. In that case it was found by majority that these sale deeds are brought up sales. In Administrator General of West Bengal v. Collector. Varanasi (1988) 2 SCR 1025, that the price at which the property fetches would be by a willing seller to a willing purchaser but not too anxious a buyer, dealing at arm's length. The prices fetched for similar lands with similar advantages and potentialities and the bona fide transactions of the sale at time of preliminary notification are the usual, and indeed the best, evidence of the market value. Other methods of valuation are resorted to if the evidence of sale of similar land is not available. The prices fetched for smaller plots cannot form basis for valuation of large tracts of land as the two are not comparable properties. Smaller plots always would have special features like the urgent need of the buyer, the advantageous situation, the like of the buyer etc.

17. In Narasingh Rao's case, I have dealt with in paragraph 8 thus: "The object of the inquiry is to bring on record the price fetched or capable of fetching, the relative situation of the land acquired and the subject of the sale transaction, their fertility, suitability, nature of the use to which they are put to, income derived or other special distinctive features possessed of by the respective lands either single or some or all relevant to the facts in issue. In this process the courts are not mere umpires but to take intelligent participation and to see whether the counsel on either side are directing towards this goal or the court itself to intervene in this regard. "Therefore, it is the paramount duty of the courts of facts to subject the evidence to close scrutiny, objectively assess the evidence tendered by the parties on proper considerations thereof in correct perspective to arrive at reasonable market value. The attending facts and circumstances in each case would furnish guidance to arrive at the market value of the acquired lands. The neighbourhood lands possessed of similar potentialities or same advantageous features or any advantageous special circumstances available in each case also are to be taken into account. Thus, the object of the assessment of the evidence is to arrive at a fair and reasonable market value of the lands and in that process sometime trench on the border of the guesswork but mechanical assessment has to be eschewed. The Judges are to draw from their experience and the normal human conduct of parties in bona fide and genuine sale transactions is the guiding star in evaluating evidence. Misplaced sympathies or undue emphasises solely on the claimants' right to compensation would place heavy burden on the public exchequer to which everyone contributes by direct or indirect taxes.

18. In V. R. Katarki v. State of Karnataka, C. A. No. 4392 of 1986, D/- 22-3-1990, decided by Bench of this Court to which one of us (K. Ramaswamy, J.) is a member, the appellant apart from other charges, was imputed with misconduct of fixing in his capacity as Civil Judge at Bagalkot, "higher valuation than was legitimate of the lands." After conducting enquiry he was dismissed from service and when he challenged it, the High Court upheld it on the judicial side. On further appeal., since the appeals against higher valuation were pending in the

High Court, without going into that question, while confirming the dismissal laid the rule thus: "We would like to make a special mention of the position that even if that assessment of valuation is modified or affirmed in an appeal as a part of the judicial process, the conduct of the judicial officer drawable from an overall picture of the matter would yet be available to be looked into. In appropriate. cases it may be opened to draw inferences even from judicial acts" of the misconduct. The rule of conduct spurned by this Court squarely put the nail on the official act as a refuge to fix arbitrary and unreasonable market value and the person concerned shall not camouflage the official act to a hidden conduct in the function of fixing arbitrary or unreasonable compensation to the acquired land. Equally it is salutary to note that the claimant has legal and legitimate right to a fair and reasonable compensation to the land he is deprived of by legal process. The claimant has to be recompensated for rehabilitation or to purchase similar lands else where. In some cases for lack of comparable sales it may not be possible to adduce evidence of sale transactions of the neighbouring lands possessed of same or similar quality. So insistence of adduction of precise or scientific evidence would cause disadvantage to the claimants in not getting the reasonable and proper market value prevailing on the date of' notification under Section 4(l). Therefore it is the paramount duty of the Land Acquisition Judge authority to keep before him always the even scales to adopt pragmatic approach without indulging in facts of imagination" and assess the market value which is reasonably capable to fetch reasonable market value. What is fair and reasonable market value is always a question of fact depending on the nature of the evidence, circumstances and probabilities in each case, The guiding star would be the conduct of a hypothetical willing vendor would offer the lands and a willing purchaser in normal human conduct would be willing to buy as a prudent man in normal market condition as on the date of the notification under Sec. 4(1) but not an anxious buyer dealing at arm's length nor facade of sale or fictitious sales brought about in quick succession or otherwise to inflate the market value."

14. Their lordships of the Hon'ble Supreme Court in the case of ***Karan Singh and others. vrs. Union of India,*** reported in ***(1997) 8 SCC 186,*** have held that in the absence of any evidence of sale of land on the date of issue of notification under Section 4 of the Act, under certain conditions the post-notification transactions of sales of land can be relied upon in determining the market value of the acquired land. One of the conditions being that it must be shown before the Court by reliable evidence that there was no appreciation of the value of land during the period of issue of notification under Section 4 of the Act and the date of transaction of sale which is sought to be relied upon for the purposes of fixing the market value of the acquired land. Their lordships have held as under:

"5. Before we advert to the argument raised on behalf of the appellants, it has to be borne in mind while deciding these appeals, this Court is not required to reappraise the evidences which were considered by the Courts below. But what concerns us is whether correct or legal principles were applied in arriving at the market value of the acquired land in awarding compensation to the claimants. When a land is compulsorily acquired, what is basically required to be done for awarding compensation is to arrive at the market value of the land on the date of notification under Section 4 of the Act. The market value of a piece of land for determining compensation under Section 23 of the Act would be

the price at which the vendor and the vendee (buyer and seller) are willing to sell or purchase the land. The consideration in terms of price received for land under bona fide transaction on the date of notification issued under Section 4 of the Act or few days before or after the issue of notification under Section 4 of the Act generally shows the market value of the acquired land and the market value of the acquired land has to be assessed in terms of those transactions. The sale of land on or about the issue of notification under Section 4 of the Act is stated to be the best piece of evidence for determining the market value of the acquired land. Often evidence on transaction of sale of land on or few days before the notification under Section 4 is not available. In the absence of such evidence contemporaneous transactions in respect of lands which had similar advantages and disadvantages would be the good piece of evidence for determining the market value of the acquired land. In case the same is not also available, the other transaction of land having similar advantages nearer to the date of notification under Section 4 of the Act would guide in determination of the market value of acquired land. In the present case, in the absence of evidence of any transaction or sale of land on the date of issue of notification under Section 4 of the Act, the Court would be justified in relying upon the transaction of sale of land having similar advantages nearer to the notification issued under Section 4 of the Act which can be taken as a guide for determining the market value of the acquired land and compensation to be awarded to the claimants. Thus the transaction of sale of land after the issue of notification under Section 4 of the Act can guide the Court in fixing the market value of the acquired lands under certain conditions. In the case of Administrator General of West Bengal v. Collector, Varanasi, AIR 1988 SC 943, it was held thus (at p. 948) :

> "Such subsequent transaction which are not proximate in point of time to the acquisition can be taken into account for purpose of determining whether as on the date of acquisition there was an upward trend in the prices of land in the area. Further under certain circumstances where it is shown that the market was stable and there were no fluctuations in the prices between the date of the preliminary notification and the date of such subsequent transaction, the transaction could also be relied upon to ascertain the market value."

15. Their lordships of the Hon'ble Supreme Court in the case of ***A. Natesam Pillai vrs. Special Tahsildar, Land Acquisition, Tiruchy,*** reported in ***(2010) 9 SCC 118,*** have held that small area of land in exemplar though not comparable with acquired land may not be an excellent guide but it is still a better guide than other documents exhibited, and same can be used as a relevant yardstick to assess just and reasonable compensation. Their lordships have held as under:

> "18. The small area of land measuring 1710 sq. ft. was sold for Rs. 20,000/- as per Ex. A3 dated 15.7.92 which works out to a value of Rs. 11/- per sq. ft. A comparison of the two plots, namely, land in Ex. A3 and the acquired land shows that they are not identical. While the land in Ex. A3 may not be an excellent guide it is still a better guide than any other document exhibited on record. The same could be used as a relevant yardstick to assess the just and reasonable compensation in the present case."

16. Similarly, their lordships have held that sale deed which is dated post-notification is generally ignored, however, evidence is led to show that there was no increase in price despite such acquisition. Their lordships have held as under:

> "11. It is important to note that Ex. A1 and Ex. A4 are sale deeds executed subsequent to the date of notification under Section 4(1) and for this reason, the High Court held these to be irrelevant for the purpose of determining compensation. The first clause of Section 23 of the Act clearly provides that the amount of compensation awarded for the land acquired is required to be determined on the basis of market value of the land at the time of publication of the notification under Section 4 of the Act. Therefore, it is the duty of both of the Land Acquisition Officer as also of the Court to determine the actual compensation payable for the land acquired by referring to evidence regarding fair and just compensation near about the proximate date or on the date itself of the publication of the notification under Section 4.
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> 12. At times, in order to prove the actual, fair and just compensation for the land acquired, sale deeds of the adjacent land or nearabout adjacent land are produced to indicate the trend of the value of the land within the near vicinity of the acquired land. Such sale deeds are taken notice of generally when they are prior in point of time to the date of notification, and any sale deed which is post notification dated is generally ignored, unless evidence is led to show that there was no increase in price despite such acquisition.
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> 14. As a result of such acquisition, the market value of the adjacent land would generally, and in most cases, go up and therefore, such post notification transaction may not be a sound criterion to determine and assess the value of the acquired land. In the present case, the appellant has also not adduced any evidence to show that the market value of adjacent land has not increased in the interregnum. The Reference Court and the High Court were justified in rejecting these sale deeds from consideration. We must, therefore, keep the aforesaid two sale deeds outside our consideration while assessing and determining the just and fair compensation for the acquired land. Ex. A2 is also a sale deed but the same also is not a safe guide as the price for the land covered therein was later on increased to make it in parity with the government prescribed rate."

17. Thus the learned Addl. District Judge, Una has taken into consideration the sale deed Ext. PW-2/A dated 22.7.1998. The notification under Section 4 of the Act is dated 21.4.1998 and is within the period of proximately 3 months.

18. Their lordships of the Hon'ble Supreme Court in the case of ***Rishi Pal Singh and others vrs. Meerut Development Authority and another,*** reported in ***(2006) 3 SCC 205,*** have held that exemplars of small plots can be taken into consideration specially when other relevant or material evidence not available, provided adequate discount given in that behalf. Their lordships have held as under:

> "5. On merits the learned counsel submits with reference to the impugned judgment of the High Court that only two reasons have been given by the High Court for setting aside the order of the Reference Court and remanding the case back to it. First reason is that exemplars relied upon by the Reference Court are of small plots of land whereas the

acquisition is of a large tracts of land i.e. about 180 acres. The second reason given in the impugned judgment for remand is that exemplars filed by the acquiring authority i.e. appellants before us, were not considered by the Reference Court. The learned counsel for the appellants has taken us through the judgment of the Reference Court to show that both the reasons given by the High Court in its impugned order are factually incorrect. With respect to the first reason, that is, exemplars of small plots have been taken into consideration by the Reference Court, in the first instance our attention was invited to some judgments of this Court to urge that there is no absolute bar to exemplars of small plots being considered provided adequate discount is given in this behalf. Thus there is no bar in law to exemplars of small plots being considered. In an appropriate case, specially when other relevant or material evidence is not available, such exemplars can be considered after making adequate discount. This is a case in which appropriate exemplars are not available. The Reference Court has made adequate discount for taking the exemplars of smaller plots into consideration. It appears that the attention of the High Court was not drawn to this part of the judgment of the Reference Court which has resulted in the High court completely overlooking the relevant discussion in the judgment of the Reference Court."

19. Their lordships of the Hon'ble Supreme Court in the case of ***Trishala Jain and another vrs. State of Uttaranchal and another,*** reported in ***(2011) 6 SCC 47,*** have held that the value of sale of small pieces of land can be taken into consideration for determining even the value of a large tract of land but with a rider that the court while taking such instances into consideration has to make some deduction keeping in view other attendant circumstances and facts of that particular case. Their lordships have held as under:

"44. It is thus evident from the above enunciated principle that the acquired land has to be more or less developed land as its developed surrounding areas, with all amenities and facilities and is fit to be used for the purpose for which it is acquired without any further expenditure, before such land could be considered for no deduction. Similarly the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilisation, amenities and infrastructure with hardly any distinction. On such principles each case would have to be considered on its own merits.

81. It is not in dispute before us that sale instance at serial No. 108 falls in the Revenue Estate of the same Village and as recorded by the Reference Court, in LA Case No. 121 of 1994, it is situated at a distance of 1= furlong from the acquired land. The acquired land belonging to the claimants forms part of Khasra No.39/2 while, in the same Reveue Estate, the sale instance at serial No. 108 is part of Khasra No. 410. Thus a sale deed related to a land in such proximity of time and distance cannot be said to be incomparable sale instance, i.e. it has to be taken as a comparable sale instance. Though it relates to the sale of a smaller plot of land but is certainly bigger than the land sold by the claimants between themselves. Its location and potential, if not identical in absolute terms, is certainly comparable for the purposes of determining market value of the land in question.

82. It is a well established principle that the value of sale of small pieces of land can be taken into consideration for determining even the value of a large tract of land but with a rider that the Court while taking such instances into consideration has to make some deduction keeping in view other attendant circumstances and facts of that particular case. We have already held that keeping in view the surrounding developed areas and location and potential of the land it will meet the ends of justice if 10% deduction is made from the estimated market value of the acquired land."

20. Their lordships of the Hon'ble Supreme Court in the case of ***Bilkis and others vrs. State of Maharashtra and others,*** reported in ***(2011) 12 SCC 646,*** have held that the following factors are required to be considered for determining compensation:

(i) Conversion of acquired land into non-agricultural land;
(ii) Potential for which land was reasonably capable of being used;
(iii) Existence of some structures;
(iv) Proximity to highway.

In the present case also, the land is situated on the either side of the road. It is in close proximity to town. It is of great potential for development. The potentiality of the land has to be taken into consideration for determining compensation.

21. Their lordships of the Hon'ble Supreme Court in the case of ***R. Sarangapani vrs. Special Tahsildar Karur Dindigul Broadguage Line,*** reported in ***(2011) 14 SCC 177,*** have held that in absence of any other exemplars, small pieces of land can be taken into consideration after applying appropriate deduction. Their lordships have held as under:

"19. Equally erroneous is the approach adopted by the High Court in fixing market value of the remaining land. Although, the appellants' argument that the Reference Court should not have segregated land covered by the trees for the purpose of fixing market value of the remaining land may not be acceptable because once market value of the trees was separately fixed, there could be no justification for clubbing the two types of land for the purpose of fixing market value, the High Court committed serious error by ignoring the two sale instances - Ext. A4 and A5 and, at the same time, applying 1/3 rd cut. It is true that the two sale instances related to a small parcel of land but, in the absence of any other exemplar, such sale instance could be relied upon for the purpose of fixing market value of the acquired land, on which trees had not been planted, after applying an appropriate cut. By Ext.A4 dated 8.9.1982, 21 cents land was sold for a sum of Rs.41,500/-. The same piece of land was sold vide Ext. A5 dated 6.7.1983 at the same price, i.e. Rs.41,500/-. The notification under Section 4(1) was published on 30.5.1984. If the rule of escalation in the land price evolved by this Court is applied, then a minimum increase of 10% is to be added to the price specified in Ext. A5. Thus, as on the date of Section 4(1) notification, the approximate value of 21 cents land would be Rs.45,550/-. This would be equivalent to approximately Rs.2,169/- per cent and Rs.2,27,750/- per acre. Though, the respondent did not produce any evidence to show the amount, which was likely to be spent on making the land useful for the purpose of laying

Broad Gauge Line, if 1/3rd cut applied by the High Court is considered reasonable in view of the principles laid down by this Court in Kasturi v. State of Haryana (2003) 1 SCC 354, which were reiterated in Tejumal Bhojwani v. State of U.P. (2003) 10 SCC 525, V. Hanumantha Reddy v. Land Acquisition Officer & Mandal Revenue Officer (2003) 12 SCC 642, H.P. Housing Board v. Bharat S. Negi (2004) 2 SCC 184 and Kiran Tandon v. Allahabad Development Authority (2004) 10 SCC 745, market value of the acquired land will be about Rs.1,50,000/- per acre.

20. We also agree with Shri Nageswara Rao that the appellants should be given the benefit of the principles laid down by the Constitution Bench in Sunder v. Union of India (supra). It appears that attention of the High Court was not drawn to that judgment else it would have, in all probability, extended the benefit of that judgment to the appellants.

21. In the result, the appeals are allowed. The impugned judgments are set aside and the award passed by the Reference Court is restored with modification that the appellants shall be entitled to interest on the enhanced amount with effect from 11.3.1985, i.e. the date on which possession of land was taken by the Railway Department. They shall also be entitled to interest on solatium and additional amount in terms of the judgment in Sunder v. Union of India (supra). The respondent is directed to pay the balance amount of compensation and interest to the legal representatives of the landowners within a period of 3 months from the date of receipt/production of copy of this judgment."

22. Their lordships of the Hon'ble Supreme Court in the case of ***Digamber and others vrs. State of Maharashtra and others,*** reported in ***(2013) 14 SCC 406,*** have reiterated that the Land Acquisition Collector is required to keep in mind the following factors:

(i) Existing geographical situation of the land.

(ii) Existing use of the land.

(iii) Already available advantages, like proximity to National or State Highway or road and/or developed area.

(iv) Market value of other land situated in the same locality/village/area or adjacent or very near the acquired land.

23. The land is situated near Una town. Una town is fastly developing town. The land is also situated on Una-Takka road, Jhalera Takka road and Dangehra Takka road. The appellants have not led any evidence except by producing DW-1, Joginder Singh, who has proved the award made by the Land Acquisition Collector, dated 18.9.2000. There is no record of comparable sales available on record other than document Ext. PW-2/A. According to the sale deed Ext. PW-2/A, the rate of one kanal also comes to Rs. 33,340/- for *abbi* kind of land. The acquired land is connected with the metalled roads. The learned Addl. District Judge, has rightly reduced the rate of land 33340 per kanal to Rs. 25,000/-. The land acquired is for the construction of the railway track and thus the same was to be assessed irrespective of its classification. According to the revenue record, the land of the claimants is other than the classified as *'banjar kadim'* or *'birani avval'*, as per the revenue record. The market value assessed by the learned Addl. District Judge at the uniform rate of Rs. 25,000/- is legal. The claimants have rightly been held entitled to other statutory benefits, as per law.

24. There is no merit in the contention of Mr. Rahul Mahajan, Advocate, that the excess amount has been awarded contrary to Ext. RW-1/A to RW-1/K prepared by the government agency. The market value has been assessed on the basis of the sale deed Ext. PW-1/A, which was in close proximity to the notification issued under Section 4 of the Act on 21.4.1998.

25. Accordingly, there is no merit in these RFAs and the same are dismissed.

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

Anurag Sharma .....Appellant.
Versus
Pratibha Sharma .....Respondent.

FAO No. 208 of 2014.
Reserved on: 03.11.14
Decided on: 26.11.2014.

Hindu Marriage Act, 1955- Sections13(1)(i)- & 13(1) (i-a)- Husband filed a divorce petition against the wife on the ground of cruelty and adultery – evidence proved that husband called his wife characterless for which he was reprimanded by his mother- he had also misbehaved with the members of his family and his wife- he had made false allegations against the wife that she was living an adulterous life- he used to beat the wife on which she had to file a complaint under Protection of Women from Domestic Violence Act, 2005- held, that in these circumstances, version of the petitioner regarding cruelty and adultery was not proved.

(Para-13 to 15)

Cases referred:

Dr. N.G.Dastane vrs. Mrs. S. Dastane, AIR 1975 SC 1534
Shobha Rani v. Madhukar Reddi AIR 1988 SC 121
Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511
Manisha Tyagi vs. Deepak Kumar 2010(1) Divorce & Matrimonial Cases 451
Ravi Kumar vs. Julumidevi (2010) 4 SCC 476
Pankaj Mahajan vs. Dimple Alias Kajal (2011) 12 SCC 1
Vishwanath Agrawal vs. Sarla Vishwanath Agrawal (2012) 7 SCC 288

For the appellant: Mr. Sunil Mohan Goel, Advocate.
For the respondent: Ms. Reeta Goswami, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is directed against the judgment dated 11.3.2014, rendered by the learned District Judge, Kullu, in HMP No. 19 of 2011 (23 of 2012) 499 of 2013.

2. Key facts, necessary for the adjudication of this appeal are that the appellant-petitioner (hereinafter referred to as the appellant) has filed the petition under Section 13 (1) (i) & 13(1) (i-a) of the Hindu marriage Act, 1955 for dissolution of marriage by decree of divorce against the respondent. According to the appellant, the marriage between the appellant and the respondent was solemnized on 3.6.2010 at Sauli Khad, Mandi, H.P., according to Hindu rites, customs and ceremonies. The appellant was posted as Labour Officer at Bilaspur till 5.11.2010. Thereafter, he was transferred to Kullu. The marriage was arranged by the parents, Uncle and Aunt of the appellant. The appellant was disowned by his father from his movable and immovable property on 26.7.2005 by publishing a notice in the newspaper in Hindi Daily '*Dainik Bhaskar*'. The appellant told the respondent not to have any contact with his father, however, despite this, the respondent visited the father of the appellant. Once, the father of the appellant had come to Bilaspur and had stayed there for three days, the appellant raised objection. The respondent took side with the father of the appellant. The respondent used to talk with the father of the appellant on telephone ignoring the warning of the appellant. In the month of August, 2010, the respondent insisted to go to Shimla to meet his father. The appellant never gave consent to the respondent. However, respondent did not pay any heed and went to Shimla. The respondent stayed with the father of the appellant for a week and he offered her costly gifts. The respondent used to call him "Soordass, divorcee and outdated person". He even demanded pornographic films and beer to drink from the appellant. He joined in the month of November, 2010 as Labour Officer at Kullu. The respondent instead of coming to Kullu went to Shimla without informing him. On 19/20.5.2011, the appellant had to attend the training camp at HIPA, Shimla and at that time the respondent asked the appellant that she also wants to accompany the appellant to Shimla. The appellant booked a room in Hotel at Shimla. However, after reaching Shimla, the respondent refused to stay with the appellant in hotel and went to Vikas Nagar. The father of the appellant was residing at Vikas Nagar. The appellant stayed in hotel all alone. On 21.5.2011, when he went to the house of his father to bring back the respondent, he saw the respondent and his father in a compromising position. The respondent was living in adultery. In the month of July, 2011, the respondent had insisted to go to Jaipur to meet her friend Kumar Gaurav. The appellant objected to it. The respondent left the company of the appellant and even attempted to commit suicide. On 28.8.2011, the appellant was staying at Hotel Sandhya Palace, District Kullu. In the morning his father and parents of the respondent, her sister and Uncle came to Hotel and used abusive language. They gave beatings to him. He contacted police and reached Police Station Bhunter. He filed a complaint in the Court of learned CJM, Kullu. On 23.8.2011 at 8:00 PM, two persons at the instance of the respondent had threatened him with dire consequences. On 6.9.2011, after the filing of the complaint in the Court of learned CJM, Kullu, both the parties were called in the Chamber by the learned CJM, Kullu for amicable settlement. However, the behavior of the respondent did not change.

3. The petition was contested by the respondent. She admitted the marriage between the parties. She also admitted that it was the second marriage of the appellant. He had divorced his first wife. She denied the allegations contained in the petition. She denied that the relationship between the appellant and his father were strained. She denied that she was having any illicit relations with the father of the appellant. She also denied that the father of the appellant has visited house at Bilaspur with the consent of the appellant. The appellant used to call her '*Charitrahin*'. She admitted that on 19/20.5.2011, she had gone to Shimla with the appellant. She denied that the

appellant has booked hotel at Shimla. The appellant himself has taken her to the house of his father. They stayed in the house of the father of the appellant. She specifically denied that on 21.5.2011, the appellant had found her in compromising position with the father of the appellant. The appellant has settled the earlier dispute with his first wife and paid Rs. 3,00,000/-.

4. The appellant filed the replication. The learned District Judge, Kullu dismissed the petition on 11.3.2014. Hence, this appeal.

5. Mr. Sunil Mohan Goel, Advocate, has vehemently argued that the learned District Judge, Kullu, has misconstrued the evidence. According to him, his client has proved that the respondent has treated his client with cruelty and was living a adulterous life. On the other hand, Ms. Reeta Goswami, Advocate, has supported the judgment dated 11.3.2014.

6. I have heard the learned counsel for the parties and also gone through the record and judgment dated 11.3.2014 carefully.

7. PW-1 Dharmesh Kumar has proved e-mail Ext. PW-1/A. PW-2 Jeevan Ram, deposed that he was not aware about the strained relations between the husband and wife. It was their private life. He was not in a position to comment on the same. PW-3 Tenzin Bodh deposed that on 20.8.2011, he has gone to hotel Sandhya Palace at 7:30 PM. He enquired from the Manager of the hotel as to in which room the appellant was staying. He came to know that he was staying in Room No. 106. When he went to room No. 106, he saw the quarrel has taken place. Two ladies were standing outside the door. They have not permitted him to go inside. There were two persons inside. One was very tall and the second was of short statured. The name of one person was Duni Chand. The tall man had caught hold of the appellant and the short stature man was hitting the appellant with his kicks and fist blows. One of the person was the father of the appellant. In his cross-examination, he has categorically admitted that he has not apprised the police about the incident seen by him.

8. The appellant has led his evidence by filing Ext. PW-4/A. He has reiterated the averments contained in the petition in his affidavit. He deposed about the marriage which has taken place between the parties on 3.6.2010. There is reference to his posting at Bilaspur till 5.11.2010. He was disowned by his father from the movable and immovable property on 26.7.2005. He was married with Smt. Monika Sharma. He got divorce by mutual consent. His father has visited Bilaspur without his wish. He objected to the same. He had gone to Shimla with his wife in the month of August, 2010 without his consent. She came back to Bilaspur on 8.8.2010. She brought costly gifts. She used to call him "Soordass, divorcee and outdated person". He joined his duty as Labour Officer at Kullu on 6.11.2010. He had come to Shimla on 19-20.5.2011 to attend training at HIPA. The respondent refused to stay with him and went to Vikas Nagar. When he went to the house of his father on 21.5.2011 to bring her back, he caught his father and the respondent in the compromising position. She wanted to go to Jaipur to see her friend Kumar Gaurav. She used to quarrel with him. She has also tried to commit suicide. The respondent, his father-in-law, brother-in-law and father misbehaved with him on 20.8.2011 at hotel Sandhya Palace, Shamshi. He filed application under Section 156(3) Cr.P.C. before the learned C.J.M., Kullu on 30.8.2011. He did not know whether all the members of the family were alive or not. He did not know when his father retired. He also admitted that when he was posted as Labour Officer at Bilaspur, the respondent stayed with him. According to him, the house of his father could be at Vikas Nagar. He admitted that on 20.8.2011, his parents and

mother-in-law and father-in-law had come to Sandhya Palace Hotel to settle the matter. He did not know that his mother was involved in the incident. When his father has offered alto car, he was not present on the spot. He has also submitted representations to the Chief Justice of the High Court and DGP, Himachal Pradesh.

9. The respondent has appeared as RW-2. She has led her evidence by filing RW-2/A. She has admitted the marriage with the appellant on 3.6.2010. She remained with her husband at Bilaspur. Thereafter, he was transferred to Kullu on 6.11.2010. He has called her characterless. This fact was brought to the notice of her mother-in-law. She was beaten up by the appellant. She has to file a case against the appellant under the Protection of Women from Domestic Violence Act, 2005 in the month of December, 2011. Her father-in-law and mother-in-law were the witnesses. The matter was decided in her favour on 5.10.2012. The appellant has not filed an appeal against the order dated 5.10.2012. He has sent the complaints to the Chief Justice of the High Court and DGP on 5/6.9.2011. The appellant has beaten her. She was saved by her mother-in-law. The appellant has leveled false and baseless allegations against her that she was caught in compromising position with her father-in-law. She has never uttered words "Soordass, divorcee and outdated person" to him. She has never told him to go to Jaipur. The father of the appellant has never given her any costly gifts.

10. RW-3 Rajinder Kumar has led his evidence by filing Ext. RW-3/A. According to him, 8 years back, he was working as Manager in Hotel Sandhya Palace. Anurag Sharma has stayed in room No. 106 from 18.8.2011 to 20.8.2011. No altercation has taken place in the hotel.

11. RW-4 Raj Kumar has tendered his evidence by filing RW-4/A. According to the averments contained in the affidavit, the appellant is his son and the marriage between the appellant and the respondent was solemnized on 3.6.2010. He was posted as Labour Officer at Bilaspur and thereafter at Kullu. His wife Santosh told him on 7.7.2011 that appellant has called his wife characterless. They have visited the hotel Sandhaya Palace on 20.8.2011. The appellant has mis-behaved with the members of the family. The appellant used to beat respondent. He has also broken the T.V. He and his wife were witnesses in the case filed under the Protection to Women from Domestic Violence Act, 2005. The matter was decided in favour of the respondent on 5.10.2012. In his cross-examination, he deposed that the first wife was divorced by the appellant by mutual consent. He was also pushed when he tried to save his wife.

12. The appellant's mother has appeared as RW-5. She has led the evidence by filing affidavit RW-5/A. it is stated in the affidavit that the marriage between the appellant and the respondent was solemnized on 3.6.2010. Her daughter-in-law had told her on 7.7.2011 that the appellant has called her characterless. She also deposed the manner in which all the family members had gone to hotel Sandhya palace on 20.8.2011 and the appellant has misbehaved with her. She was one of the witnesses in a case filed by the respondent against the appellant under the Protection to Women from Domestic Violence Act, 2005.

13. What emerges from the evidence discussed hereinabove, is that the marriage between the parties was solemnized on 3.6.2010 at Mandi. The appellant was posted at Bilaspur. The respondent stayed with him. The appellant was transferred to Kullu as Labour Officer. The appellant has called the respondent characterless. He was reprimanded by his mother. He had also misbehaved with the members of his family and respondent at Sandhaya Palace

Hotel. The appellant has made reckless and irresponsible allegations against the respondent. The appellant has gone to the extent of leveling false allegations without any proof that the respondent was living adulterous life with his father. The appellant had come to Shimla with his wife. He insisted his wife to stay in the hotel. The wife went to Vikas Nagar where the parents were staying. His mother was also staying in the house. It is not believable that the father-in-law would commit such a heinous act with his daughter-in-law in the presence of his wife and would keep the door open. According to his statement, in cross-examination the house of the father could be at Vikas Nagar. He has not led any evidence to prove that his wife was provided with any gifts by the appellant's father. The parents of the appellant and the respondent have tried to settle the matter amicably. They have visited the Sandhya Palace Hotel. He, instead of mending his ways has misbehaved with the mother. His mother was saved by the appellant's father. He is a divorcee. His marriage was solemnized with one Monika Sharma. He has obtained divorce by mutual consent. It has come in the statement of respondent's witnesses that appellant used to administer beatings to respondent. The respondent was constrained to file a complaint against the appellant under the Protection to Women from Domestic Violence Act, 2005. The same was decided in favour of the respondent on 5.10.2012. The appellant's father and mother had appeared as witnesses against the appellant at Mandi. He has not filed any appeal against the order dated 5.10.2012. He has also gone to the extent of making false complaints against the respondent and the family members before the Chief Justice of this Court and DGP, Himachal Pradesh. No action was ever taken on these complaints.

14. Now, as far as disowning of the appellant by his father is concerned, by issuing notice in the daily edition of vernacular newspaper, no consequential steps were ever taken of divesting him of movable or immovable property. He has made false allegations that his wife tried to go to Jaipur. She has denied the suggestion that she has adulterous relations with the father of the appellant. It was not expected from a person working as Labour Officer to make such reckless allegations against his father and wife. The appellant cannot take advantage of his own wrongs rather, he has treated the respondent with cruelty by making reckless allegations and irresponsible statement against his family members and his wife. The wife while appearing as RW-2, has categorically denied that she has ever called him "Soordass, divorcee and outdated person". The appellant had been giving beatings to the respondent. He was told to mend his ways by the mother-in-law of the respondent. He has also broken the T.V. as per the statement of his father.

15. The case of the respondent has been fully supported by her father-in-law and mother-in-law. The matter is required to be considered from another angle. The appellant deposed that on 19-20.5.2011 he booked the room in Hotel at Shimla. He did not name the hotel where he had booked the room. The case of the appellant is that his father has disowned him. Thus, there was no occasion for him to visit his father. The allegations like calling the respondent as '*Charitrahin*' has definitely traumatized her.

16. Their lordships of the Hon'ble Supreme Court in the case of ***Dr. N.G.Dastane vrs. Mrs. S. Dastane,*** reported in ***AIR 1975 SC 1534,*** have held that Section 23 confers on the Court the power to pass a decree if it is "satisfied" on matters mentioned in clauses (a) to (e) of the Section. It is true that the proceedings under the Act being essentially of a civil nature, the word "satisfied" in Section 23 must mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt". The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle.

The impossible is weeded out at the first stage, the improbable at the second. Their lordships have held as under:

> "24. The normal rule which governs civil proceedings is that a fact can be said to be estabilshed if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, section 3, a fact issaid to be proved when the court either believes it to exist or considersits existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where. the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue"(1) ; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear" (2). But whether the issue is one of cruelty or of a loan on a promote, the test to apply is whether on a preponderance of robabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged.
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> 26. Neither section 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor section 23 which governs the jurisdiction of the court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the court the power to pass a decree if it is "satisfied" on matters mentioned in clauses(a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature, the word "satisfied" must mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases.
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> 28. In England, a view was at one time taken that the petitioner in a matrimonial petition must establish his case beyond a reasonable doubt but in Blyth v. Blyth(P), the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, "the case; like any civil case, may be proved by a preponderance of probability". The High Court of Austraila in Wright v. Wright (2) , has also taken the view that "the civil and not the criminal standard of persuasion applies to matrimonial causes, including issues of adultery". The High Court was therefore in error in holding that the petitioner must establish the charge of cruelty "beyond reasonable doubt". The High Court adds that "This must be in accordance with the law of evidence", but we are not clear as to the implications of this observation."

17. The appellant in the present case has failed to bring his case within the ambit of preponderance of probabilities. He has not led any direct or corroborative evidence to substantiate the plea of cruelty and adultery.

18. Their Lordships of the Hon'ble Supreme Court in the case of **Shobha Rani v. Madhukar Reddi** reported in **AIR 1988 SC 121** have explained the term "cruelty" as under:

> "4. Section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.
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> 5. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, [1966] 2 All E.R. 257 (259) "the categories of cruelty are not closed." Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful/realm of cruelty."

19. Their Lordships of the Hon'ble Supreme Court in **Samar Ghosh vs. Jaya Ghosh** reported in **(2007) 4 SCC 511**, have enumerated some instances of human behaviour, which may be important in dealing with the cases of mental cruelty, as under:

"98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant

danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

20. Their Lordships of the Hon'ble Supreme Court have held in **Manisha Tyagi vs. Deepak Kumar** reported in **2010(1) Divorce & Matrimonial Cases 451**, as under:

"24. This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonable be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension that would be harmful or injurious to continue the cohabitation with the other spouse.

Therefore, to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However, in this case even with aforesaid standard both the Trial Court and the Appellate Court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce."

21. Their Lordships of the Hon'ble Supreme Court have held in **Ravi Kumar vs. Julumidevi** reported in (2010) 4 SCC 476, as under:

"19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it ma be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial case can be of infinite variety – it may be subtle or even brutal and may be by gestures and word. That possible explains why Lord Denning in Sheldon v. Sheldon held that categories of cruelty in matrimonial case are never closed.

21. This Court is reminded of what was said by Lord Reid in Gollins v. Gollins about judging cruelty in matrimonial cases. The pertinent observations are (AC p.660)

> ".. In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."

22. " About the changing perception of cruelty in matrimonial cases, this Court observed in Shobha Rani v. Madhukar Reddi at AIR p. 123, para 5 of the report: (SCC p.108, para 5)

> "5. It will be necessary to bear in mind that there has been (a) marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may

not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties."

22. Their Lordships of the Hon'ble Supreme Court have held in **Pankaj Mahajan vs. Dimple Alias Kajal** reported in (2011) 12 SCC 1, as under

"36. From the pleadings and evidence, the following instances of cruelty are specifically pleaded and stated. They are:

i. Giving repeated threats to commit suicide and even trying to commit suicide on one occasion by jumping from the terrace.

ii. Pushing the appellant from the staircase resulting into fracture of his right forearm.

iii. Slapping the appellant and assaulting him. iv. Misbehaving with the colleagues and relatives of the appellant causing humiliation and embarrassment to him.

v. Not attending to household chores and not even making food for the appellant, leaving him to fend for himself.

vi. Not taking care of the baby.

vii. Insulting the parents of the appellant and misbehaving with them.

viii. Forcing the appellant to live separately from his parents.

ix. Causing nuisance to the landlord's family of the appellant, causing the said landlord to force the appellant to vacate the premises.

x. Repeated fits of insanity, abnormal behaviour causing great mental tension to the appellant.

xi. Always quarreling with the appellant and abusing him.

xii. Always behaving in an abnormal manner and doing weird acts causing great mental cruelty to the appellant."

23. Their Lordships of the Hon'ble Supreme Court have held in **Vishwanath Agrawal vs. Sarla Vishwanath Agrawal** reported in **(2012) 7 SCC 288** as under:

"22. The expression 'cruelty' has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.

28. In Praveen Mehta v. Inderjit Mehta, AIR 2002 SC 2582 it has been held that mental cruelty is a state of mind and feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment, and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The facts and circumstances are to be

assessed emerging from the evidence on record and thereafter, a fair inference has to be drawn whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other."

24. In the instant case, the appellant has miserably failed to prove that he was treated with cruelty by the respondent or she was living adulterous life with his father. These allegations are rather baseless.

25. Accordingly, there is no merit in this appeal, the same is dismissed with costs quantified at Rs. 10,000/-.

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

RFA No.6 of 2008 alongwith RFAs No. 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21 and 22 of 2008
Reserved on: 25.11.2014
Decided on : 26.11.2014

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1. **RFA No. 6/2008**

Collector, Land Acquisition, National Hydro Electric Power Corporation.
...Appellant.

Versus

Bhagwan Dass and others. ...Respondents.

2. **RFA No. 8/2008**

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Chet Ram (died) through LRs and others. ...Respondents

3. **RFA No. 9/2008**

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Purva Devi and others. ...Respondents

4. **RFA No. 10/2008**

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Dote Ram and others. ...Respondent.

5. **RFA No. 11/2008**

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Dile Singh (died) through LRs and others.
...Respondents.

6. **RFA No. 12/2008**

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Chet Ram and others. ...Respondents.

7. **RFA No. 13/2008**

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Hukami and others. ...Respondents.

8. RFA No. 14/2008

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Dot Ram and others. ...Respondents.

9. RFA No. 15/2008

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Narayan Chand alias Narayan Singh and others. ...Respondents.

10. RFA No. 17/2008

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Raghubir Singh and others. ...Respondents.

11. RFA No. 18/2008

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Tej Ram and others. ...Respondents.

12. RFA No. 19/2008

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Sher Singh and others. ...Respondents.

13. RFA No. 20/2008

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Tek Chand and others. ...Respondents.

14. RFA No. 21/2008

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Prem Chand and others. ...Respondents.

15. RFA No. 22/2008

Collector, Land Acquisition, National Hydro Electric Power Corporation
...Appellant.

Versus

Jave Ram and others. ...Respondents.

Land Acquisition Act, 1894- Section 18- Land of the claimant was acquired for construction of Parbati Hydro Electric Project- claimant dissatisfied with the award, filed a reference petition claiming that land was situated near bazaar and had potential of raising orchards, growing vegetables, construction of commercial buildings and hotels- reference petition was allowed- appellants contended that land was not situated

near bazaar and was not marketing centre of the area- no commercial activities were expected and excessive compensation was paid- held, that no evidence was led by the appellants to show that sale deed produced by them pertained to the land having similar potentiality, utility, similarity and advantages as the acquired land- therefore, sale deeds were rightly rejected. (Para-11)

Land Acquisition Act, 1894- Section 18- Land of the claimant was acquired for construction of Parbati Hydro Electric Project – some of the land was already the subject matter of the award- acquired land is in the proximity of the headquarters of Sub-Tehsil, Sainj- there is great potentiality for the land to be used for commercial business- held, that the reference Court had rightly granted the parity to the acquired land. (Para-11)

Land Acquisition Act, 1894- Section 18- Compensation should be fair and reasonable- compensation should be determined on the basis of comparable sale-exemplars of small plots can be taken into consideration especially when other relevant or material evidence is not available- however, Court has to make suitable deduction. (Para-25 and 29)

Cases referred:

Periyar and Pareekanni Rubbers Ltd. vrs. State of Kerala, (1991) 4 SCC 195,

Rishi Pal Singh and others vrs. Meerut Development Authority and another, (2006) 3 SCC 205

Trishala Jain and another vrs. State of Uttaranchal and another, (2011) 6 SCC 47

Bilkis and others vrs. State of Maharashtra and others, (2011) 12 SCC 646,

R. Sarangapani vrs. Special Tahsildar Karur Dindigul Broadguage Line, (2011) 14 SCC 177

Digamber and others vrs. State of Maharashtra and others, (2013) 14 SCC 406,

For the Appellant	:	Mr. K.D. Shreedhar, Sr. Advocate with Mr. Rajnish Maniktala and Mr. Yudhvir Singh Thakur, Advocates.
For the Respondents:		Mr. Parmod Thakur, Addl. A.G. with Mr. Neeraj K.Sharma, Dy. A.G. and Mr. R.P. Singh, Asstt. A.G. for the respondent-State in all the appeals. Mr. Sanjeev Kuthiala and Mr. Sunil Mohan Goel, Advocates for the respective respondents.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Since common questions of law and facts are involved in all these appeals, the same were taken up together for hearing and are being disposed of by a common judgment.

2. These appeals are instituted against the award dated 29.9.2007 rendered by the Additional District Judge, Fast Track Court, Kullu in Reference Petitions No. 67/2003 6/2004, 68/2003 7/2004, 70/2003 9/2004, 71/2003 10/2004, 80/2003 15/2004, 79/2003 16/2004, 76/2003 17/2004, 77/2003

18/2004, 78/2003 19/2004, 81/2003 20/2004, 82/2003 21/2004, 83/2003 22/2004, 28/2003 38/2004, 27/2003 39/2004, 26/2003 40/2004, 29/2003 41/2004 and 30/2003 42/2004.

3. "Key facts" necessary for the adjudication of these appeals are that a notification under section 4 of the Land Acquisition Act, 1894 was issued on 5.12.2000 whereby it was proposed to acquire the land situated in Phati Dhaugi, Sub-Tehsil Sainj for the construction of Parbati Hydro Electric Project. After the completion of the procedural formalities under sections 6 and 7 of the Land Acquisition Act, 1894, the Land Acquisition Officer-Sub Divisional Officer (Civil), Kullu announced the award on 4.1.2002. Respondents-claimants (hereinafter referred to as the "claimants" for convenience sake) dissatisfied with the award of the Land Acquisition Collector preferred Reference Petitions under section 18 of the Land Acquisition Act before the Land Acquisition Collector. According to the averments contained in the reference petitions, the market value of the land has not been determined in accordance with law and the same was liable to be modified and enhanced. According to the claimants, land was situated near Sainj Bazaar, which was market centre of the area. The land has potential of raising orchards, growing vegetables, construction of commercial buildings and hotels. According to them, the market value of the land was not less than ten lakhs per bigha at the time of issuance of notification under section 4 of the Land Acquisition Act.

4. According to the appellant, the land was not situated near Sainj Bazaar and the same was not the marketing centre of the area. No commercial activities were expected in or around the area. Due, adequate and reasonable compensation has been paid to the claimants. It was denied that the value of the land was Rs. 10 lakhs per bigha.

5. Learned Additional District Judge, Fast Track Court, Kullu, after appreciating the oral as well as documentary evidence held the claimants entitled for the grant of Rs.20,000/- per biswa (Rs.4 lakhs per bigha) irrespective of nature, kind and classification of acquired land. The claimants were also held entitled to statutory benefits. Hence, the present appeals.

6. Mr. K.D. Shreedhar, learned Senior Advocate for the appellant has vehemently argued that the Additional District Judge, Fast Track Court, has wrongly assessed the market value of the land at Rs. 20,000/- per biswa. He then contended that the Additional District Judge has taken into consideration the value of the small plots. He has also contended that the sale deeds produced by appellant, i.e. Ex.R-1 to Ex.R-11 have not been taken into consideration.

7. Mr. Sanjeev Kuthiala, Advocate and Mr. Sunil Mohal Goel, Advocate have supported the award dated 29.9.2007.

8. I have heard the learned counsel for the parties and have gone through the award and records meticulously.

9. The notification under section 4 of the Land Acquisition Act, 1894 was issued on 5.12.2000. The award has been made by the Land Acquisition Collector-cum-Sub Divisional Officer (Civil), Kullu on 4.1.2002. The land has been acquired for the construction of Parbati Hydro Electric Project. The acquired land is situated at Phati Dhaugi.

10. PW-1 Tej Singh has testified that the lands of the claimants were situated in Phati Dhaugi. The lands were adjacent to Sainj Bazaar. These were acquired by National Hydro Electric Power Corporation for the construction of

colony of Parwati Project. The lands were situated by the side of Aut-Sainj road. The value of the acquired lands was more than 10 lakhs per bigha. However, the Land Acquisition Collector has assessed the value of acquired lands inadequately. There were shops, residential houses, hotels, rest house, schools, dispensary and bank adjacent to the acquired land. Lands have been reserved by the claimants for the construction of commercial complex. The lands of Bhimi Ram and Khub Ram etc. had been acquired by the National Hydro Power Corporation for the construction of colony of Parbati Project. The award of Collector was challenged before learned District Judge, Kullu. He has enhanced the compensation to Rs. 20,000/- per biswa. According to him, compensation has also not been awarded adequately for the acquired land and for fruit and non-fruiting bearing trees. He was cross-examined. In his cross-examination, he has admitted that the acquired land was situated on the left side of the river. Most of the land falls in Sainj area. The distance between Sainj and Banjar was 20-25 KMs. The distance between Dhaugi and Sub Tehsil Headquarters, Sainj is 4 KMs. He has denied that this area was developed after the acquisition of land by N.H.P.C.

11. PW-2 Padam Singh has led his evidence by way of affidavit. It is specifically averred in the affidavit that on 14.9.2000, he has purchased two biswas of land for Rs.90,000/- from Yogender Pal. Sale was duly registered. He has proved copy of sale deed Ex.P-1.

12. PW-3 Prem Chand has also led his evidence by way of affidavit. According to the averments contained in the affidavit, he has sold land measuring 0-1-10 bighas for Rs.45,000/- to Sh. Kishori Lal. He has proved copy of sale deed Ex.P-3 and Jamabandi Ex.P-4.

13. PW-4 Prem Chand son of Jagat Ram has also led his evidence by way of affidavit. According to the averments contained in the affidavit, on 15.9.2000 he has sold two biswas of land for Rs.1,00,000/- to Sher Singh. The copy of sale deed is Ex.P-5 and copy of Jamabandi is Ex.P-7.

14. The claimants have also tendered in evidence copy of award No.124/2003 passed by the Additional District Judge, Fast Track Court Ex.P-7, copy of award No.84/2003 passed by District Judge, Kullu Ex.P-9 and copy of award passed by Land Acquisition Collector Ex.P-11.

15. RW-1 Prabhat Singh has proved sale deeds dated 29,12,1999, 12.11.1999, 22.2.2000, 2.6.2000, 26.9.2000, 1.2.2000, 24.8.2000, 23.3.2000, 12.1.2000, 30.9.2000 and 23.10.2000 vide Ex.R-1 to Ex.R-11.

16. RW-2 Mohinder Pal Gupta, Junior Engineer has deposed that there was no water supply in the year 2000-2002 in village Dhaugi.

17. RW-3 Mehar Chand has proved Ex.R-13 to Ex.R-16. In his cross-examination, he has admitted that Ex.R-13 to Ex.R-16 are not in his handwriting.

18. RW-4 Kanshi Ram in his cross-examination has admitted that the acquired land was situated over and below the Sainj-Aut road and on the Northern side is Sainj Bazaar. He has also admitted that there were 100 shops in the Sainj Bazaar.

19. RW-5 Devender Singh has deposed that the acquired land was at a distance of half KM from Sainj Bazaar.

20. The appellant has tendered in evidence copy of award Ex.R-18.

21. PW-2 Padam Singh has categorically deposed that he has purchased the land measuring two biswas on 14.9.2000 for a sum of Rs. 90,000/- from Yongender Pal. Sale deed was also registered to this effect. The land is situated in Phati Dhaugi. PW-3 Prem Chand has deposed that he has sold land measuring 0-1-10 bighas on 14.9.2000 for a sum of Rs. 45,000/- to Kishori Lal. It was duly registered. He has denied the suggestion that the sale deed was prepared to get the maximum compensation. PW-4 Prem Chand son of Jagat Ram has deposed that he has sold land measuring 2 biswas on 15.9.2000 for a consideration of Rs. one lakh to Sh. Sher Singh. The sale deed was duly registered. This land is also situated in Phati Dhaugi. He has denied that the sale deed was executed by him in a fictitious manner.

22. According to the revenue record, i.e. copy of Jamabandi Ex.P-2, Ex.P-4 and Ex.P-6, the nature of the land is Bathal Som, Banzar Kadim and Ropa abal. The appellant has placed strong reliance upon Ex.R-1 to Ex.R-11. These were produced by RW-1 Prabhat Singh, Registration Clerk, Sub-Tehsil, Sainj. However, the appellant has not led any tangible evidence to establish that the sale deeds Ex.R-1 to Ex.R-11 were having same potentiality, utility, similarity and advantages as of acquired land. There is no evidence on record to suggest even remotely that nature and potentiality of the land was similar to the land having been sold vide Ex.R-1 to Ex.R-11. The nature of the land has not been recorded as per sale deeds Ex.R-1 to Ex.R-11. Thus, the learned Additional District Judge, Fast Track Court has rightly discarded the sale deeds Ex.R-1 to Ex.R-11. Some of the Reference Petitions arising out of the award passed by the Collector stood already decided by the District Judge, Kullu and Additional District Judge, Kullu vide Ex.P-9 and Ex.P-7, respectively. According to awards Ex.P-7 and Ex.P-9, the market value of the acquired land in village Phati Dhaugi was assessed at Rs. 20,000/- per bigha. The land sold as per sale deeds Ex.P-1, Ex.P-3 and Ex.P-5 relates to 0-2-0, 0-1-10 and 0-2-0 bigha, respectively. The land acquired for the construction of project in village Dhaugi was 68-19-00 bighas. Thus, the land acquired was larger chunk vis-à-vis sale deeds Ex.P-1, Ex.P-3 and Ex.P-5. Sale deeds Ex.P-1, Ex.P-3 and Ex.P-5 are bona fide sale deeds. The land acquired is in the proximity of the headquarters of Sub-Tehsil, Sainj. The distance between Aut-Dhaugi is about 20 KMs. Aut is situated on a National Highway. There are 100 shops in the Sainj Bazaar. There is great potentiality for the land to be used for the purpose of commercial activities. Learned Additional District Judge on the basis of sale deeds Ex. P-1, Ex.P-3 and Ex.P-5 has assessed the average value of the acquired land at Rs. 41,666/- per biswa, i.e. Rs. 20,000/- per biswa. However, the Additional District Judge, after taking into consideration all the facts, has made necessary deductions to the extent of 50%. The Additional District Judge has rightly maintained the parity while determining the market price of the land by relying upon Ex.P-9 and Ex.P-7. The land acquired, vide Ex.P-7 and Ex.P-9 was from the same award made by the Land Acquisition Collector.

23. Mr. K.D. Shreedhar, learned Senior Advocate has also argued that example by way of Ex.P-1, Ex.P-3 and Ex.P-5 could not be taken into consideration by the learned Additional District Judge while determining the market price of the land. The notification under section 4 of the Land Acquisition Act was issued on 5.12.2000. Sale deeds Ex.P-1, Ex.P-3 and Ex.P-5 are dated 14.9.2000, 14.9.2000 and 15.9.2000, respectively. These are in close proximity with the date of issuance of notification under section 4 of the Land Acquisition Act.

24. Their lordships of the Hon'ble Supreme Court in the case of ***Periyar and Pareekanni Rubbers Ltd. vrs. State of Kerala,*** reported in

(1991) 4 SCC 195, have held that the compensation should be fair and reasonable and not arbitrary and unreasonable. Their lordships have held that when the courts are called upon to fix the market value of the land the best evidence of the value of the property is the sale of acquired land to which claimant himself is a party, in its absence the sales of the neighbouring lands. The underlying principle to fix a fair market value with reference to comparable sale is to reduce the element of speculation. In a comparable sale the features are: (1) it must be within a reasonable time of the date of the notification; (2) it should be a bonafide transaction; (3) it should be a sale of the land acquired or land adjacent to the land acquired and (4) it should possess similar advantages. Their lordships have held as under:

> "10. Therefore, the transaction relating to the acquired land of recent dates or in the neighbourhood lands that possessed of similar potentiality or fertility or other advantageous features are relevant pieces of evidence. When the Courts are called upon to fix the market value of the land in compulsory acquisition, the best evidence of the value of property is the sale of the acquired land to which the claimant himself is a party, in its absence the sales of the neighbouring lands. In proof of the sale transaction, the relationship of the parties to the transaction, the market conditions, the terms of the sale and the date of the sale are to be looked into. These features would be established by examining either the vendor or vendee and if they are not available, the attesting witnesses who have personal knowledge of the transaction etc. The original sale deed or certified copy thereof should be tendered as evidence. The underlying principles to fix a fair market value with reference to comparable sales is to reduce the element of speculation. In a comparable sales the features are: (1) it must be within a reasonable time of the date of the notification; (2) it should be a bona fide transaction; (3) it should be a sale of the land acquired or land adjacent to the land acquired; and (4) it should possess similar advantages. These should be established by adduction of material evidence by examining as stated above the parties to the sale or persons having personal knowledge of the sale transactions. The proof also would focus on the fact whether the transactions are genuine and bona fide transactions. As held by this Court in Collector, Rajgarh v. Hari Singh Thakur, (1979) 2 SCR 183 : (AIR 1979 SC 472) that fictitious and unreal transactions of speculative nature brought into existence in quick succession should be rejected. In that case it was found by majority that these sale deeds are brought up sales. In Administrator General of West Bengal v. Collector. Varanasi (1988) 2 SCR 1025, that the price at which the property fetches would be by a willing seller to a willing purchaser but not too anxious a buyer, dealing at arm's length. The prices fetched for similar lands with similar advantages and potentialities and the bona fide transactions of the sale at time of preliminary notification are the usual, and indeed the best, evidence of the market value. Other methods of valuation are resorted to if the evidence of sale of similar land is not available. The prices fetched for smaller plots cannot form basis for valuation of large tracts of land as the two are not comparable properties. Smaller plots always would have special features like the urgent need of the buyer, the advantageous situation, the like of the buyer etc.
>
> 17. In Narasingh Rao's case, I have dealt with in paragraph 8 thus: "The object of the inquiry is to bring on record the price fetched or capable of fetching, the relative situation of the land acquired and the subject of the sale transaction, their fertility, suitability, nature of the

use to which they are put to, income derived or other special distinctive features possessed of by the respective lands either single or some or all relevant to the facts in issue. In this process the courts are not mere umpires but to take intelligent participation and to see whether the counsel on either side are directing towards this goal or the court itself to intervene in this regard. "Therefore, it is the paramount duty of the courts of facts to subject the evidence to close scrutiny, objectively assess the evidence tendered by the parties on proper considerations thereof in correct perspective to arrive at reasonable market value. The attending facts and circumstances in each case would furnish guidance to arrive at the market value of the acquired lands. The neighbourhood lands possessed of similar potentialities or same advantageous features or any advantageous special circumstances available in each case also are to be taken into account. Thus, the object of the assessment of the evidence is to arrive at a fair and reasonable market value of the lands and in that process sometime trench on the border of the guesswork but mechanical assessment has to be eschewed. The Judges are to draw from their experience and the normal human conduct of parties in bona fide and genuine sale transactions is the guiding star in evaluating evidence. Misplaced sympathies or undue emphasises solely on the claimants' right to compensation would place heavy burden on the public exchequer to which everyone contributes by direct or indirect taxes.

18. In V. R. Katarki v. State of Karnataka, C. A. No. 4392 of 1986, D/- 22-3-1990, decided by Bench of this Court to which one of us (K. Ramaswamy, J.) is a member, the appellant apart from other charges, was imputed with misconduct of fixing in his capacity as Civil Judge at Bagalkot, "higher valuation than was legitimate of the lands." After conducting enquiry he was dismissed from service and when he challenged it, the High Court upheld it on the judicial side. On further appeal., since the appeals against higher valuation were pending in the High Court, without going into that question, while confirming the dismissal laid the rule thus: "We would like to make a special mention of the position that even if that assessment of valuation is modified or affirmed in an appeal as a part of the judicial process, the conduct of the judicial officer drawable from an overall picture of the matter would yet be available to be looked into. In appropriate. cases it may be opened to draw inferences even from judicial acts" of the misconduct. The rule of conduct spurned by this Court squarely put the nail on the official act as a refuge to fix arbitrary and unreasonable market value and the person concerned shall not camouflage the official act to a hidden conduct in the function of fixing arbitrary or unreasonable compensation to the acquired land. Equally it is salutary to note that the claimant has legal and legitimate right to a fair and reasonable compensation to the land he is deprived of by legal process. The claimant has to be recompensated for rehabilitation or to purchase similar lands else where. In some cases for lack of comparable sales it may not be possible to adduce evidence of sale transactions of the neighbouring lands possessed of same or similar quality. So insistence of adduction of precise or scientific evidence would cause disadvantage to the claimants in not getting the reasonable and proper market value prevailing on the date of' notification under Section 4(l). Therefore it is the paramount duty of the Land Acquisition Judge authority to keep before him always the even scales to adopt pragmatic approach without indulging in facts of imagination" and assess the market value which is reasonably capable to fetch reasonable market

value. What is fair and reasonable market value is always a question of fact depending on the nature of the evidence, circumstances and probabilities in each case, The guiding star would be the conduct of a hypothetical willing vendor would offer the lands and a willing purchaser in normal human conduct would be willing to buy as a prudent man in normal market condition as on the date of the notification under Sec. 4(1) but not an anxious buyer dealing at arm's length nor facade of sale or fictitious sales brought about in quick succession or otherwise to inflate the market value."

25. Their lordships of the Hon'ble Supreme Court in the case of ***Rishi Pal Singh and others vrs. Meerut Development Authority and another,*** reported in ***(2006) 3 SCC 205,*** have held that exemplars of small plots can be taken into consideration specially when other relevant or material evidence not available, provided adequate discount given in that behalf. Their lordships have held as under:

"5. On merits the learned counsel submits with reference to the impugned judgment of the High Court that only two reasons have been given by the High Court for setting aside the order of the Reference Court and remanding the case back to it. First reason is that exemplars relied upon by the Reference Court are of small plots of land whereas the acquisition is of a large tracts of land i.e. about 180 acres. The second reason given in the impugned judgment for remand is that exemplars filed by the acquiring authority i.e. appellants before us, were not considered by the Reference Court. The learned counsel for the appellants has taken us through the judgment of the Reference Court to show that both the reasons given by the High Court in its impugned order are factually incorrect. With respect to the first reason, that is, exemplars of small plots have been taken into consideration by the Reference Court, in the first instance our attention was invited to some judgments of this Court to urge that there is no absolute bar to exemplars of small plots being considered provided adequate discount is given in this behalf. Thus there is no bar in law to exemplars of small plots being considered. In an appropriate case, specially when other relevant or material evidence is not available, such exemplars can be considered after making adequate discount. This is a case in which appropriate exemplars are not available. The Reference Court has made adequate discount for taking the exemplars of smaller plots into consideration. It appears that the attention of the High Court was not drawn to this part of the judgment of the Reference Court which has resulted in the High court completely overlooking the relevant discussion in the judgment of the Reference Court."

26. Their lordships of the Hon'ble Supreme Court in the case of ***Trishala Jain and another vrs. State of Uttaranchal and another,*** reported in ***(2011) 6 SCC 47,*** have held that the value of sale of small pieces of land can be taken into consideration for determining even the value of a large tract of land but with a rider that the court while taking such instances into consideration has to make some deduction keeping in view other attendant circumstances and facts of that particular case. Their lordships have held as under:

"44. It is thus evident from the above enunciated principle that the acquired land has to be more or less developed land as its developed surrounding areas, with all amenities and facilities and is fit to be used

for the purpose for which it is acquired without any further expenditure, before such land could be considered for no deduction. Similarly the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilisation, amenities and infrastructure with hardly any distinction. On such principles each case would have to be considered on its own merits.

81. It is not in dispute before us that sale instance at serial No. 108 falls in the Revenue Estate of the same Village and as recorded by the Reference Court, in LA Case No. 121 of 1994, it is situated at a distance of 1= furlong from the acquired land. The acquired land belonging to the claimants forms part of Khasra No.39/2 while, in the same Reveue Estate, the sale instance at serial No. 108 is part of Khasra No. 410. Thus a sale deed related to a land in such proximity of time and distance cannot be said to be incomparable sale instance, i.e. it has to be taken as a comparable sale instance. Though it relates to the sale of a smaller plot of land but is certainly bigger than the land sold by the claimants between themselves. Its location and potential, if not identical in absolute terms, is certainly comparable for the purposes of determining market value of the land in question.

82. It is a well established principle that the value of sale of small pieces of land can be taken into consideration for determining even the value of a large tract of land but with a rider that the Court while taking such instances into consideration has to make some deduction keeping in view other attendant circumstances and facts of that particular case. We have already held that keeping in view the surrounding developed areas and location and potential of the land it will meet the ends of justice if 10% deduction is made from the estimated market value of the acquired land."

27. Their lordships of the Hon'ble Supreme Court in the case of ***Bilkis and others vrs. State of Maharashtra and others,*** reported in ***(2011) 12 SCC 646,*** have held that the following factors are required to be considered for determining compensation:

(i) Conversion of acquired land into non-agricultural land;

(ii) Potential for which land was reasonably capable of being used;

(iii) Existence of some structures;

(iv) Proximity to highway.

28. Their lordships of the Hon'ble Supreme Court in the case of ***R. Sarangapani vrs. Special Tahsildar Karur Dindigul Broadguage Line,*** reported in ***(2011) 14 SCC 177,*** have held that in absence of any other exemplars, small pieces of land can be taken into consideration after applying appropriate deduction. Their lordships have held as under:

"19. Equally erroneous is the approach adopted by the High Court in fixing market value of the remaining land. Although, the appellants' argument that the Reference Court should not have segregated land covered by the trees for the purpose of fixing market value of the remaining land may not be acceptable because once market value of the trees was separately fixed, there could be no justification for clubbing the two types of land for the purpose of fixing market value, the High Court

committed serious error by ignoring the two sale instances - Ext. A4 and A5 and, at the same time, applying 1/3 rd cut. It is true that the two sale instances related to a small parcel of land but, in the absence of any other exemplar, such sale instance could be relied upon for the purpose of fixing market value of the acquired land, on which trees had not been planted, after applying an appropriate cut. By Ext.A4 dated 8.9.1982, 21 cents land was sold for a sum of Rs.41,500/-. The same piece of land was sold vide Ext. A5 dated 6.7.1983 at the same price, i.e. Rs.41,500/-. The notification under Section 4(1) was published on 30.5.1984. If the rule of escalation in the land price evolved by this Court is applied, then a minimum increase of 10% is to be added to the price specified in Ext. A5. Thus, as on the date of Section 4(1) notification, the approximate value of 21 cents land would be Rs.45,550/-. This would be equivalent to approximately Rs.2,169/- per cent and Rs.2,27,750/- per acre. Though, the respondent did not produce any evidence to show the amount, which was likely to be spent on making the land useful for the purpose of laying Broad Gauge Line, if 1/3rd cut applied by the High Court is considered reasonable in view of the principles laid down by this Court in Kasturi v. State of Haryana (2003) 1 SCC 354, which were reiterated in Tejumal Bhojwani v. State of U.P. (2003) 10 SCC 525, V. Hanumantha Reddy v. Land Acquisition Officer & Mandal Revenue Officer (2003) 12 SCC 642, H.P. Housing Board v. Bharat S. Negi (2004) 2 SCC 184 and Kiran Tandon v. Allahabad Development Authority (2004) 10 SCC 745, market value of the acquired land will be about Rs.1,50,000/- per acre.

20. We also agree with Shri Nageswara Rao that the appellants should be given the benefit of the principles laid down by the Constitution Bench in Sunder v. Union of India (supra). It appears that attention of the High Court was not drawn to that judgment else it would have, in all probability, extended the benefit of that judgment to the appellants.

21. In the result, the appeals are allowed. The impugned judgments are set aside and the award passed by the Reference Court is restored with modification that the appellants shall be entitled to interest on the enhanced amount with effect from 11.3.1985, i.e. the date on which possession of land was taken by the Railway Department. They shall also be entitled to interest on solatium and additional amount in terms of the judgment in Sunder v. Union of India (supra). The respondent is directed to pay the balance amount of compensation and interest to the legal representatives of the landowners within a period of 3 months from the date of receipt/production of copy of this judgment."

29. Their lordships of the Hon'ble Supreme Court in the case of ***Digamber and others vrs. State of Maharashtra and others,*** reported in ***(2013) 14 SCC 406,*** have reiterated that the Land Acquisition Collector is required to keep in mind the following factors:

(i) Existing geographical situation of the land.

(ii) Existing use of the land.

(iii) Already available advantages, like proximity to National or State Highway or road and/or developed area.

(iv) Market value of other land situated in the same locality/village/area or adjacent or very near the acquired land.

30. The Additional District Judge has correctly assessed the market value @ 20,000/- per biswa and awarded the statutory benefits by applying the correct principles.

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

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

Krishna Devi .....Petitioner
Versus
Amar Jeet Ahuja and others .....Respondents

Civil Revision No. 61/2014
Reserved on 25.11.2014
Decided on 26.11.2014

Himachal Pradesh Urban Rent Control Act, 1984- Section 14- Landlord sought eviction of the tenant on the ground of personal bona-fide requirement of the shop- landlord had also instituted a case before Rent Controller-1 on the ground of subletting and personal bona fide requirement for the purposes of building and rebuilding- tenant filed an application for staying the proceedings- application was rejected by Rent Controller- held, that the subject matter in the two proceedings was not same and, therefore, there was no need to stay the proceedings- petition dismissed. (Para- 6 to 8)

Case referred:
ASPI Jal and another vs. Khushroo Rustom Dadyburjor, (2013)4 SCC 333

For the Petitioner	:	Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K. Vashishta, Advocate.
For the Respondents	:	Mr. Janesh Gupta, Advocate, for respondent No. 1. Respondents No. 2 and 3 ex parte.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This petition is instituted against order dated 15.3.2014 rendered by learned Rent Controller, Shimla in case No. 8/2 of 2013.

2. "Key facts" necessary for the adjudication of the present petition are that respondent No. 1 has filed an eviction petition against petitioner and proforma respondents No. 2 and 3, bearing case No. 8/2 of 2013, on the grounds of personal bona fide requirement of the shop in question. Respondent has already instituted a case bearing No. 37/2 of 2008 before the learned Rent Controller (1) Shimla on the ground of subletting and personal bona fide requirement for the purposes of building and rebuilding. Petitioner has challenged the relationship of landlord-tenant.

3. Petitioner filed an application under order 14 Rules 1 and 2 read with Section 10 of the Civil Procedure Code for determining and trying the issue for staying the petition under Section 10 of the Civil Procedure Code, 1908, as a preliminary issue in case No. 8/2 of 2013 vide annexure PA. Reply was filed vide annexure PB. Application has been rejected by the learned Rent Controller on 15.3.2014.

4. I have heard the learned counsel for the parties and also gone through the order dated 15.3.2014 carefully.

5. In the instant case, case No. 37/2 of 2008 has been filed by the respondent seeking eviction of the petitioner and proforma respondents No. 2 and 3 on the grounds of subletting and personal bona fide requirement for the purposes of building and rebuilding. Subsequent case bearing No. 8/2 of 2013 has been filed on the grounds of personal bona fide requirement of the shop in question. Issues were framed by the learned Rent Controller on 23.5.2014 inter alia following issues:

> "3. Whether there is no relationship and tenant between the parties as alleged? OPR
>
> 5. Whether the petition is liable to be stayed under Section 10 of C.P.C. as alleged? OPR"

6. Though the question of relationship of landlord-tenant may be common, however, fact of the matter is that entire subject matter of the proceedings is not the same in the previous case and subsequent case i.e. case No. 37/2 of 2008 and 8/2 of 2013. There was no need to decide issue No. 5 as a preliminary issue or to stay proceedings.

7. Their Lordships of the Hon'ble Apex Court in (2013)4 SCC 333 in **ASPI Jal and another vs. Khushroo Rustom Dadyburjor**, have held as under:

> 9. Section 10 of the Code which is relevant for the purpose reads as follows:
>
> > " 10. Stay of suit.- No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.
> >
> > Explanation.- The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action.
>
> From a plain reading of the aforesaid provision, it is evident that where a suit is instituted in a Court to which provisions of the Code apply, it shall not proceed with the trial of another suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. For application of the provisions of Section 10 of the Code, it is further required that the Court in which the previous suit is pending is competent to grant the relief claimed. The use of negative expression in Section 10, i.e. "no court shall proceed with the trial of any suit makes the provision mandatory and the Court in which

the subsequent suit has been filed is prohibited from proceeding with the trial of that suit if the conditions laid down in Section 10 of the Code are satisfied. The basic purpose and the underlying object of Section 10 of the Code is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the plaintiff to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to protect the defendant from multiplicity of proceeding.

10. The view which we have taken finds support from a decision of this Court in National Institute of Mental Health & Neuro Sciences vrs. C.Parameshwara, (2005) 2 SCC 256 in which it has been held as follows:

> " 8. The object underlying Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The object underlying Section 10 is to avoid two parallel trials on the same issue by two courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. The language of Section 10 suggests that it is referable to a suit instituted in the civil court and it cannot apply to proceedings of other nature instituted under any other statute. The object of Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res-judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject-matter in both the suits is identical. The key words in Section 10 are the matter in issue is directly and substantially in issue in the previous instituted suit. The words directly and substantially in issue are used in contradistinction to the words incidentally or collaterally in issue. Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical

11. In the present case, the parties in all the three suits are one and the same and the court in which the first two suits have been instituted is competent to grant the relief claimed in the third suit. The only question which invites our adjudication is as to whether the matter in issue is also directly and substantially in issue in previously instituted suits. The key words in Section 10 are the matter in issue is directly and substantially in issue in the previously instituted suit. The test for applicability of Section 10 of the Code is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. To put it differently one may ask, can the plaintiff get the same relief in the subsequent suit, if the earlier suit has been dismissed? In our opinion, if the answer is in affirmative, the subsequent suit is not fit to be stayed. However, we hasten to add then when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.

12. As observed earlier, for application of Section 10 of the Code, the matter in issue in both the suits have to be directly and substantially in issue in the previous suit but the question is what the matter in issue exactly means? As in the present case, many of the matters in issue are common, including the issue as to whether the plaintiffs are entitled to recovery of possession of the suit premises, but for application of Section 10 of the Code, the entire subject-matter of the two suits must be the same. This provision will not apply where few of the matters in issue are common and will apply only when the entire subject matter in controversy is same. In other words, the matter in issue is not equivalent to any of the questions in issue. As stated earlier, the eviction in the third suit has been sought on the ground of non-user for six months prior to the institution of that suit. It has also been sought in the earlier two suits on the same ground of non-user but for a different period. Though the ground of eviction in the two suits was similar, the same were based on different causes. The plaintiffs may or may not be able to establish the ground of non-user in the earlier two suits, but if they establish the ground of non-user for a period of six months prior to the institution of the third suit that may entitle them the decree for eviction. Therefore, in our opinion, the provisions of Section 10 of the Code is not attracted in the facts and circumstances of the case.

8. Accordingly, there is no merit in the present petition and the same is dismissed, so also the pending applications, if any.

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

D.K.Tandon .....Petitioner.

Versus

State of H.P. & ors. .....Respondents.

CWP No. 7186 of 2014.
Decided on: 27.11.2014.

Constitution of India, 1950- Article 226- State Government amended rule 56 of fundamental rule providing an option to the Government servant to continue in service beyond the age of 58 years till 59 years, subject to fulfillment of certain conditions- matter was placed before the Board of Directors of HIMUDA who declined to give similar benefit to its employees - petitioner, an employee of HIMUDA gave option for extension of service – Board did not give any extension to the petitioner but gave extension to another employee on the ground that he was looking after the construction work of many projects -the petitioner was also looking after the projects as Executive Engineer- held, that the petitioner was treated in an unfair manner- petitioner had right to be considered for extension of service- he was discriminated against by denying him the benefit of extension and by granting the extension to another employee – Writ Petition allowed and the Board directed to consider the case of the petitioner and to extend the services of the petitioner by one year.

(Para-6 and 7)

For the petitioner: Mr. P.S. Goverdhan, Advocate.
For the respondents: Mr. Shrawan Dogra, AG, with Mr. M.A.Khan, Addl. AG and Mr. P.M.Negi, Dy. AG for respondents No. 1, 2 & 4.
Mr. C.N.Singh, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J. (oral)

The State Government amended Rule 56 of the Fundamental Rules vide Notification dated 28th May, 2014, whereby the following sub clause (dd) was inserted after clause (d):

> **"56 (dd).** A Government servant shall have an option to continue in Govt. service beyond the age of superannuation i.e. 58 years till the attainment of age of 59 years subject to the conditions as mentioned below:-
>
> (i) The extension in service shall be allowed only to those Government servants who exercise an option on prescribed 'Proforma' annexed to this Notification. The requisite option shall be submitted to the Head of Office or Head of Department, well before six months of attaining the age of superannuation I.e. 58 years. The option once exercised will be treated as final and shall not be allowed to be withdrawn/ changed in any circumstance.
>
> Provided that the Government servants, in whose cases the date of superannuation is before the expiry of six month from the date of commencement of this notification, they may exercise option at any time before the date of their superannuation and after the issue of this Notification.
>
> (ii) During the extension, the Government servant shall continue to draw the same pay which was being drawn by him at the time of attaining the age of superannuation i.e. 58 years.
>
> Provided that increases in the dearness allowance as may be sanctioned by the Government from time to time shall be admissible during the extension.
>
> Provided, further that the Government servant will be considered for promotion in case of availability of promotional post during the extended service. In case of such promotion, pay will be fixed from the date of promotion.
>
> (iii) The Government servant will be entitled to receive pensionary benefits on completion of his extended service.
>
> (iv) The extension in service will be subject to satisfaction of the State Government and the State Government may withdraw the extension given at any stage."

2. The matter was placed before the Board of Directors of respondent No. 3 in its meeting held on 27.7.2014. The Board took the following decision on item No. 32 (33) as under:

> "The Board did not agree for the implementation of the scheme of the State Govt. for its employees of extension in service on attaining the age

of 58 years in pursuance to FR-56(dd) of the Fundamental (Amendment) Rules, 2014 to the employees of HIMUDA. The Board, however, felt that individual cases of the employees for extension in service where there is dire necessity & urgency can be considered by the Board."

3. The petitioner also gave his option for extension of service on 29.5.2014. The petitioner retired on 30.6.2014. The fact of the matter is that the respondent-Board has given extension to one Sh. Desh Raj Gandhi, Asstt. Engineer, vide office order dated 30.8.2014. The respondent-Board has not decided to give extension to the petitioner as per letter dated 14.10.2014. The petitioner also made a representation for extension in service vide Annexure P-6. The case of the petitioner, in a nut shell, is that the Board has not treated him fairly while rejecting his case for extension of service.

4. Mr. P.S.Goverdhan, Advocate, for the petitioner has vehemently argued that Annexure R-3/A is illegal and arbitrary, thus, violative of Articles 14 and 16 of the Constitution of India. He then contended that the respondent-Board has indulged in practice of pick and choose. He lastly contended that the petitioner was more suitable for extension vis-à-vis Mr. Desh Raj Gandhi. On the other hand, Mr. C.N.Singh, Advocate for the Board has supported the issuance of Annexure R-3/A.

5. We have heard the learned Advocates for the parties and gone through the pleadings very carefully.

6. It is true that amendment carried out in Rule 56 of the Fundamental Rules whereby sub clause (dd) was inserted after clause (d) was not binding on the Board dated 28.5.2014. However, the fact of the matter is that the Board of Directors of the respondent-Board has taken a conscious decision that the individual cases of the employees for extension in service where there is dire necessity and urgency can be considered. The petitioner was working at the time of exercising option as Executive Engineer. We have also gone through Annexure R-3/B whereby the extension in service has been given to Mr. Desh Raj Gandhi for one year after attaining the age of superannuation on 31.8.2014. The decision has been taken by the Board by way of circulation. The reasons assigned for giving extension to Mr. Desh Raj Gandhi is that he was holding additional charge of the Executive Engineer and was looking after construction work of Indoor Stadium at Rohroo, Construction work of Mushroom Unit at Dutt Nagar, Rampur and Construction work of Commercial Complex near Vikas Nagar at Shimla. According to Annexure R-3/B, his case was also recommended by the Superintending Engineer (South). It is also stated in Annexure R-3/B that Sh. Desh Raj Gandhi was very sincere, experienced, hard working and conversant with the prestigious projects being looked after by him. Sh. Desh Raj Gandhi was holding additional charge of Executive Engineer when his case was considered for extension of service.

7. It is amply proved that before the superannuation of the petitioner, he was looking after these projects as Executive Engineer. There is no complaint, whatsoever against the petitioner, as per the reply filed. Sh. Desh Raj Gandhi has been given extension in service as per Annexure P-5, on 30.8.2014 and the case of the petitioner has been rejected on 14.10.2014. The Board has taken the decision though on 27.7.2014, but should have taken into consideration the option exercised by the petitioner on 29.5.2014. The petitioner has not been treated in a just and fair manner by the respondent No. 3. All the parameters were required to be taken into consideration while considering the case of the petitioner for extension of one year service up to the age of 59 years. The discretion is required to be exercised in a judicious manner

and not arbitrarily. The Board is a State within the meaning of Article 12 of the Constitution of India. The petitioner has a right to be considered for extension of service as per Articles 14 & 16 of the Constitution of India. The petitioner has been discriminated against by the respondent-Board by denying him the benefit of extension and granting the extension to Mr. Desh Raj Gandhi, who was merely officiating Executive Engineer.

8. Accordingly, the Writ Petition is allowed. Annexure R-3/A dated 14.10.2014 is quashed and set aside. The respondent-Board is directed to consider the case of the petitioner and extend the period by one year w.e.f. 30.6.2014, with all consequential benefits, within three weeks from today.

9. Pending application(s), if any, shall stand disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.

State of Himachal Pradesh & another ...Appellants
Versus
Smt. Suresh Sharma & others ...Respondents

FAO No. 478 of 2007
Decided on : 28.11.2014

Motor Vehicle Act, 1988- Section 166- FIR was lodged against the driver of the vehicle – investigation was conducted and challan was filed before the Court- Investigating Officer specifically stated that accident was the result of rashness and negligence of the driver- this statement could not be demolished by the State or the Driver- therefore, it was duly proved that accident was the result of rashness and negligence of the driver- driver had also not challenged the findings recorded by the Tribunal- hence, plea that accident had taken place due to contributory negligence could not be accepted- appeal dismissed. (Para- 9 to 11)

For the appellant : Mr. V.S. Chauhan, Additional Advocate General.
For the respondents : Mr. Neel Kamal Sharma, Advocate, for respondents No. 1 to 4.
Mr. Janesh Mahajan, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

By the medium of this appeal, the appellant-State has questioned the award, dated 31st August, 2007, passed by the Motor Accidents Claims Tribunal (II), Kangra at Dharamshala, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 22-K/05, whereby compensation to the tune of ` 6,82,500/- with interest at the rate of 7½% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-respondents 1 to 4, herein and against the State, being the owner of the offending vehicle, i.e. Gypsy bearing registration No. HP-47-0022 (for short, the "impugned award").

2. The claimants and the driver have not questioned the impugned award, on any count, thus it has attained finality, so far as it relates to them.

3. Only the insured-owner-the State, has questioned the impugned award on the grounds taken in the memo of appeal.

Brief Facts:

4. The claimants being victims of the vehicular accident filed claim petition before the Tribunal, for grant of compensation to the tune of Rs.12,00,000/-, on the ground that driver Badri Narayan, was driving Gypsy bearing registration No. HP-47-0022, rashly and negligently, on 05.01.2005, at about 3.25 p.m., near Chowk Rasood, P.W.D. Road, Ranital, Tehsil and District Kangra, struck against Scooty (Kinetic Nova) bearing registration No. HP-40A-1800 driven by deceased Joginder Pal Sharma; sustained injuries and succumbed to the injuries; FIR No. 3/2005, dated 05.01.2005, was registered in Police Station, Haripur.

5. Mr. V.S. Chauhan, learned Additional Advocate General argued that the accident was the outcome of the contributory negligence of the drivers of the gypsy and the scooty and the Tribunal has fallen in error.

6. Admittedly, the claimants have specifically pleaded in para-24 of the claim petition that the said accident was outcome of the rash and negligent driving of respondent No. 3, i.e. driver of the offending vehicle.

7. The State in para 24 of the reply to the claim petition denied the same, but has stated that the accident was the outcome of the negligence of the drivers of the scooty and the bus.

8. The parties led evidence. The Tribunal, after examining the pleadings and scanning the evidence, held that driver, namely, Badri Narayan, has driven the offending vehicle, rashly and negligently, on the date of accident; the deceased sustained injuries and succumbed to the injuries.

9. It is apt to mention herein that FIR No. 3/2005 was lodged against the driver of the offending vehicle; investigation was conducted; challan was presented against him in the Court of competent jurisdiction and the Tribunal called CW-1 ASI Negi Ram as Court witness, who has stated before the Tribunal that he had conducted the investigation and came to the conclusion that driver Badri Narayan, has driven the offending vehicle, rashly and negligently, as is recorded in para-10 of the impugned judgment. The State or the driver has not been able to demolish his statement. Thus, the Tribunal has rightly recorded the findings in para-10 of the impugned judgment.

10. Having said so, the Tribunal has rightly held that the driver of the offending vehicle was driving the said vehicle, rashly and negligently, on the date of the accident.

11. It is pertinent to mention here that the driver has not questioned the said findings and how the employer can question the same, when there is a relationship of master and servant between them.

12. The learned Counsel for the appellant argued that the compensation is on higher side. I have gone through the impugned award. The amount awarded is meager, but the claimants have not questioned it. Thus, the findings returned by the Tribunal are upheld.

13. Having said so, the appeal merits dismissal. The same is accordingly dismissed and the impugned award is upheld.

14. The Registry is directed to release the awarded amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees account cheque.

15. Send down the records after placing copy of the judgment on record.

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

Khub Chand Verma ...Appellant.
Versus
The State of Himachal Pradesh & others ...Respondents.

LPA No. 177 of 2014
Decided on: 02.12.2014

Constitution of India, 1950- Article 226- Settled seniority cannot be unsettled- when the petitioner had remained in deep slumber and had not taken any action, he is not entitled for any relief. (Para-3 and 4)

Case referred:
H.S. Vankani and others versus State of Gujarat and others, reported in (2010) 4 SCC 301

For the appellant: Mr. Aman Sood, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This Letters Patent Appeal is directed against the judgment and order, dated 4th July, 2014, passed by the Writ Court in CWP No. 1105 of 2011, whereby the writ petition filed by the appellant-writ petitioner came to be dismissed (hereinafter referred to as "the impugned judgment").

2. The appellant-writ petitioner had invoked the jurisdiction of the Writ Court and had sought unsettling of the seniority position which was settled in the year 1968.

3. It is beaten law of land that settled seniority position cannot be unsettled in view of the Apex Court judgment in the case titled as **H.S. Vankani and others versus State of Gujarat and others,** reported in **(2010) 4 SCC 301.** The Apex Court, while determining the said issue, has taken note of all the judgments right from the year 1950 till the time the judgment was delivered.

4. We have gone through the pleadings and are of the considered view that the appellant-writ petitioner has remained in deep slumber. The Writ Court has rightly dismissed the writ petition in view of the pleadings and the law

applicable. The impugned judgment is well reasoned, needs no interference. Thus, the appeal merits to be dismissed.

5. Accordingly, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J

Naveen Sood & Others .....Petitioners
Versus
State of Himachal Pradesh & another .....Respondents.

Cr.MMO No. 145 of 2014
Reserved on : 24.11.2014
Decided on: 2nd December, 2014.

Code of Criminal Procedure, 1973- Section 482- Petitioners sought quashing of FIR registered against them for the commission of offences punishable under Sections 498-A and 406 read with Section 34 of IPC- held, that FIR can only be quashed if the allegations made in the same do not constitute an offence – where the allegations satisfy the ingredients of an offence, such power cannot be exercised- it was asserted in the FIR that the accused had harassed the deceased physically and mentally compelling her to commit suicide- she was turned out of home and she started living with her husband who threatened her- she went to her maternal home and she asked her husband to take her to his home but he had refused to do so- she was residing separately from 2009 to 2011- complaint was made on 10.4.2014- there was no explanation for delay - magnitude and enormity of the physical and mental cruelty were not specified – therefore, it could not be said that the accused intended to cause injury and the danger to her life, limb or health- hence, ingredients of Section 498-A were not satisfied- she stated that she had entrusted her jewellery to the petitioner and when she demanded it back, jewellery was not returned-however, the day on which jewellery was entrusted was not mentioned- allegations were vague and ambiguous- hence, FIR ordered to be quashed. (Para- 2 to 7)

For the Appellants: Mr. Ajay Sharma, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

In the instant petition instituted under the provisions of Section 482 Cr.P.C, a prayer is made by the petitioners to quash and set aside FIR No. 75 of 2014, registered in Police Station, Kangra, H.P., for theirs having allegedly committed offences under Sections 498-A/406/34 IPC. Before proceeding to record findings and arrive at conclusions in the instant petition, it is deemed apt and imperative to extract the provisions of 498-A IPC:-

(a) *any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life limb or health (whether mental or physical) of the woman; or*

(b) Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. "

2. The import of the term 'cruelty' existing in the Section 498-A IPC, whose provisions, are extracted hereinabove, and which 'cruelty' is alleged to have been perpetrated upon the complainant by the petitioners herein is of its being constituted by any willful conduct of such a nature as is likely to drive a woman to commit suicide or its likely to cause grave injury and danger to her life, limb or health, besides harassment of a woman where such harassment is with a view to coerce her to comply with any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

3. Besides, the guiding principles encapsulated in a judgment of the Hon'ble apex Court for while construing the factum of the allegations set forth in the FIR lodged against the petitioner while being bereft of the ingredients constituting the offence alleged, in which event this Court being actuated to exercise the plenary jurisdiction vested in it under Section 482 Cr.P.C, is also required to be extracted. The decision of the Hon'ble Apex Court is reported in 1986 Cr.L.J 817, the relevant portion enshrining the guiding principles to be borne in mind by this Court while exercising jurisdiction in a petition under Section 482 Cr.P.C is extracted hereinbelow:-

"7. Insofar as Section 498-A, IPC is concerned, the relative of the husband of a woman, if he subjects the woman to harassment with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or the. harassment is on account of failure by her or any person related to her to meet such demand, could it be said that the woman had been subjected to cruelty and thereby an offence under Section 498-A, IPC have been committed. The harassment alleged in the present charge-sheet is not on account of any unlawful demand of properly or valuable security nor is it on account of failure by the second respondent or any person related to her to such a demand. There is no allegation in the charge-sheet that the petitioner herein demanded property or valuable security from the second respondent. On the other hand, it is the second respondent, who is seeking return of her "Stridhan" and her share in her husband's property from the petitioner herein. The ingredients of Section 498-A, IPC is clearly not attracted and the proceedings to the extent the petitioner is charged of an offence under Section 498-A, IPC is quashed.

8. Insofar as the petitioner is alleged to have been committed an offence under Section 406, IPC the Supreme Court in Pratibha Rani (1985 Cri LJ 817, Paras 20, 27 & 57) (supra), held thus:

...We are clearly of the opinion that the mere factum of the husband and wife living together does not entitle either of them to commit a breach of criminal law and if one does then he/she will be liable for all the Consequences of such breach, Criminal law and matrimonial home are not strangers. Crimes committed in matrimonial home are as much punishable as anywhere else, in the case of Stridhan property also, the

title of which always remains with the wife though possession of the same may sometimes be with the husband or other members of his family, if the husband or any other member of his family commits such an offence, they, will be liable to punishment for the offence of criminal breach of trust under Sections 405 and 406, IPC....

...To sum up, the position seems to be that a pure and simple entrustment of Stridhan without creating any rights in the husband excepting putting the articles in his possession does not entitle him to use the same to the detriment of his wife without her consent. The husband has no justification for not returning the same articles as and when demanded by the wife nor can he burden her with losses of business by using the said property which was never intended by her while entrusting possession of Stridhan. On the allegations in the complaint, the husband is no more and no less than a pure and simple custodian acting on behalf of his wife and if he diverts the entrusted property elsewhere or for different purposes he takes a clear risk of prosecution under Section 406 of the IPC. On a parity of reasoning, it is manifest that the husband, being only a custodian of the Stridhan of his wife, cannot be said to be in joint possession thereof and thus acquire a joint interest in the property....

...We now come to the question as to whether or not a clear allegation of entrustment and misappropriation of properties was made by the appellant in her complaint and, if so, was the High Court Justified in quashing the complaint at that stage, It is well settled by a long course of decisions of this Court that for the purpose of exercising its power under Section 482, Cr. P.C. to quash a FIR or a complaint the High Court would have to proceed entirely on the basis of the allegations made in the complaint or the documents accompanying the same per se. It has no jurisdiction to examine the correctness or otherwise of the allegation. In case no offence is committed on the allegation and the ingredients of Sections 405 and 406, IPC are not made out, the High Court would be justified in quashing the proceedings. In the present case, we shall show that the allegations are both clear, specific and unambiguous and, therefore, the complainant should have been given a chance to prove her case. It is, of course, open to the accused at the trial to take whatever defences that were open to him but that stage had not yet come and therefore, the High Court was totally ill-advised to speculate on the merits of the case at that stage and quash the proceedings."

4. Bearing in mind the hereinabove extracted provisions of Section 498-A IPC, whose ingredients have to be prima-facie at this stage established to have been accomplished as also bearing in mind the effulgence of light shed by the relevant paragraph of the apt decision of Hon'ble Apex Court qua the exercise of jurisdiction by this Court in a petition under Section 482 Cr.P.C, in as much , as its contemplating therein that only when the allegations comprised in the FIR taken in their entirety constitute an offence, as also when the allegations are specific and unambiguous allegations and theirs constitute an offence within the parameters of the penal provisions of law would the jurisdiction vested in this Court under Section 482 Cr.P.C be not available to be exercised by this Court. Contrarily in case the allegations elucidated in the FIR which purportedly constitute an offence under the relevant and apt provisions of penal laws do not satisfy the ingredients of the provisions of the penal laws under which the allegations purportedly constitute an offence or when the allegations are unspecific and ambiguous, in that event this court would be

actuated to exercise jurisdiction vested in it under Section 482 Cr.P.C. Now with this Court having unraveled the ingredients which are to be accomplished or satiated for an offence being constituted under Section 498 IPC, as, also it having held that in case such allegations do not satisfy or accomplish the ingredients for constituting such allegations to be an offence under Section 498-A IPC, as, also when the allegations are unspecific and ambiguous, in that event this Court would proceed to quash the FIR. It is now imperative to incisively with circumspection traverse through the allegations comprised in the FIR. It is elucidated in the FIR that the complainant had entered into a wedlock in the year 2009. In the FIR she avers that after marriage the accused/petitioners herein behaved well with her for sometime and thereafter their attitude towards her started changing. Despite the intervention of the mediator, the accused/petitioners herein continued to harass her. Besides she alleges that the accused–petitioners herein physically and mentally harassed her, compelling her to commit suicide. She proceeds to allege that in September, 2011 she was thrown out from her matrimonial home and thereafter she started living separately with her husband in a quarter at Ghukari. She further alleges that at that place her husband threatened her with dire consequences. She continues to spell out in the FIR that at the instance of her husband she shifted to another quarter at some other place. She narrates that During November, 2013, she had gone to her parents and from there she called her husband to retrieve her to her matrimonial home. However he refused to bring her back on the score that he has no need for her. He further told her that he had no money to bear her expenses. She further narrates in the FIR that she had gone to her in-laws and asked for her jewellary, however her demand was not acceded to. Prima-facie on a reading of allegations made by the complainant against the petitioners herein unfold the factum of hers living separately with her husband since 2009 to 2011, hers having been subjected to mental and physical cruelty. However, the acts constituting mental and physical cruelty remained un-complained, since 2011 till the institution of an FIR qua the acts purportedly constituting an offence under the provisions of Section 498-A IPC having been complained by the complainant on 10.4.2014. As such prima-facie the un-explained delay itself has a sequelling effect in rendering the allegations leveled by the complainant against the petitioners herein and theirs purportedly constituting an offence under Section 498 A IPC to be perse smeared with concoction as well as prevarication. Even otherwise dehors the unexplained delay in the lodging of the complaint by the complainant and its sequelling an adverse inference qua the truthfulness of the allegations comprised in it, a bare reading of the allegations comprised in the FIR unearth the factum of the allegations therein omitting to convey the magnitude and enormity of the physical and mental cruelty perpetrated on her person by the accused nor also hence when the enormity of the physical and mental cruelty has remained un-displayed in the FIR, it can not be hence concluded that it was of such a nature so as to drive her to commit suicide. Besides, in the absence of the enormity and magnitude of the cruelty having been spelt out in the FIR, it cannot be concluded that the physical and mental cruelty as purportedly meted to the complainant by the accused/ petitioners herein was intended to cause injury and danger to her life, limb or health. Consequently, with the allegations leveled against the accused/petitioners herein having not satiated or accomplished the ingredients for constituting an offence under Section 498 A IPC nor as such obviously the attraction of the ingredients of the offence alleged against the petitioners herein in the FIR have been begotten or theirs having remained un-satiated for abysmal want of narration in the FIR qua the fact that the petitioners herein subjected the complainant to harassment with a view to coerce her to meet their unlawful

demand, constrains this Court to aptly conclude that the ingredients enshrined in Section 498-B IPC remain unaccomplished or un-satiated.

5. At this stage, It is also imperative to advert to the factum of Naveen Sood petitioner/accused having in September, 2011 endorsed an application to the SHO with a narration therein of his having segregated both his son and daughter-in-law, the complainant, from his house and property. The said fact finds reflection in Annexure P-2, an affidavit sworn by Naveen Sood, the petitioner/accused, of his having disowned his son, on account of his unheeding to his guidance and advice. In pursuance thereto, a notice proclaiming the fact of the petitioner herein having disowned his son was published and printed in "Dainik Jagran" as reflected in Annexure P-3. It hence appears that at the time contemporaneous to the complainant having left her matrimonial home in the company of her husband in September, 2008, the petitioner herein namely Naveen Kumar Sood had disowned his son. Concomitantly, then the un-explained belated institution of an FIR at the instance of the complainant against the petitioner herein appears to have been triggered by a backlash on the part of the complainant to the act of the petitioner herein namely Naveen Sood having disowned his son as also hence his having deprived him from his share in the personal property of the petitioner herein namely Naveen Sood. Consequently, the FIR lodged as a backlash to Annexure P-3, when as such, it being borne out of vendetta or reprisal to Annexure P-3, renders it to perse smack of malafides as well as untruthfulness in addition to the fact that on its reading it omits to unfold allegations which satiate the ingredients of Section 498 IPC.

6. The complainant has averred in the FIR that she entrusted her jewellary to her in-laws/petitioners herein, which was demanded by her to be retrieved to her which demand was un-acceded to. As such, an offence under Section 406 IPC is alleged tobe made out. However, the allegations which constitute an offence against the accused under Section 406 IPC ought to have also precisely and unambiguously spelt out the fact of the day on which she entrusted her jewellary to her in laws as also the date on which her in-laws refused to comply with her demand. However, it is apparent on a reading of the FIR that she in the company of her husband left her matrimonial home in September, 2011. She omitted to disclose in the FIR of her then handing over her satridhan or her jewellery to her in-laws. The said omission is material as it impinges upon the veracity of hers having belatedly as narrated in the concluding part of the FIR having demanded from her in-laws the jewellery as purportedly entrusted to them. Moreover, when at the time prior to her departure from her matrimonial home, the petitioner had under Annexure P-3 disowned the husband of the complainant from his house as well as from his property, as such debarred him from claiming a right in his home as well as in his property, the reprisal on the part of the complainant appears to have been in the shape of hers belatedly in the year 2014 having nebulously, ambiguously and imprecisely in the FIR lodged at her instance, spelt therein the bare nebulous factum of hers having entrusted her jewelry to her in-laws/petitioners herein, and hers demand of it being retrieved to her having remained un complied with, hence an offence under Section 482 IPC having come to be constituted. However, for reiteration when neither there is a specific date of entrustment of her jewellery by her to her in-laws/petitioners herein, rather when the demand for its retrieval to her too is enigmatic hence renders the allegations to be ridden with the vice of inveracity. The imprecise date of its purported entrustment rather preponderantly conveys that she was driven by reprisal or vendetta to allege that she had entrusted her jewellery to her in laws who on its being demanded by her from them refused to accede to it.

7. The upshot of the above discussion is that the allegations comprised in the FIR against the complainant qua both offences under Section 498-A and 406 IPC are ambiguous. Consequently when in the relevant paragraph of the decision of the Hon'ble Apex Court it is mandated that where the allegations purportedly constituting an offence under the apt provisions of the penal laws do not satiate the ingredients thereof nor also when the allegations are not clear, precise or unambiguous, in that event the continuation of criminal proceedings against the petitioners would tantamount to abuse of process of law. In aftermath when the discussion aforesaid communicates the factum of the ingredients of Section 498-A IPC, prima-facie having remained not satiated, besides when the allegations against the accused/petitioners herein and theirs purportedly constituting an offence under Section 498 A IPC against the petitioners herein are nebulous and imprecise. Moreover the allegations are also imprecise and ambiguous qua the commission of the offence under Section 406 IPC. Therefore, this Court is constrained to exercise its jurisdiction vested under Section 482 Cr.P.C., as the continuation of criminal proceedings would tantamount to both abuse of process of law as also would sequel the harassment and humiliation of the petitioners**.** Accordingly the petition is allowed and the FIR No. 75 of 10.04.2014 registered at Police Station Kangra, under Sections 498A/406/34, IPC against the accused/petitioners herein is quashed and set aside. All pending applications, if any, are also disposed of.

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

Samuel Masih & another .....Petitioners.
Versus
State of Himachal Pradesh & others .....Respondents.

Cr.MMO No. 13 of 2013.
Date of Decision : 2nd December, 2014.

Code of Criminal Procedure, 1973- Section 482 - An FIR was registered for the commission of offences punishable under Sections 363, 366-A and 120-B of IPC at the instance of Respondent No. 4 who was proceeded ex-parte- petitioner No. 1/accused and petitioner No. 2/victim solemnized marriage subsequent to the registration of FIR – a child was born out of wedlock- parties approached the High court for quashing of the FIR- the fact that respondent No. 4 allowed himself to be proceeded ex-parte shows that he has no objection for quashing of the FIR- held, that since the parties had entered in to a compromise – therefore, proceeding with the case would be an exercise in futility – further, in order to preserve the institution of marriage and for maintaining peace between the parties who constitute one family, FIR ordered to be quashed. (Para-1 to 3)

Cases referred:
B.S. Joshi v. State of Haryana, (2003)4 SCC 675
Gian Singh versus State of Punjab and another, (2012)10 SCC 303

For the Petitioners: Mr. Ajay Sharma, Advocate.

For the Respondents: Mr. Vivek Singh Attri and Mr. Tarun Pathak, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

An FIR bearing No.141 of 2010 of 16.04.2010, under Sections 363, 366 A and 120-B of the Indian Penal Code was lodged in Police Station, Nurpur, District Kangra, H.P. by respondent No.4, Ravinder Kumar, who was proceeded against ex-parte. On registration of the FIR by Ravinder Kumar against petitioner No.1, investigation into the offences alleged against the accused therein commenced. A perusal of the record reveals that contemporaneous to the commencement of investigation, petitioner No.1/accused and petitioner No.2/victim of the crime solemnized marriage on 28.04.2011. Copy of the marriage certificate of 16.05.2012 has been placed on record as Annexure P-1. Out of the said wedlock the petitioners have one issue. The factual matrix aforesaid does communicate the fact that both the petitioner No.1/accused and petitioner No.2/victim of the crime have solemnized marriage and now are living connubial bliss. It ought to be the endeavour of the Court to ensure that the matrimonial life of married partners is both peaceful and amiable besides, endeavour should be made to ensure that the married partners live in peace and harmony. The husband and wife have demonstrated their willingness to live in peace and harmony as divulged by the aforesaid material. Theirs concerted attempt to abort turbulences in their family ought to be revered. The fact that the complainant/respondent NO.4 allowed himself to be proceeded against ex-parte, hence, omitted to contest the petition portrays that he projects no remonstrance to the aspiration and desire of both the accused/petitioner No.1 and petitioner No.2/victim of the crime for quashing of the FIR.

2. Even though, the marriage as has been solemnized inter se the victim of the crime/petitioner No.2 and petitioner No.1/accused has sequelled the institution of the instant joint petition on their behalf for according the relief of quashing of the FIR against the accused yet reliefs as prayed for in the petition would come to be afforded in favour of the petitioners only in the face of this Court being vested with apposite powers under Section 482 of the Cr.P.C. 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 be borne in mind while exercising powers vested in this Court under Section 482 of the Cr.P.C., are encapsulated in the judgment of the Apex Court reported in ***B.S. Joshi v. State of Haryana, (2003)4 SCC 675*** wherein it has been held that in so far as disputes, both civil and criminal arising out of the matrimonial strife are concerned, they stand on a footing/pedestal and distinct from other crimes which are committed against the society, inasmuch, as, when the marriage inter se the bickering parties is both sacrosanct and sacramental, as such, endeavour ought to be made to preserve it rather, than to unsettle. Further more, in the face of the verdict of the Hon'ble Apex Court in ***Gian Singh versus State of Punjab and another***, (2012)10 SCC 303 the relevant paragraph whereof is extracted hereinafter mandating that where the victim of the offence and the accused come to record a settlement/strike a compromise even qua the offence which are not compoundable, hence would rather not pave way for the success of the complaint/prosecution, rather the prosecution of the offender for his having committed the alleged non-compoundable, would be an exercise in futility is a preponderant and preeminent factory to be borne in mind

by this Court while exercising the plenary jurisdiction vested in it under Section 482, Cr.P.C. Relevant paragraph No.58 of the judgment supra reads as under:

> "58. Whether the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put on an end and peace is resorted; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrongdoing that seriously endangers and threats the well being of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the permission of the Court. In respect of serious offences like murder, rape, dacoity, etc., or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by the public servants while working in that capacity, the settlement between the offender and the victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions of the offences arising out of matrimony, particularly relating to dowry, etc., or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed."

3. For preserving the institution of marriage and for maintaining peace, inter se the parties, who now constitute one family and who have jointly moved this Court for quashing of the FIR, this Court to maintain equilibrium in the family, who have chosen or shown their desire to live in unison, peace and harmony, hence, when the exercise of inherent powers vested in this Court under Section 482 of the Cr.P.C. for quashing of FIR qua disputes which are purely matrimonial in nature is neither trammeled nor restricted, rather is a plenary power to be exercised in matrimonial disputes for halting bickerings and for facilitating peace and harmony in the family, as such, this Court is constrained to exercise it. More so, even if, assuming that the some of the offences constituted in the FIR may not be compoundable, nonetheless in the face of the verdict of the Hon'ble Apex Court rendered in Gian Singh versus State of Punjab and another (supra) investing a jurisdiction in this Court for restoring peace and amity inter se the parties as also for putting at rest their disputes, besides when given the fact that the victim of the crime and the accused having entered into a wedlock imminently conveying striking of or arrival of compromise inter se them, would frustrate the prosecution case, as such, this Court is constrained to even in the face of non-compoundability of the some of the offences constituted in the FIR to accept the concerted striving

of the victim and the accused/petitioner portrayed by theirs having entered into a wedlock to live hereafter in peace and harmony. Obviously, then the pendency of the FIR would frustrate such an endeavour. It ought to be quashed. Consequently, the petition is allowed and the FIR bearing No.141 of 2010 of 16.04.2010, under Sections 363, 366 A and 120-B of the Indian Penal Code lodged in Police Station, Nurpur, District Kangra, H.P. is quashed. All the pending applications also stand disposed of.

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

State of Himachal Pradesh .....Appellant.
Vs.
Susheel Kumar son of Shri Gurbachan and others ...Respondents.

Cr. Appeal No. 322 of 2008
Judgment reserved on: 9th September,2014
Date of Decision: 19th November, 2014.

Indian Penal Code, 1860- Sections 306 and 498-A read with Section 34 of IPC- As per prosecution case, accused had treated the deceased with cruelty due to which she had committed suicide- father of the deceased deposed that deceased had told him that her husband was demanding Rs. 50,000/- and motorcycle- brother of the deceased also deposed that deceased had disclosed that her in-laws harassed her and had called her handicapped and Paharan- medical evidence proved that death was due to suicide- deceased had written a suicide note - her husband had abused her on the day of commission of suicide- held, that in these circumstances, husband is guilty of the commission of offence punishable under Section 498-A of IPC.

Cases referred:

Arun Vyas and another vs. Anita Vyas AIR 1999 SC 2071
Virbhan Singh and another vs. State of U.P. AIR 1983 SC 1002
Pawan Kumar and others vs. State of Haryana, 1998 (3) SCC 309
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.
Jose vs. The State of Kerala AIR 1973 SC 944
Vadivelu Thevar vs. The State of Madras AIR 1957 SC 614
Masalti and others vs. State of Uttar Pradesh AIR 1965 SC 202
Dalbir Singh vs. State, AIR 1987 SC 1328
Bhee Ram vs. State of Haryana AIR 1980 SC 957
Rai singh vs. State of Haryana AIR 1971 SC 2505
Lallu Manjhi and another vs. State of Jharkhand AIR 2003 SC 854
State of U.P. vs. Kishanpal and others JT 2008(8) SC 650

For the Appellant: Mr. B.S. Parmar, Additional Advocate

General with Mr. Vikram Thakur, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

For the Respondents: Mr. Ramakant Sharma Advocate with Ms. Soma Thakur, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, J.

Present appeal is filed against the judgment of acquittal passed by learned Sessions Judge Solan in Sessions trial No. 16-NL/7 of 2006 titled State of H.P. vs. Susheel Kumar and others.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 4.7.2005 at 5.30/6 AM at village Channal Majra P.S. Barotiwala District Solan deceased Kamla Devi aged 23 years daughter of Neeta Ram committed suicide in the bed room of her matrimonial house when she was pregnant. It is alleged by prosecution that accused persons abetted the deceased to commit suicide and also subjected the deceased to mental cruelty in her matrimonial house. It is alleged by prosecution that deceased committed suicide by way of hanging herself and left her suicide note Ext.PW2/A. It is alleged by prosecution that on dated 4.7.2005 ASI Tajinder Singh Incharge P.S. Baddi received secret information that a lady had committed suicide in village Channal Majra. It is further alleged by prosecution that thereafter information was entered into daily dairy vide report Ext.PW8/A and thereafter police officials proceeded to the place of incident and reached within 15-20 minutes. It is alleged by prosecution that deceased was found hanging from the roof of the bed room in her matrimonial house and deceased was already died. It is further alleged by prosecution that thereafter parents of deceased were called who reached at the spot within 1-1½ hours and statement of father of deceased was recorded. It is further alleged by prosecution that in the meantime Dy.S.P. Nalagarh and SHO Barotiwala on receiving information came to the spot and doctor was also called to spot who examined the dead body of deceased. It is further alleged by prosecution that photographs of hanged dead body Ext.P3 to Ext.P8 and negatives of which Ext.P9 obtained and thereafter inquest report Ext.PW8/B and spot map of the room Ext.PW8/C were prepared. It is alleged by prosecution that in room of matrimonial house a writing pad Ext.PW2/A was found which was took into possession vide memo Ext.PW2/B. It is further alleged by prosecution that thereafter dead body of deceased was brought to CHC Nalagarh for post mortem and it was found that cause of death was due to ante mortem hanging/asphyxia. It is also alleged by prosecution that post mortem report is Ext.PW3/A and dead body of deceased handed over to PW1 vide memo Ext.PW8/C. It is further alleged by prosecution that brother of deceased during investigation had handed over the admitted writing of deceased Ext.PW2/D-1 and Ext.PW2/D-2 to PW8 which were took into possession by him vide memo Ext.PW2/E. It is further alleged by prosecution that suicide note and admitted hand writing were sent to the Examiner of Question Documents FSL Junga and report is Ext.PW6/A. It is alleged by prosecution that admitted hand writing and suicide note as per expert report belong to the same person. It is alleged by prosecution that deceased had told to PW2 when he came to her matrimonial house that accused persons were harassing the deceased in her matrimonial house. It is further alleged by prosecution that deceased told PW2 that deceased was pregnant and accused persons did not want the child and thereafter they

had administered some medicine to the deceased. It is alleged by prosecution that PW3 preserved viscera of deceased which was handed over to Investigating Agency and same was sent to FSL Junga for chemical examination.

3 Accused persons were charged by learned Sessions Judge Solan on dated 18.10.2006 under Sections 306, 498-A read with Section 34 of Indian Penal Code. Accused persons did not plead guilty and claimed trial.

4. The prosecution examined the following witnesses in support of its case:-

Sr.No.	Name of Witness
PW1	Shri Neeta Ram
PW2	Sunder Dass
PW3	Bhupesh Gupta
PW4	H.C.Inder Lal
PW5	H.C. Sohan Lal
PW6	SHO Bhisham Thakur
PW7	C. Hakam Ram
PW8	ASI T.S. Thakur
DW1	Dalip Singh

4.1 Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description:*
Ex.PW2/A.	*Note Book*
Ex.PW2/B.	*Recovery memo*
Ex.P1	*Stool*
Ex.PW2/D-1 & Ext.PW2/D2	*Writing of deceased*
Ex.PW2/E	*Recovery memo*
Ex.PW3/A	*Post mortem report*
Ex.PW3/B	*Application*
Ex.PW4/B	*Ruka*
Ex.P2	*Scarf*
Ext.P3 to Ext.P8 and Ext.P9	*Photographs and negatives*
Ext.PW6/A	*Chemical report*
Ext.PW6/B	*Chemical Report*

Ex.PW8/A	*Nakal Rapat No. 30*
Ext.PW8/B	*Inquest report*
Ext.PW8/C	*Receipt of dead body*
Ext.PW8/D	*Spot map*
Ext.DA	*Statement of Shri Dalip Singh under Section 161 Cr.P.C. for contradiction purpose.*

5. Statements of the accused persons were also recorded under Section 313 Cr.P.C. They have stated that deceased wanted to do job and did not want to live with them in village and also wanted to reside with her parents at Pinjore and did not want to have a child also. They further stated that they did not harass the deceased and deceased committed suicide of her own at her matrimonial house. They have produced one witness in defence. Learned trial Court acquitted all the accused of the charges framed against them.

6. Feeling aggrieved against the judgment passed by learned Trial Court State of H.P. filed present appeal under Section 378 of Code of Criminal Procedure.

7. We have heard learned Additional Advocate General appearing on behalf of the State of H.P. and learned Advocate appearing on behalf of the respondents and also perused the entire record carefully.

8. Question that arises in present appeal is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice as mentioned in memorandum of grounds of appeal.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9.1. PW1 Neeta Ram has stated that deceased was his daughter and she was married to accused Susheel about 1½ years back in the month of May. He has stated that marriage was solemnized as per Hindu customs and ceremonies. He has stated that in the month of July he came to know from his son-in-law accused Susheel Kumar that deceased had hanged herself in her matrimonial house. He has stated that thereafter he along with his brother Karam Chand and son Sunder Dass came to matrimonial house of deceased and found that his daughter was hanging from the ceiling fan with scarf tied around her neck. He has stated that when his daughter came to her parental house she told that her husband namely co-accused Susheel Kumar was demanding a motor cycle and Rs. 50,000/- (Rupees Fifty thousand only). He has stated that he told his daughter that his wife was ill and he would come to matrimonial house of deceased with 4/5 persons and would inquire from the co-accused Susheel Kumar as for what purpose the money was required. He has stated that his daughter was killed and she was hanged after killing because feet of deceased were touching the ground. He has stated that police also took photographs in his presence. He has stated that accused were harassing and torturing his deceased daughter for dowry and further stated that suicide was abetted by accused persons. He has denied suggestion that deceased was married against her will. He has denied suggestion that his daughter informed that she was pregnant and she intended to terminate the pregnancy. He has denied suggestion that accused persons did not demand any dowry from the

deceased and also denied suggestion that accused persons did not harass and torture the deceased in her matrimonial house.

9.2 PW2 Sunder Dass has stated that his sister was married to accused Susheel Kumar on dated 11.5.2005. He has stated that on dated 2.7.2005 he had gone to the house of his sister to attend the function. He has stated that his sister told him that accused persons have harassed her and called her handicapped. He has stated that his sister was pregnant but her in-laws did not want the child and they administered wrong medicine to the deceased. He has stated that he visited the house of deceased on 4th July 2005 and found that deceased was hanging from the fan and her feet were touching the ground. He has stated that police officials found a suicide note which was written on a writing pad and suicide note is Ext.PW2/A which was took into possession by police vide memo Ext.PW2/B. He has stated that suicide note Ext.PW2/A was written by his deceased sister and he has stated that he is conversant with hand writing of his deceased sister. He has stated that accused used to harass his sister. He has denied suggestion that deceased told him that deceased did not want child. He has denied suggestion that suicide note Ext.PW2/A and writing Ext.PW2/D-1 and Ext.PW2/D-2 are written by him. He has denied suggestion that accused persons did not harass the deceased.

9.3 PW3 Dr. Bhupesh Gupta has stated that he is posted as Medical Officer in CHC Nalagarh since 2002 and on dated 4.7.2005 he visited the spot and found that deceased was hanging from the ceiling hook with red coloured scarf. He has stated that there were no struggle marks in the room and dress of the deceased was in order. He has stated that there was no blood on the floor and further stated that on dated 4.7.2005 dead body of deceased was brought by him to CHC Nalagarh for post mortem. He has stated that scarf is Ext.P2 and on post mortem he observed that deceased was well build and found ligature marks of red scarf around the neck of deceased and found that deceased was wearing pinkish red suit. He has stated that he did not observe any external injury on the body of deceased except the ligature mark on the neck. He has stated that it was found that ligature mark was of 2 cm wide above thyroid cartilage and base of jaw obliquely placed at the mastoied bone bilaterally ligature mark was absent posteriorily and hyoid bone fracture was present. He has further stated that on dissection of ligature mark perchament wide (glistening) area found beneath sub cutaneous tissue. He has stated that no bruising of muscles and carotied artery intima injury found and found that left side face of the patient was pale and found bluish tinged eyes had petechial hemorrhage and hands were clichéd. He has stated that on removing the uterus pregnancy of about six to eight weeks was observed and uterus was sent for chemical and histeopathological examination and he opined that deceased was pregnant at the time of post mortem to the gestational age of around six to eight weeks and died due to ante mortem hanging. He has stated that viscera was sent to FSL Junga and after receipt of FSL report he did not find any evidence of poisoning or alcohol in the viscera. He has stated that he issued post mortem report Ext.PW3/A which bears his signatures.

9.4 PW4 HC Inder Lal has stated that he remained post as MHC P.S. Barotiwala and on dated 4.7.2005 statement Ext.PW4/A through HC Yashpal was received in police station and FIR Ext.PW4/B was registered. He has stated that case file was sent to the spot through HC Yash Pal and on dated 5.7.2005 C. Narinder Singh vide RC No. 3 of 2005 deposited with him viscera of deceased, four jars each sealed with three seals of CHC Nalagarh and one sealed envelope along with sample seal which were deposited by him in the Malkhana and entries were made by him in the register. He has stated that on dated 14.7.2005

vide RC No. 22 of 2005 he sent four jars of viscera of deceased sealed with three seals of CHC Nalagarh to FSL Junga along with sample of seal and one more envelope containing letter pad and admitted handwriting of deceased along with relevant papers through C. Hakkam Ram and case property was handed over by Hakkam Singh at FSL Junga on the same day and further stated that receipt was handed over to him by C. Hakkam Singh. He has stated that one stool and scarf were also deposited. He has further stated that case property remained intact in his custody. He has denied suggestion that proceedings regarding FIR Ext.PW4/B recorded subsequently. He has denied suggestion that no ruka was received by him in police station through H.C. Yash Pal.

9.5 PW5 HC Sohan Lal has stated that he is posted as I.O. P.P. Baddi since 2003 and on dated 9.7.2005 he remained associated in the investigation of the present case. He has stated that on dated 9.7.2005 Sunder Dass produced Ext.PW2/D-1 and Ext.PW2/D-2 to the Investigating Officer ASI Tapinder Singh vide seizure memo Ext.PW2/E which bears his signatures. He has further stated that Ext.PW2/D-1 to Ext.PW2/D-2 were written by deceased. He has admitted that about 100-150 villagers were gathered outside the house of deceased.

9.6 PW6 SHO Bisham Thakur has stated that in the year 2005 he was posted as SHO P.S. Barotiwala and after completion of investigation ASI Tajinder Singh presented the case file to him and after receipt of FSL reports Ext.PW6/A and Ext.PW6/B he prepared challan and presented the same in Court.

9.7 PW7 C. Hakam Ram has stated that on dated 14.7.2005 MHC Inder Lal P.S. Barotiwala handed over to him two parcels sealed with seal CHC Nalagarh along with two envelopes also sealed with same seal and sample seal vide RC No. 22 of 2005 for taking the same to FSL Junga. He has stated that samples were took by him and deposited in the office of FSL Junga. He has stated that receipt was handed over to MHC and parcels remained intact in his custody. He has denied suggestion that parcels were handed over to him on dated 13.7.2005 in the evening.

9.8 PW8 ASI T.S. Thakur I.O. has stated that in the year 2005 he was posted as Incharge of P.P. Baddi and on dated 4.7.2005 an information was received from an unknown person of village Channal Majra that some lady had committed suicide. He has stated that information was recorded in daily dairy vide report Ext.PW8/A and he along with HC Sohan Lal, H.C. Yahspal, C. Harwinder and Lady C. Gurmeet Kaur proceeded in official vehicle to the spot and reached the spot within 15-20 minutes. He has stated that they found that one lady was hanging from the roof in her bed room and lady was already dead and they waited for parents of deceased. He has stated that parents of deceased came within 1-1½ hours and further stated that father of deceased had given statement Ext.PW4/A. He has stated that father of deceased told that deceased was harassed by accused persons. He has stated that thereafter Dy.S.P. Nalagarh, SHO Barotiwala came at the spot and medical officer was also called at the spot who examined the hanging dead body. He has stated that thereafter he took photographs with his own camera. He has further stated that thereafter he prepared inquest report Ext.PW8/B and inspected the room and prepared map Ext.PW8/C. He has stated that during the inspection of room writing pad Ext.PW2/A was found. He has stated that there was one stool on the bed. He has stated that thereafter he filed application for post mortem of deceased and thereafter obtained post mortem report. He has stated that dead body of deceased was handed over to parents of deceased vide memo Ext.PW8/O. He has stated that he also recorded statements of witnesses and viscera presented

by medical officer was sent for examination to FSL Junga. He has stated that admitting hand writing of deceased Ext.PW2/D-1 to Ext.PW2/D-2 took from the brother of deceased vide memo Ext.PW8/E and they were sent to the expert of question document FSL Junga for comparison with hand writing of suicide note Ext.PW2/A. He has stated that report Ext.PW6/A was obtained and as per report of Handwriting Expert both writings was of same person. He has stated that after investigation file was handed over to SHO P.S. Barotiwala for preparation of challan. He has denied suggestion that deceased wanted to terminate her pregnancy. He has stated that he does not know that deceased was not interested for living in the village. He has denied suggestion that deceased wanted to terminate her pregnancy. He has stated that he does not know that deceased was reprimanded by her parents for termination of her pregnancy. He has denied suggestion that suicide note Ext.PW2/A and hand writings Ext.PW2/D-1 to Ext.PW2/D-2 are hand writing of Sunder Dass. He has denied suggestion that deceased committed suicide of her own. He has denied suggestion that deceased was not harassed by accused persons.

10. Statements of accused persons recorded under Section 313 Cr.P.C. Accused persons have stated that deceased did not want the child and wanted to perform job. Accused persons have further stated that deceased did not want to live with accused persons in village and wanted to reside with her parents at Pinjore. Accused persons stated that they did not harass the deceased in her matrimonial house. Accused persons have further stated that deceased had committed suicide of her own.

11. Accused persons also examined Shri Dalip Singh as DW1 who has stated that he is familiar with the family of accused persons residing in village Chanar Majra. He has stated that he remained President of Panchayat Kishanpur from 2001 to 2006 and further stated that village Chanar falls under his Panchayat. He has stated that police officials recorded his statement in present case which is Ext.DA placed on record. He has admitted that he is running a clinic at village Manpura and further stated that he was called by accused Susheel Kumar and also stated that house of accused persons is situated at a distance of about 3-4 K.m. from his clinic. He has stated that his house is also situated at the same distance from the house of accused persons. He has stated that he did not give any treatment to the deceased as deceased was pregnant. He has further stated that he also did not conduct any test. He has denied suggestion that he was having knowledge that deceased was murdered by accused persons. He has denied suggestion that deceased had died on account of maltreatment by accused persons. He has admitted that accused persons are voters of his Panchayat.

Testimony of PW1 Shri Neeta Ram father of deceased is fatal to co-accused Susheel Kumar qua criminal offence punishable under Section 498-A IPC

12. PW1 Neeta Ram father of deceased has stated in positive manner that when deceased used to come to her parental house she told him personally that her husband i.e. co-accused Susheel Kumar was demanding a motor cycle and Rs.50,000/- and he told his daughter that his wife was ill and he would come to her matrimonial house with 4/5 persons and he would ask co-accused Susheel Kumar purpose of demanding the money. Above stated testimony of PW1 against co-accused Susheel Kumar is trustworthy reliable and inspires confidence of Court and is fatal to co-accused Susheel Kumar. There is no reason to disbelieve the above stated testimony of PW1.

Testimony of PW2 Sunder Dass brother of deceased is also fatal to co-accused Susheel Kumar qua criminal offence punishable under Section 498-A IPC

13. PW2 Sunder Dass has stated in positive manner that deceased was married to co-accused Susheel Kumar on dated 11.5.2005. He has stated that on dated 2.7.2005 he personally went to the house of his deceased sister to attend the function where on the next day of the function she told him that her in-laws harassed her and called her handicapped and also called her as Paharan. He has stated in positive manner that his deceased sister did not feel happy in her matrimonial home and further stated that his sister was pregnant. Above stated testimony of PW2 Sunder Dass is also trustworthy reliable and inspires confidence of Court and fatal to co-accused Susheel Kumar. There is no reason to disbelieve the above stated testimony of PW2.

Testimony of PW3 Dr. Bhupesh Gupta is also fatal to co-accused Susheel Kumar qua criminal offence punishable under Section 498-A IPC

14. PW3 Dr. Bhupesh Gupta has stated in positive manner that he visited the spot and found that deceased was hanging from the ceiling hook in the bed room of her matrimonial house. He has stated that on dated 4.7.2005 dead body of deceased was brought to CHC Nalagarh for post mortem. He has stated that ligature marks were present over the neck of 2 cm wide above thyroid cartilage. He has stated that hyoid bone fracture was also present. He has stated that deceased was pregnant at the time of post mortem and further stated that pregnancy was of 6 to 8 weeks. He has stated that deceased had died due to ante mortem hanging. Above stated testimony of PW3 is also trustworthy reliable and inspires confidence of Court and is fatal to co-accused Susheel Kumar.

Corroborative testimonies of witnesses namely PW4 HC Inder Lal, PW5 HC Sohan Lal, PW6 HC Bisham Thakur, PW7 C. Hakam Ram, PW8 ASI T.S. Thakur are fatal to co-accused Susheel Kumar qua criminal offence punishable under Section 498-A IPC

15. PW4 has stated in positive manner that viscera of deceased four jars each sealed with three seals of CHC Nalagarh and one sealed envelope along with sample of seal deposited with him. He has stated in positive manner that on dated 14.7.2005 vide RC No. 22 of 2005 he sent four jars of viscera of deceased each sealed with three seals of CHC Nalagarh to FSL Junga along with sample of seal and one envelope containing letter pad and admitted hand writing along with relevant papers through C. Hakam Ram. Testimony of PW4 HC Inder Lal is trustworthy reliable and inspires confidence of Court and there is no reason to disbelieve the testimony of PW4 HC Inder Lal. Another corroborative witness PW5 HC Sohan Lal has stated that documents Ext.PW2/D-1 and Ext.PW1/D-2 were produced and same were took into possession vide seizure memo Ext.PW2/E which bears his signatures. Testimony of PW5 HC Sohan Lal is trustworthy reliable and inspires confidence of Court and there is no reason to disbelieve the testimony of PW5 HC Sohan Lal. Another corroborative witness namely PW6 SHO Bisham Thakur has stated in positive manner that on receipt of FSL reports Ext.PW6/A and Ext.PW6/B he prepared challan. Testimony of PW7 C. Hakam Ram also inspires confidence of Court. He has specifically stated that two parcels sealed with seal CHC Nalagarh along with two envelopes were handed over to him vide RC No. 22/2005 and he deposited the same in FSL Junga. Testimony of corroborative witness PW8 ASI T.S. Thakur is also trustworthy reliable and inspire confidence of Court. PW8 T.S. Thakur has stated in positive manner that he visited the spot and further stated in positive manner that father of deceased had given a statement to him Ext.PW4/A which

was reduced into writing. He has stated that deceased was harassed by accused persons in her matrimonial house.

Suicide note Ext.PW2/A is also fatal to co-accused Susheel Kumar qua criminal offence punishable under Section 498-A IPC

16. Deceased has specifically stated in her suicide note that she used to remain confine in a room and there is recital in suicide note written by deceased that she did not like comments about her works in her in-laws house. There is recital in suicide note written by deceased that deceased had tolerated everything on account of new marriage. There is recital in suicide note written by deceased that in breakfast co-accused Susheel Kumar told the deceased on oath that he was very aggrieved after marrying the deceased with him because his freedom was snatched after marriage. There is recital in suicide note written by deceased that at 12 Noon electricity light went out of order and co-accused Susheel Kumar went to sleep outside and told the deceased to awaken him when electricity light would come. There is further recital in suicide note written by deceased that electricity light came after ½ hours and she awaken her husband namely co-accused Susheel Kumar and told him to come inside the room. There is further recital in suicide note written by deceased that at 3 AM co-accused Susheel Kumar came in room and abused the deceased. There is further recital in suicide note written by deceased that co-accused Susheel Kumar told the deceased that deceased should tell her mother not to visit matrimonial house of deceased.

17. After perusal of testimony of prosecution witnesses carefully and after perusal of suicide note Ext.PW2/A placed on record it is proved beyond reasonable doubt that deceased had committed suicide in her matrimonial house in the stage of pregnancy due to mental cruelty given by co-accused Susheel Kumar. Provision of Section 498 has been enacted to meet social challenge to save married woman from being ill-treated and forced to commit suicide by husband or relatives. It is well settled law that if married woman is treated with cruelty within four walls of her matrimonial house then no independent witness of locality would be available. It is well settled law that any form of cruelty to married woman in her matrimonial house will attract the provisions of Section 498-A IPC. It is well settled law that cruelty is not only physical cruelty but also mental cruelty. It is well settled law that basic difference between Section 498-A and 306 IPC is that of intention only. It is well settled law that under Section 498-A IPC cruelty committed by husband or his relatives drag the woman to commit suicide and under Section 306 IPC suicide is abetted and intended by accused person. It was held in case reported in ***AIR 1999 SC 2071 titled Arun Vyas and another vs. Anita Vyas*** that cruelty as defined in Section 498-A IPC is a continuing offence and on each occasion on which wife is subjected to cruelty new starting point of limitation would start on last act of cruelty. ***(Also see AIR 1983 SC 1002 titled Virbhan Singh and another vs. State of U.P.).*** It is well settled law that cruelty or harassment need not be physical but even mental cruelty would be a cruelty under Section 498-A IPC (Also See ***1998 (3) SCC 309 Pawan Kumar and others vs. State of Haryana***.)

Report of State Forensic Science Laboratory Junga is fatal to co-accused Susheel Kumar.

18. Even Scientific Officer State Forensic Science Laboratory Junga has specifically mentioned in positive manner in report Ext.PW6/A that admitted hand writing A1 to A4 and question hand writing Q1 to Q4 have been written by one and same person. Hence it is held that hand writing expert's

report is fatal to co-accused Susheel Kumar qua suicide note and qua criminal offence punishable under Section 498-A IPC.

19. Submission of learned Additional Advocate General appearing on behalf of the State that offence under Section 498-A IPC is also proved beyond reasonable doubt against other co-accused persons namely Gurbachan, Smt. Ramla Devi and Kumari Narinder Kaur is rejected being devoid of any force for the reasons hereinafter mentioned. There is no positive cogent and reliable evidence as well as oral and documentary evidence on record against other accused persons namely Gurbachan, Smt. Ramla Devi and Kumari Narinder Kaur.

20. Another submission of learned Additional Advocate General appearing on behalf of the State that offence under Section 306 IPC is also proved beyond reasonable doubt against all accused persons is also rejected being devoid of any force for the reasons hereinafter mentioned. There is no positive cogent and reliable evidence on record in order to prove that all accused persons have abetted the deceased to commit suicide immediately prior to the commission of suicide. There is no direct nexus between abetment and suicide. Hence all accused persons are acquitted qua offence punishable under Section 306 IPC read with Section 34 IPC by way of giving them benefit of doubt. 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.)*** I

21. Submission of learned defence Advocate appearing on behalf of co-accused Susheel Kumar that testimonies of PW1 and PW2 and statement of deceased recorded in suicide note Ext.PW2/A are not sufficient to convict co-accused Susheel Kumar qua criminal offence punishable under Section 498-A IPC is rejected being devoid of any force for the reasons hereinafter. It is well settled law that in matrimonial cases relatives are the best witnesses. It is also well settled law that married women generally used to narrate the facts of cruelty to her close relatives. There is no positive cogent and reliable evidence to disbelieve the testimonies of PW1 father of deceased and PW2 brother of deceased. It is well settled law that that conviction can be based on honest and trustworthy evidence even of a single witness in criminal case. ***(See AIR 1973 SC 944 titled Jose vs. The State of Kerala See AIR 1957 SC 614 titled Vadivelu Thevar vs. The State of Madras . See AIR 1965 SC 202 titled Masalti and others vs. State of Uttar Pradesh).*** It was held in case reported in ***AIR 1987 SC 1328 titled Dalbir Singh vs. State*** that there is no hard and fast rule for appreciation of evidence and each case has to be decided on facts as they proved in particular case.

22. Another submission of learned defence Advocate appearing on behalf of co-accused Susheel Kumar that there are material contradictions in the testimonies of PWs 1 and 2 and therefore co-accused Susheel Kumar be acquitted qua offence punishable under Section 498-A IPC is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the testimonies of PWs 1 and 2 and there is no material contradiction between testimonies of PWs 1 and 2 and it is well settled law that minor contradictions are bound to come in criminal cases. Deceased had committed suicide on dated 4.7.2005 in her matrimonial house within about two

months after her marriage due to mental cruelty given to deceased by co-accused Susheel Kumar and statements of prosecution witnesses were recorded on dated 14.12.2006, 15.12.2006, 14.5.2007, 15.5.2007 and minor contradictions are bound to come in testimonies of prosecution witnesses when statements of prosecution witnesses were recorded after a lapse of time. It is also well settled law that concept of *falsus in uno falsus in omnibus* is not applicable in criminal cases. ***(See AIR 1980 SC 957 titled Bhee Ram vs. State of Haryana. See AIR 1971 SC 2505 titled Rai singh vs. State of Haryana.)***

23. Another submission of learned defence Advocate appearing on behalf of co-accused Susheel Kumar that deceased did not want the child and she has voluntarily committed suicide in her matrimonial house is rejected being devoid of any force for the reasons hereinafter mentioned. The plea of learned defence Advocate that deceased has voluntarily committed suicide in her matrimonial house is rejected on the concept of *ipse dixit* (An assertion made without proof).

24. Another submission of learned defence Advocate appearing on behalf of co-accused Susheel Kumar that deceased wanted to perform job and she did not want to reside in village and she has voluntarily committed suicide in her matrimonial house when she was at the stage of pregnancy is rejected being devoid of any force for the reasons hereinafter mentioned. There is no evidence on record in order to prove that deceased had voluntarily committed suicide in her matrimonial house. On the contrary it is proved by way of oral as well as documentary evidence placed on record that deceased had committed suicide in her matrimonial house due to mental cruelty given to deceased by her husband namely co-accused Susheel Kumar and mental cruelty to the deceased is proved qua co-accused Susheel Kumar when he told the deceased personally that he was very aggrieved after marriage with deceased because his freedom was snatched after marriage. Above stated words have caused mental cruelty to deceased in her matrimonial house in positive manner.

25. Another submission of learned defence Advocate appearing on behalf of co-accused Susheel Kumar that in view of testimony of DW1 Dalip Singh it is proved on record that deceased had voluntarily committed suicide in her matrimonial house is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that mental cruelty to woman is committed within four walls of matrimonial house and DW1 Dalip Singh has stated in positive manner when he appeared in witness box that his house is situated at a distance of 3-4 K.m. from the house of accused persons. DW1 was not present when mental cruelty was committed upon the deceased within four walls of matrimonial house during night time. Hence we are of the opinion that testimony of DW1 Dalip Singh is not sufficient to discard the testimonies of PWs 1 and 2 with whom the deceased had personally narrated that she had sustained mental cruelty in her matrimonial house. It is well settled law that none would commit suicide without any reason in the matrimonial house. In present case it is proved on record that deceased had committed suicide in her matrimonial house within about two months of her marriage when she was in the stage of pregnancy. Even as per Section 134 of Indian Evidence Act 1872 no particular number of witnesses is required for the proof of any fact. It was held in case reported in ***AIR 2003 SC 854 titled Lallu Manjhi and another vs. State of Jharkhand*** that law of evidence does not require any particular number of witnesses to be examined and it was held that Court may classify the oral testimony into three categories (1) wholly reliable (2) wholly unreliable and (3) neither wholly reliable nor wholly unreliable. It was held that in first two categories there would be no difficulty in accepting or discarding the testimony

of a single witness. It was also held in case reported in ***JT 2008(8) SC 650 titled State of U.P. vs. Kishanpal and others*** that it is the quality of evidence and not quantity of evidence which requires to be judged by the Court to place credence to the testimony of witness.

26. Another submission of learned defence Advocate appearing on behalf of co-accused Susheel Kumar that suicide note Ext.PW2/A is not admitted writing pertaining to deceased and on this ground co-accused Susheel Kumar be acquitted is also rejected being devoid of any force for the reasons hereinafter mentioned. There is positive cogent and reliable evidence on record that suicide note was found from the drawer of bed room of deceased in her matrimonial house which was written on a writing pad. The suicide note was found from the room in which dead body of deceased was found hanging. Age of deceased at the time of her death was 23 years. The deceased had committed suicide due to mental cruelty suffered by deceased in her matrimonial house when she was in prime age of youth i.e. 23 years. In view of positive fact that suicide note Ext.PW2/A written by deceased was found from the same room in which dead body of deceased was found it is held that suicide note Ext.PW2/A is relevant fact in present case. Even State Forensic Science Laboratory Junga in report Ext.PW6/A has specifically mentioned that admitted hand writing A1 to A4 and questioned hand writing Q1 to Q4 have been written by one and same person. Accused did not adduce any evidence on record in order to rebut the report of Scientific Officer State Forensic Science Laboratory report Ext.PW6/A placed on record. It is also admitted by co-accused Susheel Kumar when his statement was recorded under Section 313 Cr.P.C. that deceased had committed suicide in her matrimonial house when she was under pregnancy of six to eight weeks. Accused have also admitted when their statements under Section 313 Cr.P.C. recorded that brother of deceased PW2 Sunder Dass came to matrimonial house of deceased on dated 2.7.2005 two days prior to death of deceased and it is proved on record that deceased had directly narrated the facts about mental cruelty to her brother when he came to her matrimonial house on dated 2.7.2005.

27. In view of above stated facts appeal is partly allowed. We set aside the acquittal of co-accused Susheel Kumar under Section 498-A IPC and we convict co-accused Susheel Kumar under Section 498-A IPC. We hold that co-accused Susheel Kumar had committed mental cruelty upon deceased in her matrimonial house. We hold that due to mental cruelty given by co-accused Susheel Kumar in matrimonial house of deceased the deceased had committed suicide when she was under pregnancy of six to eight weeks. We affirm the acquittal of other co-accused persons under Sections 498 and 306 read with Section 34 IPC granted by learned trial Court. We also affirm acquittal of co-accused Susheel Kumar under Section 306 IPC. Judgment of learned trial Court is modified to this extent only. Now convict Susheel Kumar be heard on quantum of sentence qua offence punishable under Section 498-A IPC. Non-bailable warrants be issued against convict Susheel Kumar and he be produced before us on 2.12.2014.

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Cr. Appeal No. 322 of 2008
QUANTUM OF SENTENCE

02.12.2014

Present:- Mr. B.S. Parmar and Mr. Ashok Chaudhary, Additional Advocate Generals with Mr.Vikram Thakur, Deputy Advocate General, and Mr. J.S. Guleria, Assistant Advocate General, for the appellant.

Mr. Ramakant Sharma, Advocate, for the convicted person.

Convicted person namely Susheel Kumar is in custody of C. Gaurav Jaswal No. 507 and ASI Dharam Pal Singh of P.S. Baddi.

28. We have heard learned Additional Advocate General appearing on behalf of the State and learned defence counsel appearing on behalf of the convicted person upon quantum of sentence.

29. Learned Additional Advocate General appearing on behalf of the State submitted before us that convicted person had committed mental cruelty upon deceased namely Kamla Devi aged 23 years in her matrimonial house and due to mental cruelty deceased had committed suicide in her matrimonial house within two months after her marriage when she was pregnant and therefore deterrent punishment be awarded to the convicted person in order to maintain majesty of law. On the contrary learned defence counsel appearing on behalf of convicted person submitted before us that convicted person is first offender and further submitted that he has large family to support and lenient view be adopted in present case and convicted be released on Probation of Offenders Act.

30. We have considered the submissions of learned Additional Advocate General appearing for the State and learned defence counsel appearing on behalf of convicted person carefully upon quantum of sentence. We are of the opinion that it is not expedient in the ends of justice to give the benefit of Probation of Offenders Act to the convicted person keeping in view the commission of criminal offence punishable under Section 498-A IPC. In view of the fact that deceased Kamla Devi aged 23 years had committed suicide in her matrimonial house within two months of her marriage due to mental cruelty given by convicted person and in view of the fact that deceased Kamla Devi aged 23 years was having pregnancy of six to eight weeks when she committed suicide in her matrimonial house due to mental cruelty given by convicted person and in view of the fact that mental cruelty upon married woman in her matrimonial house is a stigma upon the society and in view of the fact that every married woman has legal right to live in her matrimonial house without any mental cruelty and in order to curb the criminal offence punishable under Section 498-A IPC in the society we sentence the convicted person as follow:-

Sr. No.	Nature of Offence	Sentence imposed
1.	Offence under Section 498-A IPC.	Convicted person is sentenced to undergo simple imprisonment for one year. Convicted person is also sentenced to pay fine of Rs. 25,000/-(Rs. Twenty Five thousand only). In default of payment of fine convicted person shall further undergo simple imprisonment for two months.

31. Period of custody during investigation, inquiry and trial will be set off. Certified copy of this judgment and sentence be also supplied to convicted person forthwith free of cost by learned Registrar (Judicial). Case property will be confiscated to State of H.P. after the expiry of prescribed period of filing further legal proceedings before the competent Court of law. Warrant of

Commitment of sentence of imprisonment be issued to the Superintendent Jail Kanda District Shimla (HP) forthwith for compliance by learned Registrar (Judicial) in accordance with law. File of learned trial Court be transmitted back forthwith along with certified copy of judgment and sentence. Appeal stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

CWP No.7249 of 2010 a/w CWP No.8480 of 2014
Reserved on: 2.12.2014
Pronounced on : 3.12.2014

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1. <u>CWP No.7249 of 2010</u>

Devinder Chauhan Jaita .....Petitioner

Versus

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

2. <u>CWP No.8480 of 2014</u>

Narender Bragta. .....Petitioner

Versus

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

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1. CWP No.7249 of 2010

For the Petitioner: Petitioner in person.

For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Addl. Advocates General and Mr. J.K. Verma, Deputy Advocate General, for the respondents-State.

Mr. Shakya Negi, Proxy Counsel, for respondent No.4.

2. CWP No.8480 of 2014

For the Petitioner: Mr. R.K. Sharma, Senior Advocate with Mr. Rajinder Dogra, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Addl. Advocates General and Mr. J.K. Verma, Deputy Advocate General, for respondents No.1 and 2.

Constitution of India, 1950- Article 226- Writ Petition was disposed of on 6.9.2013 on the assurance made by State with liberty to the petitioner or any other affected person to take recourse to appropriate proceedings, including the revival of the writ petition – petitioner filed a public interest litigation for issuing the direction to the state to complete the construction of Theog-Rohru road and to submit the status report periodically- State contended that the Writ Petition is not maintainable and the petitioner was a minister in the previous government who was opposing the petition- Writ petition was politically motivated- held, that

the remedy of public interest litigation should not be misused - the Courts should, prima facie, be satisfied that writ petition is not the outcome of political or extraneous considerations or motivated one- petitioner was an ex-minister and, therefore, Writ petition cannot be treated as public interest litigation on his behalf- however, keeping in view the fact that the projected issue is of great importance and relates to public at large- hence, cognizance taken suo motu by High Court by appointing an Amicus Curiae to assist the Court - a Committee constituted to monitor the progress of the work and to submit report periodically. (Para- 1 to 21)

Cases referred:

State of Uttaranchal vs. Balwant Singh Chaufal & Ors., 2010 AIR SCW 1029

M/s Holicow Pictures Pvt. Ltd. vs. Prem Chandra Mishra & Ors., 2008 AIR SCW 343

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

A batch of writ petitions, the lead petition of which was CWP No.7249 of 2010, came to be disposed of vide order dated 6th September, 2013, passed by a Division Bench of this Court, in terms of the affidavit filed by the respondents-State containing assurance made by the State Authorities, with liberty to the writ petitioners or any affected person having any grievance to take recourse to appropriate proceedings, including to revive the concerned writ petition.

2. The petitioner Devender Chauhan Jaita moved an application, being CMP No.18403 of 2014, for revival of the writ petition No.7249 of 2010, on the grounds taken in the application, which was granted and the writ petition was posted for 2.12.2014.

3. CWP No.8480 of 2014 has been moved by Shri Narender Bragta in the nature of public interest for issuing directions to the respondents to complete the construction of Theog-Rohru Road, efficiently and properly within the stipulated time frame i.e. by or before 1st June, 2016, and to submit status reports periodically, on the grounds taken in the writ petition.

4. At the very outset, we may place on record that three writ petitions came to be filed in the year 2010, in public interest, and similar reliefs were prayed for. After the Authorities concerned filed affidavits, containing details and status of the works in question, and the assurance made by the concerned Authorities to complete the said work within the time frame, came to be disposed of vide order supra.

5. The question is whether the writ petition i.e. CWP No.8480 of 2014 is maintainable, in view of the above facts, read with the objection raised by the learned Advocate General on the last date of hearing vis. a vis. maintainability of the writ petition.

6. We have heard the learned Senior Advocate for the writ petitioner in CWP No.8480 of 2014 and the learned Advocate General.

7. The learned Advocate General argued that the petitioner, namely, Shri Narender Bragta, was a Minister in the previous Government, which was

contesting the batch of writ petitions, the lead of which was CWP No.7249 of 2010, came to be disposed of in terms of the order passed by this Court on 6th September, 2013, referred to hereinabove. Thus, it is contended that the petitioner cannot file writ petition and seek same relief. The learned Advocate General further argued that the present writ petition is politically motivated, which fact is evident from the averments contained in paragraph 1 of the writ petition, wherein it has been admitted by the petitioner that he was a Minister and has every right to take care of the interests of the public and development of the area, and has filed the writ petition as such.

8. The learned Senior Advocate appearing for the writ petitioner argued that the writ petitioner has filed the writ petition in two capacities – one in his personal capacity being the permanent resident of the said area, an agriculturist and also having orchards situated in the said area; and secondly, being an ex-Minister, is also concerned with the welfare of the poor public of the area. The learned Senior Advocate further argued that in the present writ petition, the petitioner has arrayed the Contractor, to whom the contract of the work is allotted, as party respondent, who was not a party in the earlier writ petitions. Thus, it was submitted that the writ petition is maintainable in its present form. He also submitted that the petitioner be permitted to delete last four lines from paragraph 1 of the writ petition.

9. The learned Advocate General argued that the writ petitioner had publicly proclaimed/declared that the Bhartiya Janta Party would not sit idle and take the issue/subject matter of the writ petition to the Court, which was published in the Dailies having wide circulation in the entire Himachal Pradesh, such as, The Tribune etc., in their issues, dated 27th November, 2014. Therefore, the writ petition is outcome of political considerations.

10. We deem it proper to record herein that the Registry has received letters/communications, wherein grievance has been projected that Rohru-Shimla road is in bad condition and is not being properly maintained, made part of the file. It is also stated in the said letters/communications that the work of the contractor is not satisfactory.

11. We cannot be oblivious to the fact that the road, subject matter of the writ petition, is really an important one and is the lifeline for large public residing in the area concerned, therefore, it becomes the duty of the State and the said Contractor to complete the construction of the road and bridges as early as possible and not later than the cut off date provided in the contract, read with the order made by this Court on 6th September, 2013, referred to supra. It is also the duty of the Courts to ensure that public interests are protected and grievances are redressed.

12. However, while determining the issue of maintainability of the present writ petition, both aspects, as discussed hereinabove, have to be kept in mind, and including the law expounded by the Apex Court in public interest litigations.

13. The concept of public interest litigation was evolved by the Apex Court and, in order to preserve the sanctity of the public interest litigation, the Apex Court has also held in so many unequivocal words that the remedy of public interest litigation should not be misused and the Courts should, prima facie, be satisfied that it is not the outcome of political or extraneous considerations or motivated one.

14. A reference may be made to the decision of the Apex Court in **State of Uttaranchal vs. Balwant Singh Chaufal & Ors., 2010 AIR SCW 1029,** in which, in paragraph 198, it has been held as under:

> "198. 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 P.I.L.
>
> (4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.
>
> (5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.
>
> (6) The court 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 court 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."

15. The Apex Court in **M/s Holicow Pictures Pvt. Ltd. vs. Prem Chandra Mishra & Ors., 2008 AIR SCW 343,** has held that, while dealing with the public interest litigations, it is desirable for the Courts to filter out the frivolous writ petitions and ensure that the writ petitions are not the outcome of political motivation or other oblique considerations. It is apt to reproduce paragraphs 18 and 23 of the said decision hereunder:

> "18. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and /or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body

of persons or member of public, who approaches the Court is acting bonafide and not for personal gain or private motive or political motivation or other oblique considerations, 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.

23. In S. P. Gupta v. Union of India (J981 Supp. SCC 87), it was emphatically pointed out that the relaxation of the rule of locusstandi 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. He has also left the following note of caution . (SCC p. 219, para 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.""

16. Applying the above tests to the facts of the present case and while keeping in view paragraph 1 of the writ petition that the petitioner was an ex-Minister, the writ petition cannot be retained as public interest litigation on behalf of the petitioner.

17. However, at the same time, since we feel that the issue projected through the present writ petition, is of great importance and relates to public at large, question which emerges for consideration is whether this Court should dismiss the writ petition or keep the same on the docket of this Court, by keeping the writ petitioner out of picture, in order to redress the grievance of the public in general, and treat the said writ petition as Public Interest Litigation by appointing an Amicus Curiae to assist the Court. The answer is in the affirmative in view of the dictum of the Apex Court in **M/s Holicow Pictures Pvt. Ltd. (supra).** It is apt to reproduce paragraph 26 of the said decision hereunder:

> "26. It is true that in certain cases even though the Court comes to the conclusion that the writ petition was not in a public interest, yet if it finds that there is scope for dealing with the matter further in greater public interest, it can be done. This can be done by keeping the writ petitioner out of picture and appointing an amicus curiae. This can only be done in exceptional cases and not in a routine manner."

18. In the given circumstances, we deem it proper to take suo motu cognizance and treat the writ petition i.e. CWP No.8480 of 2014 as public interest litigation by keeping the writ petitioner out of picture. The Registry is directed to correct the memo of parties accordingly.

19. Ms.Jyotsna Rewal Dua, Advocate, is appointed as Amicus Curiae. The Registry is directed to supply a complete copy of the paper book to the learned Amicus Curiae. The learned counsel appearing for the petitioner and

the petitioner in CWP No.7249 of 2010, who is also an Advocate by profession, are also requested to assist the Court.

20. In order to ensure that the construction of the work, subject matter of the writ petition, is properly and efficiently executed, we deem it proper to constitute a Committee of the following officers to monitor the progress of the work:

1. Chief Secretary , State of H.P. – Chairman
2. Principle Secretary (PW), to the Govt. of H.P. – Member
3. Engineer-in-Chief (PWD) – Member

21. The above Committee shall monitor the progress of the work and shall submit their separate status reports on each and every hearing.

22. Issue notice to the respondents. Mr.Romesh Verma, learned Additional Advocate General, waives notice for respondents No.1 and 2, on whose instructions Mr.Shrawan Dogra, learned Advocate General, appears for the said respondents. Notice to respondent No.3 through learned Advocate General. Dasti notice also permitted.

23. The respondents are directed to file present status reports and the affidavits/replies within two weeks.

24. In the given circumstances, CWP No.7249 of 2010 be consigned to records in view of the orders passed. A copy of this order be placed on record of said petition.

25. List CWP No.8480 of 2014 on 17th December, 2014. Copy dasti.

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

Cr. Appeal Nos. 203, 206 & 383 of 2009.
Reserved on: November 26, 2014.
Decided on: December 03, 2014.

1. Cr. Appeal No. 203 of 2009.
Sant Ram alias Nikku .....Appellant.
Versus
State of H.P. .....Respondent.
2. Cr. Appeal No. 206 of 2009.
Bhagi Rath alias Sanju .....Appellant.
Versus
State of H.P. .....Respondent.
3. Cr. Appeal No. 383 of 2009.
Surender Kaur alias Pinki .....Appellant.
Versus
State of H.P. .....Respondent.

Indian Penal Code, 1860- Sections 302, 201 and 120-B, read with Section 34 IPC- Dead body of the deceased was found in a sitting posture tied from the neck with one side of rope - other portion of the rope was tied with the branch of tree - on examination, wounds were found on the

person of the deceased- as per prosecution, deceased was killed by his wife with the help of other person- wife made a disclosure statement under Section 27 of Indian Evidence Act-as per medical evidence, cause of the death was asphyxia leading to cardio-respiratory failure- no fractures of thyroid cartilages and hyoid bone were detected- the ligature was also high on the neck- the shirt did not bear any cut marks- disclosure statement was also not proved satisfactorily- house was already open prior to the arrival of the witnesses- held, that in these circumstances, prosecution version is not proved- accused acquitted.

(Para- 27 to 29)

For the appellants:	Mr. Manoj Pathak, Advocate, for the appellants in Cr. Appeal Nos. 203 & 206 of 2009.
	Mr. Y.P. S. Dhaulta, Advocate, Legal Aid Counsel for the appellant in Cr. Appeal No. 383 of 2009.
For the respondent:	Mr. M.A.Khan, Addl. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these appeals, the same were taken up together for hearing and are being disposed of by a common judgment.

2. These appeals are instituted against the judgment dated 29.6.2009 of the learned Presiding Officer, Fast Track Court, Mandi, H.P., rendered in Sessions Trial No. 31 of 2008, whereby the appellants-accused Surender Kaur and Bhagi Rath alias Sanju, who were charged with and tried for offences under Sections 302, 201 and 120-B, read with Section 34 IPC, were convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/- each under Sections 302 and 120-B IPC and in default of payment of fine, these accused were sentenced to undergo rigorous imprisonment for one year. All the accused were also sentenced to undergo simple imprisonment for a period of three years for the commission of offence punishable under Section 201 IPC read with Section 34 IPC and a fine of Rs. 1000/- was imposed upon each of the accused and in default of payment of fine, they were directed to undergo simple imprisonment for a period of three months. All the sentences were ordered to run concurrently against convicts Surender Kaur and Bhagi Rath alias Sanju.

3. The case of the prosecution, in a nut shell, is that on 12.4.2008, SI Swaroop Kumar alongwith other police personnel was present at *'Puja-ka-Rida'* in Village Bahnu for verification/investigation regarding *rapat* No. 5, dated 12.4.2008 of Police Station, Sarkaghat. The statement of Devi Singh, complainant was recorded under Section 154 Cr.P.C. vide Ext. PW-3/A. According to him, his nephew told him on telephone that his brother Jai Singh alias Chaman Lal was dead. He alongwith his brother Sunder Ram reached Bahnu and found that at *'Puja-ka-Rida'* many people had gathered. The dead body of Jai Singh alias Chaman was tied from neck with one side of rope and the other portion of the rope was tied/hanged with the branch of *Chuin* tree and dead body was in a sitting posture. On the spot, Jai Singh's wife (accused Surender Kaur) was also present alongwith the police personnel. When the police was removing the clothes from the dead body of deceased Jai Singh for

the purpose of examination, his wife Surender Kaur who was weeping earlier, ran away from the spot. She was apprehended. The dead body was examined in his presence by the police. The wounds were noticed on scrotum, umbilicus and there were bruises on the body of the deceased. According to his statement, Jai Singh had been killed by his wife Surender Kaur and with the help of other persons, she had tied the neck of deceased with rope and thereafter hanged at *Chuin* tree at *'Puja-ka-Rida'*. The photographs were taken on the spot. The rope was taken into possession. The dead body was sent for post mortem to Civil Hospital, Sarkaghat. Accused Surender Kaur gave a disclosure statement under Section 27 of the Indian Evidence Act that on the night of 11.4.2008, she alongwith Bhagi Rath accused after killing Jai Singh in the house, with the help of Sant Ram alias Nikku had taken the dead body of deceased to *'Puja-ka-Rida'*. Thereafter, a rope was put around the neck of the body and the dead body was tied with the branch of *Chuin* tree. The accused Surender Kaur identified and demarcated her residential house in the presence of the witnesses. Photographs of the spot were taken. From her room, *baniyan*, broken bangles, knife and ear ring were recovered and these were taken into possession by the police vide separate memos. The accused Bhagi Rath has also handed over his shirt which was taken into possession by the police. Accused Sant ram alias Sanju and Bhagi Rath have given their statements under Section 27 of the Indian Evidence Act. They have identified the places at Village Bahnu and *'Puja-ka-Rida'*. The statement of eye witness Virender Kumar was also recorded under Section 164 Cr.P.C. by the learned ACJM, Sarkaghat.

4. According to the prosecution case, accused Bhagi Rath and Surender Kaur were having illicit relations. Deceased Jai Singh had also come to know regarding their illicit relationship. There had been regular quarrel between accused Surender Kaur and deceased Jai Singh. On 11.4.2008, Jai Singh had gone to *Talmerh* with the 'Band Party'. He came back to his house in the evening and at that time accused Surender Kaur and Bhagi Rath were present in the house of deceased Jai Singh. When Jai Singh saw and heard Surender Kaur and Bhagi Rath talking to each other then accused Surender Kaur told accused Bhagi Rath to go to his house. Bhagi Rath went outside and Jai Singh entered in the room. Jai Singh asked accused Surender Kaur as to why accused Bhagi Rath had come there. On this, quarrel took place between accused Surender Kaur and deceased Jai Singh. Accused Bhagi Rath entered the room and gave a kick blow on scrotum of deceased and he became unconscious. Accused Surender Kaur and Bhagi Rath made Jai Singh to sit in a corner of the room. Accused Surender Kaur gagged the mouth of Jai Singh with her *dupatta* and accused Bhagi Rath gave knife blow on umbilicus of Jai Singh. Thereafter, accused Surender Kaur and Bhagi Rath tied a rope around the neck of Jai Singh and later on the dead body of Jai Singh was laid beneath the cot. At that time, son of Jai Singh Virender Kumar was present in the room. Accused Surender Kaur and Bhagi Rath lateron left the room and after half an hour they alongwith Sant Ram alias Nikku came on the spot and all the three accused persons carried the dead body of Jai Singh to the place *'Puja-ka-Rida'*. According to the post mortem report, the death occurred on account of asphyxia due to ligature around the neck. The police investigated the matter and challan was put up after completing all the codal formalities.

5. The prosecution has examined as many as 22 witnesses. The statements of accused persons under Section 313 Cr.P.C. were recorded. According to the accused, they are innocent and falsely implicated in the present case. The learned Trial Court convicted and sentenced the accused, as stated hereinabove.

6. Mr. Manoj Pathak and Mr. Y.P.S. Dhaulta, Advocates appearing for the respective accused have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, Addl. Advocate General, has supported the judgment of the learned P.O. Fast Track Court, Mandi, H.P., dated 29.6.2009.

7. We have heard learned counsel for both the sides and gone through the impugned judgment and material available on record very carefully.

8. PW-1, Dr. V.K. Sharma, has conducted post mortem on the dead body of deceased Jai Singh. According to him, ligature mark was present all around neck and not oblique. Cyanosis was present over face and petechial hemorrhages on conjunctiva was also present. He has noticed the following injuries on the dead body:

> "1. 2x5 mm oblique abrasion over right hypochondrium with central graze over it and brownish in colour.
>
> 2. 2 x 2 cm. rounded abrasion over umbilicus and brownish coloured.
>
> 3. 2 x 1 cm. oval bruise over left arm lateral aspect and 6" above wrist joint.
>
> 4. x 2" x 1' oval bruise below scrotum brownish coloured and perineum soiled with clotted blood and blood oozing out of urethra."

He has issued post mortem report Ext. PW-1/C. According to him, the deceased died due to strangulation which resulted in asphyxia and thereby cardio-respiratory failure. In his cross-examination, he admitted that before conducting the post mortem the photographs taken by the police, were not shown to him. The shoe, with which the injury was stated to have been inflicted, was also not shown to him before conducting the post mortem. He admitted that as per the photograph mark D-1, the ligature was high up in the neck. He also admitted that as per photograph Mark D-2, the ligature was touching the occipital region. The injury No. 2 in Ext. PW-1/C in red circle 'A' was over umbilicus. No blood had oozed from injury No. 2, as per Ext. PW-1/C. There was no patterned injury over the dead body. He also admitted that neither thyroid cartridges nor hyoid bone was broken. In the case of strangulation, the hyoid bone generally does not break and may also break. In case the ligature mark is high up in the neck, thyroid cartilage does not break. In case it is not high up in neck, the thyroid cartilages may break or may not break. According to him, it was not necessary that death would occur only if thyroid cartilages are broken.

9. PW-2 Mahant Ram deposed that he saw the dead body of Jai Singh alias Chaman Lal. The dead body was lying at *'Puja-ka-Rida'* in a position shown in Marks D-1, D-2 and Ext. PX. Upon removing the clothes of the deceased, a steel clip belonging to accused Surender Kaur, was recovered vide memo Ext. PW-2/A. He signed the recovery memo. In his cross-examination, he deposed that the steel clip which was shown to him in the Court was easily available in the vicinity. The deceased was son of his sister. He also admitted that he has never seen Ext. P-1/A, shown to him in the Court, ever been worn by the accused Surender Kaur. The dead body was naked. According to him, he has seen the clotted blood on the umbilicus and the wound was also present. He also admitted that Surender Kaur was weeping on the spot.

10. PW-3 Devi Singh deposed that he received a telephonic message from the house of Hari Singh at Village Bahanu about the death of Jai Singh alias Chaman Lal. He reached *'Puja-ka-Rida'*. The dead body of Jai Singh was tied with a tree of *Chuin*. The neck of the deceased was tied with plastic and jute rope. The dead body was in a sitting posture. There were bruises on the scrotum and umbilicus. He has stated to the police in his statement Ext. PW-3/A that Ext. P-1/A was recovered in his presence from the dead body at the time of removing the clothes. He was confronted with Ext. PW-3/A, where this fact is not mentioned. He has also stated to the police that he had brought a piece of cloth for cremation. He was confronted with Ext. PW-3/A where this fact is not mentioned. He has stated to the police that ligature was half that of plastic and half that of jute. He was confronted with Ext. PW-3/A wherein it is not so recorded. According to him, accused Surender Kaur was arrested on 12.4.2008. He also admitted that the son of the deceased was in the custody of his Uncle and Aunt at Sarkaghat.

11. PW-4 Gyano Devi deposed that the accused persons namely Bhagi Rath and Sant Ram were known to her. She has not seen accused Bhagi Rath and Sant Ram in the house of accused Surender Kaur in the evening of 11.4.2008. She was declared hostile and cross-examined by the learned Public Prosecutor. She denied the suggestion that the accused persons had murdered the deceased on the intervening night of 11/12.4.2008 in his house. She admitted that they came in the house of deceased and accused Surender Kaur on 11.4.2008. The accused Bhagi Rath and Sant Ram used to visit the house of the deceased in the absence of deceased Jai Singh. She admitted that on 11.4.2008, in the evening at about 7:00 PM, deceased and accused Surender Kaur had exchanged hot words. There was no light in their house. She did not know that the deceased was suspecting the character of accused Surender Kaur regarding illicit relationship between Bhagi Rath and Surender Kaur. She was also cross-examined by the learned defence Counsel. She stated to the police that both accused Bhagi Rath and Sant Ram were seen by her in the evening on 11.4.2008 in the house of deceased Jai Singh. She was confronted with Mark D-3, wherein it is not so recorded. According to her, the deceased Jai Singh had come around about 3-4:00 PM to his house on 11.4.2008 and thereafter a minor duel took place between accused Surender Kaur and deceased. Thereafter, animals were tethered by the accused Surender Kaur inside the cowshed. The father-in-law of the accused was present in the house on 11.4.2008. He used to live with them. She also admitted that deceased and accused Bhagi Rath were members of the same Band Party. She denied that she had a land dispute and boundary dispute with the father of the accused Bhagi Rath. She also admitted that they were not on visiting and talking terms with the family of accused Bhagi Rath and his father due to land dispute.

12. PW-5 HHC Dharam Chand deposed that the disclosure statement Ext. PW-5/A was made by accused Surender Kaur. Knife and broken pieces of bangles and a stick were concealed beneath the cot in a room where the dead body of Jai Singh was also kept. The accused Surender Kaur led the police party to *'Puja-ka-Rida'* where the dead body was kept by her and accused Bhagi Rath in a sitting posture. He admitted in his cross-examination that the items mentioned in Ext. PW-5/A were not concealed in any manner by the accused Surender Kaur. The house, from where the articles were recovered, was already open before their arrival. Volunteered that the accused Surender Kaur was already arrested by the police on 12.4.2008 and at that time the room was already open but he was not aware by whom this door was opened.

13. PW-6 Partap Singh deposed that on 12.4.2008 at about 7:00 AM, he was going to *Chajwali* for feeding his cattle. Near the *Pipal* tree, accused Surender Kaur met him and asked to see at *'Puja-ka-Rida'* what her husband has done. He did not go there. He rang up Dinu Ram and told him about the incident. He admitted in his cross-examination that accused Surender Kaur was leading a peaceful and happy married life with the deceased.

14. PW-7 Jagdish Chand, deposed that accused Surender Kaur told the police in their presence that the deceased Jai Singh was killed with the aid of accused Sanju alias Bhagi Rath. The dead body was taken by both of them from the house of the deceased to *'Puja-ka-Rida'* and his neck was tied with plastic and jute rope and hanged with a tree of *Chuin*. The identification memo Ext. PW-7/A was prepared and signed by him. According to him also, the deceased and Surender Kaur had very cordial relations. There was no occasion/cause for accused Surender Kaur to commit murder of her husband Jai Singh.

15. PW-8 Paro Devi deposed that accused Surender Kaur made a disclosure statement before him and Bhuvneshwar to the effect that on 11.4.2008, in the evening, the deceased Jai Singh was quarreling with her and at that time the accused Bhagi Rath alias Sanju came there and gave a kick blow on the scrotum of the deceased because of which the deceased fell down on the floor of the room. He was removed by her under the cot and his mouth was gagged with *Dupatta* and thereafter the dead body was removed to *'Puja-ka-Rida'* with the help of accused Bhagi Rath and Sant Ram alias Niku, where his neck was tied with jute and plastic rope and hanged with *Chuin* tree. She also deposed that her bangles were broken and the pieces were scattered in the room. She got recovered the bangle pieces, under-shirt (*baniyan*), silver ear ring and a knife vide memo Ext. PW-8/A. She also signed the recovery memo. In her cross-examination, she deposed that the papers which were signed by her were neither read over to her nor has she herself gone through the contents of all the memos. The police had already written these papers and she was asked to sign the same lateron. She also admitted that the accused Surender Kaur had cordial relations with her husband so long he was alive.

16. PW-9 Const. Om Chand deposed that the accused Bhagi Rath made a disclosure statement Ext. PW-9/A that on 11.4.2008 at about 8-8:30 PM, he came to the house of deceased Jai Singh. Jai Singh was quarrelling with accused Surender Kaur and abusing her. Upon witnessing Bhagi Rath in his house, Jai Singh abused him also and Bhagi Rath gave a kick blow on the scrotum of deceased Jai Singh. Jai Singh fell down. Accused Surender Kaur brought a plastic and jute rope and tied the neck of Jai Singh. Before this, she gagged the mouth of the deceased Jai Singh with her *dupatta*. They both removed the dead body to *'Puja-ka-Rida'* with the aid of accused Sant Ram alias Niku. Similarly, accused Sant Ram also made a disclosure statement Ext. PW-9/B that he came to the house of accused on 11.4.2008 and removed the dead body of Jai Singh from his house to *'Puja-ka-Rida'* and placed him in a sitting posture. In his cross-examination, he could not tell the time at which these statements Ext. PW-9/A and PW-9/B were recorded. These statements were recorded when the accused were in police custody.

17. PW-10 Sarwan Kumar deposed that the accused Bhagi Rath and Sant Ram were in police custody and led the police party to the house of Jai Singh and then got identified the place *'Puja-ka-Rida'*. The identification memo Ext. PW-10/A was prepared.

18. Statements of PW-11 Const. Pawan Kumar, PW-12, HC Prakaram Singh, PW-13 Const. Khem Chand, PW-14 Const. Yashwant Singh, PW-15 Chhaju Ram, PW-16 Balwant Kumar, PW-17 HC Balak Ram, PW-18 HC Raj Kumar and PW-19 ASI Tulsi Ram are formal in nature.

19. PW-20 Bhupinder Singh Negi, Dy. S.P. has recorded the supplementary statement of witnesses Virender Singh and Jaya Devi vide memos Ext. PW-20/A and PW-20/B, respectively.

20. PW-21 Virender Kumar is the son of accused Surender Kaur. According to him, on 11.4.2008 at about 7:00 PM, in their house accused Sanjay and Surender Kaur were inside the room. His father Jai Singh came to the house. His mother told Sanjay to go out of the house to avoid quarrel. His father Jai Singh was hearing the conversation of the accused persons. Accused Sanju went outside the house and his father came inside the room. Accused Sanju again came inside the room and gave a kick blow on the side of the penis and his father fell down unconscious. His mother gagged the mouth of his father with *dupatta.* Accused Sanju hit his father with knife on umbilicus (*Nabhi*) and tied the neck of his father with rope. His father was put under the cot. He told this fact to his *Tai* (Aunt) after two days of the occurrence. His statement Ext. PW-21/A was recorded by ACJM, Sarkaghat. In his cross-examination, he deposed that his mother was arrested by the police on 11.4.2008 at about 5:00 PM. He also admitted that the whole of the incident, whatsoever he has seen, was narrated by him to his *Tai* Jaya Devi on 13.4.2008. He was taken to the Magistrate, Sarkaghat by his *Tai* Jaya Devi and her husband. He was tutored by his *Taya* (Uncle) and *Tai* (Aunt) Jaya Devi, to make a statement before the police and also before the Magistrate. He also admitted that he was not in speaking terms with his mother. He also admitted that after the death of his father, the whole of the property was in the possession of his *Tai* and her husband. He also admitted that the relations between his mother and father were cordial.

21. PW-22 SI Swaroop Kumar deposed the manner in which the report was received on 12.4.2008. He proceeded to the spot alongwith the photographer at 8:30 AM. He inspected the spot. Inquest reports Ext. PW-22/A and PW-22/B were prepared. The post mortem was got conducted. The accused Surinder Kaur was weeping and tried to flee away from the spot. She was apprehended with the help of local people. The statement of Devi Singh was recorded under Section 154 Cr.P.C. Pieces of bangles Ext. P-3 and knife Ext. P-4, *Baniyan* and silver ear ring Ext. P-2/A, were taken into possession vide memo Ext. PW-8/A. The sketch map of knife Ext. PW-8/D was separately prepared. In his cross-examination, he admitted that as per photographs, the ligature and its mark were high up on the neck as per Ext. PA, earlier mark D-1 and as per Ext. PB, earlier mark as D-2, the ligature on the back side of the neck was touching the hair below the occipital region. He also admitted that when he inspected the dead body and spot, no inside injury or any apparent injury was seen by him on umbilicus. The shirt which was worn by the deceased was having no cut mark on it. He recorded statement of Virender Kumar (minor) on 24.4.2008. The witness Virender Kumar has not disclosed to him in his statement that his father deceased Jai Singh was hit with knife. He was not aware. He brought minor Virender Kumar to the Court of ACJM, Sarkaghat. He also admitted that father-in-law of the accused Surinder Kaur was present on 11.4.2008 and 12.4.2008 in his house alongwith other family members.

22. According to the prosecution case, the relations between the deceased and accused Surinder Kaur were not cordial. However, it has come in

the statements of PW-6 Partap Singh and PW-7 Jagdish Chand that the relations between the deceased Jai Singh and accused Surinder Kaur were very cordial. PW-7 Jagdish Chand who has signed identification memo Ext. PW-7/A, has also deposed that there was no occasion for accused Surinder Kaur to commit murder of her husband. He has also deposed that the spot demarcation which was signed by him was Ext. PW-7/A. It was already in their knowledge on 12.4.2008 in the morning. PW-8 Paro Devi has also admitted that the relations between the deceased and accused Surinder Kaur were cordial. PW-8 Paro Devi in her cross-examination has categorically admitted that the papers which were signed by her were neither read over to her nor has she gone through the same. The police had already written those papers and she was asked to put her signatures on them lateron. PW-21 Virender Kumar son of the accused has also deposed that the relations between his father and mother were cordial.

23. PW-21 Virender Kumar is the sole eye witness of the incident. He was minor. His statement under Section 161 Cr.P.C. was recorded on 24.4.2008. According to his statement, accused Sanju has given kick blow on the private part of the deceased. His mother gagged the mouth of his father with *dupatta*. Accused Sanju went inside the room and gave knife blow on the stomach (belly) of his father. His father became unconscious. Accused Sanju tied the rope around the neck of his father. His father was placed below the bed. His statement was also recorded under Section 164 Cr.P.C. In his statement recorded under Section 164 Cr.P.C., he deposed that accused Sanju went inside the room and gave blow on the private part of his father. His father became unconscious. His father was made to sit in the corner. His mother gagged the mouth of his father with *duptta*. Accused Sanju gave knife blow on the umbilicus of his father. Thereafter, they tied the rope around the neck of his father and pulled him. The body was placed below the bed. In his statement recorded before the Court as PW-21, he has deposed that accused Sanju came inside the room and gave kick blow on the side of the penis of his father. His father became unconscious. His mother gagged the mouth of his father with *dupatta*. Accused Sanju hit his father with knife on umbilicus (*Nabhi*) and tied the neck of his father with rope. His father was put under the cot. In his statement recorded before the Court as PW-21, he does not say that his mother has tied the rope on the neck of his father and pushed him. He only deposed that his mother gagged the mouth with *dupatta* and accused Sanju hit his father with knife. Accused Sanju tied the neck of his father with rope.

24. The incident has taken place on 11.4.2008 and FIR was recorded on the statement of PW-3 Devi Singh. The accused Surinder Kaur was arrested on 12.4.2008. However, PW-21 Virender Kumar, in his cross-examination, has specifically deposed that his mother was arrested by the police on 11.4.2008 at about 5:00 PM. He is a child witness. He has specifically deposed that the whole of the property of his father was in the possession of his Aunt and her husband (Uncle). He was taken to the Court of Magistrate by his Aunt and Uncle. He has also admitted that he was tutored by his Aunt and Uncle to make the statement before the Police as well as the Magistrate. If the accused Surinder Kaur, according to PW-21 Virender Kumar was already arrested by the police on 11.4.2008, how she could be arrested again on 12.4.2008. PW-9 Const. Om Chand did not know by whom Ext. PW-9/A and Ext. PW-9/B were written. PW-10 Sarwan Kumar admitted in his cross-examination that when identification memo Ext. PW-10/A was prepared, the accused were already in the police custody.

25. PW-4 Gyano Devi is the neighbour of accused Surinder Kaur. According to this witness, she has not seen accused Bhagi Rath and Sant Ram in the house of accused Surinder Kaur in the evening of 11.4.2008. However, in her cross-examination, she admitted that accused Bhagi Rath and Sant Ram had come in the house of deceased and accused Surinder Kaur on 11.4.2008. According to her, minor verbal quarrel had taken place between accused Surinder Kaur and Jai Singh deceased, when Jai Singh had come to his house. According to her, the father-in-law of the accused Surinder Kaur was present in the house on 11.4.2008. He used to live with them. PW-22 Swaroop Kumar has also admitted in his cross-examination that father-in-law of the accused Surinder Kaur was present on 11.4.2008 and 12.4.2008 in the house during the intervening night alongwith other family members. The father-in-law of the accused Surinder Kaur has not been examined by the prosecution. He was a material witness. According to PW-21 Virender Kumar Sanjay Kumar accused has given a knife blow on the umbilicus of his father. Thereafter, his father became unconscious. According to PW-1 Dr. V.K.Sharma, there was only 2 x 2 cm rounded abrasion over umbilicus and brownish coloured. No blood had oozed from injury No. 2 as per Ext. PW-1/C. There was no patterned injury over the dead body. The knife recovered was oxidized. No blood was found on knife as per Ext. P-7 knife.

26. According to the prosecution witnesses, plastic and jute rope was used to tie the neck of the deceased. However, the police has only sent two pieces of jute rope for chemical examination, as per FSL report Ext. PW-22/J. No human blood was found on Ext.-6 (rope), as per Ext. PW-22/H, report of the FSL.

27. The most material witness in the present case is PW-1 Dr. V.K. Sharma. He has issued post mortem report Ext. PW-1/C. According to this witness, the cause of death of the deceased was due to strangulation which resulted in asphyxia leading to cardio-respiratory failure. He has admitted in his cross-examination that the photographs were not shown to him at the time of conducting the post mortem. The shoe, with which the injury was stated to have been inflicted, was also not shown to him before conducting the post mortem. He admitted further in his cross-examination that as per photograph Mark D-1, the ligature was high up in the neck. In photograph Mark D-2, the ligature was touching the hair on the back side of the neck. The ligature was touching the occipital region. He further admitted specifically that thyroid cartilage may or may not break in the case of hanging and strangulation. PW-16 Balwant Kumar, has admitted in his cross-examination that ligature mark in Ext. PA, Ext. PB, Ext. PX and Ext. PC, PD was high up in the neck and no ligature mark was seen by him around the neck. In the case of strangulation, the ligature mark should be around the neck and lower down in the neck below thyroid. According to PW-16 Balwant Kumar, he has not seen ligature mark around neck. According to PW-1 Dr. V.K.Sharma, ligature mark was all around the neck but not oblique.

28. PW-22 SI Swaroop Kumar has also admitted that as per the photographs, the ligature and its marks were high up in neck as per Ext. PA. The ligature on the back side of neck was touching hair below the occipital region. In case, accused Sanju had given knife blow, there was bound to be cut in the shirt of the deceased. According to this witness, the shirt which was worn by the deceased was having no cut mark on it. He also admitted that no inside injury or apparent injury was seen by him on umbilicus chord. PW-1 Dr. V.K. Sharma, has not noticed any blood oozing from the nose, mouth and ears of the deceased while conducting the post mortem. In case there had been

strangulation, as per the case of the prosecution, there was bound to be fracture of larynx trachea and hyoid bone. According to PW-1, Dr. V.K. Sharma, he has not noticed any fracture of thyroid cartilages and hyoid bone. The ligature was also high on the neck as per Ext. PW-1/C and statements of PW-1 Dr. V.K. Sharma and PW-22 Swaroop Kumar. Thus, the prosecution case that the deceased was strangulated is not free from doubt.

29. The disclosure statements, the manner in which the steel clip, broken bangles and knife were recovered from the spot and spot identified, do not inspire confidence. PW-2 Mahant Ram has admitted that he has never seen the accused Surinder Kaur wearing the steel clip Ext. P-1. PW-5 Dharam Chand has also admitted in his cross-examination that the house from where the articles were recovered was already open before their arrival. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

30. Accordingly, the appeals are allowed. The judgment of conviction and sentence dated 29.6.2009 rendered by learned Presiding Officer, Fast Track Court, Mandi, H.P. in Sessions Trial No. 31 of 2008 is set aside. The accused are acquitted of the charges framed under Sections 302, 201, 120B IPC read with Section 34 IPC by giving them benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

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

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

Ses Ram. ...Petitioner.
Versus
Reeta Bhardwaj. ...Respondent.

Cr.A. No. 266/2014
Reserved on: 1.12.2014
Decided on: 3.12. 2014

Negotiable Instruments Act, 1881- Section 138- Complainant had advanced an amount of Rs. 2 lacs to the accused- accused issued a cheque which was dishonoured due to insufficient fund on presentation- it has come in evidence that agreement was entered between the complainant and the husband of the accused- agreement was subsequently cancelled- cross-examination of the complainant showed that he did not know the accused- therefore, he had no occasion to advance the loan of Rs. 2 lacs to unknown person- held, that complainant had failed to prove that cheque was issued in discharge of any lawful authority- accused acquitted. (Para- 6 to 7)

For the Petitioner: Mr. Sunil Mohan Goel, Advocate.
For the Respondent: Mr. C.N. Singh, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is directed against the judgment dated 27.3.2014 rendered by the Special Judicial Magistrate, Kullu in Criminal Complaint No. 166-1/2011/33-1/2013.

2. "Key facts" necessary for the disposal of this appeal are that appellant filed a complaint against the respondent under section 138 of the Negotiable Instruments Act, 1881. According to the appellant, respondent has borrowed a sum of Rs. two lakhs from him. Respondent issued a cheque on 28.2.2011 bearing No.083767 amounting to Rs.two lakhs drawn on Dhalpur Branch of the State Bank of India. The cheque was presented to the bank for encashment on 3.3.2011. It was dishonoured by the bank on account of "insufficient funds". A legal notice was issued to the respondent on 4.3.2011. The trial court took cognizance of the matter vide order dated 13.7.2011. The substance of accusation was served upon the respondent on 30.4.2012. She pleaded not guilty and claimed trial.

3. The appellant has appeared as CW-1. He has tendered his evidence by way of Ex.CA. He has reiterated the stand taken in the complaint in Ex.CA. The appellant has placed on record Ex.C-1 to Ex.C-4. He was cross-examined. He did not know that the respondent was resident of Gandhi Nagar. He did not know from where she has obtained education. He did not know about the native place of respondent. He did not know about the house of respondent. He did not know about the occupation of the respondent. According to him, husband of the respondent may be employed as Junior Engineer in I.P.H. He did not know about the children of the respondent. He did not know whether the parents of Parveen Bhardwaj were alive or not. He has entered into agreement with Parveen Bhardwaj to sell the land. The agreement was cancelled subsequently. He did not know about the consideration of sale. Volunteered that the agreement was entered for consideration of Rs. twelve lakhs on 28.1.2011. He did not remember that he has taken advance of Rs.one lakh on 28.1.2011 and he has also accepted cheque from the wife of Parveen Kumar on 28.2.2011. The balance amount was to be received on 30.3.2011 after the registration. He has issued notice to Parveen Kumar. Thereafter, the agreement was cancelled.

4. CW-2 Shiv Chand has deposed that cheque Ex. C-1 had come to his bank for encashment.

5. Respondent has produced copy of agreement dated 28.1.2011 marked as DA.

6. Case of the appellant, in a nutshell, is that he had advanced a sum of Rs.two lakhs to the respondent by way of loan. However, it has come on record that an agreement was entered into between the appellant and husband of the respondent. A sum of Rs. one lakh was received by the appellant. The agreement was cancelled. The appellant has not led any evidence that he has advanced loan to the respondent. It is evident from the tone and tenor of the cross-examination of the appellant that he did not know respondent. Thus, there was no occasion for him to advance loan of Rs. two lakhs to a unknown person. Rather, the appellant has admitted that an agreement was entered into between the parties to sell the land vide agreement dated 28.1.2011. The appellant has failed to make out a case against the respondent that the cheque in question was issued by her in discharge of any lawful liability. The sale deed

was to be executed on 30.3.2011. However, before that an agreement was cancelled.

7. Accordingly, 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 TARLOK SINGH CHAUHAN, J.

Smt. Sudha Bhargava .....Petitioner.
Versus
Smt.Manju Sharma .....Respondent.

Civil Revision No.36 of 2014.
Reserved on: 27.11.2014.
Date of decision: 03.12.2014.

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Landlady filed an Eviction petition on the ground of arrears of rent- respondent denied that she was inducted as tenant or was in occupation of the premises- Rent Controller allowed the Petition- the Appellate Authority held in appeal that respondent was not a tenant but was a lessee- held, that once respondent had disputed the jural relationship of landlord and tenant, the Appellate Authority could not have conferred the status of lessee upon the respondent- respondent being in possession could not have denied the title of the landlady- Rent Controller should have simply recorded the statement of the respondent on oath and should have passed conditional order of eviction that in case respondent is found to be in possession, she would be evicted forthwith- when the Court had found respondent to be in possession, she is liable to be evicted and to pay the use and occupation charges. (Para-8, 10 and 12)

Case referred:
Kamaljit Singh versus Sarabjit Singh JT 2014 (10) SC 134

For the Petitioner : Mr.Bhupender Gupta, Senior Advocate with Mr.Janesh Gupta, Advocate.
For the Respondent : None

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner has filed this revision under Section 24(5) of the H.P. Urban Rent Control Act, 1987, (for short 'Act') against the order dated 21.12.2013 passed by learned District Judge, Shimla, in Rent Appeal RBT No. 103-S/14 of 2013/10 for setting aside the same, whereby he reversed the order of eviction dated 19.12.2009 passed by learned Rent Controller-II, Shimla, in Rent Application No.63-2 of 2008.

The facts, in brief, may be noticed.

2. Petitioner Sudha Bhargava had filed eviction petition under Section 14 of the H.P. Urban Rent Control Act, 1987 pleading therein that the premises was let out to the respondent on 10.03.2002 on rent at the rate of Rs.1750/- per month. It is averred that the premises in question is non-residential in nature situate in G-7 G.L.Bhargava Shopping Complex, Bhargava Estate, Tutikandi, Shimla and electricity facility has been provided in the premises in question. It is further averred that the respondent has not paid the rent with effect from 01.05.2005 and is liable to pay 10% increase in rent to the tune of Rs.1750/- with effect from 01.04.2007. Eviction of the respondent was sought on the ground of arrears of rent.

3. The respondent resisted the application by filing reply and averred that she was neither inducted as tenant nor was in occupation of the premises and, therefore, the question of arrears of rent does not arise and prayer for dismissal of eviction petition was made.

4. On the pleadings of the parties, the following issues were framed by the learned Rent Controller on 25.02.2009:-

1. Whether the respondent is in arrears of rent since 1.5.2005, as prayed for ?OPA.
2. Whether the respondent is not the tenant of the applicant? OPR.
3. Relief.

5. The learned Rent Controller answered both the issues in favour of the landlord-petitioner vide his order dated 19.12.2009. The respondent approached the learned appellate Authority by filing an appeal under Section 24 of the Act, who while reversing the aforesaid order passed by the learned Rent Controller, held that the respondent was not a tenant, but was infact a lessee and, therefore, the Transfer of Property Act, 1882, would over-ride the provisions of H.P. Urban Rent Control Act, 1987.

6. It is argued by the learned counsel for the petitioner that the findings recorded by the learned appellate Authority are not at all sustainable as the same carve out an entirely different case in favour of the respondent. He further claimed that the concept of lessor and lessee and landlord and petitioner have been misunderstood by the learned appellate Authority and, therefore, the order passed by the learned appellate Authority is not sustainable in the eyes of law.

I have heard the learned counsel for the petitioner and gone through the records.

7. The landlord has sought eviction of the respondent on the ground of arrears of rent along with interest. In reply to the petition, it was claimed by the respondent that she does not know the petitioner and she was never inducted as a tenant by the petitioner. Not only this, she even denied being in possession of the premises.

8. Once the respondent disputed the jural relationship of landlord and tenant between the parties then where was the question of the learned appellate Authority conferring the status of lessee upon the respondent. If the respondent was in possession of the premises, was she not estopped from denying the title of the petitioner during the continuance of the benefit that she had been drawing under the transaction.

9. It is a trite that the doctrine of estoppel is steeped in the principles of equity and good conscience and equity will not allow a person to say one thing at one time and the opposite of it another time. A similar question came up for consideration before the Hon'ble Supreme Court in ***Kamaljit Singh*** *versus* ***Sarabjit Singh JT 2014 (10) SC 134*** wherein it was held as under;

> ***"11.....The respondent would then be estopped from denying the title of the appellant during the continuance of the benefit that he is drawing under the transaction, between him and the appellant. It is trite that the doctrine of estoppel is steeped in the principles of equity and good conscience. Equity will not allow a person to say one thing at one time and the opposite of it another time. It would estop him from denying his previous assertion, act, conduct or representation to say something contrary to what was implied in the transaction under which he obtained the benefit of being let in possession of the property to be enjoyed by him as a tenant.***
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> ***12. Lord Edward Coke, Chief Justice of the Kings Bench and 17th Century English Jurist explains estoppel thus:***
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> > ***" Cometh of the French Word 'estoupe', from where the English word stopped; and it is called an estoppels or conclusion, because a man's own act or acceptance stoppeth or closet up his mouth to allege or plead the truth." [Co. Litt. 352a]***
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> ***13. Law Lexicon (Second Edition, Page 656) defines estoppel in the following words:***
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> > ***"An Estoppel is an admission, or something which the law treats as an equivalent to an admission, of so high and conclusive a nature that any one who is affected by it is not permitted to contradict it." [11th Edn p. 744 in the note to the Dutchess of Kingston's case]***
> >
> > ***"An admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted to be questioned by the parties or their privies."***
> >
> > ***"The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part, or on the part of those under whom he claims."***
>
> ***14. Black's Law Dictionary (9th Edn., page 629) describes Estoppel as :***
>
> > ***"A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true."***
>
> ***15. Section 116 of the Evidence Act deals with estoppel against tenants and of licensees or persons in possession. Estoppel under this provision falls in the category of estoppel by contract and is relatively a recent development. The rule embodied in Section 116 simply prevents the tenant in occupation of the premises from denying the title of the landlord who let him into possession, just as it applies to a mortgagor or a mortgagee, vendor or a vendee, bailer or a bailee and licensor or a licensee. The rationale underlying the doctrine of estoppel against the tenant's denial of***

title of his landlord was stated by Jessel. M.R. in Re: Stringer's Estate, [LR Ch 9] as under:

> ***"Where a man having no title obtains possession of land under a demise by a man in possession who assumes to give him a title as tenant, he cannot deny his landlord's title. This is perfectly intelligible doctrine. He took possession under a contract to pay rent so long as he held possession under the landlord, and to give it up at the end of the term to the landlord, and having taken it in that way he is not allowed to say that the man whose title he admits and under whose title he took possession has not a title. That is a well-established doctrine. That is estoppel by contract."***

16. There is considerable authority for the proposition both in India as well as in U.K. that a tenant in possession of the property cannot deny the title of the landlord. But if he wishes to do so he must first surrender the possession of the property back to him. He cannot, while enjoying the benefit conferred upon him by the benefactor, question latter's title to the property. Section 116 clearly lends itself to that interpretation when it says:

> ***"116. Estoppel of tenant; and of licensee of person in possession.—No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given."***

17.A three-Judge of this Court in Sri Ram Pasricha v. Jagannath and Ors. [1976 (4) SCC 184] reiterated the principle that a tenant in a suit for possession was estopped from questioning the title of the landlord under Section 116 of the Evidence Act. The title of the landlord, declared this Court, even otherwise irrelevant in a suit for eviction of the tenant. The only exception to the rule of estoppel as stated in Section 116 (supra) may be where the tenant is validly attorned to the paramount title holder of the property or where that the plaintiff-landlord had, during the intervening period, lost his title to the property....."

10. Taking into consideration the nature of defence set up by the respondent, the learned Rent Controller, to my mind, should have simply recorded her statement on oath and then proceeded to have passed a conditional order of eviction that in case the respondent is found in possession of the disputed premises, she be evicted forthwith. There was no question of having put the parties to undergo the agony of protracted trial.

11. Now, the further question which arises for determination is as to whether the learned Rent Controller could have conferred upon respondent the status of a tenant under the Act in view of the specific defence of the respondent. I am afraid that since this was not the case set up even by the respondent herself, the status of either tenant or lessee could not have been conferred upon the respondent. Tenant and lessee are not just mere words, but

have definite meanings and connotations under the law. This status could not have been conferred by the Court of its own when the specific plea of the respondent was to the effect that :-

i) she is not a tenant;

ii) petitioner is not the landlord;

iii) she is not in occupation of the premises in dispute.

12. Though the learned Courts below have found the respondent to be in possession of the premises, but taking into consideration the nature of defence set up by the respondent, she could neither be termed to be a tenant nor lessee and therefore her possession cannot be protected. But nonetheless, she is liable to pay user and occupation charges and, therefore, no fault can be found with the order passed by the learned Rent Controller. On the other hand, the order passed by the learned appellate Authority is liable to be set aside as it has dismissed the petition solely on the ground that the respondent is a lessee over the premises in dispute and, therefore, governed under the provisions of the Transfer of Property Act, 1882 and not under the provisions of H.P. Urban Rent Control Act, 1987. Once the respondent herself claims to be not the tenant of the petitioner nor she recognizes the petitioner as her landlord and lastly claims herself to be not in possession of the disputed premises, then, the appellate Authority of its own could not have conferred the status of lessee upon the respondent.

13. In view of the foregoing discussion, the order passed by the learned appellate Authority is set aside, as a result whereof, the order passed by the learned Rent Controller is upheld, though for a different reason.

14. Accordingly, the petition is allowed in the aforesaid terms.

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

Hari Ram .....Appellant.
Versus
Tarlok Chand .....Respondent.

RSA No. 160 of 2003.
Reserved on: 25.11.2014.
Decided on: 4.12.2014.

Transfer of Property Act, 1882-Section 122- Plaintiff claimed that she was an illiterate lady with rural background- defendant, being the son of her brother residing with her, persuaded her to execute a 'Will' in his favour- instead the defendant got executed a gift deed in his favour- defendant never intended to execute a gift deed- hence, she prayed that gift deed be set aside- the gift deed was executed on 18.7.1994- an Ikrarnama was also executed vide which defendant agreed to pay maintenance @ Rs. 100/- per month- no explanation was given for executing Ikrarnama- no receipt was produced to show that defendant was paying Rs. 100/- per month- defendant failed to prove that gift deed was a result of fraud, mis-representation and undue influence- when the deed was executed by illiterate lady, the burden of proving that

transaction was free and fair would be upon the beneficiaries.
(Para-11 to 21)

Cases referred:

Vithal vrs. Narayan, reported in AIR 1931 Nagpur 69

Sayed Zawar Hussain Shah and another vrs. Mian Saleh Mohammad Shah, reported in AIR 1940 Lahore 515

Mt. Sunder Kuer vrs. Shah Udey Ram and others, reported in AIR (31) 1944 Allahabad 42

Bhola Ram Lieri and ors. vrs. Peari Devi and ors. reported in AIR 1962 Patna 168

Afsar Shaikh and another vrs. Soleman Bibi and ors., reported in AIR 1976 SC 163

Ajmer Singh and ors. vrs. Atma Singh, reported in AIR 1985 Punjab and Haryana 315

For the appellant: Mr. Rajnish K. Lall, Advocate vice counsel.

For the respondent: Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Hamirpur, dated 6.1.2003, passed in Civil Appeal No. 54 of 1995.

2. Key facts, necessary for the adjudication of this regular second appeal are that the predecessor-in-interest of the respondent-plaintiff (hereinafter referred to as the plaintiff, for the convenience sake), Jayanti Devi instituted a suit for possession and declaration against the appellant-defendant (hereinafter referred to as the defendant). According to the plaintiff, she was owner to the extent of 8/27 share of land comprised in Khasra Nos. 28, 39, 41, 157, 169, 170 & 174 measuring 7 kanals 15 marlas. She was also co-owner to the extent of half share of land comprised in Khasra No. 4, as per entries of the *Jamabandi* for the year 1981-82. She was an illiterate lady with rural background. The defendant was son of her brother. He started living with her and after some time, he persuaded her to execute a 'Will' of the suit land in his favour. Since she was very much influenced by the defendant, she agreed to execute a 'Will' in his favour. She never intended to execute the *gift deed* of the suit land in his favour. The defendant instead of getting the 'Will' executed, fraudulently, by misrepresenting the facts, exercised undue influence upon her and got the *gift deed* Ext. DW-1/A dated 18.7.1984, executed in his favour. The defendant has never rendered any services as mentioned in the alleged *gift deed*. She also alternatively prayed for maintenance @ Rs. 200/- per month from 18.7.1984 till her death.

3. The suit was contested by the defendant. The defendant has denied the averments contained in the plaint. According to him, the gift deed was genuine document and no fraud, undue influence or mis-representation has been exercised upon the executrix, as alleged. The replication was filed by the plaintiff. The learned Sub Judge Ist Class, Hamirpur, framed the issues on 8.6.1989. The learned Sub Judge Ist Class, Hamirpur, decreed the suit on

20.1.1995 in favour of the plaintiff. The defendant preferred an appeal before the learned District Judge, Hamirpur. The learned District Judge, Hamirpur dismissed the same on 6.1.2003. Hence, this regular second appeal.

4. This regular second appeal was admitted on the following substantial question of law on 28.4.2003:

> "1. Whether both the Courts below have misread and mis-appreciated the oral and documentary evidence on record, more specifically, Exts. DW-1/A, endorsement DW-1/B and the agreement DW-1/C to come to the conclusion that gift was the result of undue influence, misrepresentation and fraud in order to reject the same?"

5. Mr. Rajnish K. Lall, Advocate, on the basis of substantial question of law framed, has vehemently argued that both the Courts below have misread and misconstrued Ext. DW-1/A *gift deed*, endorsement Ext. DW-1/B and agreement Ext. DW-1/C. According to him, the gift was genuine. His client has not exercised any undue influence upon the plaintiff. On the other hand, Mr. Bhupinder Gupta, Sr. Advocate, has supported the judgments and decrees passed by both the Courts below.

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

7. The gift deed is Ext. DW-1/A dated 18.7.1984. *Ikrarnama*/Agreement is Ext. DW-1/C dated 18.7.1984. The endorsement is Ext. DW-1/B on Ext. DW-1/A. The copy of the *Jamabandi* is for the year 1981-82. According to the plaintiff *gift deed* Ext. DW-1/A was the result of fraud, mis-representation and undue influence and thus not binding upon the plaintiff.

8. The plaintiff has appeared as PW-1. According to the plaintiff, the defendant was her nephew. He stayed with her for six months. He asked and persuaded her to execute a 'Will' in his favour. He managed the execution of the 'Will' at Nadaun and treated her nicely for three months. Thereafter, he started taking the produce of the suit land to his house and on seeing all this, she objected to it. On this, the wife of the defendant quarreled with her and even broke her forearm. Not only this, the defendant also proclaimed that she had already transferred the land in his favour and as such, she had nothing to do with it.

9. PW-2 Punnu Ram deposed that defendant and his wife started living with the plaintiff rendering all kind of services to her. After six months, she was taken by him to Nadaun and asked her to execute the 'Will' of the suit land. She executed the 'Will' and the defendant is now cultivating the land in question. Later on, the dispute arose in between the parties and the plaintiff came to him and represented that the defendant was now threatening her. She was now maintaining herself by begging. PW-3 Roshan Lal deposed that the plaintiff used to reside in her own house and maintaining herself because the defendant used to render services to her about two years back.

10. The defendant has appeared as DW-1. According to him, the plaintiff executed *gift deed* on 18.7.1984 in his favour which was scribed by DW-2 Deep Kumar, Petition Writer. It was signed by the marginal witnesses Sh. R.D.Kaundal and Ishwar Dass. He proved copy of the *gift deed* vide Ext. DW-1/A. The *gift deed* was presented before the Tehsildar for registration. The Tehsildar/Sub-Registrar, read over the contents of the *gift deed* to the plaintiff, who after admitting its contents to be correct put her thumb impression on the same. Thereafter, *Ikrarnama* Ext. DW-1/C was also executed, vide which, he

agreed to pay maintenance at the rate of Rs. 100/- per month to the plaintiff. DW-2 Deep Kumar Petition Writer deposed that he scribed *gift deed* Ext. DW-1/A. Jayanti Devi put her thumb impression on the same after admitting the contents of the same to be correct and marginal witnesses also signed the *gift deed*. DW-3 Ishwar Dass was the marginal witness of the *gift deed* Ext. DW-1/A. He also signed *Ikrarnama* Ext. DW-1/C. DW-4 Mahender Singh deposed that he has scribed DW-1/C. DW-5 Rup Lal testified that on the date of execution of the *gift deed*, he was also taken to Tehsil Office because plaintiff was his sister and when he reached the Tehsil Office, the Petition Writer had already scribed the *gift deed* Ext. DW-1/A. He was reading its contents to the executrix-plaintiff. He intervened and asked as to what has been thought about the future of the plaintiff. He suggested to execute *Ikrarnama* to pay maintenance @ Rs. 100/- per month to the plaintiff by the defendant. Thereafter *Ikrarnama* Ext. DW-1/C was executed. DW-6 Pirthi Chand testified that plaintiff never made any complaint with him as to whether the defendant was not rendering any services to her. DW-7 Ram Dass Kaundal is also one of the marginal witnesses of the *gift deed*. He testified that plaintiff put her thumb impression in *gift deed* after admitting its contents to be correct.

11. The plaintiff was illiterate widow lady. The precise case of the plaintiff, is that the defendant persuaded her to execute 'Will' in his favour. However, the defendant cleverly got the *gift deed* executed from her vide Ext. DW-1/A. The *gift deed* is dated 18.7.1984 and the *Ikrarnama* Ext. DW-1/C was executed vide which defendant agreed to pay maintenance to the plaintiff @ Rs. 100/- per month. Once the gift deed was executed as per the defendant, there was no occasion for him to execute *Ikrarnama* Ext. DW-1/C, whereby he agreed to pay Rs. 100/- per month to the plaintiff. He could not explain the circumstances under which *Ikrarnama* Ext. DW-1/C was executed. He could not produce the receipt to the effect that he was regularly paying the amount of maintenance to plaintiff @ Rs. 100/- per month. DW-2 Deep Kumar, Petition Writer has admitted that plaintiff was an illiterate lady. DW-3 Ishwar Dass has signed Ext. DW-1/A and Ext. DW-1/C. He also admitted that the plaintiff was under the influence of defendant. He also admitted that defendant remained a '*Ward Panch*' with him in his Panchayat. He also admitted that the plaintiff had taken him for executing the 'Will'. However, afterwards, he changed his version and stated that he was brought by the plaintiff for the execution of *gift deed*. DW-4 Mahender Singh has scribed *Ikrarnama* Ext. DW-1/C. He could not explain as to what was the necessity to execute *Ikrarnama* by defendant. DW-5 Rup Lal testified, as noticed above, that he had gone to Tehsil. *Gift deed* was being written. He intervened and suggested to execute *Ikrarnama* in favour of the plaintiff to pay maintenance @ 100/- per month by the defendant. DW-6 Prithi Chand has admitted that defendant remained Vice President of the Panchayat. DW-3 Ishwar Dass was the President. PW-7 Ram Dass is not resident of the village of the plaintiff. His village is at a distance of 6 km. from the village of the plaintiff. He remained counsel of the defendant.

12. The defendant has failed to produce tangible evidence to establish that *gift deed* Ext. DW-1/A dated 18.7.1984 was not the outcome of undue influence, fraud or mis-representation. Mr. Bhupinder Gupta, Sr. Advocate, has also drawn the attention of the Court to Ext. P-1 *Jamabandi* for the year 1981-82. It is not discernable from the entry in Ext. P-1 that it was attested and signed in the presence of plaintiff. The defendant has not even placed on record mutation order or certified copy thereof. The defendant was living with plaintiff. He was in a position to dominate her will. It is in these circumstances, he has

got the *gift deed* dated 18.7.1984, executed from her in his favour. The plaintiff was looking after herself.

13. In the case of ***Vithal vrs. Narayan,*** reported in ***AIR 1931 Nagpur 69,*** the Hon'ble Court held that even where it is not proved that the lady donor is not a strict pardanashin woman in the sense necessary to attract the application of the rule that protects pardanashin women, still when it is established that a transferee is in the active confidence of the transferor, Section 111, applies.

14. In the case of ***Sayed Zawar Hussain Shah and another vrs. Mian Saleh Mohammad Shah,*** reported in ***AIR 1940 Lahore 515,*** the Division Bench has held that when a gift is made by pardanashin lady, the donee must prove that donor had independent advice and that she understood the deed.

15. In the case of ***Mt. Sunder Kuer vrs. Shah Udey Ram and others,*** reported in ***AIR (31) 1944 Allahabad 42,*** the Division Bench has held that when the pardanashin lady is to transaction, onus is on person relying on transaction to prove that it was free and intelligent act of the lady.

16. In the case of ***Bhola Ram Lieri and ors. vrs. Peari Devi and ors.*** reported in ***AIR 1962 Patna 168,*** the Division Bench has explained the undue influence to mean that the party is in dominating position. It is further held that where a party challenges a deed of gift as bad on the grounds of its having been executed under undue influence, he must prove firstly, that there was a special relationship between the donor and the donees on account of which the former relied upon the latter for advice and the latter were in a position to dominate the will of the former in giving the advice; and secondly, that the donees used that position to obtain an unfair advantage for themselves. Their lordships have held as under:

> "7. The first contention of Mr. Das was that the deed of gift was bad inasmuch as it was executed by Sheodutt under undue influence. He referred to the following observations of Lindley, L. J. (see Allcard v. Skinner, (1887) 36 Ch. D. 145 at p. 181) and submitted that the present case was covered by the second proposition laid down by the learned Lord Justice;
>
> "First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor.....
>
> The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to show that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made".
>
> But our law on the subject is slightly different as will appear from the definition of "undue influence" in Section 16 of the Indian Contract Act, which reads thus:

"16 (1) A contract is said to be induced by 'Undue Influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another-

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, On the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of Section 111 of the Indian Evidence Act (I of 1872)".

It will be noticed that the ingredient of using the dominant position contained in Sub-section (1) is absent from the proposition laid down by Lindley, L. J. In Poosathurai v. Kannappa Chettiar, 47 Ind App 1: (AIR 1920 PC 65) the Privy Council explained the provisions o Section 16 of the Indian Contract Act thus:

"When a party to a contract seeks to set it aside on the ground of undue influence, it is not sufficient for him under Section 16 of the Indian Contract Act, 1872, to establish that the other party was in a position to dominate his will. He must also prove that the other party has used that position to obtain an unfair advantage over him. It is only if the transaction appears to be unconscionable that, by Sub-section (3), the burden of proving that the contract was not induced by undue influence is thrown upon the person who was in a dominating position. He, in that case must prove affirmatively that no domination was practised, but that the person seeking to set aside the contract was scrupulously kept separately advised in the independence of a free agent".

The appellants in the present case must, therefore, prove, firstly, that there was a special relationship between Sheodutt and the donees on account of which the former naturally relied upon the latter for advice and the latter were in a position to dominate the will of the former in giving the advice; and, secondly, that the donees used that position to obtain an unfair advantage for "themselves. But if the appellants prove that the donees were in a position to dominate the will of Sheodutt and that the transaction appeared to be unconscionable the onus will be shifted on the donees to show that Sheodutt was not induced to make the gift by undue influence and he had the opportunity to obtain independent advice before making the gift. Mr. Das also relied in Section 111 of the Indian Evidence Act which reads thus:

"Where there is a question as to the good faith, of a transaction between parties, one of whom stands to the other in a position of active confidence the burden of proving good faith of the transaction is on the party who is in a position of active confidence".

In other words, if the appellants prove in the present case that the donees were in a position of advantage over Sheodutt, who put trust in them, the onus is shifted on the donees to prove that they did not abuse that trust.

8. Mr. Das has referred to certain admitted facts to show that the donees were in a position to dominate the will of Sheodutt. As stated earlier, the donees are Peary Devi (plaintiff No. 1), wife of Harihar Prasad, (plaintiff No. 3), son of the sala of Sheodutt, and Janki Devi (plaintiff No. 2), wife of Durga Prasad (plaintiff No. 4), who is the son of Peary Devi, daughter's daughter of Sheodutt. Harihar (P. W. 5) has stated that he was brought up by Sheodutt at his house and Durga was brought up by Sheodutt after the death of his mother in his infancy. He has explained this fact further in cross-examination, where he says that each of them was brought at the age of one year by Sheodutt to his house. Both of them were married by Sheodutt. He has, of course, stated that Durga's father took Durga to Asansol when he was ten years old and since 1948 or thereabout Durga has been living in Calcutta in connection with a business. But he has admitted that the wife of Durga lived with Sheodutt and she still lives in a portion of the gifted house.

Prahlad Modi (P.W. 1), Chairman of Madhupur Municipality, stated that Harihar and Durga were living with 'Sheodult since their boyhood and they were living with Sheodutt with their wives. Even in the deed of gift (Ext. A) dated the 5th June 1948, the executant, Sheodutt, has said that he brought Harihar and Durga in their infancy and since then he and his wife had been maintaining them as their sons. Then he states that he got them married and since the marriage the wives of both of them, that is, the donees, had been serving and taking care of Sheodutt and his wife; and out of boundless love and affection for them he was making this gift. None of the contents of the deed of gift were disputed. Harihar has further said that Sheodutt had a business of potatoes which was looked after by him (Harihar), as Sheodutt had grown old. According to Harihar, Sheodutt died at the age of 80 years, three years after the deed of gift and, according to the deed of gift, the executant, Sheodutt was about 75 years old in 1948 and he had grown very old and felt helpless in walking.

The other plaintiffs have not been examined. Dwarka Prasad Sahu (D. W. 2), a neighbour, said that Sheodult died at a very old age and during his illness he used to lose the balance of his mind and to talk incoherently. The deposing defendant, Ramsaran Prasad, has stated that Sheodutt had become blind about eight years before his death and had lost the balance of life mind. But Ramautar Sah (P. W. 2), another neighbour, and Harihar have denied the fact that Sheodutt had lost his eye-sight or his power of understanding. The recitals in the deed of gift and the statements of Harihar and Prahlad prove, however, that (1) Sheodutt was so old at the time he executed the deed of gift that he felt helpless in walking, (2) he brought Harihar and Durga since their childhood, married them and maintained them as well as their wives, (3) Sheodutt had boundless affection for all of them, and (4) his business was being looked after by Harihar. Thus, they were in a position to dominate the will of Sheodutt.

10. The other admitted facts in support of Mr. Das's contention are: (1) the gift was made in favour of Peary Devi, who could never inherit the property of Sheodutt even though her husband Harihar, and Janki Devi who was a distant heir, (2) the deed of gift was unnatural inasmuch as Sheodutt excluded his natural heirs, namely, his wife and thereafter the defendants-appellants and (3) by executing the deed of gift Sheodutt

placed himself and his wife at the mercy of the donees inasmuch as he did not keep any property for himself. Incidentally, it may be mentioned that in 1936 Sheodutt had executed a will in which he made some provision for his wife as well. This will was in favour of Harihar, Durga, Harikishun (Harihar's brother), Musammat Rukmini Kumar (mother of Harihar), Srimati Gujari (mother of Durga) and Musamat Rabutari (wife of Sheodutt). The two holdings were given by this will to the first four persons; but it was further stated that Musammat Kabutari and Srimati Gujari would be entitled to live in one of the houses during their life-time and that Harihar and Durga woufd be bound to maintain them.

Further, these two ladies were amongst the executrix of the will and were required to look after the properties so long Murikishun, Harihar and Durga did not attain majority. The will would, however, have no effect, if the gift were a valid and effective transaction and there would be no provision for Sheodutt's wife or Musammat Gujari. It follows therefore that the plaintiffs were in a position to dominate the will of Sheodutt and, inasmuch as the transaction was unconscionable, the plaintiffs have to satisfy the court that they did not abuse their position and that the deed of gift was not brought about by any undue influence on their part. In such a case, the donee must show that the donor had independent advice and was removed from the influence of the donee when the gift was made. But the plaintiffs did not adduce, any evidence to show that Sheodutt received any independent advice before executing the deed of gift; and even Harihar, the only plaintiff, who gave evidence, did not state that no undue influence was exerted on Sheodutt at the time.

The donor's wife, namely Musammat Kabutari, was not examined in court, though she filed a written statement in support of the case of the plaintiff; but any statement, in the absence of her statement on oath, is of no use to the plaintiffs in the eye of law. The scribe of the deed of gift, namely Sailjanand Prasad and two of the three attesting witnesses namely, Amvar Alt and Murli-dhar Sah both of Madunpur were not examined. The third attesting witness, Ramaular Sah (P. W. 2) in cross-examination did not say that Sheodutt received any independent advice or that he was for the time being removed from the influence of the, plaintiffs. His statement that the contents of the deed of gift were read over and explained to Sheodutt before be signed the same does not mean that he received independent advice. It is also remarkable that the deed was registered at the house of Sheodutt. Plaintiff Harihar has said that he had left the house after the arrival of the sub-registrar to call Ramantar Sah from the bazar and after calling him he had again left for bazar on some business. There is no evidence however, to show that the donees were not inside the house at the time or that Sheodutt received any independent advice.

Mr. Kaushai Kishore Sinha, learned advocate for the plaintiffs-respondents contended that there is no evidence to show that the donees or even Durga, husband of one of the donees, dominated the will of Sheodutt; and a distinction must be made between the donees and their husbands. But on account of the fact that the donees were living with Sheodutta since their marriage and that Sheodutt had boundless affection and love for them and their husbands, it was very easy for them to dominate the will of Sheodutt in his old age when he was even helpless in his walking and he was not in a position to exercise his independent judgment due to his dotage for them. It appears that Durga was not at

Madupur at the time the deed o[gift was executed, but his wife was there. Of course, Harihar and Durga were themselves legatees under the will executed in February 1936 and they were not donees under the deed of gift, which came into existence about twelve years later; but under the wilt Durga and Harihar got only one house and Harikishun and Rukmini Kumari got the other home, subject to certain rights given to Musammat Kabutari and Gujari Kumari, while under the gift only the wives of Durga and Harihar were the sole beneficiaries without any reservation for any body else.

Thus Harihar and Durga got better benefit under the gift, and Harihar, who wag managing the affairs of Sheodutt must have played an important part in the creation of the deed of gift, Harihar could not obviously get the deed of gift executed in favour of his wife only, because in that case Sheodutt would have been suspicious of his intentions. The next argument was that, as Sheodutt wanted to give his properties to Harihar and Durga in 1936, the gift was a natural act of Sheodutt; but, as stated earlier, they could not have got the houses under the will exclusively even after the death of Sheodutt."

17. In the case of ***Afsar Shaikh and another vrs. Soleman Bibi and ors.,*** reported in ***AIR 1976 SC 163,*** their lordships of the Hon'ble Supreme Court have explained the term undue influence. Their lordships have further held that whether a person is in a position to dominate the will of another and procure certain deed by undue influence is a question of fact which cannot be reopened in second appeal if decided in accordance with prescribed procedure. Their lordships have held as under:

"15. While it is true that `undue influence', `fraud', `misrepresentation' are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are in view of Order 6, Rule 4, read with Order 6, r.2, of the Code of Civil Procedure, required to be separtely pleaded, with specificity, particularity and precision. A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court could take notice, particularly when no issue was claimed and no contention was raised on that point at any stage in the trial court, or, in the first round, even before the first appellate court.

19. It is well settled that a question whether a person was in a position to dominate the will of another and procured a certain deed by undue influence, is a question of fact, and a finding thereon is a finding of fact and if arrived at fairly, in accordance with the procedure prescribed, is not liable to be reopened in second appeal (Satgur Prasad v. Har Narain Das;(2) Ladli Prashad Jaiswal v. The Karnal Distillery Co. Ltd.(3)."

18. In the case of ***Ajmer Singh and ors. vrs. Atma Singh,*** reported in ***AIR 1985 Punjab and Haryana 315,*** the learned Single Judge has held that when an old man alleges gift deed was executed by him was not a voluntary act, the onus shifts on donee to prove that the gift was made voluntarily. It was held as under:

"4. I have heard the learned counsel for the parties and have also gone through the relevant evidence on the record. In paragraphs 4 and 6 of the plaint (which appear to have been anomalously numbered therein), it is inter alia averred that the plaintiff being an old man, with feble health

and weak eyesight, the father of the defendants-Charan Singh, taking advantage of his weaknesses, fraudulently got executed the gift deeds dated Jan. 12, 1977, in the names of his sons. The father of the defendants misrepresented the factum of the gift deeds and told the plaintiff that the papers related to the special power of attorney in his favour about the property of the plaintiff. Thus, the plaintiff signed the documents under the impression that he was signing the papers in regard to the special power of attorney in favour of Charan Singh, the father of the defendants, about his property. By doing so, the father of the defendants committed a fraud upon the plaintiff and played a ruse on his innocence taking advantage of his weakness and simplicity. In the gift deeds, it was stated that Charan Singh, the father of the defendants-donees, was his pota (grandson) and had been serving him since long. it has been concurrently found by both the Courts below that Charan Singh, the father of the defendants, was not in any manner related to the plaintiff. Apart from that, there is no cogent and independent evidence to prove that Charan Singh had been serving the plaintiff in any manner. The defendants did not produce any witness from the village to depose about this fact. They were satisfied by only producing the attesting witnesses of the gift deeds. The learned Additional District Judge discussed the entire evidence on the record and gave a firm finding that the plaintiff was an old man having feeble and bad health and therefore could not resposed confidence in Charan Singh, the father of the defendants and that is why he asked him for the execution of the power of attorney in his favour. Charan Singh taking advantage of the ill-health of the plaintiff got the three gift deeds executed from him in favour of his three sons. Regarding the production of the witnesses on behalf of the defendants, the lower appellate Court observed that though the witnesses produced by them were from the village, but in such a case where the donor is issueless having no other family member, there is no dearth in the village to get evidence in favour of the donees. Surprisingly enough, as observed earlier, no independent witness was produced from the village to testify as to whether Charan Singh, the father of the defendants, was serving the plaintiff in any manner. Once these two facts are found to militate against the defendants, i.e. Charan Singh was not related to the plaintiff and that he was not rendering any services to him, then it was for the defendants to prove that the gift deeds were voluntarily executed by the plaintiff. S. 122 of the Act, reads--

"Gift' defined--'Gift' is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made--Such acceptance must be made during the lifetime of the donor and while he is capable of giving.

If the donee dies before acceptance, the gift is void".

From a perusal of the above provisions, it is quite clear that the gift, in order to be valid, must have been made voluntarily. In the present case, the evidence in this behalf is missing. It was for the defendants to prove that the plaintiff executed the gift deeds voluntarily after understanding the nature of the documents. This, the defendants have failed to prove by any cogent evidence as found by the lower appellate Court. The judgments relied upon by the learned counsel for the appellants have no applicability to the facts of the present case. The case of a gift deed is on

a different footing than a sale deed or any other document which is executed for consideration. A gift is made by the donor ordinarily without consideration and, therefore, it must be executed voluntarily by the donor. The circumstances of the present case clearly go to prove that the plaintiff was an old man with feeble health and weak eyesight and was unlettered. Charan Singh, the father of the defendants, was in a position to dominate his will as he had faith in him and that is why he wanted to execute the special power of attorney in his favour in regard to his property. The mere fact that the plaintiff has many litigations pending is of no consequence unless there was evidence to prove as to what type of litigation if at all relevant to the matter, he was having. In this view of the matter, I do not find any infirmity or illegality in the findings of the lower appellate Court as to be interfered with in second appeal."

19. In the instant case, the defendant was in a position to dominate the will of the old widow. She was illiterate lady with rural background. She was made to understand that she has to execute the 'Will' but infact 'Gift' was got executed from her. The family of the defendant has also stayed with the plaintiff. They have exercised undue influence upon the plaintiff. The execution of 'gift' in favour of the plaintiff was not voluntary act and it was obtained by way of fraud and mis-representation and undue influence. The substantial question of law is answered accordingly.

20. Consequently, the learned Courts below have correctly appreciated the oral as well as documentary evidence on record. There is no merit in this appeal, the same is dismissed.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Om Parkash Murarka .....Petitioner

Versus

Controller and Auditor General of India and others. ....Respondents

CWP No. 7432/2010-H.
Judgment reserved on 27.11.2014.
Pronounced on: 4th December, 2014

Constitution of India, 1950- Article 226- Petitioner was working as Senior Accountant in the office of the Accountant General – he applied for voluntary retirement on 30.9.2004 by giving three months notice- he was informed that his request for voluntary retirement had been accepted and the process of preparation of pension papers had been initiated- petitioner withdrew the notice for voluntary retirement but he was informed that his request for withdrawal was rejected and he would be treated as voluntarily retired- petitioner filed an application before Central Administrative Tribunal which allowed the application and directed the petitioner to return the retiral benefits received by him - the respondent was directed to treat the petitioner on service- however, the back-wages were not granted to the petitioner- held, that the benefit of back-wages was wrongly denied- when the order of retirement was held to be illegal, employee is entitled to the benefit of back-wages- Petition

allowed with a direction to the respondent to pay the back-wages and other benefits to the petitioner. (Para- 3 to 12)

Cases referred:

Srikantha S.M. versus Bharath Earth Movers Ltd. (2005) 8 SCC 314

Chairman-cum-M.D., Coal India Ltd. & Ors. vs. Ananta Saha & Ors., 2011 AIR SCW 3240

Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others 2013 AIR SCW 5330

Bhuvnesh Kumar Dwivedi vs. M/s. Hindalco Industries Ltd., 2014 AIR SCW 3157

For the petitioner: Mr. Lovneesh Kanwar, Advocate.

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

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Petitioner, by the medium of this writ petition, has questioned the order made by the Central Administrative Tribunal, Chandigarh Bench (Circuit Bench at Shimla) dated 5th November, 2009 (Annexure P-9) read with the order dated 13th June, 2008, (Annexure P-6) made by respondent No. 2, on the grounds taken in the memo of the writ petition.

2. The respondents have filed the reply and the petitioner has also filed the rejoinder.

3. It appears that the petitioner was working as Senior Accountant in the office of the Accountant General, H.P. He applied for voluntary retirement on 30.9.2004, by giving three months notice for such retirement, w.e.f. 1.1.2005, due to his family circumstances. Vide letter dated 1.10.2004, he was informed that his request for voluntary retirement w.e.f. 1.1.2005, has been accepted and necessary steps for preparation of pension papers had been initiated. The petitioner, however, due to changed circumstances and settlement in the family, withdrew the said notice for voluntary retirement vide letter dated 22.12.2004, but vide letter dated 27.12.2004, he was informed that his request has been rejected and it was made clear that the petitioner would be treated as voluntary retired with effect from 1.1.2005, constraining the petitioner to file a representation to reconsider the decision made by the respondents and allow him to withdraw his notice for voluntary retirement. The said request of the petitioner for withdrawing the notice of voluntary retirement and the representation was not considered by the respondents and vide order dated 30.12.2004, the petitioner was retired from service, constraining him to approach the Central Administrative Tribunal.

4. The Tribunal declared the order of retirement as illegal and held the petitioner in continuous service right from 1.1.2005 and also directed the petitioner to return/deposit all the retiral benefits received by him with the respondents, within three months and competent Authority-respondents were directed to consider his regularization in service, pay and allowances etc. vide order dated 28.9.2006 (Annexure P1). It is apt to reproduce para 6 of the said order herein:

> *"6.In view of the aforesaid position under the law, we declare the orders, dated 27.12.2004 (A-2) and 30.12.2004 (A-3) as illegal. We declare that the applicant has a right to continue in service w.e.f. 1.1.2005 from which he was ordered to be voluntarily retired. In case, the applicant deposits back all the retiral benefits, received by him, with the respondents within three months from the date of presentation of a copy of this order to the respondents, his continuation in service shall be given to him, ignoring the fact that he was ordered to retire w.e.f. 1.1.2005. The competent authority to take a decision for the period w.e.f. 1.1.2005 onwards till his resuming duties, for grant of regularization in service, pay and allowances etc. etc."*

5. The petitioner complied with the said mandate by depositing entire service benefits, which he had received and requested to pay him the salary and other allowances for the period 1.1.2005 to 28.12.2006, but respondent No. 2, vide letter dated 13.6.2008, rejected the claim of the petitioner for pay, allowances and back-wages w.e.f. 1.1.2005 to 28.12.2006, stating that the period 1.1.2005 to 28.12.2006, has been treated as leave of the kind due, constraining him to again approach the Central Administrative Tribunal, Chandigarh Bench.

6. The Central Administrative Tribunal dismissed the Original Application of the petitioner vide its judgment and order dated 5.11.2009 (Annexure P9). It is apt to reproduce para 5 of the said judgment herein:

> *"5.After hearing the learned counsel for the respondents and perusal of the record, particularly directions earlier issued by this Court, we find that the Court had directed the competent authority to take a decision for the period w.e.f. 1.1.2005 onward till his resuming duties for grant of regularization in service, pay and allowances etc. etc. There was no direction to treat this period in a particular manner. Even otherwise also it is within the domain of the competent authority to decide as to how the period during which applicant remained out of employment is to be regulated as provided under the rules and after perusal of the chart with the written statement, we find no error in the orders passed by the respondents as most of the period has been regulated as EOI with pay and allowances and HPL with pay and allowances, therefore, in our considered view nothing survives in the O.A. as the respondents have fully implemented the orders passed by this Court in letter and spirit."*

7. Admittedly, the order of retirement of the petitioner w.e.f. 1.1.2005 was held by the Tribunal as illegal vide order dated 28.9.2006, the relevant portion stands quoted supra and he was treated to be in service w.e.f. 1.1.2005. Thus, the petitioner was entitled to back-wages also.

8. The respondents have not averred that the petitioner was gainfully employed, during the period 1.1.2005 to 28.12.2006. The authorities have wrongly denied the relief of back-wages to the petitioner and the order made by the Tribunal dated 5.11.2009, thus is illegal.

9. The apex Court in case titled ***Srikantha S.M.*** *versus* ***Bharath Earth Movers Ltd.*** reported in ***(2005) 8 SCC 314,*** held that when the order of termination/ retirement is illegal and the employee has been kept out of job illegally, is entitled to back-wages. It is apt to reproduce paras 20 and 30 of the judgment herein:

> *"20. The Court added in Balram Gupta v. Union of India AIR 1987 SC 2354 para 13.*
>
> *in the modern and uncertain age it is very difficult to arrange one's future with any amount of certainty; a certain amount of flexibility is required, and if such flexibility does not jeopardize Government or administration, administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the appellant to withdraw his letter of retirement in the facts and circumstances of this case. Much complications which had arisen could have been thus avoided by such graceful attitude. The court cannot but condemn circuitous ways 'to ease out' uncomfortable employees. As a model employer the Government must conduct itself with high probity and candour with its employees.*
>
> 21-29... ....
>
> *"30.For the foregoing reasons, in our opinion, the appeal deserves to be allowed and is accordingly allowed. The action of the respondent Company in accepting the resignation of the appellant from 4.1.1993 and not allowing him to work is declared illegal and unlawful. It is, therefore, hereby set aside. The orders passed by the learned Single Judge and the Division Bench upholding the action of the Company are also set aside. The respondent Company is directed to treat the appellant in continuous service up to the age of superannuation i.e. 31.12.1994 and give him all benefits including arrears of salary. The Company may adjust any amount paid to the appellant on 15.1.1993 or thereafter. The appeal is accordingly allowed with costs."*

10. The apex Court in case titled ***Chairman-cum-M.D., Coal India Ltd. & Ors. v. Ananta Saha & Ors.,*** reported in ***2011 AIR SCW 3240*** has discussed the issue when the relief of back-wages can be granted. It is apt to reproduce paras 47 and 48 of the said judgment herein:

> "*47.The issue of entitlement of back wages has been considered by this Court time and again and consistently held that even after punishment imposed upon the employee is quashed by the court or tribunal, the payment of back wages still remains discretionary. Power to grant back wages is to be exercised by the court/tribunal keeping in view the facts in their entirety as no straitjacket formula can be evolved, nor a rule of universal application can be laid for such cases. Even if the delinquent is re-instated, it would not automatically make him entitled for back wages as entitlement to get back wages is independent of re-*

instatement. The factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate authority/court or tribunal. In such matters, the approach of the court or the tribunal should not be rigid or mechanical but flexible and realistic. (Vide: U.P.SRTC v. Mitthu Singh, AIR 2006 SCC 3018; Secy., Akola Taluka Education Society & Anr. v. Shivaji & Ors., (2007) 9 SCC 564; and Managing Director, Balasaheb Desai Sahakari S.K. Limited v. Kashinath Ganapati Kambale, (2009) 2 SCC 288).

48. In view of the above, the relief sought by the delinquent that the appellants be directed to pay the arrears of back wages from the date of first termination order till date, cannot be entertained and is hereby rejected. In case the appellants choose to hold a fresh inquiry, they are bound to reinstate the delinquent and, in case, he is put under suspension, he shall be entitled for subsistence allowance till the conclusion of the enquiry. All other entitlements would be determined by the disciplinary authority as explained hereinabove after the conclusion of the enquiry. With these observations, the appeal stands disposed of. No costs"

11. The apex Court also in case titled ***Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others*** reported in ***2013 AIR SCW 5330*** has discussed that in which circumstances an employee is entitled to back-wages. it is apt to reproduce para 33 of the said judgment herein:

"33.The propositions which can be culled out from the aforementioned judgments are:

(i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

(ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

(iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence.

It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

(iv) The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

(v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

(vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford

the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra).

(vii) The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (supra) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.

12. Applying the test, the petitioner was entitled to back-wages.

13. The apex Court in a recent judgment titled ***Bhuvnesh Kumar Dwivedi v M/s. Hindalco Industries Ltd.,*** reported in ***2014 AIR SCW 3157,*** the facts of which are similar to the facts of the case in hand, held that how and in which circumstances an employee is entitled to back wages. It is apt to reproduce paras 18, 33 and 35 of the said judgment herein:

"18.A careful reading of the judgments reveals that the High Court can interfere with an Order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant.

19-32..... ....

33. In the present case, the respondent has made a vague submission to the extent that:

> *"the conduct of the workman throughout the proceedings before the High Court during 2002 to 2011 shows that he is continuously gainfully employed somewhere. Admittedly even in the counter affidavit in the said Writ Petition, it has not been stated that the workman was not employed"*

Therefore, on the basis of the legal principle laid down by this Court in the Deepali Gundu Surwase case (supra), the submission of the respondent that the appellant did not aver in his plaint of not being employed, does not hold since the burden of proof that the appellant is gainfully employed post termination of his service is on the respondent. The claim of the respondent that the appellant is gainfully employed somewhere is vague and cannot be considered and accepted. Therefore, we hold that the appellant is entitled to full back wages from the date

> *of termination of his service till the date of his reinstatement.*
>
> *34..... ....*
>
> *35. We therefore conclude and hold that the Labour Court was correct on legal and factual principles in reinstating the appellant along with full back wages after setting aside the order of termination. The High Court on the other hand, has erred by exceeding its jurisdiction under Article 227 of the Constitution of India in holding that the appellant has in fact, resigned by not joining his duty as a Badly worker and also awarding that retrenchment compensation to the tune of Rs.1,00,000/- will do justice to the appellant without assigning reasons which is wholly unsustainable in law.*

14. Having said so, the order dated 13.6.2008, (Annexure P-6), made by the respondents is quashed and consequently, the order made by the Central Administrative Tribunal dated 5.11.2009, (Annexure P-9) is also quashed with direction to the respondents to pay salary, i.e., back-wages and other allowances, to the petitioner, w.e.f., 1.1.2005 to 28.12.2006, the date of his joining, with 6% interest per annum.

15. With the aforesaid observations, the writ petition is disposed of alongwith pending applications, if any.

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

Prahalad Mishra. ...Petitioner.

Versus

State of Himachal Pradesh and another. ...Respondents

CWP No. 5451 of 2014
Decided on: 4.12.2014

Constitution of India, 1950- Article 226- Father of the petitioner died in harness on 25.4.2006- he filed an application for considering his case for appointment on compassionate basis – same was rejected on the ground that case of the petitioner does not meet the financial/income criteria fixed by the Government – held, that while computing income of the petitioner pensionery/retiral benefits should not be taken into consideration and State had wrongly included pensionery/retiral benefits while computing annual income- petition allowed and the respondent directed to consider the case of the applicant by ignoring the family pension/retiral benefits. (Para-2 to 7)

Cases referred:

Govind Prakash Verma vs. Life Insurance Corporation of India and others, (2005) 10 SCC 289

Kumari Savita Sharma vs. State of H.P. and others, latest HLJ 2011 (HP) 739

For the Petitioner: Mr. V.D. Khidta, Advocate.
For the Respondents: Mr. M.A. Khan, Addl. A.Gs. with Mr. P.M. Negi, Dy. A.G.

The following judgment of the Court was delivered:

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

Petitioner's father died in harness on 25.4.2006. Petitioner submitted an application for considering his case for appointment on compassionate basis on 8.2.2007. The same has been rejected by the respondent-Department on 28.9.2013 on the ground that case of the petitioner does not meet the financial/income criteria fixed by the Government in Finance Department.

2. Mr. V.D. Khidta, learned counsel for the petitioner, has vehemently argued that the case of the petitioner has been rejected by the competent authority by including pensionary benefits while computing the annual income of the family of the petitioner. Income of the petitioner's family as per the reply is Rs.1,07,078/-.

3. It is settled law by now that while computing the income of family for the purpose of compassionate appointment, the pensionery/retiral benefits should not be taken into consideration.

4. Their Lordships of the Hon'ble Supreme Court in ***Govind Prakash Verma*** vs. ***Life Insurance Corporation of India and others***, (2005) 10 SCC 289, while dealing with almost similar situation has held as under:

> **"6.....The scheme of compassionate appointment is over and above whatever is admissible to the legal representatives of the deceased employee as benefits of service which one gets on the death of the employee. Therefore, compassionate appointment cannot be refused on the ground that any member of the family received the amounts admissible under the Rules....."**

5. This Court in ***Kumari Savita Sharma*** vs. ***State of H.P. and others***, latest HLJ 2011 (HP) 739 has taken a view that while considering the applications for giving appointment on compassionate grounds, pension received by the family is not to be computed for the purpose of determining the income of the family.

6. Similar view has been taken by this Court in CWP No. 9965 of 2011 titled as ***Vikas Kumar vs. State of H.P***., decided on 28.8.2012, CWP No. 4852 of 2013, titled as ***Ashwani Kumar*** vs. ***State of H.P. and others***, decided on 29.7.2013 and CWP No. 9637 of 2013, titled as ***Parvinder Kumar*** vs. ***State of H.P. and others***, decided on 2.1.2014.

7. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is allowed. Annexure P-7 dated 28.9.2013 is set aside. Respondents are directed to consider the case of the petitioner for compassionate appointment in view of the law laid down in the judgments cited hereinabove, within a period of 10 weeks from today by ignoring family pension/retiral benefits. Pending application(s), if any, also stands disposed of. No costs.

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

Tek Ram. ...Appellant.
Versus
Smt. Bali and others. ...Respondents.

RSA No. 341/2000
Reserved on: 24.11.2014
Decided on: 4.12. 2014

Indian Succession Act, 1925- Section 63- Plaintiff claimed that she being daughter of the deceased is entitled to succeed to his share along with defendants 1 a, b and 2- defendant No. 2 had forged a fictitious document stated to be a "will" of the deceased – defendant No. 2 claimed that Will was executed by the deceased in his favour in the presence of respectable persons- held, that as per evidence, will was duly executed by the deceased – plaintiff was born in the house of her maternal grand-mother and had no inimical relations with the witnesses– defendant No. 2 was looking after the deceased and had performed his last rites – the mere fact that mutation was attested after few years will not render the Will suspicious. (Para- 22 and 23)

For the Appellant: Mr. Bhupender Gupta, Sr. Advocate with Mr. Ajeet Jaswal, Advocate.
For the Respondents: Mr. Rajender Kumar, Advocate for respondent No.1.
Mr. Rahul Verma, Advocate vice Mr. Ramesh Sharma, Advocate for respondents No.3 (a) to 3 (d) and 4 (b) and 4 (c).

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is directed against the judgment and decree dated 30.6.2000 rendered by the District Judge, Kullu in Civil Appeal No. 58/99.

2. "Key facts" necessary for the adjudication of this appeal are that respondent-plaintiff (herein after referred to as 'plaintiff ' for convenience sake) has filed a suit for declaration with consequential relief of injunction and in the alternative for possession of the suit land against the appellant-defendant (herein after referred to as 'defendant No.2 ' for convenience sake) and against Sh Sawaru, predecessor-in-interest of defendant 1-a and 1-b, Tulsi and Bimla as per the original memo of parties of Civil Appeal No.58 of 1999 and against respondents No.3 to 5, namely, Ram Bhagat, Beli Ram and Tulsi. According to the averments contained in the plaint, one Sefu had three sons, namely, Phagnu, Bhogi and Sawaru. Plaintiff is the daughter of Phagnu whereas defendants No.1-a, 1-b and 2 are the legal heirs of Sawaru. Bhogi died on 25.4.1983. He was owner in possession of the land as per detailed given in the plaint. Plaintiff claimed that she being the only daughter of Phagnu is entitled to succeed to the share of Bhogi in the suit land alongwith defendants No.1-a, 1-b and 2 in equal shares. According to her, Bhogi died intestate. Defendant No.2 Tek Ram in connivance with deceased defendant No.1, i.e. Swaru forged a

fictitious document claimed to be a "will" dated 24.4.1983 whereby the testator is alleged to have bequeathed his entire estate in favour of defendant No.2. She was not bound by the "will". She had raised objection before the Assistant Collector IInd Grade at the time of attestation of mutation. However, he did not record her objections. She has also challenged the sale deed dated 3.10.1991 effected by defendant No.2 Tek Ram in favour of Saje Ram, Beli Ram and Ram Bhagat.

3. The suit was contested by the defendants. Defendants No.1-a and 1-b, namely, Tulsi and Bimla have denied that Bhogi died intestate. Bhogi executed a "will" in favour of defendant No.2. The same was perfectly valid and legal.

4. Defendant No.2 has also filed written statement. According to him, Bhogi required his services. He rendered services to him. Bhogi executed a "will" in his favour out of love and affection on 24.4.1983. It was executed in presence of respective marginal witnesses whereby he bequeathed his entire moveable and immovable property in his favour. The testator was in his sound state of mind. The dispute arose between him and father of plaintiff after the death of Bhogi. It was resolved vide compromise dated 6.6.1983 in the presence of witnesses.

5. Defendants No.3 to 5 have also filed written statement. They have supported the sale deed dated 3.10.1991.

6. Name of Tulsi widow of Sawaru was ordered to be deleted from the array of respondent vide order dated 26.7.2010. Smt. Bimla daughter of Sawaru was ordered to be proceeded *ex parte* vide order dated 21.3.2014. The legal representatives of Ram Bhagat were permitted to be brought on record vide order dated 8.7.2013, namely, 3-a Sheela Devi, 3-b Anita Devi, 3-c Rameshwari and 3-d Anil Sharma. Respondents 3-a to 3-d were ordered to be proceeded *ex parte*. The legal representatives of deceased respondent No.4 Beli Ram were also permitted to be brought on record vide order dated 8.7.2013 whereby defendant No. 4-a Bhag Singh and 4-b Raghubir Singh were brought on record.

7. Trial court framed the issues. The suit was dismissed by the trial court on 7.1.1999. Plaintiff preferred an appeal against the judgment and decree dated 7.1.1999 before the District Judge, Kullu. He partly allowed the same on 30.6.2000. Hence, the present appeal. It was admitted on the following substantial questions of law:

1. **"Whether the learned District Judge has misapplied law pronounced by the Apex Court as well as by this Hon'ble Court for considering the due execution and attestation of the Will? Are not the findings of the learned District Judge vitiated by holding such circumstances to be suspicious ignoring such principles of law?**

2. **Whether the learned District Judge has wrongly rejected the application for additional evidence filed by the Defendant-Appellant?**

3. **Whether the findings rendered by the Lower Appellate Court are vitiated on account of misreading the relevant evidence and wrong application of correction principles of law?**

4. **Whether the learned District Judge has exceeded its jurisdiction in granting a decree of injunction in favour of the**

plaintiff-respondent without even deciding the question as to who is in possession of the suit property, whether the Judgment and Decree of Injunction is bad in law as there was no jurisdiction vested in the learned District Judge to grant an injunction against the co-sharer?

8. Mr. Bhupender Gupta, learned Senior Advocate, on the basis of substantial questions of law, has vehemently argued that learned first appellate court has misconstrued and misread the evidence pertaining to "will" Ex.DW-2/A dated 24.4.1983. According to him, the plaintiff was never in possession of the suit land and thus, the decree of injunction in favour of plaintiff could not be granted. Mr. Bhupender Gupta has supported the judgment and decree dated 7.1.1999 passed by the trial court.

9. Mr. Rajender Kumar has supported the judgment and decree passed by the first appellate court.

10. Mr. Rahul Verma has supported the judgment and decree of the trial court.

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

12. One Sefu had three sons, namely, Phagnu, Bhogi and Sawaru. Plaintiff is the daughter of Phagnu. Defendants No.1-a and 1-b and 2, i.e. Tek Ram are the legal representatives of Sawaru. It is not disputed that Bhogi died on 25.4.1983. According to the plaintiff, she being the only daughter of Phagnu was entitled to succeed to the share of Bhogi in the suit land alongwith defendants No.1-a, 1-b and 2 in equal shares. According to her, "will" dated 24.4.1983 Ex.DW-2/A was not genuine. She had raised objections at the time of attestation of mutation. The objections raised by her were not accepted by the Assistant Collector 2nd Grade.

13. Plaintiff has appeared as PW-1, Phagnu was her father. Bhogi was her uncle. Bhogi died in the year 1983. She has proved death certificate Ex.PW-1/A. Her father died in the year 1989. Death certificate is Ex.PW-1/B. Bhogi died issueless. Bhogi never got married. Sawaru has also died. She inherited the property after the death of her father and her uncle. Bhogi's estate was inherited by her father and her uncle Sawaru. Bhogi has never executed any "will' during his life time. He was looked after by her father. The last rites were performed by her father. Defendants Saje Ram, Beli Ram and Ram Bhagat knew about the dispute and despite that they bought the property vide mark 'A'. In her cross-examination, she has deposed that her marriage was solemnized about 15 years ago. She used to live with her in-laws and also used to reside in the maternal house. She has further deposed that her father and Bhogi used to live together. Their ration card was one. Bhogi was suffering from Asthma. Her mother was divorced by her father when she was in the womb. She was born in the house of her maternal grand-father. Her father has got treated Bhogi at Patli Kuhal and Duare. She did not know the names of doctors. She knew Mahant, Shyam Lal and Lal Chand. They were man of repute. These three persons had no enmity with her father. She had appeared before the Tehsildar at the time of attestation of mutation. No counsel had accompanied her. Tehsildar had made certain inquiries. She has denied the suggestion that Bhogi was occupying the house. Volunteered that she was also in possession. She has also admitted that key of the house was with Tek Ram.

14. According to DW-1 Tek Ram, Bhogi was his uncle. Phagnu was also his uncle. Name of first wife of Phagnu was Gulabi. Plaintiff is the

daughter of Gulabi. Phagnu and Gulabi divorced. Plaintiff was born in Seobagh. Plaintiff has never looked after Bhogi. He used to look after Bhogi. He has performed his last rites. He has executed the "will" mark X' in his favour. Shyam Lal, Tulsi Ram and Shyamu were the marginal witnesses. Bhogi was in his senses. A dispute has taken place between plaintiff's father and him. A compromise has taken place between him and father of plaintiff. It was scribed by Tulsi. The mutation was attested on the basis of "will". Plaintiff was present at the time of attestation of mutation. In his cross-examination, he has deposed that Bhogi had desired to execute "will" 3-4 days before executing the "will". All the members of the family were present at that time. The marginal witnesses were summoned scribe was also summoned. The "will" was executed in the courtyard. Bhogi was in a position to walk. It took one hour to scribe the "will". He has denied the suggestion that Bhogi and Phagnu used to live together. He has also denied the suggestion that Bhogi became unconscious 3-4 days before executing the "will". He has denied the suggestion that Bhogi was not in a position to speak. He has sold 14 biswas of land due to adverse circumstances.

15. DW-2 Shyam Lal is the marginal witness. He remained Pradhan of Gram Panchayat Duara between 1978 to 1982. Bhogi has executed "will" Ex.DW-2/A. It was scribed by Lal Chand Kapoor. The contents of the "will" were read over to Bhogi by Lal Chand Kapoor. He admitted the same to be correct. He put his thumb impression in the presence of marginal witnesses. He signed in his presence and Shyamu put his thumb impression. Bhogi was in senses at the time of execution of "will" Ex.DW-2/A. Lal Chand Kapoor has died. Bhogi was looked after by Tek Ram. The "will" was scribed in the courtyard. It took about 15-20 minutes to scribe the "will". Firstly, Bhogi put his thumb impression on "will" Ex. DW-2/A and thereafter he put his signatures on the same. Thereafter, Tulsi signed the same and Shyamu put his thumb impression.

16. DW-3 Nand Lal has deposed that a compromise took place between Tek Ram and Phagnu vide Ex.DW-3/A. It was scribed by Tulsi Ram Mahant at the instance of Tek Ram and Phagnu. He has admitted that he was Vaid. Tek Ram has never come to get the medicine, but Sawaru used to take the medicine.

17. DW-4 Ram Nath has deposed that his father was Stamp Vendor. He was conversant with his handwriting. Ex.DW-2/A was scribed by his father. His father died in the year 1995.

18. DW-5 Gaje Ram has deposed that Tek Ram was the owner of the suit land. The area was about 14 biswas. They have inquired about the status of the land before purchasing it. The ownership was in the name of Tek Ram as per revenue papers. The sale consideration was Rs.35,000/-. The sale deed was registered on 3.10.1991.

19. DW-6 Maghu Ram has deposed that the land measuring 14 biswas was sold for Rs. 35,000/- on 3.10.1991. The copy of sale deed is Ex. DW-6/A.

20. DW-7 Anil Mahant has deposed that Charan Dass was his father. He was conversant with his handwriting. Ex.DW-6/A was scribed by his father.

21. Plaintiff has also appeared in rebuttal. According to her, she had gone to the office of Tehsildar at the time of attestation of mutation. She has not taken any action against the Tehsildar.

22. What emerges from the statements of the witnesses discussed hereinabove is that the "will" Ex.DW-2/A was executed on 24.4.1983. Bhogi died on 25.4.1983. The "will" was scribed by father of DW-4 Ram Nath. According to DW-4 Ram Nath, the "will" Ex.DW-2/A was scribed by his father. DW-2 Shyam Lal was the marginal witness. According to him, the contents of "will" were read over to Bhogi. Bhogi put his thumb impression on the "will". Thereafter, he alongwith marginal witnesses signed and put thumb impression on Ex.DW-2/A. It is evident from the statement of PW-1 Bali that she was born in the house of her maternal grand-father. She was married 15 years back. She has categorically deposed that she had no inimical relations with Tulsi Mahant, Shyam Lal and Lal Chand. It has come in the statement of DW-1 Tek Ram that he was looking after Bhogi. He has performed his last rites. Sh. Bhogi was in his senses at the time of execution of "will".

23. Learned first appellate court has misconstrued compromise Ex.DW-3/A dated 6.6.1983. It was not required to be signed by Tek Ram. It is evident from compromise Ex.DW-3/A that father of the plaintiff had admitted that his brother Bhogi has executed a "will" in favour of Tak Ram. The other circumstance considered by the first appellate court against the defendants is that the "will" was executed on 24.4.1983, but the mutation was attested on 28.8.1991. Merely that the mutation was attested after few years would not render the "will" invalid. The mutation is Ex.PW-1/E, name of the plaintiff is mentioned in the proceedings dated 28.8.1991. Merely that defendants did not know at what time Bhogi died would not render the "will" Ex.DW-2/A suspicious. It is not at all necessary to mention in the "will" why the legal heirs have been excluded. The first appellate court has come to a wrong conclusion that it was necessary for the defendants to prove that father of the plaintiff was not looking after deceased Bhogi. What was to be seen is whether the principles for execution of the "will" have been followed or not. In the instant case, the "will" has been proved in accordance with law. It was not necessary for the defendants to prove the minor details, more particularly, when it has come in the statement of DW-3 Nand Lal that Sawaru Ram used to take medicine for Bhogi. All the substantial questions of law are answered accordingly.

24. In view of the analysis and discussion made hereinabove, the appeal is allowed. The judgment and decree dated 30.6.2000 passed by the District Judge, Kullu in Civil Appeal No. 58/99 is set aside and the judgment and decree dated 7.1.1999 passed by the Sub Judge 1st Class, Manali in Civil Suit No. 324/98/92 is restored. 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 SANJAY KAROL, J.

Deep Raj @ Baddu. ...Appellant.
Versus
State of Himachal Pradesh. .... Respondent.

Cr. Appeal No.4009 of 2013
Date of decision: December 5, 2014

Indian Penal Code, 1860 – Section 376- Prosecutrix went to the house of one 'A' for getting her clothes stitched – she was not present but her brother was present who raped the prosecutrix- prosecutrix was proved to be below 18 years but above 16 years and of feeble mind- testimony of

prosecutrix was duly supported by independent witness- testimony of the prosecutrix is sufficient to convict the accused- mere absence of DNA profiling is not sufficient to acquit the accused. (Para-10 to 21)

Cases referred:

Krishan Kumar Malik vs. State of Haryana, (2011) 7 SCC 130

Halappa vs. State of Karnataka, 2010 Cri.L.J. 4341

For the Appellant: Mr. Lovneesh Kanwar, Advocate.

For the Respondent: Mr. R.S. Verma and Mr. H.K.S. Thakur, Addl. Advocate Generals.

The following judgment of the Court was delivered:

Sanjay Karol, Judge (Oral)

In this appeal filed under Section 374 Cr.P.C. convict Deep Raj has assailed the judgment dated 29.4.2013, passed by Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P., in Sessions Trial No.1/7 of 2013, titled as State of Himachal Pradesh versus Deep Raj @ Baddu, whereby he stands convicted of having committed an offence punishable under the provisions of Section 376 of the Indian Penal Code and sentenced to serve rigorous imprisonment for a period of seven years and pay fine of `20,000/- and in default thereof, further undergo rigorous imprisonment for a period of three months.

2. It is the case of prosecution that on 27th August, 2012, prosecutrix (PW.2) went to the house of Achla Devi (not examined) for getting her clothes stitched. Though Achla Devi was not home but her real brother i.e. the accused was present alone in the house. At that time he forcibly raped the prosecutrix. In the neighbourhood, Fullan Devi (PW.4) had called ladies of the village for collecting fuel wood. Her daughter was to get married. From courtyard of house of Fullan Devi, Parkasho Devi (PW.3), saw the prosecutrix hiding under the cot covered with a bed-sheet. Since room was bolted from inside she knocked the door. After opening the door accused ran away from the spot. Prosecutrix then narrated the incident to her. When prosecutrix was taken home, she also narrated the incident to her mother Viasan Devi (PW.1). Matter was reported to the police and FIR No.62/2012, dated 28.8.2012 (Ext.PW.1/A) registered at Police Station, Bharari, against the accused under the provisions of Section 376A of the Indian Penal Code. Investigating Officer, Dhan Raj Singh (PW.17) got the prosecutrix medically examined from Dr. Kavita Kumari (PW.10), who issued MLC (Ext.PW-10/C). For establishing age of the prosecutrix, her birth certificate (Ext.PW.11/B) was taken on record. Investigation revealed the accused to have subjected the prosecutrix to sexual assault and as such challan was presented in the court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 376 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as twenty one witnesses. Statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took plea of innocence and false implication. Both Fullan Devi and Parkasho Devi

harboured animosity against Achla Devi, hence stands falsely implicated but no evidence in defence was led to probablise this defence.

5. Trial Court, after appreciating the testimony of prosecution witnesses, convicted the accused of the charged offence and sentenced him as aforesaid. Hence, the present appeal.

6. Having heard Mr. Lovneesh Kanwar, learned counsel for the appellant and Mr. R.S. Verma, learned Addl. Advocate General, on behalf of the State and minutely examined the testimonies of witnesses and other documentary evidence so placed on record by the parties, one is of the considered view that no case for interference is made out at all. Judgment rendered by the trial court is based on complete, correct and proper appreciation of evidence (documentary and ocular) as placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting in miscarriage of justice. Prosecution has been able to fully establish and prove its case, beyond reasonable doubt.

7. In Court, Dr. Kavita Kumari (PW-10) proved MLC (Ext.PW-10/C) and opined that possibility of rape could not be ruled out. Her opinion is based on report of the Forensic Science Laboratory, analysis of clothes; vaginal swab; pubic hair of the victim as also the assailant.

8. It is vehemently argued that the victim consented for the act and as such accused stands wrongly convicted by the trial court. Significantly, no such suggestion was ever put to any one of the prosecution witnesses. Hence, contention only merits rejection.

9. Nonetheless, notwithstanding medical evidence on record, Court is duty bound, in the first appeal, to fully appreciate the testimonies of prosecution witnesses, for ascertaining the truth and finding out as to whether prosecution has been able to prove the guilt of the accused, beyond reasonable doubt or not.

10. On the question of age of the prosecutrix, which in any event is not disputed, Rekha Kumari (PW.11) has proved certificate (Ext.PW.11/B) recording date of birth in the school record to be 6th October, 1994. As such, as on the date of incident of crime i.e. 27.8.2012, prosecutrix was below eighteen years, but above sixteen years.

11. Perusal of testimonies of prosecution witnesses further reveals that prosecutrix was mentally not fully developed. She was of feeble mind. Testimonies of Viasan Devi (PW.1) and Bimla Devi (PW.5) on this count go unrebutted. Furthermore, Yoginder Lal (PW.18), Managing Director of Asha Kiran Viklang Shiksha institution has proved certificate (Ext.PW.18/A) to the effect that prosecutrix, who was mentally retarded remained admitted with them for some time.

12. In Court prosecutrix was found competent to depose and as such was examined. She categorically states that after bolting the door from inside, accused removed her clothes and committed "bad act" with her in the house of Rikhu Ram (husband of Achla Devi). She identifies the accused as Baddu. Noticeably there is no dispute about such identity. She further states that Fullan and Parkasho got opened the door of the room and Baddu ran away. She clarifies that she had gone to the house of Rikhu for getting her clothes stitched. Significantly, it stands suggested to the witness that women had gone for collecting wood required for the marriage ceremony of daughter of Fullan Devi. She denies having deposed falsely on account of any tutoring done by her

mother. In fact she has no reason to depose falsely. Her testimony fully inspiring in confidence, is narration of true events which transpired on the spot and nothing else. She is candid, clear and truthful.

13. Fullan Devi (PW.4), who corroborates such version, further clarifies that at the time when she was cleaning the courtyard, sound was coming from the adjoining house belonging of Achla Devi. Parkasho Devi (PW.3) peeped from the window and saw the prosecutrix lying under the cot covered with a bed sheet. Room was bolted from inside. When Parkasho Devi knocked at the door, accused opened and ran away. Prosecutrix disclosed that accused committed "Bura Kam" (rape). Then she took the prosecutrix home. Though witness admits of having dispute with Achla Devi pertaining to construction of house but clarifies it was over long ago. Suggestion put to the witness that house of Achla Devi did not have window panes, does not advance the case of convict in any manner. He ran away from the spot after ravishing a helpless person who was frightened and overawed.

14. Though initially Parkasho Devi (PW.3) did not support the prosecution, but on being cross examined by the Public Prosecutor, corroborated the testimony of both the prosecutrix and Fullan Devi. She admits her presence on the spot. She admits that prosecutrix was under the cot on which accused was sitting. Thus she proves presence of both the accused and the prosecutrix inside the room. She also proves that at the time door was opened by the accused only he and prosecutrix were inside. Achla Devi and her husband were not home at that time.

15. Viasan Devi (PW.1) clarifies that prosecutrix, who had gone to the house of Achla Devi for getting the suit stitched, on return, disclosed the incident to her. She clarifies that accused is also known as Baddu, which fact, in any case is not in dispute. She clarifies that the following morning she went to the police station and reported the matter. She satisfactorily explains the reasons for not visiting the police station same day. She has studied only up to 8th standard; her husband was not home and it had become dark. She denies having falsely deposed on the asking of Fullan Devi. In any event, why would she do so. No mother would defame her daughter on the asking of a third person, especially when she was under no obligation from her. In any event, Pradhan Bimla Devi (PW.5) was informed of the incident. Also it becomes duty of the spot witnesses to report the matter to the police. Delay cannot be said to be fatal.

16. Sh. Sanjeev Kumar (PW.7), aged fourteen years, brother of the prosecutrix further corroborates the prosecution story.

17. Prem Lal (PW.6), one of the persons present on the spot, who though resiled from his previous statement (Ext.PW.17/J) but when confronted by the Public Prosecutor, admits of having learnt that prosecutrix stood raped by the accused.

18. It is rather unfortunate that Amar Singh (PW.12), father of the prosecutrix, after being declared hostile, had to be cross examined by the Public Prosecutor. Nonetheless he also admits that prosecutrix, who is of feeble mind, was raped by the accused.

19. Remaining witnesses are either police officials or witnesses to recovery of incriminating articles. In view of inspiring testimony of the prosecutrix and the spot witnesses one need not elaborately deal with their testimonies save and except that testimony of the Investigating Officer, S.I. Dhan Raj Singh (PW.17) of having conducted the investigation, which cannot be

faulted on any count, is fully inspiring in confidence. He has proved on record previous statements of the witnesses, who did not support the prosecution on material facts.

20. Submission that hymen was intact and no injury or tenderness was found on the vaginal part of the prosecutrix and as such, the charged offence is not proved, only merits rejection. It is a settled principle of law that statement of the prosecutrix by itself is sufficient enough to convict the accused, if it otherwise inspires confidence even if it is not supported by contemporaneous corroborative material in the shape of medical evidence. One cannot lose sight of the fact that prosecutrix was of feeble mind and as such under these circumstances could not resist the overt acts of the accused. She was found hidden under the cot. Presence of hymen itself does not disprove an act of penetration.

21. It is further argued that absence of non-compliance of provisions of Section 53A of the Code of Criminal Procedure would render the prosecution case to be fatal. Dr. Bhanu Kanwar (PW.9) has proved that the accused was medically examined on 29th August, 2012 and certificate (Ext.PW.9/B) is placed on record to this effect. The contention, misconceived in law, to say the least, only merits rejection.

22. Mere non-compliance of Section 53A of the Code of Criminal Procedure, more so with respect to DNA profiling, would not render the investigation to be faulty in any manner, particularly when there is overwhelming evidence on record to establish guilt of the accused, beyond reasonable doubt.

23. 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 an act of rape.

24. For all the aforesaid reasons, no case for interfere with the judgment passed by the trial Court is made out. The Court has fully appreciated the evidence placed on record by the parties. There is neither any illegality nor any irregularity/ perversity in correct and complete appreciation of the material so placed on record by the parties. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeal is dismissed.

25. Section 53A of the Code of Criminal Procedure reads as under:

> **"53A. Examination of person accused of rape by medical practitioner.**
>
> (1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:—

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section."

26. In view of the dicta laid down by the Hon'ble Supreme Court of India, in ***Krishan Kumar Malik v. State of Haryana,* (2011) 7 SCC 130**, it was absolutely necessary for the prosecution to have got the DNA test conducted, for the purpose of facilitating the prosecution to establish its case against the accused.

27. Single Judge of High Court of Karnataka in ***Halappa v. State of Karnataka,* 2010 Cri.L.J. 4341**, had the occasion to deal with the Constitutional validity of provisions of Section 53A of the Code of Criminal Procedure. The Court framed the following points, for consideration and answered Points No.1 & 2 in the negative and Point No.3 in the affirmative:

"(i) Whether the consent of the petitioner-Accused No.1 is required to draw blood sample from him and for subjecting the same to DNA test?

(ii) Whether the consent of the petitioner-Accused No.1 is necessary for taking samples of his pubic hairs and also for obtaining his voice samples and photographs?

(iii) Whether the order passed by the trial Court is sustainable in law or not?"

28. The Legislative intent is evidently clear. It appears that the Investigating Agencies are either not aware of the statutory provisions and the duty cast upon them or are obliviously continuing to follow old means and methods of investigation. As such, in the interest of justice, direction is issued to the Director General of Police, State of Himachal Pradesh to issue appropriate directions, asking the Investigating Officers to comply with the statutory provisions in accordance with law. Affidavit of compliance shall be filed by the

Director General of Police, State of Himachal Pradesh, within a period of four weeks from today. Records of the Court below be immediately sent back.

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

Inder Singh .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 27 of 2011.
Reserved on: December 03, 2014.
Decided on: December 05, 2014.

N.P.P.S. Act, 1985- Section 20- Accused was found in possession of 7 kg 100 grams of charas- prosecution version regarding sending of rukka was contradictory- testimony of the independent witness also contradicted the prosecution version-No seal impression was put on the NCB form making it difficult for the laboratory to compare the sample seal- held, that in these circumstances, prosecution had not proved its case beyond reasonable doubt. (Para- 17 to 20)

For the appellant: Mr. Vivek Sharma, Advocate, vice Mr. Ajay Kochhar, Advocate.
For the respondent: Mr. P.M.Negi, Dy. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 21.12.2010, rendered by the learned Sessions Judge (Special Judge), Shimla, H.P., in N.D.P.S. Case No. 32-S-7 of 2009, whereby the appellant-accused (hereinafter referred to as the accused) who was charged with and tried for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, was convicted and sentenced to undergo rigorous imprisonment for ten years and a fine of Rs. One lac and in default of payment of fine, he was further ordered to undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 1.11.2009, PW-10 Inspector Ram Kumar, SV & ACB (SIU), Shimla in connection with patrol duty had left for *Habban,* Sirmour via *Theog-Chaila* in official vehicle No. HP-07A-0680. PW-7 Inspector Virender Chauhan, PW-8 HHC Mahinder Singh and PW-9 HC Man Singh, were accompanying PW-10 Inspector Ram Kumar. When PW-7 to PW-10 crossed Village Naina and had been at some distance from Naripul, at about 11:30 AM, one person was noticed coming on foot from opposite direction. That person was carrying one airbag of blue colour on his right shoulder. He was also carrying one empty cement bag containing something in his left hand. PW-10 Inspector Ram Kumar directed PW-6 Yog Raj to stop the vehicle. PW-10 Inspector Ram Kumar wanted to know the area from the pedestrian. The person got perplexed and took U turn. PW-10 Inspector Ram Kumar suspected said person to be in possession of charas. He was apprehended. PW-1 Rajesh Verma in his Santro Vehicle had been on his way

from Chaila to Solan via Neripul. PW-10 Inspector Ram Kumar and his team signaled him to stop the Car. PW-10 Inspector Ram Kumar stepped out of the vehicle. In the presence of PW-1 and PW-7 to PW-9, PW-10 Ram Kumar had given option of search before the Magistrate or Gazetted Officer to the accused vide memo Ext. PW-1/A. The accused consented for search before the local police party vide consent memo Ext. PW-1/A. The bag was checked. It contained charas Ext. P-3 in the shape of billets and balls. There was another bag Ext. P-6 in bag Ext. P-2. Bag Ext. P-6 contained one scale Ext. P-7, two weights of 50 gms each Ext. P-8 and Ext. P-9, one weight of 10 gms, Ext. P-10, one weight of 20 gms, Ext. P-11 one weight of 5 gms Ext. P-12 and one weight of 100 gms Ext. P-13. The empty cement bag Ext. P-14 was containing one scale with steel pot Ext. P-15, one weight of 1 kg Ext. P-16 and one weight of 2 kg Ext. P-17. PW-10 Inspector Ram Kumar weighed the charas. It weighed 7 kg. 100 gms. PW-10 Inspector Ram Kumar had drawn two samples of 50 gms each from the charas recovered from the accused. The sample packets of charas Ext. P-4 and Ext. P-5 and the rest of the charas Ext. P-3 was separately sealed in three packets with seal 'H' and were taken into possession vide recovery memo Ext. PW-1/B. Bag Ext. P-2 was sealed with bulk charas, scale and weights. The accused was arrested. PW-10 Inspector Ram Kumar prepared report Ext. PW-2/A and routed the same to the Police Station through PW-8 HHC Mahinder Singh. The contraband was produced before Inspector Narata Ram. PW-2 Insp. Narata Ram registered FIR Ext. PW-2/B. PW- 2 Insp. Narata Ram resealed the sample packets and the rest of the charas in original packing with seal T and had prepared memo Ext. PW-2/C. He deposited the case property with PW-3 MHC Ashok Kumar. PW-3 MHC Ashok Kumar carried out the entries of the case property in the relevant register vide Ext. PW-3/A. The samples were sent to chemical examiner alongwith specimen impression of seal and copy of NCB form. The report of the FSL is Ext. PX. The investigation was completed and challan was put up against the accused after completing all the codal formalities.

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

4. Mr. Vivek Sharma, Advocate, appearing vice Mr. Ajay Kochhar, Advocate, for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. P.M.Negi, learned Dy. Advocate General, has supported the judgment of the learned Sessions Judge (Special Judge), Shimla, H.P. dated 21.12.2010.

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

6. PW-1, Rajesh Verma deposed that he received a call on his mobile No. 98168 17918 of Virender Chauhan, inspector Vigilance, posted at Shimla. He asked him to accompany him to the farm house at Pulvahal. He met Insp. Virender Chauhan near his residence at 6:30 AM. Inspector Virender Chauhan was accompanied by Ram Kumar. They were only two persons. They took him towards Pulvahal. When they were proceeding near Naura Khad, 5- 6 kilometers behind Pulvahal, 6-7 persons were standing there at one spot by keeping 2-3 bags on the ground near them. It was about 10:00 AM. Insp. Virender Chauhan and Ram Kumar had a conversation regarding charas with those 6-7 persons. They remained in conversation for about 15-20 minutes. He

remained at some distance by the side of a vehicle. The vehicle belonged to Insp. Virender Chauhan bearing registration No. HP-14-1020. Those persons suspected Insp. Virender Chauhan and Ram Kumar as police officials. They all fled away. In the meantime, Inder Singh accused alongwith Baldev Singh came from the side of Pulvahal proceeding towards Naura Khad. After some time, a Bolero vehicle occupied by the police officials in civil dress also came from the Pulvahal side towards Naura Khad. There were 5-6 police officials in the vehicle. When accused Inder Singh was apprehended, he was not having anything with him. He was not carrying any bag with him. Thereafter, they were brought to Neripul. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he deposed that he did not state to the police that on 1.11.2009 at about 11:30 AM, he was coming in his own Santro Car from Chaila via Neripul to Solan. (Confronted with portion A to A of his statement Mark A under Section 161 of the Code of Criminal Procedure, in which it is so recorded). He denied that at about 11:30 AM when he was proceeding in the said car about 200 meters behind a curve, the police had parked their jeep and they were also standing there. (Confronted with portion B to B of his statement Mark A under Section 161 of the Code of Criminal Procedure, in which it is so recorded). He also denied that one person was standing there who on the asking of the police disclosed his name as Inder Singh son of Het Ram resident of Village *Gatadi*, Tehsil and Police Station Sirmaur, H.P. nor he stated so to the police. (Confronted with portion C to C of his statement Mark A under Section 161 of the Code of Criminal Procedure, in which it is so recorded). He also denied that the said person, Inder Singh was carrying one blue coloured Airbag on his right shoulder and was carrying an empty cement bag of white and green colour which was giving smell of charas not he stated so to the police. (Confronted with portion D to D of his statement Mark A under Section 161 of the Code of Criminal Procedure, in which it is so recorded). He also denied that the police asked Inder Singh in his presence in writing that the said bags were giving smell of charas, hence, as to whether, he wanted to give the search of the said bags to a Magistrate or a Gazetted Officer or to the police, upon which, the accused opted to give the search to the police nor he stated so. (Confronted with portion E to E of his statement Mark A under Section 161 of the Code of Criminal Procedure, in which it is so recorded). He also denied that the police in his presence and in the presence of Insp. Virender Chauhan searched the blue coloured Air bag being carried by Inder Singh upon which charas in the shape of balls and sticks was found nor he stated so to the police. (Confronted with portion F to F of his statement Mark A under Section 161 of the Code of Criminal Procedure, in which it is so recorded). A suggestion was put to him by the Public Prosecutor to which he deposed that the charas was weighed and found to be 1.100 Kgs. He also admitted that two samples of 50 grams each were taken out from the recovered charas. He has admitted his signatures on memo Ext. PW-1/A. He signed the memo after reading its contents. However, according to him, he refused to sign the memo but was forced by the police to sign the same. He has admitted his signatures on Ext. PW-1/C. According to him, except two bags Ext. P-2 and P-6, there was no bag on the spot. He had not seen the gunny bag Ext. P-4 on the spot and saw the same for the first time in the Court. He was cross-examined by the learned defence counsel. In his cross-examination, he admitted that accused Inder Singh was not among those 6-7 persons who were present at Naura Khad. The accused alongwith Baldev were apprehended by the police on the basis of suspicion that they might be the associates of those 6-7 persons. The police officials asked him to sign the papers as they wanted to make out a false case against the accused because those 6-7 persons had ran away from the spot. He was also told that in case he did not sign the papers, it will be difficult for them

to explain their position. There was habitation by the side of Naura Khad and Neripul. He never owned any car nor does he know driving. According to him, 6-7 persons had left the charas and other articles on the spot which were taken into possession by the police. He also admitted that accused was falsely implicated by Insp. Virender Chauhan in this case. He also admitted that he has nothing to do with the contraband in question. He also admitted that once he had appeared as a witness in case titled State Versus Satish Kumar in the Court at Solan.

7. PW-2 Insp. Narata Ram, was posted as Inspector/Investigating Officer, SV & ACB, Shimla. On 1.11.2009, he was working as Station House Officer of the Police Station. At about 6:00 PM, HHC Mohinder Singh brought *rukka* Ext. PW-2/A and handed over the same to him on the basis of which he got the FIR Ext. PW-2/B registered in the Police Station. At 9:00 PM, Insp. Ram Kumar handed over to him two sample parcels having marks S-1 and S-2 and third parcel containing charas. One bag having scale and weights and a gunny bag containing scale and weights, alongwith NCB Forms in triplicate and samples of seal. He resealed the five parcels by putting two seal impressions of seal 'T' on each. He filled in column No. 9 of the NCB forms Ext. PW-2/D and signed the same. He also issued separate certificate regarding resealing of the case property vide Ext. PW-2/E. After resealing the case property, he directly handed over the same to MHC Ashok Kumar Police SV & ACB, Shimla and not to Inspector Ram Kumar. When he resealed the case property, FIR number had not been written on the said parcels. He handed over the case property to MHC at 9:05 PM. The certificate Ext. PW-2/E was not in his hand writing. Similarly, entry in the NCB forms in column No. 9 regarding resealing of the case property was not in his hand. All the columns of NCB forms Ext. PW-2/D are in the hand writing of Insp. Ram Kumar. He did not emboss the seal of seal 'T' on NCB forms. NCB form only bears his signature and address. He did not deposit the NCB forms Ext.PW-2/D with MHC of Police Station but handed over the same to Inspector Ram Kumar.

8. PW-3 HC Ashok Kumar deposed that on 1.11.2009, HHC Mahinder Singh brought *rukka* Ext. PW-2/A in the Police Station on the basis of which FIR Ext. PW-2/B was registered. He was sent back with the case file at 6:50 PM to the spot. At 9:00 PM, Insp. Ram Kumar came and handed over the case property to Narata Ram. PW-2 Narata Ram resealed the case property and handed over to him one sealed parcel marked as P-1 allegedly containing 7 kg. of charas, two sample parcels allegedly containing 50 gms. of charas in each marked as S-I and S-II, a parcel marked as P-2 allegedly containing scale and weights, 5th parcel marked as P-3 allegedly containing scale and weights alongwith samples of seals 'T' and 'H' and NCB forms in triplicate. On 4.11.2009, he handed over three parcels mark P-1, S-I and S-II to LHC Balvinder vide RC No. 47/09, to hand over the same in FSL, Junga. NCB forms were deposited with him. Seals 'T' and 'H' were not deposited with him. Volunteered that samples of seals 'T' and 'H' were deposited with him. However, he has admitted that no entries regarding NCB forms in triplicate have been made in the Malkhana Register against Sr. No. 10/2009. No entry regarding resealing of parcel marked as P-1 at Sr. No. 1 has been made. The entries of the parcels having been resealed have not been made by him in the Malkhana Register.

9. Statements of PW-4 HHC Babu Ram and PW-5 HC Ramesh Chand are formal in nature.

10. PW-6 Const. Yog Raj was the driver of the vehicle No. HP-07A-0680. According to him, when they reached near place called Naina, just near Neripul, one person carrying bag was walking by the side of the road. He was holding gunny bag in his hand. He was stopped. The police started talking with that person. He attempted to run away from the spot. Thereafter, he was asked to park the vehicle on the side of the road and he parked the vehicle. He kept sitting in the vehicle and the police officials carried out the proceedings. In his cross-examination, he has categorically deposed that nothing was recovered from the bag in his presence from the accused. He could not narrate the name of the person who was carrying the bag. According to him, all the police officials left for Shimla in his vehicle. They reached Shimla at about 8:30/9:00 PM. HHC Mahinder Singh was with them at the time of departure. He came back with them in the same vehicle alongwith other police officials.

11. PW-7 Insp. Virender Chauhan, deposed the manner in which the accused was apprehended, searched, seizure and sampling process was completed. In his cross-examination, he admitted that he was acquainted with Sunil Dutt, husband of the sister of accused Inder.

12. PW-8 HHC Mahinder Singh, was also member of the team. He deposed the manner in which the accused was apprehended, searched, seizure and sampling process was completed. He proceeded from the spot and handed over the *rukka* at Police Station at 6:00 PM to MHC Ashok Kumar, on the basis of which FIR was registered. He intimated about the registration of FIR and its number to Inspector Ram Kumar telephonically. He did not go back to the spot. He telephoned from the Police Station at about 6:30 AM. He also admitted that Const. Yog Raj, driver remained present on the spot. He remained present when the proceedings were being conducted. He did not know how many persons have come back to the Police Station in the government vehicle.

13. PW-9, HC Man Singh was also member of the team. He deposed the manner in which the accused was apprehended, searched, seizure and sampling process was completed.

14. PW-10 Insp. Ram Kumar is the Investigating Officer. He also deposed the manner in which the accused was apprehended, searched, seizure and sampling process was completed. According to him, he prepared *rukka* on the spot. He handed over the same to HHC Mahinder Singh for registration of the FIR. NCB forms Ext. PW-2/D in triplicate were filled on the spot. He signed the same. He prepared the spot map. He came to the Police Station. He handed over the case property and custody of the accused to SHO Narata Ram. SHO Narata Ram resealed the three parcels containing charas by putting two seal impressions of seal 'T' on each of the parcels. Narata Ram got filled in column No. 9 from him and put his own signatures on the NCB form Ext. PW-2/D. He was made to fill in columns since he was busy in sealing the case property. He also handed over to him resealing certificate Ext. PW-2/E. Thereafter, the case property was deposited with MHC of PS vide *rapat* No. 10 Ext. P-10/D. In his cross-examination, he reiterated that no column of NCB forms was in the handwriting of Narata Ram. No seal had been embossed on the NCB forms by Insp. Narata Ram, however, he has embossed his own seal 'H' on the same. NCB forms Ext. PW-2/D was deposited in the Malkhana. The entry of deposit of NCB forms was not made in the Malkhana register. Volunteered that the entries were not made of the documents. Sample of seal 'T' was not deposited by Insp. Narata Ram in the Malkhana in his presence. He also admitted that FIR number was scribed on the parcels when the case property was handed over to Insp. Narata Ram. The FIR number was written by

him on the parcels in the Police Station at Shimla though the FIR number had been disclosed to him by HHC Mohinder Singh on telephone. He could not explain as to why inspite of receipt of telephone on the spot, he did not write the same on the case property.

15. PW-11 HHC Balwinder Singh has carried out the contraband to FSL, Junga.

16. PW-12 Kapil Sharma, has proved Ext. PX, FSL report.

17. According to the case of the prosecution, the accused was apprehended with the contraband on 1.11.2009 at about 11:30 AM. The *rukka* Ext. PW-2/A was prepared on the spot. PW-10 Insp. Ram Kumar has handed over the *rukka* to PW-8 HHC Mahinder Singh to be carried to the Police Station Shimla at 2:00 PM. PW-8 HHC Mahinder Singh deposed that he handed over the *rukka* at Police Station SV & ACB, Shimla at 6:00 PM to MHC Ashok Kumar, on the basis of which FIR was registered. PW-3 HC Ashok Kumar also deposed that on 1.11.2009 HHC Mahinder Singh brought *rukka* Ext. PW-2/A in the Police Station, on the basis of which FIR was registered. He was sent back with the case file at 6:50 PM to the spot. PW-2 Narata Ram deposed that HC Mahinder Singh has brought the *rukka* at 6:00 PM i.e. PW-2/A. He got the FIR Ext. PW-2/B registered. PW-6 Const. Yog Raj who was the official driver of vehicle No. HP-07A-0680, deposed categorically that HHC Mahinder Singh was with them at the time of departure from the spot. PW-8 HHC Mahinder Singh also came back with them in the same vehicle alongwith other police officials. In his examination-in-chief, he has admitted that all of them had remained on the spot since 11:30 AM till evening. They had reached Shimla at 8:30 PM. According to PW-3 HC Ashok Kumar, *rukka* was received and HHC Mahinder Singh was sent back with the case file at 6:00 PM to the spot. PW-8 HHC Mahinder Singh has categorically deposed in his examination-in-chief that he did not go back to the spot as there was no arrangement of conveyance. It casts serious doubt whether PW-8 HHC Mahinder Singh had carried *rukka* Ext. PW-2/A to Police Station at Shimla or not. According to PW-6 Const. Yog Raj, all of them came back at 8:30 PM, thus, the version of the prosecution that *rukka* was brought by PW-8 HHC Mahinder Singh at 6:00 PM is belied.

18. According to PW-10 Insp. Ram Kumar, he had handed over the case file and custody of the accused to the SHO Narata Ram. SHO Narata Ram resealed the three parcels containing charas by putting two impressions of seal 'T' on each of the parcels. SHO Narata Ram, got filled in column No. 9 of the NCB forms and put his signatures on it. The reason assigned for not filling column No.9 is that he was busy in resealing the case property. In his examination-in-chief, he admitted that column No. 9 of NCB forms Ext. PW-2/D was not in his hand writing. He also admitted that no seal was embossed on NCB forms by him. He also admitted that all the NCB forms had been handed over to Insp. Ram Kumar and not deposited with MHC. He did not deposit seal 'T' with MHC or any other police officials. He remained in the Police Station till 9:05 PM. Inspector Ram Kumar came to him at 9:00 PM only. We have gone through the Malkhana Register Ext. PW-3/A. There is no entry of NCB forms in the same at Sr. No. 10. We have also gone through NCB forms Ext. PW-2/D. According to PW-2 Narata Ram, he has put two seal impressions of seal 'T' on the samples. There is no impression of seal 'T' in NCB forms. The NCB forms Ext. PW-2/D are filled in the handwriting of one person.

19. We have also gone through FSL report Ext. PX. According to the report Ext. PX, three sealed cloth parcels marked as P-1, S-I and S-II, each parcel bearing nine seals of 'H' and resealed with two seals of 'T' were received.

The seals were found intact and tallied with specimen seals sent by the forwarding authority on the form NCB-1. Since there is no specimen seal put on NCB forms, how the same could be tallied by the FSL. The impression of seal 'T' could be tallied if it was embossed on NCB forms. It, however, dents the case of the prosecution. Rather, PW-2 Narata Ram in his cross-examination has admitted that he has not embossed the seal of seal impression 'T' on NCB forms. NCB forms were only signed by him. PW-3 HC Ashok Kumar has admitted in his cross-examination that there was no entry regarding NCB forms in triplicate in the Malkhana Register against Sr. No. 10/2009. No entry regarding resealing of parcel marked as P-1 at Sr. No. 1 has been made. The entries of the parcels having been resealed have not been made by him in the Malkhana Register. The prosecution has also not explained who has made endorsement Mark-A in Ext. PW-3/A, Malkhana Register. We have also gone through the Road Certificate Ext. PW-3/B in which there is no mentioning of NCB forms.

20. According to PW-8 HHC Mahinder Singh, he had informed PW-10 Insp. Ram Kumar of the FIR number on telephone and despite that FIR number was not written in the parcel. PW-2 Narata Ram in his cross-examination has admitted that when he resealed the case property, the FIR number was not written on the parcels. PW-10 Insp. Ram Kumar also admitted that FIR number was scribed on the parcels when the case property was handed over to Insp. Narata Ram. FIR number was written by him at Police Station at Shimla. He admitted that the FIR number was disclosed to MHC Mahinder Singh on telephone. He could not explain in his cross-examination as to why FIR number disclosed to him on telephone was not embossed on the case property.

21. The case of the prosecution has not been supported by PW-1 Rajesh Verma. According to him, he was requested by PW-7 Insp. Virender Chauhan to accompany him to farmhouse at Pulvahal. He accompanied him. The car belonged to PW-7 Insp. Virender Chauhan. The registration number of the Car was HP-14-1020. He was declared hostile. Surprisingly, a suggestion was put to him that charas recovered was 1.100 kgms though according to the prosecution, it weighed 7.100 kgms. The case of the prosecution is that all the official witnesses went to the spot in an official vehicle. However, PW-1 Rajesh Verma has deposed that he was called by PW-7 Insp. Virender Chauhan and he alongwith Insp. Virender Chauhan and PW-10 Raj Kumar travelled in Santro Car owned by PW-7 Insp. Virender Chauhan.

22. PW-6 Const. Yog Raj, was driver of the official vehicle. He was present on the spot. In his cross-examination, he has admitted that nothing was recovered from the bags in his presence from the accused. He could not tell even the name of the accused. PW-8 HHC Mahinder Singh has also admitted in his cross-examination that PW-6 Const. Yog Raj driver of the vehicle remained present on the spot. He remained present when the proceedings were conducted. The official witness of the prosecution has not supported the case of the prosecution. PW-1 Rajesh Verma, appears to be a stock witness. He also appeared in NDPS case for prosecution titled as State versus Satish Kumar. It also pertained to NDPS.

23. Thus, the prosecution has failed to prove that the contraband was recovered from the exclusive and conscious possession of the accused. There are major contradictions, improvements, discrepancies and infirmities in the statements of the witnesses, as noticed by us hereinabove.

24. Accordingly, the appeal is allowed. The judgment of conviction and sentence dated 21.12.2010 rendered by the learned Sessions Judge (Special Judge), Shimla, H.P., in NDPS case No. 32-S-7 of 2009 is set aside. The accused

is acquitted of the charges framed under Section 20 of the ND & PS Act, by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C. J.

Kamla Sharma ...Appellant.
Vs.
M/s Bharat Tour & Travels Pvt. Ltd. and others. ...Respondents.

FAO No.389 of 2007
Reserved on : 28.11.2014.
Pronounced on: December 5, 2014.

Motor Vehicle Act, 1988- Section 166- Deceased, riding a motorcycle, was hit by a bus due to which he died on the spot- Tribunal considered the income of the deceased as Rs. 4,000/- per month and determined the loss of dependency as Rs. 2,200/- per month- held, that claimant had specifically pleaded that deceased was pursuing agriculture/horticulture vocation and this evidence was not rebutted- therefore, income of the deceased could not have been less than Rs. 6,000/- per month – 50% of the income was deducted towards the personal expenses- thus, loss of the dependency would be Rs. 3,000/- per month- age of the claimant was to be taken into consideration to determine the multiplier- therefore, multiplier of 12 was proper- Tribunal had held that deceased had contributed to the negligence and had deducted 30% amount, which was not correct- therefore, amount of Rs. 4,32,000/- was awarded along with interest at the rate of 7.5% per annum. (Para-12 to 22)

Cases referred:

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

Saraladevi & Ors. vs. Divisional Manager, M/s. Royal Sundaram Alliance Ins. Co. Ltd. & Anr., 2014 AIR SCW 4993

For the appellant : Mr.Suneet Goel, Advocate.
For the respondents: Mr.Jeevesh Sharma, Advocate, for respondent No.1.
Mr.J.S. Bagga, Advovcate, for respondent No.3.
Nemo for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice:

Appellant-claimant has invoked the jurisdiction of this Court in terms of mandate of Section 173 of the Motor Vehicles Act, 1988, (for short, the

Act), by the medium of this appeal, and sought enhancement of compensation awarded by the Motor Accident Claims Tribunal (II), Shimla, (for short, the Tribunal), in MAC Petition No.14-S/2 of 2004, titled Kamla Sharma vs. M/s Bhart Tour & Travels Pvt. Ltd. and others, vide award, dated 26th June, 2006, whereby compensation to the tune of Rs.2,28,760/- alongwith interest at the rate of 7.5% per annum from the date of filing of the petition till its realization, stands awarded in favour of the appellant-claimant and against insurer, (for short, the impugned award).

2. Facts of the case, in brief, are that the claimant, being mother of deceased Joginder Sharma, filed Claim Petition before the Tribunal, for grant of compensation on the ground that on 3.12.2003, said Joginder Sharma, while riding on a motorcycle, a bus bearing registration No.DL-IPA-7798, being driven by its driver, namely, Mohd. Salim, rashly and negligently, came from opposite side, hit the motorcycle and crushed the said Joginder Sharma resulting into his death on the spot, hence the Claim Petition for grant of compensation to the tune of Rs.20.00 lacs, as per the break-ups given in the Claim Petition.

3. Respondents filed replies and resisted the Claim Petition on various grounds.

4. On the pleadings of the parties, the following issues were settled by the Tribunal:

> *"1. Whether Joginder Sharma died in a motor accident caused by rash and negligent driving of a bus (No.DL-IPA) by respondent 2, Mohd. Salim near IGMC, Shimla on December, 3, 2003?OPP*
>
> *2. Whether the petitioner is entitled to compensation. If so, to what amount? OPP*
>
> *3. Whether the driver of the bus in question was not having a valid and effective driving licence at the time of accident? OPR-3*
>
> *4. Whether the bus in question was being driven in violation of the terms and conditions of the insurance policy? OPR-3*
>
> *5. Whether the deceased also contributed to the accident. If so, to what extent?*
>
> *6. Relief."*

5. The Claimant, in order to prove her case, examined four witnesses, while the driver of the offending bus also stepped into the witness box as RW-1.

6. The Claimant while appearing as PW-1 stated that the deceased Joginder was growing vegetables and had also owned an apple orchard. PW-2 Vidya Sagar stated that the deceased was cultivating cabbage and was also having an orchard of 400 to 500 apple plants and was earning about Rs.2.00 lacs to 2.5 lacs per annum from the apple produce and about Rs.1.5 lacs to 2.00 lacs per annum by selling vegetables.

7. The Tribunal, after scanning the entire evidence, assessed the income of the deceased as Rs.4,000/- per month and after making deduction, it was held that the claimant lost source of dependency to the tune of Rs.2,200/- per month. The Tribunal, while keeping in view of the age of the deceased and the age of the claimant-mother, applied the multiplier of 12. Thus, the Tribunal held the claimant entitled to Rs.3,26,800/-, including Rs.10,000/- awarded under the head 'loss of expectation of life, pains and sufferings'. However, it was held that since the deceased was also responsible for the accident to the extent

of 30%, therefore, the claimant was entitled to 70% of the total assessed compensation, i.e. Rs.2,28,760/-. Feeling aggrieved and dissatisfied, the claimant has filed the present appeal.

8. The insurer, the insured/owner and the driver have not questioned the impugned award on any ground, thus, the same has attained finality so far as it relates to them.

9. The core question involved in the present appeal is – Whether the amount of compensation is adequate or otherwise?

10. I have heard the learned counsel for the parties and have gone through the record of the case.

11. During the course of hearing, Mr.Suneet Goel, learned counsel for the appellant, argued that the Tribunal has fallen in error in assessing the income of the deceased as Rs.4,000/- per month. It was further submitted that the deceased was earning Rs.15,000/- per month, as pleaded in the Claim Petition, at the time of his death, from agriculture and horticulture vocations. The learned counsel further submitted that the Tribunal has applied the multiplier keeping in view the age of the deceased and the claimant-mother, while the multiplier was to be applied keeping in view the age of the deceased. Thus, the impugned award suffers from grave illegality and is liable to be set aside and the compensation deserves to be enhanced accordingly.

12. Admittedly, the deceased was a young boy of the age of 20 years at the time of accident and was a student. He would have got married after 2-3 years and would have his own family. The claimant has specifically pleaded in the Claim Petition that the deceased was also pursuing agriculture/horticulture vocation simultaneously and has also led evidence to that effect, as discussed hereinabove, which evidence of the claimant has remained un-rebutted. Therefore, it can safely be concluded that the deceased would have been earning not less than Rs.6,000/- per month.

13. The Apex Court dilated on the issue of granting compensation, in cases where the deceased is survived by parents and held that 50% of the total income would be treated as personal and living expenses of the bachelor and the remaining 50% has to be treated as contribution towards family, in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120.** It is apt to reproduce paragraph 32 of the said decision hereunder:

> *"32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where family of the bachelor is large and dependant on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."*

14. In view of the dictum of the Apex Court in Sarla Verma's case (supra), it can safely be held that the claimant-mother has lost source of dependency to the tune of 50% of the total income, which the deceased would have been earning at the time of his death. Accordingly, it is held that the claimant-mother lost source of dependency to the tune of Rs.3,000/- per month.

15. The second argument of the learned counsel for the appellant that only the age of the deceased was to be taken into consideration while applying multiplier is devoid of any force for the simple reason that it is well settled that while assessing compensation, the age of the deceased and that of the victim has to be taken into consideration, in view of the decision of the Apex Court in Sarla Verma's case (supra), which position was restated by the Apex Court in its latest decision in **Civil Appeal Nos.8131-8132 of 2014, titled Ashvinbhai Jayantilal Modi vs. Ramkaran Ramchandra Sharma & Anr., decided on 25th September, 2014.** Following observations are relevant and are being reproduced hereunder:

> *".....Therefore, we have no doubt in ascertaining the future income of the deceased at Rs.25,000/- p.m. i.e. Rs.3,00,000/- p.a. Further, deducting 1/3rd of the annual income towards personal expenses as per Oriental Insurance Co.Ltd. v. Deo Patodi and Ors., and applying the appropriate multiplier of 13, keeping in mind the age of the parent of the deceased, as per the guidelines laid down in Sarla Verma case (supra), we arrive at a total loss of dependency at Rs.26,00,000/- [(Rs.3,00,000/- minus 1/3 X Rs.3,00,000) X 13]."* Emphasis supplied.

16. Thus, the Tribunal has rightly applied the multiplier of 12 keeping in view the age of the deceased and of the claimant-appellant.

17. The learned counsel for the appellant has also argued that the Tribunal has awarded Rs.10,000/- under the head 'loss of expectation of life, pains and sufferings', which is quite meager and needs to be enhanced keeping in view the age of the deceased. It is also submitted that the claimant is also entitled for compensation to the tune of Rs.1.00 lac under the heads 'loss of estate' and 'loss of love and affection' and since the Tribunal has not awarded any amount under these heads, the impugned award deserves to be modified accordingly.

18. While dealing with the above argument of the learned counsel for the appellant, a reference may be made to the latest decision of the Apex Court in **Saraladevi & Ors. vs. Divisional Manager, M/s. Royal Sundaram Alliance Ins. Co. Ltd. & Anr., 2014 AIR SCW 4993.** Paragraph 14 is relevant and is being reproduced below:

"*14. In the result, the impugned judgment and order of the High Court is liable to be set aside and accordingly set aside and the Award of the Tribunal is affirmed. Therefore, the appellants shall be entitled to compensation under the following heads:*

Loss of Dependency	*Rs.36,58,248/-*
Funeral Expenses	*Rs. 5,000/-*
Loss of love and affection	*Rs. 50,000/-*
Loss of estate	*Rs. 10,000/-*
Loss of consortium	*Rs. 10,000/-*
Total:	*Rs.37,33,248/-*

Thus, the total compensation payable to the appellants/claimants will be Rs.37,33,248/- with interest @7.5% per annum from the date of filing of the application till the date of payment. The apportionment of the compensation in favour of the appellants is as per the Award of the Tribunal."

19. Accordingly, I deem it proper to award Rs.10,000/- each under both the heads i.e. 'loss of estate' and 'loss of love and affection'.

20. A perusal of the impugned award shows that the Tribunal has held that the deceased also contributed to the accident to the extent of 30% and, therefore, deducted 30% amount from the amount of compensation assessed under the head 'loss of source of dependency', which findings of the Tribunal are not sustainable. The driver of the offending bus appeared in the witness box as RW-1 and stated that on the fateful day, he was driving the offending bus and was proceeding towards Sanjauli side. He further deposed that all of a sudden, the deceased came on the motorcycle at a very high speed and struck with the bus, which was stationery at the relevant point of time. No independent evidence has been led by the respondents in support of the statement of the driver of the bus. In the absence of any independent evidence, it is not understandable from where the Tribunal came to the conclusion that the accident was the outcome of contributory negligence on the part of the deceased and the driver of the offending bus. The findings of the Tribunal are based on the contents contained in the FIR, which have not been properly appreciated by the Tribunal. I have gone through the FIR, wherein it has been clearly recorded that the accident had occurred due to the negligence of the driver of the offending bus. Therefore, it is held that the accident was the outcome of rash and negligent driving of the driver of the offending bus. Accordingly, the findings recorded by the Tribunal on Issue No.1 are set aside and the said Issue is answered in favour of the claimant-appellant and against the respondents.

21. In view of the above discussion, the impugned award is modified and the appellant-claimant is held entitled to compensation as under:

Loss of source of dependency: Rs.3000x 12x12 =	Rs.4,32,000/-
Loss of estate:	Rs.10,000/-
Loss of love and affection:	Rs.10,000/-
Total:	Rs.4,52,000/-.

22. The compensation amount shall carry interest at the rate of 7.5% per annum from the date of the Claim Petition till realization. The insurer is directed to deposit the enhanced amount within a period of six weeks from today and on deposit, the Registry is directed to release the same in favour of the appellant-claimant, strictly in terms of the impugned award.

23. The impugned award is modified, as indicated above and the appeal is disposed of accordingly.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Company Ltd. ...Appellant.
VERSUS
Nirmala Devi and Ors. ...Respondents.

FAO No.485 of 2007
Decided on: December 5, 2014.

Motor Vehicle Act, 1988- Section 149- MACT held that respondent No. 2 was driving the vehicle- Insurance Company had failed to prove that driver did not possess a valid and effective driving license- copy of driving license showed that driver possessed the licence to drive the vehicle –

therefore, insured had not committed any breach- Insurer was rightly held liable. (Para-13)

Motor Vehicle Act, 1988- Section 166- Age of the deceased was 50 years at the time of accident- Tribunal had applied the multiplier of 11- held, that multiplier of 9 should have been applied. (Para-14)

Cases referred:

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellant :	Mr.Ashwani K. Sharma, Advocate.
For the respondents:	Mr. Ajay Chandel, Advocate, for respondents No.1 to 4. Nemo for respondents No.5 and 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral):

Challenge in this appeal is to the award, dated 18th August, 2007, passed by the Motor Accident Claims Tribunal, Fast Track Court, Kangra at Dharamshala, H.P. (for short, the Tribunal), in MAC Petition No.80-J/II/05/01, titled Nirmala Devi and and others vs. Suresh Kumar and others, whereby compensation to the tune of Rs.4,73,000/- alongwith interest at the rate of 9.5% per annum from the date of filing of the petition till its realization, stands awarded in favour of claimant No.1 and against the insurer, (for short, the impugned award).

2. On the last date of hearing, the parties were directed to seek instructions for settling the matter. The learned counsel for the appellant-insurer, on instructions, stated that the insurer is ready to settle the matter in case the claimants are ready to accept Rs.4.00 lacs, in lump sum, as compensation. The learned counsel for the claimant stated that he is under instruction to contest the appeal.

3. Heard learned counsel for the parties.

Brief facts:

4. Claimants have sought compensation to the tune of Rs.6.00 lacs, as per the break-ups given in the Claim Petition, on the grounds which may be enumerated as under.

5. On 12th October, 2000, driver, namely, Sanjay Kumar, had driven Maruti Van bearing registration No.HP-54-3663 rashly and negligently and caused the accident at Dina Nagar (Parmanand), District Gurdaspur, Punjab, as a result of which deceased Ghungar Ram, who was traveling in the said Van, sustained injuries, was taken to Hospital and succumbed to the injuries. The claimants have claimed that the deceased was 50 years of age at the time of accident and was earning Rs.5,000/- by working as mason and Rs.1,000/- from agriculture vocation, hence the Claim Petition.

6. Respondents resisted the claim petition and filed replies. It was pleaded that the age of the deceased was 65 years at the time of accident.

7 On the pleadings of the parties, the following issues were framed by the Tribunal:

1. Whether the deceased Ghungar Ram died in an accident which took place on 12.10.2000 at about 1.15 P.M. near Parmanand Distt. Gurdaspur (Punjab) while he was traveling in Maruti Van No.HP-54-3663 from Amritsar to his village Kardyal as a member of the marriage party which was owned by respondent No.1 and driven in rash and negligent manner by respondent No.2, as alleged? OPP.
2. If issue No.1 is proved in the affirmative, whether the petitioners being the L.Rs. of the deceased are entitled to claim compensation, if so, to what extent and from whom? OPP.
3. Whether the petition is bad for non-joinder of necessary parties, as alleged? OPR-1.
4. Whether the petition is not maintainable against the respondent? OPR-1.
5. Whether the respondent No.2 was not driving a Maruti Van involved in the accident, as alleged? OPR-2.
6. Whether the respondent No.2 was not holding a valid and effective driving licence and the vehicle was driven in violation of the terms and condition of the insurance policy? OPR-1.
7. Whether the petitioners are not the L.Rs. of deceased? OPR.
8. Relief.

8. Parties led their evidence in support of their respective claim.

9. The Claimants have proved by leading evidence that the driver, namely, Sanjay Kumar had driven the offending Van rashly and negligently on the fateful day and has caused the accident, in which the deceased sustained injuries and later on succumbed to the same. Therefore, the findings on issue No.1, recorded by the Tribunal, are upheld, which otherwise also are not disputed.

10. Before I deal with issue No.2, I deem it proper to deal with issues No.3 to 7.

11. Respondents have not led any evidence to prove issues No.3, 4 and 7. Accordingly, the findings returned on these issues are upheld. Moreover, the learned counsel for the appellant has also not questioned the findings recorded on the said issues.

12 Coming to issue No.5, the learned counsel for the appellant argued that the driver was not having a valid and effective driving licence to drive the offending vehicle. Thus, it was submitted that the Tribunal has committed an error in saddling the insurer with the liability. The vehicle was driven by Sanjay Kumar, as per the record and the evidence led by the parties. Respondent No.2 i.e. the driver of the offending vehicle, namely, Sanjay Kumar, has failed to prove that he was not driving the vehicle at the relevant point of time. The Tribunal, after discussing all the evidence, held that respondent No.2

Sanjay Kumar had driven the offending vehicle at the time of accident and caused the accident. Thus, findings returned on issue No.5 are also upheld.

13 As far as issue No.6 is concerned, it was for the insurer to plead and prove that the driver was not having the valid and effecting driving licence, has not led any evidence to that effect. Ext.R-1, copy of the driving licence, is on the record, which does disclose that the driver was having licence to drive the vehicle. Onus to prove this issue was on the insurer, which has not been discharged by it. The Tribunal has rightly come to the conclusion that respondent No.2, driver, was having the licence and thus, the owner/insured has not committed any breach. Therefore, the findings returned on this issue are liable to be upheld and are upheld accordingly.

Issue No.2:

14 The claimants pleaded that the income of the deceased was Rs.6,000/- per month and was 50 years of age at the time of accident. The learned counsel for the claimants argued that the age of the deceased was less than 50 years, while the learned counsel for the insurer argued that there is material on the record to show that the age of the deceased was 65 years at the time of accident. Even if, I take the age of the deceased as 50 years, as given in the Claim Petition, the multiplier applicable was 9 and the Tribunal has fallen in error in applying the multiplier of 11, while keeping in view Schedule 2 appended with the Motor Vehicles Act read with the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120.** Therefore, it is held that multiplier of 9 is applicable in the present case.

15 The claimants before the Tribunal were four in number, but the Tribunal after scanning the evidence held that only Claimant No.1 i.e. the widow of the deceased was the dependant and held entitled her to compensation. The compensation was not awarded in favour of the daughters and son. The daughters and the son, i.e. Claimants No.2 to 4 have not questioned the impugned award by the medium of any appeal or cross objections.

16 Thus, the only question is what is the loss of dependency to the widow. The Tribunal has wrongly assessed the income of the deceased as Rs.5,000/- per month. The claimants have specifically pleaded in the Claim Petition that the deceased was earning Rs.6,000/- per month by working as mason and from agriculture vocation and has also led evidence to that effect. Applying the ratio laid down in **Sarla Verma's case supra**, it can safely be held that the deceased would have spent at least 1/3rd towards his personal expenses, meaning thereby that the claimant has lost source of dependency to the tune of Rs.4,000/- per month. Thus, the claimant is entitled to Rs.4,000 x 12 x 9 = Rs.4,32,000/-.

17 The rate of interest awarded by the Tribunal is 9.5% per annum, which is on the higher side. Therefore, the same is reduced to 7.5% per annum.

18 Having said so, compensation to the tune of Rs.4,32,000/- alongwith interest at the rate of 7.5% per annum from the date of filing of the claim petition till realization stands awarded in favour of the widow i.e. Claimant No.1 Nirmala Devi.

19 The impugned award stands modified, as indicated above. The Registry is directed to release the compensation amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award and the excess amount, if any, alongwith up-to-date interest, be released in favour of the insurer through payees account cheque.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd. ...Appellant.
VERSUS
Asha Devi Gosain and Ors. ...Respondents.

FAO No.480 of 2007
Decided on: December 5, 2014.

Motor Vehicle Act, 1988- Section 149- Driver possessed a license to drive the light motor vehicle – he was driving a Taxi at the time of accident- held, that driver having a valid light motor vehicle licence is not required to have endorsement of PSV i.e. public service vehicle- therefore, it cannot be said that driver did not possess a valid driving licence at the time of accident. (Para- 9 to 12)

Motor Vehicle Act, 1988- Section 166- Age of the deceased was 42 years at the time of accident- Tribunal had applied the multiplier of 15- held, that multiplier of 13 would be applicable. (Para-14)

Cases referred:

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellant : Mr.Ashwani K. Sharma, Advocate.

For the respondents: Mr.Sanjay Bhardwaj, Advocate, vice Mr.J.L. Bhardwaj, Advocate, for respondents No.1 to 5.
Mr.Romesh Verma, Advocate, for respondents No.6 and 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral):

Insurer-appellant has questioned the award, dated 29th August, 2007, passed by the Motor Accident Claims Tribunal, Fast Track Court, Solan, H.P. (for short, the Tribunal), in MAC Petition No.33FTC/2 of 2005/06, titled Asha Devi Gosain and others vs. Deepa and others, whereby compensation to the tune of Rs.9,60,000/- alongwith interest at the rate of 7.5% per annum from the date of filing of the petition till its realization, was awarded in favour of the claimants (respondents No.1 to 5 herein) and against the insurer, (for short, the impugned award).

2. The claimants, five in number, filed a Claim Petition for grant of compensation to the tune of Rs.30.00 lacs, as per the break-ups given in the Claim Petition.

3. Respondents i.e. the insurer, the insured/owner and the driver appeared and resisted the Claim Petition and have filed replies. On the pleadings of the parties, the following issues came to be framed:

1. Whether the deceased had died in the accident caused by the taxi No.HP-01-S-0250 on account of rash/negligent driving by respondent No.2? OPP.
2. If issued No.1 is proved in affirmative, to what amount of compensation, the petitioners are entitled and from whom? OPP
3. Relief.

4. Claimants have examined Padam Dev, Padam Singh, Vinod Rana and Ishwar Dutt, as PW-1, PW-3, PW-4 and PW-5, respectively, while claimant Asha Devi appeared in the witness box as PW-2, in support of the assertions made in the Claim Petition.

5. On the other hand, respondents No.1 and 2 i.e. the owner and the driver examined Kamal Kishore as RW-1, while the insurer examined Bal Krishan Thakur, Junior Assistant, RLA, Solan as RW-2.

6. The claimants, the insured/owner and the driver have not questioned the impugned award, thus, the same has attained finality so far as it relates to them.

7. The insurer has questioned the impugned award on the ground that the compensation awarded by the Tribunal is on the higher side; and that the insured has committed breach.

8. The insurer has not questioned the findings recorded by the Tribunal on issue No.1. However, I have gone through the record and am of the considered view that the claimants have proved, by leading evidence, that the driver had driven the vehicle i.e. taxi No.HP-01-S-0250 rashly and negligently on 5th June, 2005 near Mangoti Mor, Dharampur and has caused the accident in which the deceased, namely, Jagjit Singh sustained injuries and succumbed to the same. Thus, the findings recorded on Issue No.1 are upheld.

9. Admittedly, the driver was having the driving licence to drive Light Motor Vehicles and the offending vehicle was a taxi. The documents i.e. route permit, registration certificate and the statement of RW-2 Bal Krishan Thakur, Junior Assistant, from the office of Registering and Licencing Authority, Solan, do disclose that the taxi/offending vehicle is a Light Motor Vehicle.

10. The learned counsel for the insurer argued that since the driving licence of the driver does not bear endorsement, therefore, the driver was not competent to drive the offending vehicle, is devoid of any force for the following reasons.

11. This Court in series of cases i.e. FAO No.320 of 2008, titled Dalip Kumar and another vs. New India Assurance Company Ltd. & another, decided on 6th June, 2014, FAO No.306 of 2012, titled Prem Singh and others vs. Dev Raj and others, decided on 18th July, 2014 and FAO No.54 of 2012, titled Mahesh Kumar and antoher vs. Smt.Priaro Devi and Others, decided on 25th July, 2014, has discussed the issue and held that the driver having driving

licence to drive Light Motor Vehicle is not required to have endorsement of "PSV" i.e. public service vehicle.

12. The Apex Court in latest decision in Civil Appeal Nos.9929-30 of 2014, titled Kulwant Singh & Ors. vs. Oriental Insurance Company Ltd., decided on 28th October, 2014, has held that the driver of Light Motor Vehicle is not required to have endorsement to drive Commercial Vehicle. It is apt to reproduce paragraphs No.10 and 11 hereunder:

> *"10. In S. Iyyapan (supra), the question was whether the driver who had a licence to drive 'light motor vehicle' could drive 'light motor vehicle' used as a commercial vehicle, without obtaining endorsement to drive a commercial vehicle. It was held that in such a case, the Insurance Company could not disown its liability. It was observed :*
>
> *"18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment (Civil Misc. Appeal No.1016 of 2002, order dated 31.10.2008 (Mad) is, therefore, liable to be set aside."*
>
> *No contrary view has been brought to our notice.*
>
> *11. Accordingly, we are of the view that there was no breach of any condition of insurance policy, in the present case, entitling the Insurance Company to recovery rights."*

13. Having said so, the argument of the learned counsel for the appellant is turned down and the findings returned by the Tribunal are upheld.

14. Admittedly, the age of the deceased is given as 42 years in the Claim Petition. As per schedule 2 appended with the Motor Vehicles Act, 1988 and as also as per the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** multiplier 13 was applicable. Thus, the Tribunal has fallen in error in applying the multiplier 15.

15. The claimants have pleaded that the deceased was running a Canteen and was earning Rs.20,000/- per month. The Tribunal, after scanning the evidence and the documents Exts.PW4/A to PW-4/C, held that the net income of the deceased was not less than Rs.7,600/- per month and after making deductions towards his personal expenses, held that the claimants lost source of dependency to the tune of Rs.4,800/- per month, which appears to be just and appropriate, thus is upheld.

16. Accordingly, it is held that the Claimants are entitled to compensation to Rs.4800 x 12 x 13 = Rs.7,48,800/-. In addition to it, the Claimants are also held entitled to Rs.10,000/- each under the heads 'loss of estate', 'loss of love and affection' and 'loss of consortium'. The above amount of compensation i.e. Rs.7,78,000/-, (Rs.7,48,000 + Rs.30,000/-), shall carry

interest at the rate of 7.5% per annum from the date of the Claim Petition till realization.

17. Appeal is allowed and the impugned award stands modified, as indicated above. The Registry is directed to release the compensation amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award and the excess amount, if any, alongwith up-to-date interest, be released in favour of the insurer through payees account cheque.

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

Ms. Pooja Pathania .....Petitioner.
Versus
State of H.P. & ors. .....Respondents.

CWP No. 7055 of 2014.
Decided on: 5.12.2014.

Constitution of India, 1950- Article 226- Brother of the petitioner was missing since 30.1.2013- FIR was registered for the commission of offences punishable under Sections 364 and 365 IPC at Police Station Sarkaghat, Distt. Mandi- I.O recorded the statements of 56 witnesses but could not find the brother of the complainant- held, that police had failed to trace out the brother of the petitioner- investigation should be conducted promptly – therefore, in these circumstances, CBI was directed to carry out the investigations within a period of three months and thereafter to put up the challan before the Court in accordance with law. (Para- 3 to 12)

Cases referred:

Central Bureau of Investigation though S.P. Jaipur versus State of Rajasthan and another, (2001) 3 SCC 333

Secretary, Minor Irrigation and Rural Engineering Services, U.P. and others versus Sahngoo Ram Arya and another, (2002) 5 SCC 521

Sakiri Vasu versus State of Uttar Pradesh and others, (2008) 2 SCC 409

Bhavesh Jayanti Lakhani versus State of Maharashtra and others (2009) 9 SCC 551

Central Bureau of Investigation and another versus Rajesh Gandhi and another, AIR 1997 SC 93

Seethalakshmi versus State of Tamil Nadu and others, 1991 Cri. L.J. 1037

Nirmal Singh Kahlon versus State of Punjab and others, (2009) 1 SCC 441

Rubabbuddin Sheikh versus State of Gujarat and others, (2010) 2 SCC 200

State of West Bengal and others versus Committee for Protection of Democratic Rights, West Bengal and others, (2010) 3 SCC 571

For the petitioner: Mr. Parshotam Chaudhary, Advocate.

For the respondents: Mr. Shrawan Dogra, AG with Mr. M.A. Khan, Addl. AG, Mr. Anup Rattan, Addl. AG and Mr. Ramesh Thakur, Asstt. AG for respondents-State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J. (oral)

The petitioner's brother is missing since 30.1.2013. FIR No. 41 of 2013 dated 7.2.2013 under Sections 364 and 365 IPC was registered at Police Station Sarkaghat, Distt. Mandi, H.P. against unknown persons. The Investigating Officer has recorded the statements of 5 witnesses, interrogated 56 persons and searched the missing/kidnapped person in several States. The investigation of the case has been entrusted to the State Criminal Investigation Department by the order of Director General of Police, Himachal Pradesh. The investigation was carried out by Sh. Manohar Lal (HPS), Dy. Superintendent of Police, CID Unit, Mandi.

2. The FIR was registered on 7.2.2013 and by now, all out efforts should have been made to trace out the brother of the petitioner. The investigation must be carried out promptly in order to nab the culprits. The valuable evidence is lost if the investigation is not prompt. Mr. Parshotam Chaudhary, Advocate, submits that the investigation being tardy, may be handed over to the Central Bureau of Investigation. Mr. Ashok Sharma, learned Asstt. Solicitor General of India, has no objection to the same.

3. Their Lordships of the Hon'ble Supreme Court in ***Central Bureau of Investigation though S.P. Jaipur versus State of Rajasthan and another***, (2001) 3 SCC 333 have held that the powers of the High Court under Article 226 of the Constitution of India or the Supreme Court under Article 32 or Article 142 (1) of the Constitution can be invoked, though sparingly, for giving such direction to Central Bureau of Investigation in certain cases. Their Lordships have held as under:

> **"14. True, powers of the High Court under Article 226 of the Constitution and of the Supreme Court under Article 32 or Article 142(1) of the Constitution can be invoked, though sparingly, for giving such direction to the CBI to investigate in certain cases, [vide Kashmeri Devi vs. Delhi Administration and anr. {1988 (Supple.) SCC 482} and Maniyeri Madhavan vs. Sub-Inspector of Police and ors. {1994 (1) SCC 536}]. A two Judge Bench of this Court has by an order dated 10.3.1989, referred the question whether the High Court can order the CBI to investigate a cognizable offence committed within a State without the consent of that State Government or without any notification or order having been issued in that behalf under Section 6 of the Delhi Act.**
>
> **15. In Mohammed Anis vs. Union of India and ors. {1994 Supple (1) SCC 145} Ahmadi, J. (as his Lordship then was) has observed thus (SCC pp. 148-49, para 6):**
>
> **"6. True it is, that a Division Bench of this Court made an order on March 10, 1989 referring the question whether a court can order the CBI, an establishment under the Delhi Special Police Establishment Act, to investigate a cognizable offence committed within a State without the consent of that State Government or without any notification or order having been issued in that behalf. In our view, merely because the issue is referred to a larger Bench everything does not grind to a halt. The reference to the expression court in that order cannot in the context mean the Apex Court for the reason that the Apex Court has been conferred extraordinary powers by**

Article 142(1) of the Constitution so that it can do complete justice in any cause or matter pending before it.

16. As the present discussion is restricted to the question whether a magistrate can direct the CBI to conduct investigation in exercise of his powers under Section 156(3) of the Code it is unnecessary for us to travel beyond the scope of that issue. We, therefore, reiterate that the magisterial power cannot be stretched under the said sub-section beyond directing the officer in charge of a police station to conduct the investigation."

4. Their Lordships of the Hon'ble Supreme Court in ***Secretary, Minor Irrigation and Rural Engineering Services, U.P. and others versus Sahngoo Ram Arya and another***, (2002) 5 SCC 521 have held that the High Court under Article 226 of the Constitution of India can direct an inquiry by the Central Bureau of Investigation against a person only if the High Court after considering the material on record comes to a conclusion that such material does discloses a prima facie calling for an investigation by Central Bureau of Investigation or any other similar agency. Their Lordships have held as under:

"5. While none can dispute the power of the High Court under Article 226 to direct an inquiry by the CBI, the said power can be exercised only in cases where there is sufficient material to come to a prima facie conclusion that there is a need for such inquiry. It is not sufficient to have such material in the pleadings. On the contrary, there is a need for the High Court on consideration of such pleadings to come to the conclusion that the material before it is sufficient to direct such an inquiry by the CBI. This is a requirement which is clearly deducible from the judgment of this Court in the case of Common Cause (supra). This Court in the said judgment at paragraph 174 of the report has held thus : (SCC p.750, para 174)

"The other direction, namely, the direction to CBI to investigate "any other offence" is wholly erroneous and cannot be sustained. Obviously, direction for investigation can be given only if an offence is, prima facie, found to have been committed or a person's involvement is prima facie established, but a direction to CBI to investigate whether any person has committed an offence or not cannot be legally given. Such a direction would be contrary to the concept and philosophy of "LIFE" and "LIBERTY" guaranteed to a person under Article 21 of the Constitution. This direction is in complete negation of various decisions of this Court in which the concept of "LIFE" has been explained in a manner which has infused "LIFE" into the letters of Article 21."

6.It is seen from the above decision of this Court that the right to life under Article 21 includes the right of a person to live without being hounded by the Police or the CBI to find out whether he has committed any offence or is living as a law- abiding citizen. Therefore, it is clear that a decision to direct an inquiry by the CBI against a person can only be done if the High Court after considering the material on record comes to a conclusion that such material does disclose a prima facie case calling for an investigation by the CBI or any other similar agency, and the same cannot be done as a matter of routine or merely because a party makes some such allegations. In the instant case, we see that the High Court without coming to a definite conclusion that there is a prima facie case

established to direct an inquiry has proceeded on the basis of 'ifs' and 'buts' and thought it appropriate that the inquiry should be made by the CBI. With respect, we think that this is not what is required by the law as laid down by this Court in the case of Common Cause."

5. The same principles have been reiterated by their Lordships of the Hon'ble Supreme Court in ***Sakiri Vasu versus State of Uttar Pradesh and others***, (2008) 2 SCC 409. Their Lordships have held as under:

> **"33. In Secretary, Minor Irrigation & Rural Engineering Services U.P. and others vs. Sahngoo Ram Arya and another 2002 (5) SCC 521 (vide para 6) , this Court observed that although the High Court has power to order a CBI inquiry, that power should only be exercised if the High Court after considering the material on record comes to a conclusion that such material discloses prima facie a case calling for investigation by the CBI or by any other similar agency. A CBI inquiry cannot be ordered as a matter of routine or merely because the party makes some allegation."**

6. Their Lordships of the Hon'ble Supreme Court in ***Bhavesh Jayanti Lakhani versus State of Maharashtra and others*** (2009) 9 SCC 551 have reiterated that superior courts have power to issue direction to Central Bureau of Investigation to investigate a matter. Their Lordships have held as under:

> **"99. We are not concerned, as it is not necessary for us to determine, whether a direction for making investigation by CBI by the superior courts of the country is permissible. As the law stands, we place on record such directions by the superior courts are permissible."**

7. Their Lordships of the Hon'ble Supreme Court in ***Central Bureau of Investigation and another versus Rajesh Gandhi and another***, AIR 1997 SC 93 have held that if the investigation of the local police is not satisfactory, further investigation is not precluded. Their Lordships have held as under:

> **"8. There is no merit in the pleas raised by the first respondent either. The decision to investigate or the decision on the agency which should investigate does not attract principles of natural justice. The accused cannot have a say in who should investigate the offences he is charged with. We also fail to see any provision of law for recording reasons for such a decision. The notification dated 2.6.1994 is issued by the Government of Bihar (Police Department) by which in exercise of powers under Section 6 of the Delhi Special Police Establishment Act, 1946, Governor of Bihar was pleased to consent and extend the powers and Jurisdiction of the members of the Delhi Special Police Establishment to the whole of the State of Bihar in connection with investigation of the concerned Police Station, on case No.159 of 9.3.1993 in the District of Dhanbad, under Sections 457, 436, 427, 201 and 120-B, Indian Penal Code and conspiracy arising out of the same and any other offence committed in course of the same. The notification of 26.10.1994 is issued by the Government of India, Ministry of Personnel in exercise of the powers conferred by sub-section (l) of Section 5 read with Section 6 of the Delhi Special Police Establishment Act, 1946 whereby the Central Government with the consent of the State**

Government of Bihar in their notification dated 2.6.1994 extended the powers and jurisdiction of the members of the Delhi Special Police Establishment to the whole of the State of Bihar for investigation of offences under Section 457, 436, 427/120-8 and 201 I.P.C. and Section 4 of the Prevention Of Damages to Public Property Act, 1984 registered at Dhanbad Police Station, Dhansar, Bihar in their case No.159 dated 9.3.1933 and any other offences, attempts, abetment and conspiracy in relation to or in connection with the said offence committed in the course of the same transactions or arising out of the same fact or facts in relation to the said case. There is no provision in law under which, while granting consent or extending the powers and jurisdiction of the Delhi Special Police Establishment to the specified State and to any specified case any reasons are required to be recorded on the face of the notification. The learned Single Judge of the Patna High Court was clearly in error in holding so. If investigation by the local police is not satisfactory, a further investigation is not precluded. In the present case the material on record shows that the investigation by the local police had not been satisfactory. In fact the local police had filed a final report before the Chief Judicial Magistrate Dhanbad. The report, however, was pending and had not been accepted when the Central Government with the consent of the State Government issued the impugned notification. As a result, the C.B.I. has been directed to further investigate the offences registered under the said F.I.R. with the consent of the State Government and in accordance with law. Under Section 173 (8) of the Cr.P.C. 1973 also, there is an analogous provision for further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate."

8. The investigation should be fair, cautious and effective. The learned Single Judge of Madras High Court in ***Seethalakshmi versus State of Tamil Nadu and others***, 1991 Cri. L.J. 1037 has succinctly explained the manner in which the investigation is required to be carried out as under:

"(i) proceedings to the spot; (ii) ascertainment of facts and the circumstances of the case, (iii) discovery and arrest of the suspected offender; (iv) collection of evidence relating to the commission of the offence which may consist of (a) examination of various persons including the accused and the reduction of their statements in writing, if the officer thinks fit, (b) search of places and seizure of things considered necessary for investigation and to be produced at the trial, and (v) formation of opinion as to whether on the material collected there is a case to place the accused before a Magistrate for a trial and if so taking the necessary steps for the same by filing charge sheet under S. 173(1) of the Code. The object of the investigation being to collect evidence, the investigating officer has to do all things necessary which he considers relevant and material without committing breach of the mandatory provisions of the Code of Civil Procedure. The investigating police are primarily the guardians of the liberty of innocent persons and a heavy responsibility devolves on them of seeing that innocent persons are not charged on irresponsible and false implication. It is of the utmost importance that people entrusted with the investigation must be scrupulously honest and efficient, otherwise cases both of innocent persons being wrongly convicted and of really guilty

persons being wrongly let off are likely to occur. It is the duty of the investigation officer to discover the truth and make a relentless pursuit for the truth. Investigation cannot be merely mechanical, and it must be an intelligent one. The police in conducting the investigation must act in such a way as to inspire fully confidence in everybody concerned. If upon the completion of the investigation it appears to the police officer that there is no sufficient evidence or reasonable ground , if he may decide to release the suspected accused, if in custody. If, however, it appears to him that there is sufficient evidence or reasonable ground to place the accused on trial, he shall take necessary steps therefore u/S. 170 of the Code. In either case, on the completion of the investigation, he has to submit a report to the Magistrate u/S. 173 of the Code in the prescribed form furnishing such details. Thus, the procedure prescribed by the Code enjoins the Police Officer to file a report before the concerned Magistrate and also inform the complainant even if the police officer comes to the conclusion that no case has been made out on the materials collected by him."

9. Their Lordships of the Hon'ble Supreme Court in ***Nirmal Singh Kahlon versus State of Punjab and others***, (2009) 1 SCC 441 have held that fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India, but the State has a larger obligation, i.e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation. Their Lordships have held as under:

"28. An accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation. When serious allegations were made against a former Minister of the State, save and except the cases of political revenge amounting to malice, it is for the State to entrust one or the other agency for the purpose of investigating into the matter. The State for achieving the said object at any point of time may consider handing over of investigation to any other agency including a central agency which has acquired specialization in such cases."

10. Their Lordships of the Hon'ble Supreme Court in ***Rubabbuddin Sheikh versus State of Gujarat and others***, (2010) 2 SCC 200 have held that the case can be transferred to C.B.I. for investigation even if the State Police had completed the investigation and charge-sheet had been submitted. Their Lordships have further held that in an appropriate case, the court is empowered to hand over investigation to an independent agency like CBI. Their Lordships have held as under:

"53. It is an admitted position in the present case that the accusations are directed against the local police personnel in which High Police officials of the State of Gujarat have been made the accused. Therefore, it would be proper for the writ petitioner or even the public to come forward to say that if the investigation carried out by the police personnel of the State of Gujarat is done, the writ petitioner and their family members would be highly prejudiced

and the investigation would also not come to an end with proper finding and if investigation is allowed to be carried out by the local police authorities, we feel that all concerned including the relatives of the deceased may feel that investigation was not proper and in that circumstances it would be fit and proper that the writ petitioner and the relatives of the deceased should be assured that an independent agency should look into the matter and that would lend the final outcome of the investigation credibility, however, faithfully the local police may carry out the investigation, particularly when the gross allegations have been made against the high police officials of the State of Gujarat and for which some high police officials have already been taken into custody.

54. It is also well known that when police officials of the State were involved in the crime and in fact they are investigating the case, it would be proper and interest of justice would be better served if the investigation is directed to be carried out by the CBI Authorities, in that case CBI authorities would be an appropriate authority to investigate the case.

56. In Kashmeri Devi vs. Delhi Administration, (supra), this court held that in a case where the police had not acted fairly and in fact acted in partisan manner to shield real culprits, it would be proper and interest of justice will be served if such investigation is handed over to the CBI authorities or an independent agency for proper investigation of the case. In this case, taking into consideration the grave allegations made against the high police officials of the State in respect of which some of them have already been in custody, we feel it proper and appropriate and in the interest of justice even at this stage, that is, when the charge sheet has already been submitted, the investigation shall be transferred to the CBI Authorities for proper and thorough investigation of the case.

57. In Kashmeri Devi (supra), this Court also observed as follows: -

"Since according to the respondent charge-sheet has already been submitted to the Magistrate we direct the trial court before whom the charge sheet has been submitted to exercise his powers under Section 173(8) Cr. P.C. to direct the Central Bureau of Investigation for proper and thorough investigation of the case. On issue of such direction the Central Bureau of Investigation will investigate the case in an independent and objective manner and it will further submit additional charge sheet, if any, in accordance with law."

60. Therefore, in view of our discussions made hereinabove, it is difficult to accept the contentions of Mr.Rohatgi learned senior counsel appearing for the state of Gujarat that after the charge sheet is submitted in Court in the criminal proceeding it was not open for this court or even for the High Court to direct investigation of the case to be handed over to the CBI or to any independent agency. Therefore, it can safely be concluded that in an appropriate case when the court feels that the investigation by the police authorities is not in the proper direction and in order to do complete justice in the case and as the high police officials are involved in the said crime, it was always open to the court to hand over the investigation to the independent agency like CBI. It cannot be said that after the

charge sheet is submitted, the court is not empowered, in an appropriate case, to hand over the investigation to an independent agency like CBI."

11. Their Lordships of the Hon'ble Supreme Court in ***State of West Bengal and others versus Committee for Protection of Democratic Rights, West Bengal and others***, (2010) 3 SCC 571 have held that in so far as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. Their Lordships have further held that this extraordinary power must be exercised sparingly, cautiously and in exception situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Their Lordships have held as under:

> **"70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.**
>
> **71. In Secretary, Minor Irrigation & Rural Engineering Services, U.P. & Ors. Vs. Sahngoo Ram Arya & Anr.31, this Court had said that an order directing an enquiry by the CBI should be passed only when the High Court, after considering the material on record, comes to a conclusion that such material does disclose a prima facie case calling for an investigation by the CBI or any other similar agency. We respectfully concur with these observations."**

12. Accordingly, the Writ Petition is disposed of and the investigation of FIR No. 41 of 2013 dated 7.2.2013 is directed to be carried out by the Central Bureau of Investigation. Sh. Manohar Lal (HPS), Dy. Superintendent of Police, CID Unit, Mandi, is directed to hand over the entire case file to the Superintendent of Police, Central Bureau of Investigation, Shimla, within a week. The investigation in the matter shall be carried out by the Central Bureau

of Investigation, within a period of three months and thereafter challan shall be put up in accordance with law.

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

Raju. ...Appellant.
Vs.
State of Himachal Pradesh ...Respondent.

Cr.A. No. 247/2011
Reserved on: 4.12.2014
Decided on: 5.12. 2014

N.D.P.S. Act, 1985- Section 20- Petitioner was occupying seat no. 36 in a bus- search of bus was conducted on which the accused was found in possession of 5.5 k.g of charas - there were contradictions in the testimonies of the prosecution witnesses regarding the location of the bag and the number of police officials who had boarded the bus- police officials had straight away gone to Seat No. 36 which showed that they had prior knowledge that the person occupying seat No. 36 had contraband- held, that in these circumstances, the compliance of Section 42 of N.D.P.S. Act was mandatory- since, there was non-compliance of Section 42, hence, accused acquitted. (Para-20 and 21)

Cases referred:
Karnail Singh vs. State of Haryana, (2009) 8 SCC 539
Sukhdev Singh vs. State of Haryana, (2013) 2 SCC 212

For the appellant: Ms. Charu Gupta, Advocate.
For the Respondent: Mr. M.A. Khan, Addl. A.G. with
Mr. P.M. Negi, Dy. A.G. and
Mr. Ramesh Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 21.5.2011 rendered by the Special Judge, Mandi in Sessions Trial No. 16 of 2010, whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offence punishable under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 has been convicted and sentenced to undergo rigorous imprisonment for a period of 15 years and to pay a fine of Rs. 1,50,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for a period of two years.

2. Case of the prosecution, in a nutshell, is that PW-10 Girdhari Lal, Inspector Madan Lal, HHC Ram Lal and HHC Ranvir were present at Naresh Chowk Sundernagar on 23.12.2009 in official vehicle. The vehicle was being driven by Constable Rakesh Kumar. Punjab Roadways bus bearing registration No. PB-12K-4306 came from Manali side. It was going towards Chandigarh. It

was signalled to stop. There were 20 passengers in the bus. The person occupying seat No.36 became perplex on seeing the police. He revealed his name as Raju. He was holding a black colour bag in his lap. Witnesses Subhash Chand and Hoshiar Singh were associated. Police party gave its search to the accused. Inspector Madan Lal told the accused that he has a legal right to be searched before Magistrate or gazetted officer. Accused consented to be searched by the police. Memo Ex.PW-1/A was prepared. Search of the accused was undertaken. Cannabis was found kept in two packets inside the bag. Ticket Ex.PW-10/A was also recovered from the accused. It was attested by the conductor. Constable Rakesh Kumar was sent to bring weight and scales. He brought the same. On weighing the contraband was found to be 5 kg 500 grams. The bag was sealed in a parcel with ten impressions of seal 'N. NCB-1 from Ex.PW-12/C was filled in triplicate. Sample seal was taken on separate pieces of cloths and one such seal is Ex.PW-11/B. Seal impression was also taken on NCB-1 form. The Seal was handed over to Subhash after use. Seizure memo Ex.PW-1/C was prepared. Rukka Ex.PW-12/A was prepared. It was sent to Police Station through Constable Rakesh Kumar for registration of case. It was handed over to Durga Dass. He recorded FIR Ex.PW-5/A. The contraband was sent to F.S.L., Junga. The report of F.S.L. Ex.PW-11/A was received. Police investigated the case and the challan was put up in the court after completing all the codal formalities.

3. Prosecution examined as many as 14 witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He has denied the case of the prosecution in entirety. Learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Ms. Charu Gupta, learned counsel for the accused has vehemently argued that the prosecution has failed to prove its case against the accused.

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

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

7. PW-1 Subhash Sharma has deposed that on 23.12.2009, he was travelling in the Punjab Roadways bus bearing registration No.PB-12-4306 from Manali to Sundernagar. He was occupying the last seat of the bus. When the bus reached at Naresh Chowk at about 12 noon, police boarded the bus. The person, who was occupying seat No.36, got frightened on seeing the police. He could not identify him in the court. Police made inquiry from him. He revealed his identity. A bag of black colour was lying beneath the seat of that person. Police inquired from him whether he wanted to be searched by the police or by some higher officer. He consented to be searched by the police vide memo Ex.PW-1/A. Police and witnesses gave their search to the accused. Search of accused was conducted. Two packets were recovered from the bag which was lying beneath his seat. Passengers stated that they were in hurry. Packets were checked before sending the bus. The packets were found to be containing black colour substance. The accused and bag were taken out of the bus. The substance was weighed. On weighing it was found to be 5 kg 500 grams. It was put in the bag from which it was recovered. Bag was sealed in a parcel with seal 'N'. The bus ticket was recovered from the accused. Memo was prepared. It was signed by him, Hoshiar Singh, Girdhari Lal and accused. Sample seal Ex.PW-1/D was prepared. The seal was handed over to him after its use. He identified his signatures on Ex.PW-1/E and Ex.PW-1/F. He has reiterated in his

examination-in-chief that accused was sitting alone on seat No.36. In his cross-examination, he has deposed that he alone got down at Sundernagar. Three police officials boarded the bus from the front door and three from the rear door. Hoshiar Singh was sitting in his shop. Police had not made inquiry from any person prior to arrival at seat No.36. The bag was kept in the aisle adjacent to seat No.36. Police had not made any inquiry about the ownership of the bag. Other luggage was also lying in the aisle. The search was conducted inside the bus by the S.H.O. Other police officials were also inside the bus.

8. PW-2 Hoshiar Singh has deposed that he was associated by the police on 23.12.2009 as a witness. He was called inside the bus. He went inside the bus. Accused was occupying seat No. 36. He was perplexed. He was holding a black colour bag in his lap. Police made inquiry from him. He revealed his identity. Bag was checked. It was found to be containing two yellow colour packets. Packets were opened. These were found to be containing charas Ex.P-5. Accused was also found in possession of ticket. Charas was weighed. It was 5 kg 500 grams. The bag was put in a cloth and the parcel was sealed with 10 seal of seal 'N'. Sample seal was taken separately on a piece of cloth and one such impression was Ex.PW-1/D. In his cross-examination, he has deposed that 5-6 police officials were on the spot. Two police officials remained outside and four went inside the bus. He was not aware about the name of the persons from whom inquiry was made by the police inside the bus. He was not aware whether an inquiry was made from the passengers or not. He was present in his shop outside the bus. Police called him. Police had already seized the bag by that time and had discovered what was lying inside the bag. The investigation was conducted outside his shop. Police had not read over and explained his statement to him. He put his signatures on the asking of the police at the places mentioned.

9. PW-3 Rakesh Kumar has deposed that constable Rakesh Kumar came to him and demanded weights and scale on 23.12.2009 at about 12-12.30 P.M.

10. Statement of PW-4 Constable Hari Singh is formal in nature.

11. PW-5 HC Durga Dass has deposed that rukka mark 'C' was written by SI/SHO Madan Lal. It was sent to Police Station through Constable Rakesh Kumar. He recorded FIR Ex.PW-5/A. One parcel sealed with ten impressions of seal 'N', sample seal, NCB-1 form were deposited with him by SI/SHO Madan Lal on the same day. He made entry in the register of Malkhana at Sr. No. 113. He handed over the articles to constable Beas Dev on 24.12.2009 vide RC No.166/09 with a direction to carry the same to F.S.L. Junga. RC is Ex.PW-5/C.

12. Statements of PW-6 Raj Kumar and PW-7 HC Ram Lal are formal in nature.

13. PW-8 Constable Beas Dev has deposed that on 24.12.2009 MHC Durga Dass handed over to him one parcel sealed with ten impressions of seal 'N', NCB-1 form, sample seal 'N' and other documents with a direction to carry the same to F.S.L. Junga vide RC No. 116/09. He deposited the articles at F.S.L. Junga in safe condition.

14. Statement of PW-9 Meera is formal in nature.

15. PW-10 Girdhari Lal has deposed the manner in which police party boarded the bus and the accused was apprehended, sampling and seizure process was completed on the spot and the rukka was prepared. It was sent to

Police Station through Constable Rakesh Kumar. In his cross-examination, he has deposed that he and SHO Madan boarded the bus. He did not remember whether seat No.36 was in row of two seats or three seats. They went directly to the accused as he got frightened. SHO Madan made inquiry from the accused.

16. Statement of PW-11 SHO Trilok Chand is formal in nature.

17. PW-12 Inspector Madan Lal has deposed the manner in which accused was apprehended from the bus, his consent was obtained, sampling and seizure process was completed on the spot, charas was weighed, rukka Ex.PW-12/E was prepared and handed over to constable Rakesh Kumar with a direction to carry it to the Police Station for registration of FIR. Rakesh Kumar brought the case file to the spot. The case property was handed over to MHC. He prepared the special report. In his cross-examination, he has deposed that he checked many vehicles prior to the checking of bus, but he did not remember the details. All the police officials were checking the passengers. He did not remember which police official had checked which passenger. He checked the accused. When he was checking the accused, other police officials were checking other passengers. He did not remember which seat was occupied by Subhash. He did not remember whether he was occupying seat in the row of two seats or three seats.

18. PW-13 Constable Rakesh Kumar has taken the rukka to Police Station and brought the file back. In his cross-examination, he has deposed that all the police officials boarded the bus. SHO and HC Girdhari boarded the bus from the front door and other police officials boarded the bus from the rear door. He was in the middle. He checked 2-3 passengers. The accused was occupying the row of three seats. He was alone. He did not remember the number of seats occupied by witnesses Subhash and Hoshiar Singh.

19. PW-14 Mohan Singh was the conductor of the bus. He has deposed that accused was occupying seat No.36. He had kept a bag in his lap. The bag was checked. It contained two yellow colour polythene bags. In his cross-examination, he has deposed that he was occupying seat No.1 when police stopped the bus. 2-3 police officials entered inside the bus. Two persons boarded the bus from front door and one boarded the bus from rear door. No other persons boarded the bus. All the passengers were checked. All the police officials were checking the passengers together.

20. According to PW-1 Subhash Sharma, accused was occupying seat No.36. A hand bag of black colour was lying under the seat of that person. He has denied the suggestion that accused was holding the bag in his lap. In his cross-examination by the defence counsel, he has deposed that the bag was kept in the aisle adjacent to seat No.36. Police has not made any inquiry about the ownership of the bag. PW-2 Hoshiar Singh has deposed that accused was holding a black colour bag in his lap. PW-10 Girdhari Lal has deposed that accused was occupying seat No. 36. He was holding a black colour bag in his lap. PW-13 Rakesh Kumar has deposed that accused had kept the bag in his lap. PW-14 has deposed that accused was occupying seat No.36. He had kept a bag in his lap. There is variance in the statements of PW-1 Subhash Sharma vis-à-vis official witnesses. According to PW-1 Subhash Sharma, the bag was lying under the seat. He has also deposed that the bag was kept in the aisle adjacent to seat No.36 and the police had not made any inquiry about the ownership of the bag. Other luggage was also lying in the aisle and the police had not made inquiry about the ownership of the luggage. PW-2 Hoshiar Singh was not aware about the names of the persons from whom the inquiry was made by the police inside the bus. He was not aware whether any inquiry was made

from the passengers or not. According to PW-12 Madan Lal all the police officials were checking other passengers. However, he did not remember, which police official has checked which passenger. When he was checking the accused, other police officials were checking other passengers. He did not remember which seat was occupied by PW-1 Subhash Sharma. PW-13 Rakesh Kumar has deposed that he has not made inquiry about the names and addresses checked by him. They were not having any luggage. He did not remember the number of seat occupied by PW-1 Subhash Sharma. According to PW-1 Subhash Sharma, six officials had boarded the bus. Three police officials boarded the bus from the front door and three boarded the bus from the rear door. PW-2 Hoshiar Singh has deposed that two police officials remained outside and four went inside the bus. PW-12 Madan Lal has deposed that all the police officials boarded the bus. PW-10 Girdhari Lal has deposed that he and SHO Madan boarded the bus. PW-13 Rakesh Kumar has admitted that SHO and HC Girdhari boarded the bus from the front door and the others police personnel boarded the bus from the rear door. There is contradiction in the statements of these witnesses how many police personnel had boarded the bus. Police has not examined any other passenger sitting in the bus near seat No.36. PW-1 Subhash Sharma was occupying the last seat. In his cross-examination, PW-1 Subhash Sharma, as noticed above, has deposed that the bag was lying under the seat and in his cross-examination; he has deposed that the bag was in the aisle adjacent to seat No.36. It was necessary for the police to make inquiry from other passengers with regard to bag lying in the aisle or under the seat. Contraband lying under the seat or in the aisle could belong to other passengers also.

21. There is overwhelming evidence on record to point out that all the police personnel had straightway gone to seat No.36. The explanation given by the prosecution is that the moment they entered the bus, person occupying seat No.36 got perplexed. There were 20 passengers sitting in the bus. The police could only reach seat No.36 straightway if it had a prior knowledge that person occupying seat No.36 was carrying contraband. If the police had the prior information that a person occupying seat No.36 was carrying contraband, compliance of section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 was mandatory. Admittedly, section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 has not been complied with. [*See:* ***Karnail Singh*** vs. ***State of Haryana***, (2009) 8 SCC 539 *and* **Sukhdev Singh** vs. ***State of Haryana***, (2013) 2 SCC 212]. Thus, the prosecution has failed to prove the recovery of contraband from the exclusive and conscious possession of the accused.

22. Consequently, in view of analysis and discussion made hereinabove, the prosecution has failed to prove the case for offence under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 beyond reasonable doubt against the accused.

23. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 21.5.2011 rendered in Sessions Trial No. 16 of 2010 is set aside. Accused is acquitted of the charge framed against him by giving him benefit of doubt. Fine amount, if already deposited, be refunded to the accused. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Ramesh Chand Khurana ...Appellant.
Versus
Oriental Insurance Company & another ...Respondents.

FAO No. 328 of 2007
Decided on: 05.12.2014

Motor Vehicle Act, 1988- Section 149- Injured was travelling in the vehicle at the time of accident – Insured contended that injured was travelling in the capacity of conductor/cleaner- he was covered under insurance policy- Insurer argued that deceased was travelling as a gratuitous passenger – copy of the application filed by injured before Commissioner under Workmen Compensation Act and copy of the judgment of the Workman Compensation Commissioner showed that the injured had contended that he was a workman which plea was turned down by Commissioner- an application was preferred which was disposed of with liberty to approach the Motor Accident Claimant Tribunal- the findings recorded by Workmen Compensation Commissioner had attained finality- therefore, it was not permissible for the claimant to say that he was travelling as cleaner/conductor- MACT had also held that no goods were found near the place of the accident- therefore, insured was rightly held liable. (Para-17 to 20)

For the appellant: Mr. Dalip K. Sharma, Advocate.
For the respondents: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate, for respondent No. 1.
Mr. Karan Singh Kanwar, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the award, dated 1st May, 2007, made by the Motor Accident Claims Tribunal, Solan, H.P.(hereinafter referred to as "the Tribunal") in MAC Petition No. 168-S/2 of 2005, titled as Shri Rajinder Kumar versus Ramesh Chand Khurana and another, whereby compensation to the tune of 4,19,000/- with interest 7.5% per annum from the date of petition till deposit of the amount came to be awarded in favour of the claimant-injured (hereinafter referred to as "the impugned award").

2. The insurer and the claimant-injured have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The owner-insured-appellant has questioned the impugned award only on the ground that the Tribunal has fallen in error in fastening the liability upon him, on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant argued that the offending vehicle was insured at the relevant point of time and risk of the claimant-injured, namely Shri Rajinder Kumar, who was travelling in the truck, bearing

registration No. HP-11-0442, as a conductor/ cleaner, was covered and he has not committed any breach.

5. Learned counsel for the insurer argued that the claimant-injured was not travelling in the vehicle as a conductor/cleaner or the owner of the goods and the Tribunal has rightly exonerated the insurer and directed the owner-insured to satisfy the award.

6. In order to determine the issue involved, the brief facts of the case are to be noticed.

Brief facts:

7. The claimant-injured, Shri Rajinder Kumar, has averred in the claim petition that he was travelling in the truck, bearing registration No. HP-11-0442, on 4th May, 1996, which met with an accident near Village Manjyat, Tehsil Arki at about 3.35 p.m. FIR No. 23 of 1996 was registered at Police Station Arki under Sections 279, 337 and 304-A of the Indian Penal Code (hereinafter referred to as "the IPC"). He has pleaded that he was 29 years of age at the time of accident and was agriculturist by occupation. In para 10 of the claim petition, it has been averred that he was travelling in the said vehicle as owner of goods and he was also entrusted the job of conductor on the said date because the regular conductor was not available.

8. The driver of the offending vehicle also lost life in the said accident.

9. The owner-insured has filed reply and in reply to para 10 of the claim petition, stated that the offending vehicle was being managed and controlled by him and his brother. The vehicle was being plied day and night for carrying goods of Ambuja Cement Limited from one place to another. Further that Shri Rajinder Kumar and Shri Babu Ram were engaged as conductors by his brother and the claimant was travelling in the offending vehicle as a conductor at the relevant point of time. In reply to para 21 of the claim petition, it has been averred that the claim petition is not maintainable against him and has denied his liability to pay compensation.

10. The insurer has filed reply and contested the claim petition on the ground that the claimant was not engaged as a conducor and he was also not travelling in the said vehicle as owner of the goods, but as a gratuitous passenger.

11. Following issues came to be framed by the Tribunal:

> *"1. Whether the petitioner has suffered injuries on account of rash/negligent driving of the truck driver in which he was one of the occupants?...OPP*
>
> *2. If issue No. 1 is proved in affirmative, what amount of compensation the petitioner is entitled to and from whom?...OPP*
>
> *3. Whether the petitioner was travelling as gratuitous passenger in the vehicle? ...OPR-2*
>
> *4. Whether the truck was not validly registered at the time of accident?...OPR-2*

5. Whether the driver was not holding driving licence to drive the offending vehicle at the time of accident? ...OPR-2

6. Relief."

12. The claimant has examined MHC Ramesh Chand as PW-2, Shri Amar Singh as PW-3, Dr. Anil Bansal as PW-4 and has also appeared himself in the witness box as PW-1. He has also placed on record affidavit as Ext. PW-1/A; discharge slips as Ext. PW-1/B, Ext. PW-1/C & Ext. PW-1/D, copy of jamabandi as Ext. PW-1/E, copy of order of the High Court as Ext. PW-1/F, disability certificate as Mark A and prescription slips as Mark B to Mark F.

13. The owner-insured has himself appeared in the witness box as RW-2 and has placed on record affidavit as Ext. RW-2/A, copy of certificate of validity of driving licence as RW-2/B, copy of insurance policy as Ext. RW-2/C, copy of registration & fitness certificates as Mark R-1 and copy of insurance cover note as Ext. RW-2/D. The insurer has examined Shri Ram Lal, Junior Assistant from the office of SDM Arki as RW-1.

Issue No. 1:

14. The Tribunal, after scanning the evidence, oral as well as documentary, held that the driver of the offending truck had driven the vehicle rashly and negligently, caused the accident and the claimant sustained injuries. The owner-insured has also admitted the factum of accident. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

15. Before I deal with issues No. 2 and 3, I deem it proper to determine issues No. 4 and 5.

Issues No. 4 and 5:

16. It was for the insurer to prove that the offending vehicle was not registered and the driver was not holding valid and effective driving licence at the time of accident. Neither it has led any evidence nor there is anything on record to prove the said issues. The Tribunal, after examining the record, has rightly held that the offending vehicle was validly registered at the relevant point of time in terms of the Registration and Fitness Certificates, Mark R-1, and the driver was having the valid and effective driving licence in terms of Ext. RW-2/B. Accordingly, the findings returned on issues No. 4 and 5 are upheld.

Issue No. 3:

17. The insurer has placed on record copy of the application filed by the claimant-injured before the Commissioner under Workmen's Compensation Act, Arki, District Solan, copy of judgment of this Court in FAO No. 111 of 2001, titled as Rajinder Kumar versus Oriental Insurance Co. & anr. It appears that the claimant has first invoked the jurisdiction of the Authority under Workmen's Compensation Act and sought compensation on the ground that he was workman, which was turned down by the Commissioner under Workmen's Compensation Act at Arki vide order, dated 31st March, 2001.

18. Feeling aggrieved, the claimant filed FAO No. 111 of 2001, which was also disposed of by providing liberty to the claimant to approach the Motor Accident Claims Tribunal concerned. The findings returned by the Commissioner under Workmen's Compensation Act have attained finality, thus, how can the claimant now plead and press into service that he was a workman i.e. cleaner/conductor. The claimant had not taken the plea before the

Commissioner under Workmen's Compensation Act that he was travelling in the offending vehicle as owner of the goods, is an afterthought, just to seek compensation.

19. It is also worthwhile to mention herein that in para 4 of the claim petition, the claimant has stated that he is an agriculturist by occupation. The Tribunal, after discussing the evidence, held that no goods were found near the place of accident or in the offending vehicle. The description as to which kind of goods/articles he was carrying in the offending vehicle has not been given, not to speak of proof.

20. The Tribunal has rightly held that the claimant was not travelling in the vehicle as conductor/cleaner or owner of the goods. The record do disclose that he was travelling in the offending vehicle as a gratuitous passenger. The insurer has been able to prove and establish that the claimant was travelling in the offending vehicle as a gratuitous passenger.

21. Having said so, findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 2:

22. The quantum of compensation is not in dispute. Accordingly, the amount of compensation awarded is upheld. The risk of gratuitous passenger is not covered in terms of the insurance policy, Ext. RW-2/C, read with the mandate of Section 149 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act"). The Tribunal has rightly discharged the insurer and saddled the owner-insured with liability. Thus, the findings returned by the Tribunal on issue No. 2 are upheld.

23. Having glance of the above discussions, no case for interference is made out and the appeal merits to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

24. The owner-insured is directed to deposit the awarded amount before the Registry within twelve weeks, if not already deposited. On deposition of the same, the Registry is directed to release the awarded amount in favour of the claimant after proper identification.

25. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Smt. Tejwanti ...Appellant.
Versus
Shri Ibrahim Bharti & others ...Respondents.

FAO No. 142 of 2007
Decided on: 05.12.2014

Motor Vehicle Act, 1988- Section 166- Deceased sustained injuries when he was debarking from the bus, which was started by the driver suddenly- claimant claimed that the income of the deceased was Rs. 12,000/- per month- however, no evidence was led to prove this fact- hence, by guess-work income of the deceased can be taken as Rs.

6,000/- per month- claimant had lost source of dependency to the extent of 50%, thus, loss of dependency was Rs. 3,000/- per month- the multiplier of '6' is applicable- claimant is entitled to the compensation of Rs. 2,16,000/- with interest at the rate of 7.5% per annum.

(Para-11 and 12)

Cases referred:

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121

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

For the appellant: Mr. Ravinder Thakur, Advocate.

For the respondents: Mr. Ajay Sharma with Mr. Vinod Chauhan, Advocate, for respondent No. 1.
Nemo for respondent No. 2.
Mr. Praneet Gupta, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Appellant, victim of a motor vehicular accident, by the medium of this appeal, has invoked the jurisdiction of this Court in terms of Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") and has questioned the award, dated 23rd March, 2007, made by the Motor Accident Claims Tribunal, Kullu, H.P. (hereinafter referred to as "the Tribunal") in Cl. Pet. No. 39/06, titled as Smt. Tejwanti versus Shri Ibrahim Bharti and others, whereby her claim petition came to be dismissed (hereinafter referred to as "the impugned award").

Brief facts:

2. Appellant-claimant, widow of deceased-Keshav Ram, filed a claim petition before the Tribunal for grant of compensation to the tune of Rs. 5,00,000/-, as per the break-ups given in the claim petition. It is pleaded that on 22nd December, 2005, deceased, namely Shri Keshav Ram, was travelling in the offending bus, bearing registration No. HP-34-5546, was stopped by the driver at Village Khakhnal enabling him to debark. In the process of debarking, the driver suddenly drove the vehicle. Resultantly, the deceased lost control and fell down, sustained injuries, was taken to Lady Willingdon Hospital, Manali, where he breathed last. MLC was issued. The claimant-widow had asked the police not to conduct postmortem and also asked not to conduct investigation.

3. Appellant-claimant filed claim petition for grant of compensation, was resisted by the respondents on the grounds taken in the respective memo of objections.

4. Following issues came to be framed by the Tribunal:

> *"1. Whether petitioner has received injuries on her person in the accident of bus No. HP-34-5546 due to rash and negligent driving of the said bus by respondent-2? OPP*
>
> *2. If issue-1 is held in affirmative, to what amount of compensation, the petitioner is entitled and from whom? OPP*

3. Whether respondent-2 was not holding valid and effective driving licence at the time of accident of the vehicle in question and the same was being plied without documents? OPR-3

4. Relief."

5. The claimant has examined Dr. Alka Waltar as PW-1, HC Hari Singh as PW-2, Shri Tara Chand as PW-4 and the claimant, Smt. Tejwanti, herself has appeared in the witness box as PW-3. The owner-insured and the driver have examined Shri Praveen Kumar, Clerk-cum-Typist from the office of SDJM, Chachiot at Gohar as RW-1, Shri Chetan as RW-2, the owner insured, Shri Ibrahim Bharti, himself has stepped into the witness box as RW-3 and the driver, namely Shri Mohinder Singh, has also appeared in the witness box as RW-4. The insurer has not examined any witness in support of its case.

Issue No. 1:

6. The Tribunal has held that the claimant has failed to prove the rash and negligent driving of the driver of the offending vehicle, which is factually incorrect.

7. I have gone through the record and minutely perused the evidence. PW-4, Shri Tara Chand, and the claimant have deposed that the deceased was travelling in the offending vehicle and sustained injuries due to the rash and negligent driving of the driver. They have specifically stated that the deceased sustained injuries when he was debarking from the bus, which was driven by the driver suddenly.

8. Having said so, it is held that the claimant has proved that the driver of the offending vehicle had driven the vehicle rashly and negligently resulting in the death of the deceased. Accordingly, issue No. 1 is decided in favour of the claimant and against the respondents.

9. Before I deal with issue No. 2, I deem it proper to determine issue No. 3.

Issue No. 3:

10. The insurer has not led any evidence to the effect that the driver of the offending vehicle was not having the valid and effective driving licence and the vehicle was being plied without documents. Shri Praveen Kumar, Clerk-cum-Typist from the office of SDJM Chachiot at Gohar, while appearing in the witness box as RW-1 stated that he has brought the original driving licence of the driver, namely Shri Mahinder Singh, was seized property in a case titled as State versus Mahinder Singh and after perusing the photocopy, which is on the record, stated that the said copy is true and correct, is exhibited as Ext. RW-1/A. The insurer has also failed to prove that the vehicle was being plied without documents. The Tribunal has rightly decided issue No. 3 against the insurer. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 2:

11. The claimant has pleaded that deceased was earning Rs.12,000/- per month, though, there is no such evidence on the file. It can be held, by guess work, that the deceased was earning not less than Rs.6,000/- per month as a labourer. It can be safely held that the claimant has lost source of

dependency to the extent of 50%, thus, has lost source of dependency to the tune of Rs.3,000/- per month.

12. Admittedly, the age of the deceased was 58 years at the time of accident. The multiplier of '6' is applicable in view of the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.**

13. Viewed thus, the claimant is held entitled to compensation to the tune of Rs.3,000/- x 12 x 6 = Rs. 2,16,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization. The factum of insurance is not in dispute. Accordingly, the insurer is saddled with liability.

14. Having glance of the above discussion, the appeal is allowed, the impugned award is set aside, the claim petition is granted and compensation to the tune of Rs. 2,16,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization is awarded in favour of the claimant.

15. The insurer is directed to deposit the awarded amount before the Registry within twelve weeks. On deposition of the same, the Registry is directed to release the awarded amount in favour of the claimant after proper identification.

16. Send down the record after placing copy of the judgment on Tribunal's file. Copy dasti.

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

Dr. N.K.Joolka .... Petitioner.

Vs.

Dr. Y.S.Parmar University of Horticulture and Forestry, Nauni, ... Respondent.

CWP No. 8262 of 2013
Date of Decision: 8.12.2014.

Constitution of India, 1950- Article 226- Petitioner was serving as Professor in the faculty of Pomolgy, now known as "the Department of Fruit Sciences"- he was selected and appointed as Director of Extension Education for a tenure of five years- he made representation for providing increment to him which was rejected- held, that post of Director of Extension Education carried higher responsibilities- the words "other than a tenure basis" in FR 22 (1) (a) will not be applicable when the person is appointed to a post involving assumption of duties and responsibilities of greater importance- therefore, petition allowed and the university directed to grant benefit of the increment in accordance with FR 22 (1) (a). (Para-2)

For the petitioner: Mr. Ankush Dass Sood, Advocate.
For the respondent: Ms. Ranjana Parmar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.*(Oral):*

The petitioner was serving as Professor in the faculty of Pomolgy, now known as "the Department of Fruit Sciences". The petitioner, in pursuance to the advertisement issued by the University comprised in Annexure P-4 calling upon desirous candidates/aspirants to within the period prescribed in it apply for the post of Director of Extension Education, applied for the same. His having fulfilled all the necessary qualifications he came to be selected and consequently appointed as Director of Extension Education for a tenure of five years as evident from Annexure P-6. The petitioner made a representation to the University/respondent for an increment being provided to him. The respondent considered the representations of the petitioner and under Annexures P-10, P-13 and P-15 rejected it on the score that even if assuming that the appointment of the petitioner to the post of Director of Extension Education admittedly involved assumption of duties and responsibilities of greater importance yet uncontrovertedly and admittedly further when the pay scale as drawn by the petitioner while serving as Professor/HOD in the University/respondent and the pay scale to which he was entitled to on his being appointed as Director of Extension Education on tenure basis was at par, as such given the parity of pay scales drawn by him when serving as Professor/HOD in the University/respondent and while being subsequently under Annexure P-6 having come to be appointed as Director of Extension Education the bar envisaged in FRSR sub rule (III) of Rule 22 against the applicability of the provisions of FR 22(1)(a) inasmuch, as, where even if the aggrieved prior to his being appointed to a post involving higher duties and responsibilities has been drawing a pay scale at par or equivalent to the one afforded to him on assumption of duties and responsibilities of greater importance, stood attracted, hence the representation of the petitioner herein came to be rejected. The provisions of F.R 22(1)(a) and F.R. 22(III), are extracted here-in-after:-

> *"22(a)(1) Where a Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfillment of the eligibility conditions as prescribed in the relevant Recruitment Rules, to another post carrying duties and responsibilities of greater importance than these attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or(rupees one hundred only), whichever is more."*
>
> *"22(III). For the purpose of this rule, the appointment shall not be deemed to involve the assumption of duties and responsibilities of greater importance, if the post to which it is made is on the same scale of pay as the post, other than a tenure post, which the Government servant holds on a regular basis at the time of his promotion or appointment or on a scale of apy identical therewith."*

2. From a reading of the reply of the respondent-University it is manifestly admitted that the post of Director of Extension Education involves higher duties and responsibilities than the one which were performed by the petitioner while serving as Professor/HOD. It is also uncontroverted that the

appointment of the petitioner to the post of Director of Extension Education is on a tenure basis. Consequently, the fact of the petitioner having been appointed to the post of Director of Extension Education for a specific duration of time or on a tenure basis assumes significance in construing the impact of or applying the embargo created by the provisions of Sub Rule III of Rule 22 of FRSR against the applicability of sub rule 1(a) of Rule 22 of FRSR. The fulcrum for applying the embargo to the applicability of sub rule 1(a) of Rule 22 of FRSR as envisaged in Sub Rule III of Rule 22 of FRSR is encapsulated in the phrase "other than on a tenure basis" occurring after the contemplation therein of inapplicability of the provisions of FR22(1)(a) where the post to which a person is appointed involves assumption of duties and responsibilities of greater importance. The import of the phrase or of the words "other than a tenure basis" occurring subsequent to the phrase, for the purpose of this rule, the appointment shall not be deemed to involve the assumption of duties and responsibilities of greater importance, if the post to which it is made is on the same scale of pay as the post is that it consequently, creates an exception to the applicability of the embargo envisaged in sub rule (III) of FR 22 to the inapplicability of FR 22(1)(a). In other words, where a person is appointed to a post carrying or involving assumption of duties and responsibilities of greater importance yet when the pay scale attached to the said post is equivalent to the pay scale drawn by the incumbent while previously serving in a capacity not involving assumption of duties and responsibilities of greater importance the embargo contemplated and created by sub rule (III) of FR 22 against the applicability of FR 22 1(a) would apply only in the event of the incumbent having not come to be appointed on a tenure basis to a post involving assumption of duties and responsibilities of greater importance. Moreover, for reiteration the rigor of the embargo engrafted in sub rule (III) of FR 22 is relieved in the event of the incumbent donning the post or assuming the post involving assumption of duties and responsibilities of greater importance on a tenure basis. Since the petitioner came to be appointed on a tenure basis to the post of Director of Extension Education besides even when both the post of Professor previously occupied by the petitioner and the post of Director of Extension Education to which he was subsequently appointed carry parity of pay scales besides even when the latter appointment/post involves assumption of duties and responsibilities of greater importance yet in the face of subsequent appointment/posting donned/assumed by the petitioner being on a tenure basis the rejection of the representation of the petitioner for reasons comprised in Annexures P-10, P-13 and P-15 is not in consonance with a correct interpretation of the provisions of sub rule (III) of Rule 22 of the FRSR to the facts of the present case. Consequently, it is ordered that respondent-university shall while applying the provisions of sub rule (1)(a) of FR 22 afford to him in accordance with it the increment as sought. No costs.

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

Dr. Rakesh Kapoor .....Petitioner.

Versus

State of H.P. & others. .....Respondents.

CWP No. 6686 of 2014.
Reserved on: 04.12.2014.
Decided on: 08.12.2014.

Constitution of India, 1950- Article 226- An FIR was registered against the petitioner for the commission of offences punishable under Sections 7 & 13 (2) of the Prevention of Corruption Act, 1988- Department initiated departmental proceedings against the petitioner- the petitioner approached the Administrative Tribunal which granted the interim stay- subsequently, petitioner was convicted by Special Judge, Kangra at Dharamshala- petitioner was removed from the service after his conviction and departmental enquiry was dropped due to severance of the relations of master and servant- conviction was set aside by Hon'ble Supreme Court of India- petitioner was reinstated and the disciplinary authority was directed to proceed further with departmental inquiry- petitioner contended that departmental inquiry had been closed and, therefore, it was not permissible to continue with the inquiry- held, that department had taken a decision on technical ground after the removal of the petitioner that Departmental inquiry will not continue since the master-servant relationship was severed after the removal of the petitioner- once petitioner has been reinstated, the employer has a right to continue the departmental proceedings and it cannot be said that mere acquittal in a criminal case is a ground to drop the departmental proceedings- hence, petition dismissed. (Para- 3 to 15)

Cases referred:

South Bengal State Transport Corpn. Vrs. Sapan Kumar Mitra and ors., (2006) 2 SCC 584

Commissioner of Police, New Delhi Vrs. Narender Singh, (2006) 4 SCC 265

Suresh Pathrella Vrs. Oriental Bank of Commerce, (2006) 10 SCC 572

Union of India and others Vrs. Naman Singh Shekhawat, (2008) 4 SCC 1

State Bank of Hyderabad and another Vrs. P. Kata Rao, (2008) 15 SCC 657

Samar Bahadur Singh Vrs. State of Uttar Pradesh and others, (2011) 9 SCC 94

K. Venkateshwarlu Vrs. State of Andhra Pradesh, (2012) 8 SCC 73

Avinash Sadashiv Bhosale Vrs. Union of India and others, (2012) 13 SCC 142

Commissioner of Police, New Delhi & anr. Vrs. Mehar Singh, (2013) 7 SCC 685

For the petitioner: Mr. Dilip Sharma, Sr. Advocate, with Mr. Umesh Kanwar, Advocate.

For the respondents: Mr. M.A.Khan, Addl. Advocate General with Mr. P.M.Negi, Dy. AG and Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

FIR No. 1 of 2003 dated 5.5.2003 was registered against the petitioner under Sections 7 & 13(2) of the Prevention of Corruption Act, 1988 at Police Station, Anti Corruption Zone, Dharamshala. The petitioner was served with memorandums dated 24.12.2004 and 5.4.2005 vide Annexures P-1 and P-2, respectively. The petitioner filed OA(D) No. 126 of 2005 before the erstwhile H.P. Administrative Tribunal assailing the initiation of departmental proceedings against him pending criminal trial. The learned Tribunal granted interim stay on 19.5.2005. The petitioner was convicted and sentenced under Sections 7 & 13(2) of the Prevention of Corruption Act, 1988 on 16.10.2008 by the learned

Special Judge, Kangra at Dharamshala. He was sentenced to undergo two years rigorous imprisonment and to pay fine of Rs. 10,000/- and in default of payment of fine, he was ordered to undergo further simple imprisonment for six months. The petitioner was removed from service on 2.3.2010. A decision was taken vide Annexures P-5 and P-6, respectively that since master-servant relationship was severed after the removal of the petitioner, departmental proceedings were ordered to be closed. The fact of the matter is that the petitioner was acquitted by the Hon'ble Supreme Court vide judgment dated 22.11.2012. Thereafter, the petitioner was re-instated on 16.5.2013 and the order dated 2.3.2010 whereby the petitioner was removed from service was set aside and the disciplinary authority was directed to proceed further with two departmental inquiries pending before the Commissioner Departmental Enquiries against the petitioner under the provisions of the Central Civil Services (CCA) Rules, 1965. The petitioner made appeals to withdraw the departmental inquiries initiated against him. The appeals were dismissed by the competent authority vide order (Annexure R-2) dated 14.10.2013 and order dated 12.7.2014, respectively.

2. Mr. Dilip Sharma, Sr. Advocate, appearing for the petitioner has vehemently argued that once the decision has been taken vide Annexures P-5 and P-6, the departmental proceedings could not be continued on the basis of Annexure P-7 dated 16.5.2013. On the other hand, Mr. M.A.Khan, learned Addl. Advocate General, appearing on behalf of the State has strenuously argued that the departmental proceedings were closed only on a technical ground that the master-servant relationship has come to an end, after the removal of the petitioner vide order dated 2.3.2010. According to him, the departmental proceedings could continue even though the petitioner has been acquitted as per the judgment dated 22.11.2012 and there is no specific bar not to continue with the departmental proceedings. He lastly contended that the petitioner has not been acquitted honourably, but given benefit of doubt, as per the operative portion of the judgment dated 22.11.2012.

3. The petitioner, as noticed hereinabove, was convicted and sentenced by the trial Court on 16.10.2008. He was removed on 2.3.2010. He has been reinstated vide order dated 16.5.2013 after his acquittal. Now, as far as Annexures P-5 and P-6 are concerned, it is evident from the language employed therein that a technical decision was taken not to continue with the departmental proceedings since the petitioner stood removed from the service. Though the petitioner has been reinstated but the employer has absolute right to continue with the departmental proceedings which were kept in abeyance or closed only technically.

4. We have also gone through the operative portion of the judgment dated 16.10.2008. The cogent reasons have been given in Annexure P-7 dated 16.5.2013 as well as Annexure R-2 dated 14.10.2013 and Annexure P-9 dated 12.7.2014 to continue with the departmental proceedings initiated against the petitioner on 24.12.2004 and 5.4.2005.

5. Their lordships of the Hon'ble Supreme Court in the case of ***South Bengal State Transport Corpn. Vrs. Sapan Kumar Mitra and ors.,*** reported in ***(2006) 2 SCC 584,*** have rejected the contention of the petitioner that after the acquittal, the departmental proceedings could not be continued and punishment could not be inflicted. Their lordships have held as under:

> "9. We have heard the learned counsel for the parties and also examined the relevant records of this case. Although the Division Bench had not categorically said that the departmental proceeding could not be continued and punishment could not be imposed on the delinquent

employee when the criminal case ended in acquittal, even then the learned counsel for the , respondents sought to argue this ground before us. In our view, this ground is no longer res integra. In Nelson Mods v. Union of India' *[(1992) 4 SCC 711 : 1993 SCC (L&S) 13 : (1993) 23 ATC 382]* a three-Judge Bench of this Court observed at SCC p. 714, para 5, as follows:

> "5. So far the first point is concerned, namely, whether the disciplinary proceedings could have been continued in the face of the acquittal of the appellant in the criminal case, the plea has no substance 1 whatsoever and does not merit a detailed consideration. The nature and scope of a criminal case are very different from those of a departmental disciplinary proceeding and an order of acquittal, therefore, cannot conclude the departmental proceeding. Besides, the Tribunal has pointed out that the acts which led to the initiation of the departmental disciplinary proceeding were not exactly the same which were the (subject-matter of the criminal case." (emphasis supplied)

10. Similarly in Senior Supdt. of Post Offices v. .4. Gopalan *[(1997) 11 SCC 239 : 1998 SCC (L&S) 124]* the view expressed in Nelson Motis v. Union of India1 was fully endorsed by this Court and similarly it was held that the nature and scope of proof in a criminal case is very different from that of a departmental disciplinary proceeding and the order of acquittal in the former cannot conclude the departmental proceedings. This Court has further held that in a criminal case charge has to be proved by proof beyond reasonable doubt while in departmental proceeding the standard of proof for proving the charge is mere preponderance of probabilities. Such being the position of law now settled by various decisions of this Court, two of which have already been referred to earlier, we need not deal in detail with the question whether acquittal in a criminal case will lead to holding that the departmental proceedings should also be discontinued. That being the position, an order of removal from service emanating from a departmental proceeding can very well be passed even after acquittal of the delinquent employee in a criminal case. In any case, the learned Single Judge as well as the Division Bench did not base their decisions relying on the proposition that after acquittal in the criminal case, departmental proceedings could not be continued and the order of removal could not be passed."

6. Their lordships of the Hon'ble Supreme Court in the case of ***Commissioner of Police, New Delhi Vrs. Narender Singh,*** reported in ***(2006) 4 SCC 265,*** have held that acquittal in criminal trial is not by itself a ground not to initiate or drop departmental proceedings. Their lordships have held as under:

> "13. It is now well-settled by reason of a catena of decisions of this Court that if an employee has been acquitted of a criminal charge, the same by itself would not be a ground not to initiate a departmental proceeding against him or to drop the same in the event an order of acquittal is passed."

7. Their lordships of the Hon'ble Supreme Court in the case of ***Suresh Pathrella Vrs. Oriental Bank of Commerce,*** reported in ***(2006) 10 SCC 572,*** have held that acquittal in criminal case would be no bar for drawing up a disciplinary proceeding against the delinquent officer. The yardstick and standard of proof in a criminal case is different from the disciplinary proceeding. Their lordships have held as under:

> "11. In our view, the findings recorded by the learned Single Judge are fallacious. This Court has taken the view consistently that acquittal in a criminal case would be no bar for drawing up a disciplinary proceeding against the delinquent officer. It is well settled principle of law that the yardstick and standard of proof in a criminal case is different from the disciplinary proceeding. While the standard of proof in a criminal case is a proof beyond all reasonable doubt, the proof in a departmental proceeding is preponderance of probabilities."

8. Their lordships of the Hon'ble Supreme Court in the case of ***Union of India and others Vrs. Naman Singh Shekhawat,*** reported in ***(2008) 4 SCC 1,*** have held that departmental proceedings could be initiated even if the acquittal is recorded by the criminal court. It could be initiated if the department intended to adduce any evidence which is in its power and possession to prove the charges against the delinquent officer. However, such a proceeding must be initiated bonafide and the action must be reasonable and fair. Their lordships have held as under:

> "29. There cannot be any doubt whatsoever, as has been submitted by the learned Additional Solicitor General, that initiation of departmental proceeding is permissible even after the judgment of acquittal is recorded by the criminal court. But the same would not mean that a proceeding would be initiated only because it is lawful to do so. A departmental proceeding could be initiated if the department intended to adduce any evidence which is in its power and possession to prove the charges against the delinquent officer. Such a proceeding must be initiated bona fide. The action of the authority even in this behalf must be reasonable and fair."

9. In the instant case, the petitioner has been given benefit of doubt.

10. Their lordships of the Hon'ble Supreme Court in the case of ***State Bank of Hyderabad and another Vrs. P. Kata Rao,*** reported in ***(2008) 15 SCC 657,*** have again reiterated that acquittal by itself would not debar the disciplinary authority in initiating a fresh departmental proceedings and/or where the departmental proceedings had already been initiated, to continue therewith. Their lordships have held as under:

> "18. There cannot be any doubt whatsoever that the jurisdiction of superior courts in interfering with a finding of fact arrived at by the Enquiry Officer is limited. The High Court, it is trite, would also ordinarily not interfere with the quantum of punishment. There cannot, furthermore, be any doubt or dispute that only because the delinquent employee who was also facing a criminal charge stands acquitted, the same, by itself, would not debar the disciplinary authority in initiating a fresh departmental proceeding and/ or where the departmental proceedings had already been initiated or to continue therewith.
>
> 20. The legal principle enunciated to the effect that on the same set of facts the delinquent shall not be proceeded in a departmental proceedings and in a criminal case simultaneously, has, however, been deviated from. The dicta of this Court in Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. and Another [(1999) 3 SCC 679], however, remains unshaken although the applicability thereof had been found to be dependant on the fact situation obtaining in each case."

11. Their lordships of the Hon'ble Supreme Court in the case of ***Samar Bahadur Singh Vrs. State of Uttar Pradesh and others,*** reported in

(2011) 9 SCC 94, have held that acquittal in criminal case has no bearing or relevance to departmental proceedings as standard of proof in both cases is totally different. Their lordships have held as under:

> "2. The appellant herein was employed as a Constable in the Provincial Armed Constabulary (hereinafter referred to as 'P.A.C.') on 15.11.1978. He was posted in IV Bn. P.A.C., Allahabad. On 27.10.1991, he was unauthorisedly absent from the Battalion Headquarter and on that day in the evening he along with one of his friends grabbed one bottle of liquor from the wine shop forcibly and also threatened them. With regard to the aforesaid incident, a criminal case was also registered on the basis of a complaint filed by the salesman of the wine shop, Sh. Rajan Lal. The appellant was also medically examined during the course of which he was found to be under the influence of liquor. The Doctor has opined that he had consumed alcohol, but was not intoxicated.
>
> 6. We have considered all the aforesaid submissions in the light of the records that are available with us. The medical report which is placed on record indicates that the appellant had consumed alcohol, but he was not intoxicated. The appellant was missing from the headquarters on 27.10.1991 from the morning and he was caught in the case registered under Section 392 I.P.C. in the evening. The appellant wishes to make a defence that he was advised to take medicine but the prescription which is placed in the departmental proceedings does not indicate that any medicine was prescribed in that prescription. The appellant was arrested in the criminal case in connection with stealing of a bottle of foreign liquor and even during that time he had consumed alcohol prior to the incident. These facts have been brought out in the inquiry proceedings initiated against him in which the appellant did not participate. Therefore, whatever allegations have been brought against him, have been proved by placing cogent materials on record, which go unrebutted due to his absence in the proceedings. We also find that the appellant has been charged on the ground of negligence, deriliction of duty and consuming liquor. The aforesaid facts are found proved in the departmental proceedings.
>
> 7. Acquittal in the criminal case shall have no bearing or relevance to the facts of the departmental proceedings as the standard of proof in both the cases are totally different. In a criminal case, the prosecution has to prove the criminal case beyond all reasonable doubt whereas in a departmental proceedings, the department has to prove only preponderance of probabilities. In the present case, we find that the department has been able to prove the case on the standard of preponderance of probabilities. Therefore, the submissions of the counsel appearing for the appellant are found to be without any merit.
>
> 8. Now, the issue is whether punishment awarded to the appellant is disproportionate to the offence alleged. The appellant belongs to a disciplinary force and the members of such a force is required to maintain discipline and to act in a befitting manner in public. Instead of that, he was found under the influence of liquor and then indulged himself in an offence. Be that as it may, we are not inclined to interfere with the satisfaction arrived at by the disciplinary authority that in the present case punishment of dismissal from service is called for. The punishment awarded, in our considered opinion, cannot be said to be

shocking to our conscience and, therefore, the aforesaid punishment awarded does not call for any interference."

12. Their lordships of the Hon'ble Supreme Court in the case of ***K. Venkateshwarlu Vrs. State of Andhra Pradesh,*** reported in ***(2012) 8 SCC 73,*** have held that even in case of acquittal, when acquittal is other than honourable, departmental proceedings may follow. Their lordships have also issued directions as under:

> "13. In R.P. Kapur v. Union of India the Constitution Bench of this Court has held that if the trial of a criminal charge results in conviction, disciplinary proceedings are bound to follow against the public servant so convicted, but even in case of acquittal departmental proceedings may follow, when the acquittal is other than honourable. We are not aware whether any disciplinary proceedings are pending against the appellant. But, if they are, the concerned authority shall proceed with them independently, uninfluenced by this judgment and in accordance with law."

13. Their lordships of the Hon'ble Supreme Court in the case of ***Avinash Sadashiv Bhosale Vrs. Union of India and others,*** reported in ***(2012) 13 SCC 142,*** while discussing the scope of acquittal and its effect on departmental proceedings have held that conduct of criminal trial was in hands of prosecuting agency and once FIR was registered, Bank had little or no role to play. Failure of prosecution in producing necessary evidence before trial Court can have no adverse impact on evidentiary value of material produced by Bank before enquiry officer in departmental proceedings. Their lordships have held as under:

> "57. Mr. Dwivedi, in our opinion, has rightly pointed out that the conduct of the criminal trial was in the hands of the prosecuting agency. Having registered the First Information Report, the Bank had little or no role to play, apart from rendering assistance to the prosecuting agencies. In our opinion, the failure of the prosecution in producing the necessary evidence before the trial court can not have any adverse impact on the evidentiary value of the material produced by the Bank before the Inquiry Officer in the departmental proceedings. Before the Inquiry Officer, the Bank had placed on the record all the relevant documents which clearly establish that the appellant had exceeded his discretionary powers in purchasing the cheques and issuing demand drafts to show undue favour to the three construction companies named in the charge sheet. In view of the above, the findings recorded by the Inquiry Officer can not be said to be based on no evidence.
>
> 58. It is a settled proposition of law that the findings of Inquiry Officer cannot be nullified so long as there is some relevant evidence in support of the conclusions recorded by the Inquiry Officer. In the present case, all the relevant documents were produced in the Inquiry to establish the charges levelled against the appellant. It is a matter of record that the appellant did not doubt the authenticity of the documents produced by the Bank. He merely stated that the signature on the documents were not his. The aforesaid statement of the appellant was nullified by Mr. S.M. Mahadik, who appeared as a witness for the Bank. He clearly stated that he recognized the signature of the appellant as he had been working as his subordinate.

> 59. The findings recorded by the Enquiry Officer cannot be said to be based on no evidence. In such circumstances, the appellant cannot take any advantage of the findings of innocence recorded by the criminal court. The 'clean chit' given by the learned Magistrate was influenced by the failure of the prosecution to lead the necessary evidence. No advantage of the same can be taken by the appellant in the departmental proceedings."

14. Their lordships of the Hon'ble Supreme Court in the case of ***Commissioner of Police, New Delhi & anr. Vrs. Mehar Singh,*** reported in ***(2013) 7 SCC 685,*** have held that even if the person was acquitted or discharged in a criminal case that acquittal or discharge will have to be examined to see whether he has been completely exonerated in the case because even a possibility of his taking to life of crime poses a threat to the society. Their lordships have explained the terms "honourable acquittal", "acquitted of blame" and "fully exonerated" and the purpose of departmental proceedings is to keep persons, who are guilty of serious misconduct or dereliction of duty or who are guilty of grave cases of moral turpitude, out of government service, if found necessary, because they pollute the department. Their lordships have held as under:

> "24. We find no substance in the contention that by cancelling the respondents' candidature, the Screening Committee has overreached the judgments of the criminal court. We are aware that the question of co-relation between a criminal case and a departmental inquiry does not directly arise here, but, support can be drawn from the principles laid down by this Court in connection with it because the issue involved is somewhat identical namely whether to allow a person with doubtful integrity to work in the department. While the standard of proof in a criminal case is the proof beyond all reasonable doubt, the proof in a departmental proceeding is preponderance of probabilities. Quite often criminal cases end in acquittal because witnesses turn hostile. Such acquittals are not acquittals on merit. An acquittal based on benefit of doubt would not stand on par with a clean acquittal on merit after a full fledged trial, where there is no indication of the witnesses being won over. In R.P. Kapur v. Union of India[AIR 1964 SC 787] this Court has taken a view that departmental proceedings can proceed even though a person is acquitted when the acquittal is other than honourable.
>
> 25. The expression 'honourable acquittal' was considered by this Court in S. Samuthiram. In that case this Court was concerned with a situation where disciplinary proceedings were initiated against a police officer. Criminal case was pending against him under Section 509 of the IPC and under Section 4 of the Eve-teasing Act. He was acquitted in that case because of the non-examination of key witnesses. There was a serious flaw in the conduct of the criminal case. Two material witnesses turned hostile. Referring to the judgment of this Court in Management of Reserve Bank of India, New Delhi v. Bhopal Singh Panchal[(1994) 1 SCC 541], where in somewhat similar fact situation, this Court upheld a bank's action of refusing to reinstate an employee in service on the ground that in the criminal case he was acquitted by giving him benefit of doubt and, therefore, it was not an honourable acquittal, this Court held that the High Court was not justified in setting aside the punishment imposed in departmental proceedings. This Court observed that the expressions 'honourable acquittal', 'acquitted of blame' and 'fully exonerated' are unknown to the Criminal Procedure Code or the Penal

Code. They are coined by judicial pronouncements. It is difficult to define what is meant by the expression 'honourably acquitted'. This Court expressed that when the accused is acquitted after full consideration of prosecution case and the prosecution miserably fails to prove the charges leveled against the accused, it can possibly be said that the accused was honourably acquitted.

26. In light of above, we are of the opinion that since the purpose of departmental proceedings is to keep persons, who are guilty of serious misconduct or dereliction of duty or who are guilty of grave cases of moral turpitude, out of the department, if found necessary, because they pollute the department, surely the above principles will apply with more vigour at the point of entry of a person in the police department i.e. at the time of recruitment. If it is found by the Screening Committee that the person against whom a serious case involving moral turpitude is registered is discharged on technical grounds or is acquitted of the same charge but the acquittal is not honourable, the Screening Committee would be entitled to cancel his candidature. Stricter norms need to be applied while appointing persons in a disciplinary force because public interest is involved in it."

15. Accordingly, in view of the facts enumerated hereinabove and the definitive law laid down by the Hon'ble Supreme Court, there is no merit in this petition and the same is dismissed.

16. Pending application(s), if any, shall also stand disposed of.

****

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

Smt. Minakshi .... Petitioner.
Vs.
State of H.P and others .... Respondents.

CWP No. 9533 of 2013
Date of Decision: 8.12.2014.

Limitation Act, 1965- Section 5 – An appeal was filed before the Deputy Commissioner, Kangra which was accompanied by an application under Section 5 of Limitation Act for condonation of delay- application was allowed and the delay was condoned- held, that the period of 15 days has been prescribed for the filing of an appeal before the trial Court against the selection and appointment of a person from the date of issuance of appointment letter- an appeal preferred beyond the prescribed period is not maintainable- Section 5 empowers only the Court and not the administrative authority to condone delay- order passed by the Deputy Commissioner, Kangra condoning delay set aside.

For the petitioner: Mr. Devinder K. Sharma vice Mr. C. N. Singh, Advocate.
For the respondents: Mr. Vivek Singh Attri, Dy. A.G. for respondents No. 1 to 5.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.*(Oral):*

An appeal was preferred before the learned Deputy Commissioner, by respondent No.6 herein assailing the selection and appointment of the petitioner herein as Anganwari helper. The appeal preferred by respondent No.6 herein before the Deputy Commissioner, Kangra at Dharamshala, was time barred, hence, it was accompanied by an application under Section 5 of the Limitation Act for condoning the delay in the preferment of appeal at the instance of respondent No.6. The learned Deputy Commissioner, Kangra at Dharamshala, while adjudicating the application filed by respondent No.6 herein for condoning the delay in the preferment of an appeal at her instance against the selection and appointment of the petitioner as Anganwari worker had on consideration of the material laid before him condoned the delay of two months. Obviously it enlarged the time prescribed by the apt guidelines for the filing of an appeal. The Appellate Authority is not bestowed or conferred any power under the apt guidelines to condone the delay in the event an appeal is filed beyond the period prescribed in the apt guidelines. Hence, it is contended by the learned counsel for the petitioner that the order rendered in Annexure P-5 is beyond the jurisdictional competence of the learned Deputy Commissioner. The said contention has leverage and force in view of the apt guidelines prescribing a period of 15 days for the filing of an appeal which period is to be reckoned from the date of issuance of letter of appointment to the appointee. The relevant/apt guidelines as formulated by respondent No.1 do not in them contemplate or vest jurisdiction, power or authority in the appellate authority to extend, condone or enlarge the period of time prescribed in them for the filing of an appeal. In other words, the period of 15 days prescribed in the apt guidelines for the filing of an appeal before the appellate authority against the selection and appointment of a person as an Anganwari helper reckonable from the date of issuance of appointment letter is an inflexible period or in case an appeal is filed beyond the prescribed period the same is jurisdictionally not maintainable, it entails dismissal, besides rendering the act of the appellate authority while taking to rely upon the provisions of Section 5 of the Limitation Act which empowers courts of law alone to condone delay which the appellate authority who rendered annexure P-5 is not in condoning the delay to be wholly untenable. Consequently, the learned Deputy Commissioner, Kangra, while having adjudicated an application under Section 5 of the Limitation Act preferred before him for condoning the delay in the institution of an appeal before him challenging/assailing the selection/appointment of the petitioner herein as Anganwari helper and having recorded findings therein in favour of respondent No.6 has committed a jurisdictional error. Consequently, the impugned order is set-aside. The above conclusion is supported by a judgement rendered by a Division Bench of this Court comprised in Annexure P-4, relevant portion of which is extracted hereinafter:-

> "Another legal contention is as to whether the Appellate Authority has power to condone delay in filing appeal. The guidelines provide a period of 15 days for filing an appeal. Being a statutory authority, in terms of the police guidelines, the Appellate Authority does not have the power under Section 5 of the Limitation Act. No power is conferred also in the guidelines for condonation delay. Therefore, he cannot enlarge the time, by condoning delay in filing the appeal. In other words, if an appeal is not filed within the prescribed time, it has only to be dismissed,

since the appellate authority has no power to condone the delay in filing the appeal."

Even otherwise, considering the fact as evident from a perusal of annexure P-5, of the petitioner having come to be appointed on 22.02.2013 obviously, then the period of 15 days envisaged in the apt guidelines for filing of appeal commenced/arose therefrom. However, respondent No.6 filed an RTI application beyond the period of 15 days, inasmuch as on 18.3.2013. In face thereof and when even the copy of the appointment letter was sought by respondent No.6 herein beyond the period of limitation prescribed in the apt guidelines for filing of an appeal and when the said delay remains unexplained, it was wholly insagacious for the learned Deputy Commissioner, Kangra, to condone the delay.

Accordingly, I find merit in the writ petition and the impugned order is set-aside. No costs.

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

Rikhi Ram son of Shri Kedar Dutt .....Appellant.
Vs.
State of Himachal Pradesh ...Respondent.

Cr. Appeal No. 98 of 2009
Judgment reserved on: 17th September,2014
Date of Decision: December 08.2014

Indian Penal Code, 1860- Section 302- Accused caused death of 'K' in the sawmill of 'V' by hitting him with the shovel on the head – testimony of eye-witnesses clearly proved that accused gave beating with the shovel on the head of the deceased and thereafter dragged the deceased towards his house- medical evidence proved that the deceased had died due to head injury which was possible with the sharp edged shovel- the testimony of the eye- witness was corroborated by other prosecution witnesses- accused made a disclosure statement leading to the recovery of blood clotted stones, shirt and hair- body of deceased was also found in the house of the accused- all these circumstances clearly established the prosecution version – hence, conviction of the accused was justified. (Para- 11 to 17)

Indian Evidence Act, 1872- Section 3- Appreciation of evidence- it was contended that testimony of PW-1 was not acceptable and he had reported the matter to the police after some days-PW-1 specifically stated that he was under extreme fear that he would also be killed by accused- held, that the testimony of eye witness was acceptable and accused can be convicted on his sole testimony. (Para-22)

Cases referred:

Mohmed Inayatullah vs. State of Maharashtra AIR 1976 SC 483
Selvi and others vs. State of Karnataka AIR 2010 SC 1974

Kamal Kishore vs. State (Delhi Administration) 1997(2) Crimes 169 (Delhi High Court)
Jose Vs. The State of Kerla (Full Bench) AIR 1973 SC 944
Vadivelu Thevar Vs. The State of Madras AIR 1957 S.C. 614
Masalti and others Vs. The State of Uttar Pradesh AIR 1965 S.C. 202
Dalbir Singh Vs. State of Punjab AIR 1987 S.C. 1328
Anil Phukan vs. State of Assam 1993(1) Crimes 1180
State of U.P. vs. Kishanpal and others JT 2008(8) SC 650
Lallu Manjhi and another vs. State of Jharkhand AIR 2003 SC 854
Chacko vs. State of Kerala (DB) AIR 2004 SC 2688
Bhe Ram Vs. State of Haryana AIR 1980 S.C.957
Rai Singh Vs. The State of Haryana AIR 1971 S.C. 2505
Triloki Nath and others vs. State of U.P. AIR 2006 SC 321
Nashik vs. State of Maharashtra 1993(1)Crimes 1197 SC
Sangaraboina Sreenu vs State Of Andhra Pradesh 1997 (4)Supreme 214
Mandhari vs. State of Chattisgarh 2002 Criminal Law Journal 2630 (SC)
Chacko vs. State of Kerala AIR 2004 SC 2688

For the Appellant: Mr.N.K. Tomar, Advocate.
For the respondent: Mr.B.S.Parmar, Additional Advocate General with Mr.Ashok Chaudhary, Additional Advocate General with Mr.Vikram Thakur, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, J.

Present appeal filed against the judgment and sentence passed by learned Additional Sessions Judge Sirmaur District at Nahan in Sessions Trial No. 8-N/7 of 2006 titled State of H.P. Vs. Rikhi Ram decided on 16.2.2008.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by the prosecution are that on dated 10.8.2005 at about 10 PM at Dadahu appellant committed murder voluntarily and intentionally by causing death of Kedar Dutt in the sawmill of Vijay Sood by hitting him with shovel sharp edged weapon on his head. It is alleged by prosecution that deceased Kedar Dutt who was father of appellant and father of Ram Kishan was employed as a watchman by PW2 Vijay Sood in his sawmill at Dadahu where PW1 Devender Singh also used to work as a carpenter. It is alleged by prosecution that PW2 Vijay Sood had made an arrangement for food of Kedar Dutt in the restaurant of PW5 Jang Bahadur Thapa and on dated 10.8.2005 Kedar Dutt after taking his meal left his restaurant at about 9 PM to the sawmill of Vijay Sood. It is further alleged by prosecution that on dated 10.8.2005 at about 8.45 PM appellant went to the restaurant of PW4 Pardeep Kumar to consume wine and thereafter went away. It is also alleged by prosecution that on dated 10.8.2005 at 10 PM when Kedar Dutt along with PW1 Devender Singh were present in the sawmill then appellant came there and gave beatings with the shovel sharp edged weapon to Kedar Dutt due to which Kedar Dutt sustained injuries on his head and arms. It is further alleged by prosecution that appellant dragged Kedar Dutt towards his house and PW1 Devender Singh became frightened due to the incident and he ran away

and in the morning he informed Pardhan of Gram Pacnahayt and also informed PW2 Vijay Sood about the incident. It is also alleged by prosecution that on dated 12.8.2005 when PW3 Ram Kishan came to house of appellant then he saw the dead body of deceased Kedar Dutt which was kept on the bed in house of appellant. It is further alleged by prosecution that thereafter information was given to the police at which rapat in the daily diary Ext.PW7/A was recorded in police station and on receipt of information Inspector Madan Kant Sharma PW14 the then SHO P.S. Nahan went to village Tirmuli where he recorded statement of PW1 Devender Singh under Section 154 Cr.P.C. Ext.PW1/A and thereafter sent the same to police station for registration of FIR. It is further alleged by prosecution that on receipt of such statement FIR Ext.PW12/A was recorded in police station by Inspector Purshottam Dass PW12 the then SHO P.S. Renukaji who made endorsement Ext.PW12/B. It is also alleged by prosecution that spot map Ext.PW14/A was prepared and body of deceased was took into possession and was sent for post mortem examination. It is alleged by prosecution that post mortem of dead body of deceased Kedar Dutt was conducted by PW13 Dr. Vijay Kishan and as per opinion of medical officer cause of death was due to head injury and shock and post mortem report Ext.PW13/A was issued. It is alleged by prosecution that clothes, blood, hair of beard of deceased were preserved by PW13 Dr. Vijay Kishan and were handed over for chemical examination. It is also alleged by prosecution that Inspector Purshottam Dass PW12 also visited the spot i.e. sawmill of Vijay Sood and prepared spot map Ext.PW12/C and during spot inspection near the machine there were black and grey hairs of beard which were put in separate match boxes and those match boxes were wrapped in a cloth and sealed with seal impression 'H' and same were took into possession vide memo Ext.PW6/A in presence of Satya Nand PW6. It is also alleged by prosecution that near the stairs there were blood stains which were lifted with help of a wet cotton and said cotton was also put in a match box and wrapped in a cloth and same was sealed with seal impression 'H' and took into possession vide memo Ext.PW6/B. It is also alleged by prosecution that on dated 17.8.2005 medical examination of appellant was conducted by PW13 Dr. Vijay Kishan and no external injury was found on body of appellant and MLC Ext.PW13/B was obtained. It is further alleged by prosecution that Dr. Vijay Kishan PW13 took sample of hair of head of appellant pursuant to application Ext.PW13/C and on dated 17.8.2005 appellant gave a disclosure statement and as per his disclosure statement shovel sharp edged weapon Ext.P1 was got recovered from the bushes near Jalal river in presence of PW2 Vijay Sood which was took into possession vide recovery memo Ext.PW2/B. It is alleged by prosecution that spot map of recovery Ext.PW12/D was also prepared and appellant had given identification of spot. It is also alleged by prosecution that near the rivulet blood stained stones were found which were took into possession vide memo Ext.PW2/C and spot map of recovery of stones Ext.PW12/E was prepared. It is further alleged by prosecution that sample of seal was took separately and spot map Ext.PW8/A was prepared. It is further alleged by prosecution that photographs of dead body Ext.PW10/A-1 to Ext.PW10/A-19 and negatives Ext.PW10/A-20 were obtained and thereafter on dated 22.8.2005 HC Ashok Kumar sent all parcels except shovel to FSL Junga for chemical examination through HHC Karun Kumar PW9 who deposited the same in FSL Junga. It is also alleged by prosecution that said parcels were cut opened and examined by PW15 Dr. Arun Sharma Scientific Officer FSL Junga who has issued his report Ext.PX. It is alleged by prosecution that as per opinion of medical officer Dr. Vijay Kishan PW13 injuries sustained by deceased were possible with blow of shovel sharp edged weapon Ext.P1.

3 Learned Additional Sessions Judge Sirmaur District at Nahan framed the charge against the appellant under Section 302 of Indian Penal Code on dated 16.6.2006. Appellant did not plead guilty and claimed trial.

4. The prosecution examined as many as fifteen witnesses in support of its case and appellant also examined one defence witness:-

Sr.No.	Name of Witness
PW1	Devender Singh
PW2	Vijay Sood
PW3	Ram Kishan
PW4	Pardeep Kumar
PW5	Jang Bahadur
PW6	Satya Nand
PW7	Tikka Ram
PW8	Ramesh Chand
PW9	HHC Karun Kumar
PW10	HC Choli Ram
PW11	HC Ashok Kumar
PW12	Inspector Purshotam Dass
PW13	Dr. Vikay Krishan
PW14	Inspector Madan Kant
PW15	Dr. Arun Sharma
DW1	Depinder Singh Patwari

4.1 Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description:*
Ex.PW.1/A.	*Statement under Section 154 Cr.P.C. of Devinder Singh.*
Ex.PW2/A.	*Disclosure statement.*
Ex.PW2/B.	*Recovery memo of Shovel sharp edged weapon*
Ex.PW2/C.	*Recovery memo of blood stained stone*
Ex.PW2/D.	*Recovery memo of blood stained shirt*
Ex.PW6/A	*Recovery memo of white shirt and hair*
Ex.PW6/B	*Recovery memo of blood*
Ex.PW7/A.	*Rapat Roznamcha No. 12 dt.12.8.2006*

Ex.PW8/A.	*Spot Map*
Ex.PW8/B	*Jamabandi for 2001-2002*
Ex.PW.10/A-1 to Ext.PW10/A-19.	*Photographs*
Ex.PW10/A-20	*Negatives.*
Ex.PW12/A	*FIR*
Ext.PW12/B	*Endorsement on statement Ext.PW1/A*
Ext.PW12/C	*Spot map*
Ext.PW12/D	*Spot map*
Ext.PW12/E	*Spot map*
Ext.PW12/F to Ext.PW12/J	*Sample of seals*
Ext.PW13/A	*Post mortem report*
Ext.PW13/B	*MLC of Rikhi Ram*
Ext.PW13/C	*Letter of police*
Ext.PW13/D	*Opinion regarding cause of death in FIR No. 64/05 in police station Renukaji*
Ext.PW14/A	*Spot map*
Ext.PX	*FSL report*
Ext.DW1/A	*Copy of Mutation 2001-2002*
Ext.P1	*Shovel sharp edged weapon*

5. Learned Additional Sessions Judge Sirmaur District at Nahan convicted the appellant under Section 302 IPC and sentenced the appellant to undergo rigorous imprisonment for life and to pay fine of Rs. 10,000/- (Rupees ten thousand only). Learned trial Court further directed that in default of payment of fine the appellant would undergo further imprisonment for a period of one year. Feeling aggrieved against the judgment and sentence passed by learned Trial Court the appellant has filed present appeal under Section 374 (2) of the Code of Criminal Procedure and a prayer for acceptance of appeal sought.

6. We have heard learned Advocate appearing on behalf of the appellant and learned Additional Advocate General appearing on behalf of the State and also perused 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 the appellant.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

8.1. PW1 Devinder Singh has stated that he is working as a labourer/carpenter in sawmill of Vijay Sood at Dadahu and Vijay Sood has also

engaged one person namely Kedar Dutt in his sawmill as a night watchman. He has stated that on dated 8.8.2005 Vijay Sood informed him that he would go for religious trip and further stated that deceased Kedar Dutt used to take his meal in the restaurant of Thapa. He has stated that he and deceased Kedar Dutt were present in the sawmill and appellant Rikhi Ram came in the sawmill and gave beatings to the deceased with the sharp edged weapon namely shovel on his head due to which deceased Kedar Dutt sustained injuries on his head and arms. He has further stated that thereafter appellant dragged Kedar Dutt towards his house. He has stated that he became frightened and ran way. He has stated that in the morning Investigating Agency came at the spot and he handed over the beard hair to Investigating Agency. He has also stated that Investigating Agency also took into possession the blood stains from the spot. He has stated that thereafter in the morning he informed Pardhan and Vijay Sood and on the next day he went to his house. He has stated that he came to know that deceased Kedar Dutt had died. He has stated that dead body of deceased was wrapped and kept upon the bed. He has stated that police officials also recorded his statement Ext.PW1/A which bears his signatures. He has denied suggestion that when deceased Kedar Dutt was pulling the log of wood on one side of sawmill the hacksaw got broken and hit the head of deceased who fell down on the waste material and on grinder and roller. He has denied suggestion that deceased had sustained injuries in the accident and he and mill owner did not report the matter to police to save themselves from criminal cases and compensation. He has denied suggestion that he and Vijay Kumar placed the dead body of deceased in the open place in the house of Rikhi Ram. He has denied suggestion that in order to save himself and sawmill owner he has deposed falsely.

8.2 PW2 Vijay Sood has stated that he is running a sawmill at Dadahu and on dated 8.8.2005 he went on religious trip and further stated that he employed deceased Kedar Dutt as a watchman in the sawmill. He has stated that he had made the arrangement in the restaurant of Thapa for the food of deceased. He has further stated that on dated 12.8.2005 he came back to Dadahu and he came to know that deceased Kedar Dutt was murdered. He has further stated that Investigating Agency inspected the spot and recovered shovel Ext.P1 vide memo Ext.PW2/B. He has stated that blood stained stones were also took into possession and memo Ext.PW2/C was prepared. He has stated that stones Ext.P2 to Ext.P5 are the same which were took into possession by police officials and appellant Rikhi Ram handed over to the police his shirt which was also took into possession vide recovery memo Ext.PW2/D. He has stated that shirt Ext.P6 is the same. He has denied suggestion that all documents were prepared in police station. He has denied suggestion that no shovel was recovered at the instance of appellant. He has denied suggestion that deceased had sustained injuries in the accident in his sawmill. He has denied suggestion that he along with Devinder Singh lifted the dead body of deceased and kept in the house of appellant in order to save themselves. He has denied suggestion that deceased had died due to starvation. He has denied suggestion that he had deposed wrongly in order to implicate the appellant in present case.

8.3 PW3 Ram Kishan has stated that deceased Kedar Dutt is his father and appellant Rikhi Ram is his brother. He has stated that house of Devinder is near to his house and Devinder also met him between 12.8.2005 to 20.8.2005 but he did not disclose the incident to him. He has further stated that Rikhi Ram was living alone in the house. He has further stated that before the death of his father his father executed a Will in favour of his brother Rikhi Ram, his sisters which he proceeded before the revenue officer for attesting the mutation.

8.4 PW4 Pardeep Kumar has stated that he is running a restaurant at Dadahu and on dated 10.8.2005 at 8.45 PM appellant Rikhi Ram came to his restaurant to consume wine in the restaurant and thereafter he went away. He has admitted that appellant was performing the work of mules for his livelihood. He has denied suggestion that appellant did not visit restaurant. He has denied suggestion that he was deposing falsely against the appellant in order to help the Investigating Agency.

8.5 PW5 Jang Bahadur has stated that he is running the restaurant at Dadahu and Vijay Sood had made an arrangement for the food of Kedar Dutt in his restaurant. He has stated that on dated 10.8.2005 Kedar Dutt after consuming his meal left his restaurant at about 9 PM to the sawmill of Vijay Sood.

8.6 PW6 Satya Nand has stated that on dated 12.8.2005 at about 1.30 PM Mohan Singh called him and told that somebody had murdered the deceased. He has stated that he along with Mohan Singh and Kishan went to the sawmill of Vijay Sood. He has stated that police recovered black and grey hairs and put the same in small match boxes. He has stated that memo Ext.PW6/A was prepared and police also took photographs of dead body. He has stated that match box is Ext.P7 in which grey hairs were sealed by the police. He has denied suggestion that Investigating Agency did not take hairs from the spot. He has denied suggestion that police did not collect the blood sample.

8.7 PW7 C. Tikka Ram has stated that during the year 2005 he was posted as MC at P.S. Nahan and on dated 12.8.2005 at 10 AM some unknown person informed the police that dead body of Kedar Dutt was lying in the room. He has stated that in this regard report in daily diary Ext.PW7/A was entered which is true as per original record.

8.8 PW8 Ramesh Chand has stated that he is posted as Patwari in Patwar Circle Thana Kashoga and on dated 29.9.2005 on the request of police he prepared the map of place where dead body of Kedar Dutt was kept in the house of appellant Rikhi Ram. He has further stated that map is Ext.PW8/A and jamabandi of said house is Ext.PW8/B and land in which house was situated is bearing Khasra No. 418/178 which is in the ownership of Neetan Kumar. He has stated that he could not state without examining the record that inheritance of property of deceased is mutated in the name of appellant Rikhi Ram, his brother Kishan Singh and two sisters.

8.9 PW9 HHC Karun Kumar has stated that during the year 2005 he was posted as HHC at P.S. Ranukaji and on dated 22.8.2005 MHC Ashok Kumar handed over to him total eight packets and two envelops along with sample seals out of which three samples were sealed with seal of Food Inspector Renuka, two were sealed with impression 'X' and three packets were sealed with seal bearing impression 'H' and two envelopes bearing impression Food Inspector Renuka for depositing with FSL Junga which he deposited on the same day with FSL Junga. He has stated that as long as parcels remained in his custody they remained intact. He has stated that on dated 22.8.2005 he deposited eight parcels in the office of FSL Junga.

8.10 PW10 HC Choli Ram has stated that he is posted as photographer in police department and on dated 12.8.2005 at the instance of police he photographed the dead body at village Tirmuli. He has stated that he also took photographs near the river where blood stains stones were found. He has stated that photographs Ext.PW10/A-1 to Ext.PW10/A-19 were not developed by him. He has stated that aforesaid photographs were developed at Chandigarh.

8.11 PW11 HC Ashok Kumar has stated that during the year 2005 he was posted at P.S. Renukaji at MHC and on dated 12.8.2005 Pushottam Dass deposited with him one packet which was sealed with seal impression 'H' another packet which was also sealed with seal impression 'H' and another packet which was also sealed with seal impression 'H' along with sample seals. He has further stated that on dated 13.8.2005 he also deposited with him one packet sealed with seal bearing impression Food Inspector Renuka and on dated 22.8.2005 he sent all articles except shovel sharp edged weapon through HHC Karun Kumar to be deposited with FSL Junga along with sample seals vide RC No. 45/2005 dated 22.8.2005. He has further stated that as long as samples remained in his custody neither he nor anyone tampered with it. He has denied suggestion that no property was deposited with him and he has denied suggestion that no property was sent by him to Chemical Laboratory.

8.12 PW12 Inspector Purshottam Dass has stated that during the year 2005 he was posted at P.S. Renukaji as SHO and on dated 12.8.2005 he received statement under Section 154 Cr.P.C. Ext.PW1/A through C. Khazan Singh in Police Station. He has stated that on this he recorded FIR Ext.PW12/A which bears his signatures. He has stated that he also made endorsement Ext.PW12/B. He has stated that on same day he proceeded to the spot i.e. sawmill of Vijay Sood which is situated as Dadahu. He has stated that during the spot inspection near the machine there were black and grey hairs of beard which were put in separate matchboxes and wrapped in cloth and sealed with seal impression 'H'. He has stated that match boxes were took into possession vide memo Ext.PW6/A. He has further stated that blood was lifted with the help of wet cotton and said cotton was also placed in matchbox. He has stated that thereafter matchbox was wrapped in cloth and sealed with seal impression 'H'. He has stated that seal after taking specimen was handed over to Satya Nand and match boxes were took into possession vide memo Ext.PW6/A. He has stated that match boxes are Ext.P7 and Ext.P8. He has further stated that near the stairs there were blood stains and blood stains were lifted with the help of wet cotton and said cotton was also placed in match box. He has stated that matchbox was wrapped in cloth after taking specimen seal and took the seal impression 'H' on the matchbox and same was handed over to Satya Nand. He has stated that on dated 17.8.2005 Rikhi Ram had given disclosure statement to the police that he could recover the shovel and in this regard memo Ext.PW2/A was prepared. He has stated that as per disclosure statement shovel Ext.P1 was recovered from the bushes near the Jalal river and memo Ext.PW2/B was prepared. He has stated that stones are Ext.P2 to Ext.P5 and spot map of recovery of stones Ext.PW12/E was prepared. He has stated that spot map Ext.PW8/A was got prepared from Halqua Patwari and statements of witnesses were recorded by him. He has stated that after receiving the FSL report Ext.PX he prepared challan. He has denied suggestion that no recovery of shovel was effected at the instance of appellant. He has denied suggestion that Ext.PW2/B was prepared in P.S. Renukaji. He has denied suggestion that deceased Kedar Dutt had sustained injuries in the accident as the hacksaw was broken and he fell down on the grinder and wooden material. He has denied suggestion that in order to avoid the payment of compensation sawmill owner lifted the dead body of deceased and placed it in the open house. He has denied suggestion that witness did not give any statement and he has denied suggestion that he recorded the statements at his own. He has denied suggestion that appellant has been falsely implicated in present case.

8.13 PW13 Dr. Vijay Kishan has stated that during the year 2005 he was posted at R.H. Dadahu as medical officer and on dated 12.8.2005 at the instance of police he conducted the post mortem of dead body of Kedar Dutt and

observed as under. He has further stated that deceased was average built wearing pant shirt (dark brown) his mouth was open, left eye was damaged, right hand was amputated and rigor mortis were present. He has stated that contused lacerated wound was present over front parietal region 4x3x2 inch. He has stated that no fresh blood CLW was found over lateral side of right eye near outer canthus 3x3x1 inch. He has further stated that no fresh blood CLW was present over left forearm 4 inches above wrist joint side 5x3x2 inch. He has stated that both bones were fractured and further stated that multiple abrasions were present over entire buttock and no ligature was present. He has also stated that there was fracture of right frontal parietal bone and membrane was ruptured and brain was also ruptured. He has stated that fracture of third and fourth rib and other organs were normal. He has stated that he issued post mortem report Ext.PW13/A and as per opinion cause of death was due to head injury and shock. He has stated that probable duration between injury and death was less than 36 hours and between death and post mortem was 12 to 24 hours. He has stated that he handed over the clothes, blood, hair of beard and letter to chemical examiner to the police. He has stated that injuries sustained by deceased are possible with blows of shovel Ext.P1. He has denied suggestion that deceased had sustained injuries as a result of fall on wooden material and instruments like grinder and roller. He has stated that there was digested food in the stomach of deceased. He has denied suggestion that deceased died due to non-availability of medical facility and starvation.

8.14 PW14 Inspector Madan Kant Sharma has stated that he remained as SHO P.S. Nahan from October 2003 to January 2005 and on dated 12.8.2005 on receipt of information at Police Station vide D.D. No. 12 he along with other staff members reached village Tirmuli. He has stated that he recorded statement of Devinder Singh under Section 154 Cr.P.C. Ext.PW1/A and further stated that he inspected the spot and prepared spot map Ext.PW14/A. He has stated that dead body of Kedar Dutt was took into possession and body was sent for post mortem through C. Hari Singh. He has stated that he recorded statements of witnesses namely Satya Nand and Ram Kishan and got the spot and dead body photographed through photographer HC Choli Ram. He has stated that thereafter he handed over the investigation to I.O. of P.S. Renukaji for further investigation. He has stated that dead body was recovered from the house which was situated at the outskirt of village Tirmuli at a lonely place. He has denied suggestion that he did not record statement Ext.PW1/A as per version of witness Devinder Singh. He has denied suggestion that he recorded statements of his own. He has denied suggestion that appellant has been falsely implicated in present case.

8.15 PW15 Dr. Arun Sharma has stated that he is posted as Scientific Officer in FSL Junga since 1991 and he had passed MSc Forensic Science from Punjab University Patiala and PhD from Punjab University Chandigarh and National Institute of Criminology and Forensic Science Ministry of Home Affairs Government of India Delhi. He has further stated that he examined cases in biology and serology division since 1991 and further stated that in this case vide FIR No. 64 of 2005 P.S. Renukaji District Sirmaur eight sealed parcels were received on dated 22.8.2005 through C. Karan Kumar. He has denied suggestion that samples mentioned in Ext.PX were not worthy or analyzed.

9. Statement of appellant was recorded under Section 313 Cr.P.C. He has stated that he has been falsely implicated in present case at the instance of sawmill owner who is responsible for the death of deceased Kedar Dutt due to accidental injuries while he was working in the sawmill. He has stated that he is innocent. He has stated that his father Kedar Dutt had executed the Will of his

property in favour of him and brother Kishan Singh and two sisters in equal shares and mutation has been sanctioned in the revenue record.

10. DW1 Depinder Singh Patwari has stated that he is posted as Patwari in Patwar circle Thana Kishoga since September 2007. He has stated that he has brought the summoned record. He has stated that property of late Kedar Dutt is inherited in equal shares by his legal representatives including appellant by way of Will No. 463 dated 8.5.2006 and further stated that copy of mutation is Ext.DW1/A.

Testimony of eye witness namely Devinder Singh is fatal to the appellant

11. In present case eye witness namely Devinder Singh PW1 has specifically stated in positive manner that appellant came to sawmill and thereafter gave beatings with shovel sharp edged weapon to deceased Kedar Dutt in his presence. PW1 has specifically stated in positive manner that thereafter appellant dragged the deceased towards his house. Testimony of PW1 Devinder Singh is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of eye witness namely Devinder Singh. There is no evidence on record in order to prove that PW1 has hostile animus against the appellant at any point of time.

Testimony of PW13 Dr. Vijay Kishan Medical Officer is fatal to appellant

12. PW13 Dr. Vijay Kishan medical officer has specifically stated in positive manner that deceased had died due to head injury and shock and PW13 Dr. Vijay Kishan has specifically stated in positive manner that injuries mentioned in post mortem report are possible with sharp edged weapon i.e. shovel Ext.P1. PW13 Dr. Vijay Kishan has denied suggestion that deceased had sustained injuries as a result of fall on wooden material and instruments like grinder and roller. Testimony of PW13 Dr. Vijay Kishan is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW13 Dr. Vijay Kishan and there is no evidence on record in order to prove that PW13 Dr. Vijay Kishan has hostile animus against the appellant at any point of time.

Testimonies of corroborative witnesses are fatal to appellant

13. PW2 namely Vijay Sood corroborative witness has specifically stated that he employed deceased Kedar Dutt as watchman in his sawmill and he has specifically stated that appellant had given a disclosure statement that he had concealed the shovel sharp edged weapon in the bushes. He has specifically stated in positive manner that thereafter sharp edged weapon was recovered from the bushes. Another corroborative witness PW3 Ram Kishan has stated in positive manner that dead body of deceased was kept on bed and he has further stated that appellant was living alone in the house where dead body of the deceased was kept. PW4 Pardeep another corroborative witness has stated in positive manner that on dated 10.8.2005 at 8.45 PM appellant Rikhi Ram came to his restaurant to consume wine and thereafter went away. PW5 Jang Bahadur has stated in positive manner that deceased came to his restaurant and consumed the food and thereafter left his restaurant at about 9 PM after taking his meal to sawmill of Vijay Sood. Another corroborative witness PW6 Satya Nand has proved seizure memos Ext.PW6/A and Ext.PW6/B. PW7 another corroborative witness C. Tikka Ram No. 457 has proved the fact that information was received that dead body of deceased was lying in the room which was in possession of appellant Rikhi Ram. PW8 another corroborative witness namely Ramesh Chand has stated in positive manner that he has prepared spot map Ext.PW8/A and jamabandi of house Ext.PW8/B. PW9 HHC

Karun Kumar proved the facts that total eight packets and two envelopes along with specimen seal were deposited. PW10 another corroborative witness has proved the photographs Ext.PW10/A-1 to Ext.PW10/A-19 and also proved the negatives of photographs Ext.PW10/A-20. Testimonies of above stated corroborative witnesses are trustworthy reliable and inspire confidence of Court. There is no reason to disbelieve the testimonies of corroborative witnesses.

Disclosure statement given under Section 27 of Indian Evidence Act is fatal to appellant

14. Appellant has given disclosure statement Ext.PW2/A in presence of prosecution witness Vijay Sood and as per disclosure statement weapon of offence i.e. shovel was recovered. Disclosure statement Ext.PW2/A given by appellant is also fatal to appellant. Seizure memo of four blood clotted stones and seizure memo of blood clotted shirt Ext.PW2/D and hair of appellant took into possession vide seizure memo Ext.PW6/A from the place of incident are also fatal to appellant. Stones and one white shirt were also took into possession vide seizure memos Ext.PW2/C and Ext.PW2/D which are also fatal to appellant. It was held in case reported in ***AIR 1976 SC 483 titled Mohmed Inayatullah vs. State of Maharashtra*** that as per Section 27 of Indian Evidence Act the statement must be split into its components and to separate the admissible from the inadmissible portion or portions. Only those components or portions which were immediate cause of the discovery would be legal evidence. It was held in case reported in ***AIR 2010 SC 1974 titled Selvi and others vs. State of Karnataka*** that there is no automatic presumption that custodial statement was extracted through compulsion. It was held in case reported in ***1997(2) Crimes 169 (Delhi High Court) titled Kamal Kishore vs. State (Delhi Administration)*** that fact discovered under Section 27 of Indian Evidence Act 1872 is an information supplied by the appellant in his disclosure statement and same is relevant fact.

Hair of appellant found at the place of incident is also fatal to appellant as per Chemical Analyst report Ext.PX placed on record

15. It is proved beyond reasonable doubt by the prosecution that hair of appellant were found at the place of incident i.e. sawmill where incident took place and original specimen of hair of appellant were sent for chemical examination along with hairs found at the place of incident and as per chemical analyst report Ext.PX hair of appellant found at the place of incident and original specimen hair of appellant tallied with each other. Hence it is held that report of Chemical Analyst report is also fatal to the appellant.

Post mortem report of deceased is also fatal to the appellant.

16. Post mortem report Ext.PW13/A placed on record is also fatal to appellant. As per post mortem report Ext.PW13/A Kedar Dutt aged 70 years died due to head injury and shock and probable duration between injury and death was less than 36 hours and between death and post mortem was 12 to 24 hours. As per post mortem report deceased had sustained contused lacerated wound over parietal region 4x3x2 inches and there was fracture of right parietal bone and membrane was ruptured and brain was also ruptured and there was fracture of third and fourth rib of deceased.

Availability of dead body of deceased Kedar Dutt in the house of appellant is fatal to the appellant.

17. In present case it is proved on record that dead body of deceased was found in room which was in possession of appellant. No reason has been

assigned by appellant that how dead body of deceased came inside the residential house of appellant which was in possession of appellant. There is no reason on record in order to prove that there was possibility of access of some other person in the residential house of appellant where dead body of deceased was found. Availability of dead body of deceased in the room which was in possession of appellant is also fatal to the appellant.

18. Submission of learned Advocate appearing on behalf of the appellant that there is no evidence on record in order to prove that appellant and deceased were lastly seen together and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. In present case PW1 Devinder Singh is eye witness of incident and he has further stated in positive manner that appellant came to the sawmill and gave beatings with shovel sharp edged weapon to deceased Kedar Dutt and he has further stated in positive manner that thereafter Kedar Dutt sustained injuries on his head and arms and thereafter appellant Rikhi Ram dragged the deceased towards his house. Testimony of single eye witness in present case is trustworthy reliable and inspires confidence of Court. Present case is not a case of circumstantial evidence.

19. Another submission of learned Advocate appearing on behalf of the appellant that deceased was father of appellant and there was no possibility of appellant to commit criminal offence against his father without any strong motive and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is held that in presence of eye witness prosecution is not under legal obligation to prove any motive. In present case PW1 Devinder Singh single eye witness of incident has specifically stated in positive manner that appellant had inflicted injuries upon the deceased in his presence with shovel upon his head and arms and testimony of PW1 to this fact is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of eye witness PW1 Devinder Singh.

20. Another submission of learned Advocate appearing on behalf of the appellant that deceased had died because he fell on the roller of sawmill and owner of sawmill has falsely implicated the appellant in present case in order to avoid the payment of compensation under Workmen's Compensation Act is rejected being devoid of any force for the reasons hereinafter mentioned. There is no positive cogent and reliable evidence on record in order to prove that deceased had died due to accidental injuries sustained by deceased while he was working in sawmill. On the contrary there is positive cogent and reliable evidence of eye witness PW1 Devinder Singh who has stated in positive manner that appellant had inflicted injuries upon the deceased with shovel in his presence upon his head and arms. Hence plea of appellant that deceased had died due to accidental injuries when he was working in sawmill is defeated on the concept of *ipse dixit* (An assertion made without proof).

21. Another submission of learned Advocate appearing on behalf of the appellant that prosecution has not explained the unreasonable delay in lodging the FIR and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Incident took place on dated 10.8.2005 at 10 PM and FIR was registered on dated 12.8.2005 at the instance of complainant Devinder Singh PW1. Devinder Singh has specifically stated that due to fear he concealed himself because he was only eye witness of incident and he was under the fear that being sole eye witness of incident appellant would also kill him. Hence it is held that complainant has satisfactorily explained the delay in lodging the FIR because

complainant was under the grave fear that he would also be killed by appellant being sole eye witness of incident.

22. Another submission of learned Advocate appearing on behalf of the appellant that conviction cannot be sustained on the sole testimony of eye witness Devinder Singh keeping in view his conduct as he reported the matter to the police on dated 12.8.2005 and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. In present case Devinder Singh PW1 has specifically explained his subsequent conduct because PW1 Devinder Singh was under the extreme fear that he would also be killed by appellant being sole eye witness of criminal offence committed by appellant. It was held in ***AIR 1973 SC 944 Jose Vs. The State of Kerla (Full Bench)*** that the conviction can be based on the testimony of solitary witness in criminal case if testimony of solitary witness is trustworthy and reliable. ***(See: AIR 1957 S.C. 614 Vadivelu Thevar Vs. The State of Madras and See: AIR 1965 S.C. 202 Masalti and others Vs. The State of Uttar Pradesh.)*** It was held in case reported in ***AIR 1987 S.C. 1328 Dalbir Singh Vs. State of Punjab*** that there is no hard and fast rule which could be laid down for appreciation of evidence and it is a question of fact and each case has to be decided on the fact as they proved in a particular case. Even as per Section 134 of Indian Evidence Act 1872 no particular number of witnesses is required for the proof of any fact. ***(Also see 1993(1) Crimes 1180 titled Anil Phukan vs. State of Assam).*** It was also held in case reported in ***JT 2008(8) SC 650 titled State of U.P. vs. Kishanpal and others*** that it is the quality of evidence and not quantity of evidence which requires to be judged by the Court to place credence to the testimony of witness. It was held in case reported in ***AIR 2003 SC 854 titled Lallu Manjhi and another vs. State of Jharkhand*** that law of evidence does not require any particular number of witnesses to be examined and it was held that Court may classify the oral testimony into three categories (1) wholly reliable (2) wholly unreliable and (3) neither wholly reliable nor wholly unreliable. It was held that in first two categories there would be no difficulty in accepting or discarding the testimony of a single witness. It was held in case reported in ***AIR 2004 SC 2688 titled Chacko vs. State of Kerala (DB)*** that conviction could be based on testimony of single witness if testimony of single witness inspires confidence of Court. In the present case also testimony of single eye witness inspires confidence of Court.

23. Another submission of learned Advocate appearing on behalf of the appellant that prosecution did not examine Pardhan of Gram Panchayat to whom PW1 Devinder Singh narrated the incident and non-examination of Pardhan of Gram Panchayat is fatal to prosecution is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that Pardhan of Gram Panchayat is not the eye witness of incident. Hence it is held that non-examination of Pardhan of Gram Panchayat is not fatal to prosecution case.

24. Another submission of learned Advocate appearing on behalf of the appellant that recovery of shovel sharp edged weapon is made from the open place which was accessible to the general public and hence same could not be reliable is also rejected being devoid of any force for the reasons hereinafter mentioned. As per disclosure statement recorded under Section 27 of Indian Evidence Act Ext.PW2/A sharp edged weapon was concealed in bushes. Hence it is held that sharp edged weapon was not kept in open place but was concealed in bushes. Hence it is held that recovery under Section 27 of Indian Evidence Act is not fatal to prosecution in present case qua weapon of attack i.e. shovel.

25. Another submission of learned Advocate appearing on behalf of the appellant that learned trial Court has not proved the chain of circumstances and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Present case is not the case of circumstantial evidence but present case is based upon eye witness of incident namely PW1 Devinder Singh.

26. Another submission of learned Advocate appearing on behalf of appellant that medical report as well as post mortem report are totally doubtful and statement of concerned doctor is also doubtful and do not connect the injury with alleged weapon of offence is also rejected being devoid of any force for the reasons hereinafter mentioned. Medical officer has specifically stated in positive manner that right frontal parietal bone of deceased was fractured and brain of deceased was also fractured and third and fourth ribs of deceased were also ruptured and there was fracture of left forearm and also stated that death occurred due to head injury and shock. Hence it is held that medical report and post mortem report are trustworthy reliable and inspire confidence of Court. Medical Officer has also connected the weapon of offence with injury in present case. Hence it is held that medical report and post mortem report are not doubtful in present case.

27. Another submission of learned Advocate appearing on behalf of the appellant that report submitted by PW15 Assistant Director State Forensic Science Laboratory Junga is not helpful to the prosecution in any manner is rejected being devoid of any force for the reasons hereinafter mentioned. As per State Forensic Science Laboratory Junga hairs of appellant found at the place of incident and original specimen hair of appellant have tallied with each other. Hence presence of appellant in sawmill is proved as per testimony of eye witness PW1 Devinder Singh and as per availability of hairs of appellant at the place of incident.

28. Another submission of learned Advocate appearing on behalf of the appellant that prosecution had effected the recovery by associating interested and bias witnesses is also rejected being devoid of any force for the reasons hereinafter mentioned. As per prosecution story recovery of weapon of offence was effected in presence of PW2 Vijay Sood and Chaman Lal. Prosecution has proved the recovery of weapon of attack through testimony of PW2 Vijay Sood and appellant did not examine another independent witness Chaman Lal in order to rebut the testimony of PW2 Vijay Sood. There is no reason to disbelieve the testimony of PW2 Vijay Sood and even appellant did not file any application before learned trial Court to examine Chaman Lal another eye witness of recovery memo in order to disprove the testimony of PW2 Vijay Sood.

29. Another submission of learned Advocate appearing on behalf of the appellant that appellant is legally entitled for benefit of doubt is also rejected being devoid of any force for the reasons hereinafter mentioned. In present case no two views emerged. On the contrary it is proved beyond reasonable doubt by prosecution that appellant had inflicted injuries upon the head of deceased with sharp edged weapon. At that time deceased was 70 years old and he was senior citizen of India and was father of appellant.

30. Another submission of learned Advocate appearing on behalf of the appellant that there are material contradictions and improvements in prosecution case and on this ground present appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. Appellant did not point out any material contradiction which goes to the root of the case. It is

well settled law that maxim of *falsus in uno falsus in omnibus* is not applicable in criminal law. ***(See: AIR 1980 S.C.957 Bhe Ram Vs. State of Haryana, See: AIR 1971 S.C. 2505 Rai Singh Vs. The State of Haryana. See:AIR 2006 SC 321 titled Triloki Nath and others vs. State of U.P.)*** Minor contradictions are bound to come in prosecution case when testimonies of witnesses are recorded after a gap of sufficient time. In the present case testimonies of prosecution witnesses were recorded after a gap of about two years.

31. Submission of learned Advocate appearing on behalf of the appellant that owner of sawmill himself placed the dead body nearby the open place of residential house of appellant and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. In present case appellant did not file any counter FIR in order to prove that dead body of deceased was kept by sawmill owner in outer portion of residential portion of appellant in open place. Plea of appellant that owner of sawmill himself placed the dead body of deceased in the courtyard of residential house of appellant is defeated on the concept of *ipse dixit* (An assertion made without proof).

32. Another submission of learned Advocate appearing on behalf of appellant that father of deceased namely Kedar Dutt during his lifetime had executed a Will of his property in favour of appellant and his brother and two sisters in equal shares and there was no enmity between the deceased and appellant at any point of time and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. In view of testimony of PW1 Devinder Singh who is eye witness of incident that appellant came in sawmill and had given beatings to deceased with shovel sharp edged weapon in his presence upon the head and arms of deceased. In present case it is proved on record that deceased father of appellant aged 70 years was unarmed at the time of incident and it is proved on record that appellant had inflicted head injuries upon the deceased with sharp edged weapon without any provocation on the part of deceased. ***(See 1993(1)Crimes 1197 SC Nashik vs. State of Maharashtra)*** It is well settled law that basic constituent of an offence under Section 302 IPC is the homicidal death. ***(See: 1997 (4)Supreme 214 titled Sangaraboina Sreenu vs State Of Andhra Pradesh Also see: 2002 Criminal Law Journal 2630 (SC) Mandhari vs. State of Chattisgarh).*** It was held in case reported in ***AIR 2004 SC 2688 titled Chacko vs. State of Kerala*** that Indian Penal Code 1860 recognizes three degrees of culpable homicide. Culpable homicide define under Section 300 IPC and culpable homicide define under Sections 304 Part I and 304 Part II of Indian Penal Code 1860. It was held that culpable homicide define under Section 300 IPC is gravest form of culpable homicide and culpable homicide define under Sections 304 Part I IPC and 304 Part II IPC are of second degree and third degree.

33. In view of above stated facts it is held that learned trial Court has properly appreciated the oral as well as documentary evidence placed on record in present case. It is also held that learned trial Court did not commit any miscarriage of justice to appellant as appellant has caused death of deceased Kedar Dutt intentionally and knowingly with sharp edged weapon i.e. shovel and it is further held that there is no infirmity in judgment and sentence passed by learned trial Court. No ground for interference is established on record in present case. Hence we affirm the judgment and sentence passed by learned trial Court in present case and we dismiss the present appeal filed by appellant being devoid of any force. Appeal stands disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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

Smt. Seema Luthra .....Petitioner.
Versus
State of Himachal Pradesh .....Respondent.

Cr.MMO No. 169 of 2014.
Reserved on: 03.12.2014.
Date of Decision : 8th December, 2014.

Code of Criminal Procedure, 1973- Section 482 - An FIR was registered for the commission of offences punishable under Sections 420 and 120B, IPC and 13(2) of the Prevention of Corruption Act – it was alleged that petitioner is not an agriculturist and had obtained an agriculturist certificate fraudulently- petitioner claimed to be a legatee under the Will of one Shri Surjeet Singh- however, mutation was attested in favour of legal heirs- petitioner filed a civil suit which was decreed- decree is stated to be collusive and not conferring any right upon the petitioner- held, that FIR can only be quashed if it does not disclose any offence or is perverse, fictitious or oppressive- on the death of the testator estate vested in the petitioner- H.P. Land Tenancy and Reforms (Amendment) Act, 1995 will not be retrospective and will not affect the completed transactions- decree merely confirmed the recital of the Will and did not confer any fresh title in favour of the petitioner- consequently, it cannot be said that agriculturist certificate issued in favour of the petitioner was fraudulent- hence, petition allowed and FIR quashed. (Para-3 to 6)

For the Petitioner: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi and Mr. Vinod Kumar Sharma, Advocates.
For the Respondents: Mr. Vivek Singh Attri and Mr. Tarun Pathak, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioner herein seeks quashing of FIR No.148 of 2013 of 12.12.2013 registered at Police Station, Dharampur, District Solan, H.P., under Sections 420 and 120B, IPC and 13(2) of the Prevention of Corruption Act.

2. The allegations against the petitioner as comprised in the FIR is of hers despite not being an agriculturist in the State of Himachal Pradesh, having fraudulently obtained an agriculturist certificate from the revenue agency concerned. The agriculturist certificate is comprised in Annexure P-4. She in sequel thereof purchased property under sale deed comprised in Annexure P-5. In the FIR, it is alleged that though the petitioner herein claims herself to be a legatee under the Will of one late Shri Surjeet Singh alias Jatinder Kumar, her brother-in-law which was executed in the year 1987, yet on attestation of mutation No.178 sanctioned in the year 1999, the entire land of deceased testator Surjeet Singh alias Jatinder Kumar came to be mutated in the name of his legal heirs. Hence, the petitioner herein was driven to institute a civil suit for declaration for setting aside mutation No.178 sanctioned in the year 1999, whereby in derogation to the conferment upon the petitioner herein of ¼ share

in the property of the deceased testator, the entire property of the deceased testator was mutated in favour of his legal heirs. Even though, the suit was decreed, however, the FIR records that the decree is collusive and does not have the effect of rendering the petitioner herein to be construable to be an agriculturist, besides with the factum of the petitioner herein having purportedly acquired a right in the land/estate of deceased testator Surjeet Singh alias Jatinder Kumar under the testamentary disposition of the latter, yet the decree of the Civil Court of competent jurisdiction having been rendered in the year 2008, as such then investing a right in the petitioner herein to claim in consonance with the testamentary disposition of her brother-in-law since deceased, in sequel, with the provisions of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972, the relevant portion whereof stand extracted hereinafter, creating a bar/embargo in the year 1995 against the transfer of land by a decree of a Civil Court of competent jurisdiction or by way of Will in favour of a person, who is not an agriculturist as the respondent contend the petitioner herein to be so, the acquisition of title by the petitioner herein under a purported collusive decree of the Civil Court of competent jurisdiction rendered in the year, 2008 would lead to no other conclusion than that of the decree of the Civil Court of competent jurisdiction creating or investing no right in the petitioner herein to claim herself to be an agriculturist. On anvil thereof, it is contended that the petitioner herein was not entitled to obtain an agriculturist certificate comprised in Annexure P-4 issued in the year, 2012, as such, it is contended that the same is fraudulently obtained by the petitioner. The relevant portion of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act reads as under:

> "118. Transfer of land to non agriculturists barred.- (1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, no transfer of land (including transfer by a decree of a civil Court or for recovery of arrears of land revenue) by way of sale, gift, will, exchange, lease, mortgage with possession creation of a tenancy or in any other manner shall be valid in favour of a person who is not an agriculturist....."

3. Before the proceeding to adjudicate upon the factum of the validity of the decree of a Civil Court of competent jurisdiction and whether it on its rendition or pronouncement created a right then in favour of the petitioner herein so as to attract the bar of the afore extracted relevant provisions of the Himachal Pradesh Tenancy and Land Reforms Act or whether when it merely pronounced on its rendition the factum of the petitioner herein being entitled to, in consonance with the testamentary disposition of her brother-in-law a 1/4th share in the latter's estate which right accrued on the deceased testator's demise in the year 1989, as to whether then a right accrued or ensued to the petitioner herein to claim title to his estate and concomitantly, whether then in the face of a right in the estate of the deceased testator having occurred prior to coming into force of an amendment in the relevant provisions of the Himachal Pradesh Tenancy and Land Reforms Act, the obtaining or issuance of an agriculturist certificate in favour of the petitioner herein by the Revenue Agency concerned even subsequent to the coming into force an amendment in the relevant provisions of the Himachal Pradesh Tenancy and Land Reforms Act, constituted it to be or not to be fraudulently obtained, it is hence, imperative to gauge the scope and amplitude of the powers conferred upon this Court under the Section 482 of the Code of Criminal Procedure. The relevant decision which encapsulates the scope of the jurisdiction vested in this Court under Section 482, Cr.P.C. is reported in State of Haryana v. Bhajan Lal,

1992 Suppl(1) SCC 335, the relevant portion whereof reads as under: (SCC pp.378-379, para 102)

> "(1) Whether the allegations made in the First Information Report or the complaint, even if they are taken at their face valued and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> (2) Where the allegations in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
>
> (3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
>
> (4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
>
> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
>
> (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacio0us redress for the grievance of the aggrieved party.
>
> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grude."

4. The gravamen and import of the decision whose relevant portion has been extracted hereinabove is that this Court would be competent to quash an FIR only in the event where the FIR does not disclose any offence or is frivolous, fictitious and oppressive. The determinant fact for reaching a conclusion whether any offence is constituted by the allegations leveled against the petitioner herein in the FIR lodged against her, is whether the agriculturist certificate obtained by the petitioner herein comprised in Annexure P-4, was fraudulently or dishonestly obtained. It would be sufficient for this Court to construe that it was dishonestly and fraudulently obtained in the event of the petitioner herein not having demonstrated before this Court by cogent material that she on the demise of her brother-in-law, namely, Surjeet Singh alias Jatinder Kumar in the year 1989, who had under his testamentary disposition executed in the year 1987 bestowed upon her a ¼ share in his estate had then no right to seek its alienation or transfer in her favour. The legatees under the Will or the legal representatives of the deceased testator, namely, Surjeet Singh alias Jatinder Kumar have not contested the factum of the validity of the testamentary disposition of the latter. Therefore, an apt conclusion is that the

testamentary disposition of the deceased testator Surjit Singh alias Jatinder Kumar is to be concluded to be duly and validly executed. The anvil of the prosecution case, at this stage, against the petitioner herein is that with the coming into force of the amendment to the provisions of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act in the year 1995 the decree of a civil Court of competent jurisdiction rendered in the year 2008 whereby the petitioner herein was declared to be in consonance with the testamentary disposition of brother-in-law of the petitioner herein, namely, Surjeet Singh alis Jatinder Kumar entitled to a ¼ share in his estate, attracts the bar envisaged under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, inasmuch as with the transfer of land to the petitioner herein having occurred or taken place, hence, by a decree of a Civil court of competent jurisdiction subsequent to the year, 1995, when the amendment in the relevant provisions of the Himachal Pradesh Tenancy and Land Reforms Act came into force and the acquisition of title to the estate of the legator under a decree of the Civil Court of competent jurisdiction, as such, then constituting transfer of the land of the brother-in-law of the petitioner/deceased testator Surjeet Singh alias Jatinder Kumar in favour of the petitioner herein under a decree of a Civil Court of competent jurisdiction constitutes an infraction by the relevant provisions of the Himachal Pradesh inTenancy and Land Reforms Act with the concomitant effect of rendering invalid the issuance of an agriculturist certificate in her favour by the revenue agency concerned.

5. At this stage, the acid or acerbic determinant to put to at rest the controversy qua the attraction or applicability of the bar envisaged under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 to the acquisition of title by the petitioner herein by a decree of a Civil Court subsequent to 1995 in consonance with the Will of her brother-in-law whereby she was held entitled to 1/4th share in his estate is encapsulated in the fact whether the acquisition of title to the estate of the deceased testator/brother-in-law by the petitioner here was under a decree of a Civil Court or the right of the petitioner herein to inherit the property of her brother-in-law/the deceased testator/legator, namely, Surjeet Singh alias Jatinder Kumar arose on demise of the latter in the year 1989, hence prior to the creation of a bar or embargo in the year 1995 in the relevant provisions of the Himachal Pradesh Tenancy and Land Reforms Act against the acquisition of title either by a Will or a decree of the Civil Court of competent jurisdiction. In case this Court concludes that then the embargo or legal bar contemplated under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, is attracted to the decree of a Civil Court of competent jurisdiction rendered subsequently to the year 1995 when the amendment engrafting the bar came into force, then the petition as laid before this Court would suffer dismissal. However, in case this Court concludes on a interpretation of the provisions of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act in consonance with the material as laid before this Court, more especially the testamentary disposition of the brother-in-law of the petitioner herein, namely, Surjeet Singh alias Jatinder Kumar, who executed a testamentary disposition vesting in his estate on his demise a 1/4th share in the petitioner herein, hence, in the face of his demise having occurred in the year 1989, therefore, prior to the year 1995 when the amendment in the relevant provisions of the Himachal Pradesh Tenancy and Land Reforms Act creating an embargo against the acquisition of title in agricultural land by a non-agriculturist by way of a Will or a decree of a Civil Court of competent jurisdiction came into force, as such, then a concomitant conclusion may be arriveable that the transfer of alienation or vestment of a right in the estate of the deceased testator Surjeet Singh alias Jatinder Kumar occurred on his

demise in the year 1989, then the agriculturist certificate obtained by the petitioner even after coming into force of the amended relevant provisions of the Himachal Pradesh Tenancy and Land Reforms Act in the year 1995, would be stripped off its fraudulence.

6. Before determining whether on the demise of the brother-in-law of the petitioner herein in the year 1989, the petitioner herein acquired title or was entitled then to succeed to his estate, a finding also ought to be rendered that the amendment in the provisions of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act in the year 1995 creating and constituting an embargo or a bar against the transfer of agricultural land in favour of a non-agriculturist by a decree of a Civil Court of competent jurisdiction and by way of a will has been given a prospective effect, hence, is not retrospective. Consequently, when the amendment in the relevant provisions of the Himachal Pradesh Tenancy and Land Reforms Act has been omitted to be given retrospective effect, consequently, the testamentary disposition of the brother-in-law of the petitioner herein, namely, Surjeet Singh alias Jatinder Kumar, executed in the year 1987 and who died in the year 1989 did immediately on his demise in the year 1989, hence, preceding to coming into force of the amendment constitute a right or entitlement of the petitioner herein to succeed to his estate. In other words, immediately on his demise the transfer of the estate of the deceased testator was effectuated in her favour. Even though, the decree of the Civil Court was rendered in the year 2008, hence, it is urged by the learned Deputy Advocate General that the acquisition of title or entitlement or transfer of agricultural land of deceased testator Surjeet Singh alias Jatinder Kumar occurred only on its rendition, nonetheless the said argument is fallacious besides staggers in the face of the aforesaid finding that the acquisition of title or entitlement or transfer of the land of the deceased testator having accrued on the demise of deceased testator in the year, 1989 whereas the decree of a Civil Court was rendered in the year 2008 decree of a Civil Court is anvilled on the Will of Surjeet Singh alias Jatinder Kumar and merely confirms the recitals in it of the petitioner herein being entitled to a 1/4th share in his estate. The decree of a Civil Court did not create or transfer on its rendition rights in the petitioner in the estate of deceased testator Surjeet Singh alias Jatinder Kumar, rather the transfer or creation of rights in the estate of deceased testator Surjeet Singh alias Jatinder Kumar occurred under the testamentary disposition of the latter to the extent of 1/4th share in his estate immediately on his demise in the year 1989, hence, prior to the amendment in the relevant provisions of the Himachal Pradesh Tenancy and Land Reforms Act carried out in the year 1995. As such, it cannot be concluded that the agriculturist certificate Annexure P-4 issued in favour of the petitioner herein by the Revenue Agency, is fraudulently obtained by her. In aftermath, it ought to be concluded that since ingredients of the offence constituted in the FIR lodged against the petitioner herein are not sustainable, as such, the prosecution of the petitioner would be oppressive as also humiliate or harass her besides would be an abuse of the process of law.

7. For the foregoing reasons the petition is allowed and the FIR No.148 of 2013 of 12.12.2013 registered at Police Station, Dharampur, District Solan, H.P., under Sections 420 and 120-B, IPC and Section 13(2) of the Prevention of Corruption Act is quashed. All the pending applications, if any, also stand disposed of. No costs.

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

State of Himachal Pradesh — Appellant.
Versus
Jeet Singh — Respondent.

Cr. Appeal No. 4101 of 2013
Reserved on: 2.12.2014
Date of decision : 8.12.2014

Indian Penal Code, 1860- Sections 354 and 323 IPC – As per the prosecution case accused caught hold of the prosecutrix- she cried on which her parents came to the spot and rescued her from the accused- the testimony of the prosecutrix was contradictory to the version narrated by her in the FIR- the other eye-witnesses also made contradictory statements- held, that in these circumstances, prosecution version was not proved- hence, accused acquitted. (Para- 6 to 12)

For the appellant: Mr. Vivek Singh Attri, Deputy Advocate General with Mr. Tarun Pathak, Deputy Advocate General.
For the respondent: Ms. Mahika Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

The instant appeal is directed by the state against the impugned judgment, rendered on 20.2.2013, by the learned Sessions Judge, Sirmaur, District at Nahan, Himachal Pradesh, in Criminal Appeal No. 90-Cr.A/10 of 2011 whereby, the learned Sessions Judge while reversing the judgment of conviction recorded against the accused/respondent by the learned Judicial Magistrate, 1st Class, Rajgarh, District Sirmuar, H.P., acquitted the accused for his having allegedly committed offences punishable under Sections 354 and 323 IPC.

2. The brief facts of the case are that on 8.9.2009 the complainant alongwith his father Sunder Singh came to report the matter at police Station pachhad. She revealed that on 7.9.2009 she was studying in her room. At about 12.45 a.m., when she proceeded to the toilet, then someone caught hold of her from behind and pressed her breast and kissed her. When she turned back, the person was found to be Jeet Singh, who was wearing a ladies suit. On hers raising an alarm, her parents have attempted to evacuate her from the clutches of the accused by entering into the scuffle with the latter, who however successful in fleeing from the spot. In this incident her shirt was torn off and she also suffered injuries on her head and back. Prior to this incident the accused had thrice done such obscene acts with her. On the basis of her statement an FIR came to be registered and the investigation was taken up. 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 offences punishable under Section 354 & 323 IPC, to, which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 9 witnesses. On closure of prosecution evidence, the statement of accused, under Section 313 of the Code of Criminal Procedure, was recorded, in, which he pleaded innocence and claimed false implication. He chose to lead evidence in defence.

5. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused. On an appeal, preferred by the accused, before the learned Sessions Judge, the Learned Sessions Judge, while reversing the judgment of conviction recorded by the learned trial Court, acquitted the accused.

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

7. On the other hand, the learned counsel for the respondent has with considerable force and vigour contended that the findings of acquittal recorded by the Appellate Court are based on a mature and balanced appreciation of evidence on record and do not necessitate interference rather merit vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The learned first appellate Court had on incisive discernment of the testimonies of the prosecutrix as well as of her parents, who deposed as PW-2 and 3, while theirs unfolding material embellishments and improvements over the version qua the incident comprised in the FIR, concluded hence that the truth of the version recorded in the FIR is eroded. The findings and conclusions arrived at by the Appellate Court would not entail reversal unless a circumspect reading and an analysis of the testimonies of prosecutrix as well as of PWs 2 and 3, her parents, portrays perse absurdity or perversity in their appreciation by the learned first appellate Court.

10. This Court while proceeding to examine the fact of the prosecutrix having indulged in a bout of embellishments and improvements over the version qua the incident recited by her in the FIR, the imminent noticeable fact which grips the attention of the Court is of hers having mentioned in the FIR, that when she proceeded to the toilet, then someone caught her from behind. However, while she came to be examined on oath, she deposes that the narration in the FIR of hers having been grabbed from behind is inadvertently mentioned in the FIR. Consequently, then the genesis of the prosecution version qua the commencement of incident comprised in the recitals recorded in the FIR of the incident having occurred when the prosecutrix had gone to the toilet and then someone having caught her from behind has obviously come to be reneged or resiled by the prosecutrix while hers come to be examined on oath, it hence, perse constitutes a dire and material contradiction over the version qua the commencement of the incident as narrated by her in the FIR. In sequel, the genesis of the prosecution version, is eroded of its veracity. She had also proceeded to mention in the FIR that after hers having been grabbed by the accused, the latter had pressed her breast and kissed her. However while

stepping into the witness box, she omits to attribute the said role to the accused, though ascribed to him in the FIR. Obviously then, too the version as spelt out qua the incident in the FIR has come to be contradicted by her while deposing as a witness on oath. Naturally then the contradiction qua the aforesaid facet belittles her credibility. Moreover other dire improvements in her deposition over the version qua the incident as spelt out in the FIR, have also occurred, inasmuch, as, she while being examined on oath has deposed that the accused tried to gag her to preclude her from shouting and asking for help. The aforesaid fact as espoused by her on oath when not recorded by her in the FIR lodged at her instance is obviously an improvement and an embellishment casting a spell of doubt qua her credibility besides rendering prevaricated the version qua the incident as initially recorded in the FIR. The aforesaid contradictions and embellishments existing in the deposition of the complainant/prosecutrix are brazen, sharp and dire. Concomitantly, then, as aptly recorded by the learned first appellate Court, they render open an inference that the version as spelt out qua the incident by the complainant is unbelievable being wholly concocted.

11. Besides, the parents of the prosecutrix who deposed as PWs 2 and 3, too, have resorted to material contradictions, improvements and embellishments which hence render their testimonies to be imbued with the vice of falsity or prevarication. The contradictions resorted to by PW-2 and PW-3 are unraveled by the fact of the FIR recording that on the arrival of the parents at the site of occurrence on theirs hearing the cries of the complainant theirs having attempted to evacuate her from the clutches of the accused by entering into a scuffle with the latter, who however was successful in fleeing from the spot. The reticence of both the PWs 2 and 3 as well as of the prosecutrix qua the arrival of the PW-2 and PW-3 at the site of occurrence surges forth an inference that the prosecution version of PW-2 and PW-3 having arrived at the site of occurrence suffers from falsity. Consequently, their depositions qua the incident are rendered incredible. Moreover both PW-2 and PW-3 have rendered contradictory versions qua the spot where the prosecutrix was found lying. PW-2 deposes that the prosecutrix was found lying 25-30 feet away from the toilet yet PW-3 deposes that she was found lying 4-5 feet away from the toilet. The contradictory versions spelt out by them qua the distance from the toilet where the prosecutrix was found lying too engenders a conclusion that as a matter of fact they never arrived at the site of occurrence rather they were apprised of it subsequently by the prosecutrix. Consequently, the version as espoused by them, qua the fact of theirs having found the prosecutrix lying near the toilet is imbued with falsity.

12. The summom bonum of the above discussion is that the contradictions, improvements and embellishments as unraveled hereinbefore erode the veracity of the prosecution version. Consequently, when the prosecution version is stripped off its truth, the benefit of doubt as afforded to the accused by the learned first appellate Court does not suffer from any perversity or absurdity comprised in its not appreciating the evidence on record in a wholesome, unbiased or impartisan manner.

13. In view of above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned first appellate Court is affirmed. Record of the learned trial Court be sent back forthwith.

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

CWP No. 6916 of 2011 a/w LPAs No. 504, 507, 512 of 2012, 203 of 2014, CWPs No. 7728 and 8412 of 2013
Reserved on: 18.11.2014
Decided on: 9.12.2014

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1. CWP No. 6916 of 2011

Pankaj Kumar ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.

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2. LPA No. 504 of 2012

Kamla Devi ...Appellant.
Versus
State of Himachal Pradesh & others ...Respondents.

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3. LPA No. 507 of 2012

Himachal Pradesh Primary Assistant Teachers Association through its President ...Appellant.
Versus
Chander Mohan Negi & others ...Respondents.

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4. LPA No. 512 of 2012

Vijay Kumar & others ...Appellants.
Versus
State of Himachal Pradesh & others ...Respondents.

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5. LPA No. 203 of 2014

State of Himachal Pradesh & another ...Appellants.
Versus
Chander Mohan Negi & others ...Respondents.

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6. CWP No. 7728 of 2013

Shikha Mankotia & others ...Petitioners.
Versus
State of H.P. & others ...Respondents.

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7. CWP No. 8412 of 2013

Rajesh Thakur & others ...Petitioners.
Versus
State of Himachal Pradesh & others ...Respondents.

CWP No. 6916 of 2011

For the petitioner: Mr. Bipin C. Negi, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 4.
Nemo for respondent No. 5.

Respondent No. 6 already ex-parte.
Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 7.
Mr. Surender Sharma, Advocate, for respondent No. 8.
Mr. Shyam Chauhan, Advocate, for respondent No. 9.
Mr. Ajay Mohan Goel, Advocate, for respondents No. 10 to 14.
Mr. Mohit Thakur, Advocate, for respondent No. 15.

LPA No. 504 of 2012

For the appellant: Mr. Kulbhushan Khajuria, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2.
Ms. Ranjana Parmar, Advocate, for respondents No. 3 to 5.
Mr. Ajay Mohan Goel, Advocate, for respondent No. 6.

LPA No. 507 of 2012

For the appellant: Mr. Ajay Mohan Goel, Advocate.

For the respondents: Ms. Ranjana Parmar, Advocate, for respondents No. 1 to 3.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 4 and 5.

LPA No. 512 of 2012

For the appellants: Mr. Avneesh Bhardwaj, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2.
Ms. Ranjana Parmar, Advocate, for respondents No. 3 to 5.
Mr. Ajay Mohan Goel, Advocate, for respondent No. 6.

LPA No. 203 of 2014

For the appellants: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.

For the respondents: Ms. Ranjana Parmar, Advocate, for respondents No. 1 to 3.
Mr. Ajay Mohan Goel, Advocate, for respondent No. 4.

CWP No. 7728 of 2013

For the petitioners: Mr. Ashok Tyagi and Mr. Mukul Sood, Advocates.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 4.
Ms. Archana Dutt, Advocate, vice Ms. Aruna Sharma, Advocate, for respondent No. 5.
Mr. D.K. Khanna, Advocate, for respondent No. 6.

CWP No. 8412 of 2013

For the petitioner: Ms. Ranjana Parmar, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 3.
Ms. Archana Dutt, Advocate, for respondent No. 4.
Mr. Avneesh Bhardwaj, Advocate, for respondent No. 5.
Mr. Mohit Thakur, Advocate, for respondent No. 6.

Constitution of India, 1950- Article 226 - State appointed Gram Vidya Upasak Assistant Teacher and Para teachers- services of gram Vidya Upasak and para teachers were subsequently regularized- Writ Petition was filed by one of the Primary Assistant Teachers and the Court held that appointment of teachers was not made in accordance with rule - State was directed to phase out those teachers in a phased manner- State preferred an appeal and contended that there was deficiency of the teachers due to which it had engaged primary assistant teachers –teachers had undergone the training subsequent to their appointment- held, that teachers were not appointed as a stop-gap arrangement- State had decided to regularize them- teachers were not parties before the Writ Court- teachers were appointed in the public interest to improve Pupil Teacher Ratio- large number of vacancies are still available- therefore, in these circumstances, decision to regularize them cannot be said to be bad.

(Para- 8 to 35)

Constitution of India, 1950- Article 226- Public Interest Litigation- public interest litigation is not maintainable in service jurisprudence- Writ petitioners claimed that they have a right of consideration, which showed that they had an interest- hence, public interest litigation is not maintainable at their instance.

(Para-38, 40 and 43)

Cases referred:

Secretary, State of Karnataka and others versus Umadevi (3) and others, (2006) 4 Supreme Court Cases 1

Indu Shekhar Singh & Ors. versus State of U.P. & Ors., 2006 AIR SCW 2582

University of Rajasthan & Anr. versus Prem Lata Agarwal, 2013 AIR SCW 989

Chief Executive Officer, Pondichery Khadi and Village Industries Board and Anr. versus K. Aroquia Radja and Ors., 2013 AIR SCW 1759

Nihal Singh and others versus State of Punjab and others, (2013) 14 SCC 65

Hari Nandan Prasad and Anr. versus Employer I/R to Management of FCI and Anr., 2014 AIR SCW 1383

State of Jharkhand and others vs Kamal Prasad & others, 2014 AIR SCW 2513

Vireshwar Singh and others versus Municipal Corporation of Delhi and others, 2014 AIR SCW 5480,

Girjesh Shrivastava & Ors. v. State of M.P. & Ors., 2010 AIR SCW 7001

State of Uttaranchal versus Balwant Singh Chaufal & Ors., 2010 AIR SCW 1029

Hari Bansh Lal versus Sahodar Prasad Mahto and others, (2010) 9 Supreme Court Cases 655

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

These Writ Petitions and the Letters Patent Appeals are the outcome of the policies, i.e. The Himachal Pradesh Gram Vidya Upasak Yojna, 2001 (Annexure P-3), Himachal Pradesh Prathmik Sahayak Adhyapak/Primary

Assistant Teacher (PAT) Scheme, 2003 and The Himachal Pradesh Para Teachers (Lecturer School Cadre), Para Teachers (T.G.T's) and Para Teachers (C&V) Policy, 2003 (Annexure P-4), which were made by the State Government in the years 2001 and 2003, respectively.

2. The State, after noticing the dire need of providing education at grass root level and particularly, in tribal and hard/difficult areas, made the policies/schemes in the years 2001 and 2003, appointed Gram Vidya Upasaks, Primary Assistant Teachers and Para Teachers. It is apt to reproduce the relevant portion of one of the policies, i.e. the Himachal Pradesh Gram Vidya Upasak Yojna-2001 herein:

> *"**2. Rationale:-***
>
> *The task of universalization of Primary Education in Himachal Pradesh is a gigantic one keeping in view the tough geographical conditions of the State and the non-availability of trained teaching man power. The trained teachers available in the urban and other developed areas are reluctant to serve in the remote areas as a result of which most of our schools in these areas are without teachers. In the remote and inaccessible areas of the State, the Department of Primary Education faced many problems like teacher absenteeism, poor scholastic standards which led to irregular functioning of primary schools and increased drop-out rate. In order to counter these problems effectively and to translate the vision of the State Govt. reflected in the NINE POINT CHARTER announced by Hon'ble Chief Minister, Himachal Pradesh, Prof. Prem Kumar Dhumal, to bring REFORMS and to accelerate the pace of development, by decentralising the power to panchayats, the HP GRAM VIDYA UPASAK YOJNA has been visualised.*
>
> *The Department of H.P. Primary Eduction has conceived this innovative scheme of H.P. Gram Vidya Yojna-2001 to relate it to the concept of Para Teachers keeping in view the problem of teacher absenteeism in the remote and difficult rural areas. It is difficult to find fully qualified teachers who would willingly accept posting in remote villages, far less actually take up residence there. A primary school in such a village actually tends to become dysfunctional, and parents as well as children fail to relate to such an institution, leading to high drop out rates. One of the ways to solve this problem is the concept of Para Teachers. The use of Para Teachers in formal schools began with the Himachal Pradesh Volunteer Teachers Scheme in 1984 and replicated by Vidya Upasaks Yojna in the year-2000 which was followed in Primary Education by other States."*

3. The State, after taking into consideration their work, conduct and output, decided to regularize the services of Gram Vidya Upasaks and Para Teachers in terms of Annexures P-7 and P-8.

4. Three persons filed a writ petition, being CWP No. 3303 of 2012, titled as Chander Mohan Negi & others versus State of Himachal Pradesh & others, and sought following reliefs amongst others:

> *"i) That the respondents may kindly be directed to fill up the available vacancies of the Junior Basic Trained teachers in accordance with Recruitment and Promotion Rules.*
>
> *ii) That the respondents may further be restrained from regularizing the Primary Assistant Teachers who have been appointed in violation of Constitutional Schemes and Law established and settled by the Hon'ble Apex Court with further directions to the respondents to advertise all the available vacancies of Junior Basic Trained teachers in the Education Department to be filled in accordance with Recruitment and Promotion Rules without any further delay and all the vacancies may be filled up in accordance with Recruitment and Promotion Rules available at the time of occurrence of the vacancies."*

5. The Writ Court vide judgment and order, dated 18th October, 2012 (hereinafter referred to as "the impugned judgment") held that the appointments of the teachers made under The Himachal Pradesh Prathmik Sahayak Adhyapak/Primary Assistant Teacher (PAT) Scheme, 2003, have not been made in accordance with the Rules and accordingly, directed to phase out the said teachers in a phased manner, constraining the appellants, i.e. the persons appointed as Primary Assistant Teachers, Himachal Pradesh Primary Assistant Teachers Association and the State of Himachal Pradesh to question the impugned judgment by the medium of LPAs No. 504, 512, 507 of 2012 and 203 of 2014, respectively, on the grounds taken in the respective memo of appeals.

6. Three writ petitions, being CWPs No. 6916 of 2011, 7728 and 8412 of 2013, also came to be filed in this Court, whereby the writ petitioners have sought quashment of all the appointments made by the State in terms of the said policies on the grounds that the appointments are illegal and have deprived them to participate, though, they are eligible in all respects and have a right to participate in the selection process.

7. All the Letters Patent Appeals and the Writ Petitions came to be clubbed in view of the fact that the common questions of facts and law were involved in all the appeals and the writ petitions.

8. The moot question for consideration in these appeals and the writ petitions is - whether the selection/engagement of the teachers made in terms of the policies made by the State aimed at to provide primary education to the needy and poor hailing from tribal, hard/difficult areas, who are entitled to it as a matter of right, being a fundamental right, and are poor read with the fact that the regular/contractual teachers were not interested to work in the said areas, is illegal and not entitled for regularization?

9. In order to ascertain what was the background of framing of these policies, the State has produced the relevant record and the notings, perusal of which do disclose that the policies were aimed at to achieve the purpose, the reference of which is made hereinabove.

10. The appointments/engagements were made subject to the conditions contained in the policies and one of the conditions was that the appointees will not seek regularization/absorption. However, the State, after noticing their work, conduct and the zeal they have shown in the hard areas read with the fact that huge number of vacancies were available; the appointees

were working for the last 8-10 years on these posts, had completed the Special Teacher Training Qualifying Condensed Course and had obtained the special JBT certificate after five years' continuous service in terms of the Himachal Pradesh Education Code, 1985, decided to regularize the Gram Vidya Upasaks. The respondents-State in the supplementary affidavit filed in CWP No. 7728 of 2013 has explained what were the basis for regularizing their services and how they have been able to engage teachers on a meager amount. They have also given the details as to what was the difference in the salary of regular teachers and teachers engaged in terms of the schemes and have also given details of percentage-wise benefit earned in each year. They have also given the output, mention of which has been made in paras 11 to 15 of the affidavit. It is apt to reproduce relevant portion of para 13 and para 14 of the supplementary affidavit herein:

> *"13. That is is relevant to submit that in case regular recruitments were made in the teaching sector the State Government would not have been able to increase the Pupil Teacher Ratio (PTR) as maximum part of financial resources would have been consumed in meeting the salary component of Regular Teachers. For quick perusal of the court the salary component of one Regular teacher and comparative payments made to the Para, PAT, PTA teachers, for the year 2003-04, 2006-07 and 2011-12, are reproduced as under:*
>
> *.....*
>
> *14. That with the passage of time the services of PTA under GIA, Para Teachers and PAT had to be continued as their engagement was obtaining the desired results as the number of schools had also drastically increased and the State was also facing financial constraints to engage regular teachers."*

11. Accordingly, the Gram Vidya Upasaks came to be regularized. No doubt, the posts against which they were regularized, were direct recruitment posts and were to be filled in by a selection process as per the Rules occupying the field, but, at the same time, it is to be kept in mind that the State has power to make one-time measure schemes/policies in order to achieve the goal of the Constitution, i.e. Right of Education and to provide education to the needy/poor, who hail from the tribal and difficult/hard areas.

12. The policies, in terms of which the said teachers came to be engaged, were not questioned by any person initially and the persons, who have now questioned these policies/regularization policy, perhaps, may be the students of those very teachers.

13. We have perused the record, read with the writ petitions and the appeals. The writ petitioners in the writ petitions have averred that now by subsequent developments and by efflux of time, they have acquired qualification and have a right of consideration.

14. It is apt to record herein that the writ petitioners were not eligible at the relevant point of time and no one questioned the selection of the teachers at the relevant point of time, even at the time when regularization was made.

15. In CWP No. 3303 of 2012, it has been specifically averred that the writ petitioners became eligible much after these teachers, who were appointed in the

years 2001 and 2003, i.e. in the year 2010, the writ petitions came to be filed at least after eleven years and it is not mentioned in the writ petition that the writ petitioners were eligible at the particular point of time, is suggestive of the fact that they were not eligible at the relevant time and had no locus to question the selection/appointments made in the years 2001 and 2003. It is apt to reproduce para 7 of the preliminary submissions of the reply filed by State-respondents No. 1 and 2 in CWP No. 3303 of 2012 herein:

> *"7. That PAT were engaged in the year 2003, whereas the petitioner have completed the JBT in 2010. In view of the above the petitioner have no claim against the posts occupied by the PAT whereas which were lying vacant in the year 2003."*

16. It has also been averred by the respondent-State in its reply on merits filed in CWP No. 3303 of 2012 that the appointment of these teachers has not affected the writ petitioners in any way. It is apt to reproduce para 11 of the reply on merits herein:

> *"11. That in reply to this para it is submitted that the Department was not in a position to leave the schools teachers deficient for long since it would have affected the studies of the students very badly. Therefore, teachers had been appointed under various schemes at various point of time. Such appointments had been made up to year-2007 and have no impact on the petitioners since they have completed their 2 year JBT training in the year-2010 and are required to qualify the TET as submitted in the preliminary submissions."*

17. It is apt to record herein that the writ petitioners have chosen not to file rejoinder and the stand taken by the State has remained uncontroverted.

18. The core question is - Can the person(s), who became eligible later on and had no locus at the particular point of time, question the same on the ground that the appointments are bad?

19. The Apex Court in **Secretary, State of Karnataka and others versus Umadevi (3) and others,** reported in **(2006) 4 Supreme Court Cases 1,** held that the back door appointment, i.e. illegal appointment, cannot be regularized. It further held that if irregular appointment is outcome of a conscious decision of the State, can be regularized. It is apt to reproduce relevant portion of para 49 and para 53 of the judgment herein:

> *"49. .....Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.*
>
> *50. to 52. .....*
>
> *53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in State of Mysore v. S.V. Narayanappa, (1967) 1 SCR 128 : AIR 1967 SC 1071, R.N. Nanjundappa v. T. Thimmiah, (1972) 1 SCC 409 : (1972) 2 SCR 799, and B.N.*

Nagarajan v. State of Karnataka, (1979) 4 SCC 507, and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

20. The Apex Court has taken the same view in the case titled as **Indu Shekhar Singh & Ors. versus State of U.P. & Ors.,** reported in **2006 AIR SCW 2582.** It is apt to reproduce paras 24 and 25 of the judgment herein:

"24. The State was making an offer to the Respondents not in terms of any specific power under Rules, but in exercise of its residuary power (assuming that the same was available). The State, therefore, was within its right to impose conditions. The Respondents exercised their right of election. They could have accepted the said offer or rejected the same. While making the said offer, the State categorically stated that for the purpose of fixation of seniority, they would not be obtaining the benefits of services rendered in U.P. Jal Nigam and would be placed below in the cadre till the date of absorption. The submission of Mr. Verma that for the period they were with the Authority by way of deputation, should have been considered towards seniority cannot be accepted simply for the reason that till they were absorbed, they continued to be in the employment of the Jal Nigam. Furthermore, the said condition imposed is backed by another condition that the deputed employee who is seeking for absorption shall be placed below the officers appointed in the cadre till the date of absorption. The Respondent Nos. 2 to 4 accepted the said offer without any demur on 3.9.87, 28.11.91 and 6.4.87 respectively.

25. They, therefore, exercised their right of option. Once they obtained entry on the basis of election, they cannot be allowed to turn round and contend that the conditions are

> *illegal. [See R.N. Gosain vs. Yashpal Dhir (1992) 4 SCC 683, Ramankutty Guptan vs. Avara (1994) 2 SCC 642 and Bank of India & Ors. vs. O.P. Swarnakar & Ors. (2003) 2 SCC 721.] Furthermore, there is no fundamental right in regard to the counting of the services rendered in an autonomous body. The past services can be taken into consideration only when the Rules permit the same or where a special situation exists, which would entitle the employee to obtain such benefit of past service."*

21. Admittedly, in terms of the policies of 2001 and 2003, the teachers-appellants/writ respondents have accepted the conditions and thereafter were appointed, but it is the State which has made another policy and decided to regularize their services. Thus, it cannot be said that they are precluded from seeking regularization. The condition was accepted by the teachers, which was imposed by the State and the State thought it proper, in its wisdom, to regularize them, made a conscious decision. Thus, keeping in view the ratio, the appellants/writ respondents have carved out a case for interference.

22. The Apex Court in a case titled as **University of Rajasthan & Anr. versus Prem Lata Agarwal,** reported in **2013 AIR SCW 989,** held that an appointment by stop-gap arrangement cannot be regularized, but, at the same time, laid down the principle that if appointments are made under a particular scheme and continued for a pretty long time, are entitled to regularization in terms of the policy. It is apt to reproduce paras 22, 33 and 34 of the judgment herein:

> *"22. On a studied scrutiny, it is found that the High Court has placed reliance on Section 3(3) of the Act and the regulations which we have reproduced hereinabove to arrive at the conclusion that the respondents were entitled to be treated as regular teachers and, therefore, it was obligatory on the part of the University to extend the benefit of pension. The provisions of the Act, when read in a conjoint manner, make it crystal clear that the legislature had imposed restrictions on the appointment, provided for the constitution of Selection Committee and also laid down the procedure of the said committees. The intention of the legislature is, as it seems to us, to have teachers appointed on the basis of merit, regard being had to transparency, fairness, impartiality and total objectivity. Under sub- section (2), it has been clearly postulated that any appointment made barring the arrangement under sub-section (3) of Section 3 would be null and void. The language is clear and categorical. The exception that had been carved out under Section 3(3) is for an extremely limited purpose. It permits stop-gap arrangements and only covers ad hoc or part-time teachers with a small duration. It is intended to serve the purpose of meeting the situation where an emergency occurs. It was never intended to clothe any authority with the power to make any appointment beyond what is prescribed therein. The scheme of the aforesaid provisions go a long way to show that the legislature, in fact, had taken immense care to see that no one gets a back door entry and the selections are*

made in a seemly manner. A proper schematic analysis of the provisions enumerated hereinabove do not envisage any kind of ad hoc appointment or part-time appointment to remain in continuance. As is demonstrable from the factual depiction in the present batch of cases, some of the respondents continued with certain breaks and also due to intervention of the court. That apart, this Court had not acceded to their prayer of regularization. The only direction that was issued in Special Leave Petition (c) No. 3238 of 1997 and other connected matters, was that they would continue in service till the regular selections were made. It is noteworthy that a distinction has to be made and we are obliged to do so because of the language employed in the provisions between a regular teacher and an ad hoc teacher or a part-time teacher who continues to work in the post sometimes due to fortuitous circumstances and sometimes due to the interdiction by the court. Their initial appointment could be regarded as legal for the limited purposes of Section 3(3) of the Act. That would only protect the period fixed therein. Thereafter, they could not have been allowed to continue, as it was only a stop gap arrangement and was bound to be so under the statutory scheme. Their continuance thereafter by operation of law has to be regarded as null and void regard being had to the language employed in Section 3(2) of the Act.

23. to 32. .....

33. We have already analysed the scheme of Section 3 and stated that there could not have been continuance of the service after the fixed duration as provided under Section 3(3) of the Act and such continuance is to be treated as null and void. That is how the Act operates in the field. That apart, regular selection was required to be made by a High Powered Committee as provided under Section 4. It is also pertinent to state that the Act lays down the procedure of the selection committee not leaving it to any authority to provide the same by rules or regulations.

34. In view of the aforesaid, the irresistible conclusion is that the continuance after the fixed duration goes to the root of the matter. That apart, the teachers were allowed to continue under certain compelling circumstances and by interdiction by courts. Quite apart from the above, this Court had categorically declined to accede to the prayer for regularization. In such a situation, we are afraid that the reliance placed by the High Court on paragraph 53 of the pronouncement in Uma Devi, (AIR 2006 SC 1806) can be said to be justified. In this regard, another aspect, though an ancillary one, may be worth noting. Prem Lata Agarwal and B.K. Joshi had retired on 31.3.2001 and 31.1.2002, and by no stretch of imagination, Uma Devi (supra) lays down that the cases of any category of appointees who had retired could be regularized. We may repeat at the cost of repetition that the protection carved out in

> *paragraph 53 in Uma Devi (supra) could not be extended to the respondents basically for three reasons, namely, (i) that the continuance of appointment after the fixed duration was null and void by operation of law; (ii) that the respondent continued in the post by intervention of the court; and (iii) that this Court had declined to regularize their services in 1998."*

23. The teachers-appellants/writ respondents were not appointed by way of stop-gap arrangement, thus, are entitled to regularization in terms of policy made by the Government while applying the ratio of the judgment (supra).

24. The Apex Court has laid down the same principle also in **Chief Executive Officer, Pondichery Khadi and Village Industries Board and Anr. versus K. Aroquia Radja and Ors.,** reported in **2013 AIR SCW 1759.** It is apt to reproduce para 18 of the judgment herein:

> *"18. As stated by this Court in Umadevi (AIR 2006 SC 1806) (supra), absorption, regularization or permanent continuance of temporary, contractual, casual, daily-wage or ad hoc employees appointed/recruited and continued for long in public employment dehors the constitutional scheme of public employment is impermissible and violative of Articles 14 and 16 of the Constitution of India. As recorded in paragraph 53 of the report in SCC (Para 44 of AIR 2006 SC 1806), this Court has allowed one time measure, regularization of services of irregularly appointed persons, provided they have worked for ten years or more in duly sanctioned posts. That is also not the case in the present matter."*

25. In the case titled as **Nihal Singh and others versus State of Punjab and others,** reported in **(2013) 14 Supreme Court Cases 65,** the initial appointments of the appellants were made after going through the procedure adopted by the State in terms of the policy, the decision to resort to such a procedure was taken at the highest level of the State consciously, a selection process was designed and the State was directed to regularize their services by creating necessary posts. The facts of the cases in hand are similar. The teachers came to be appointed in terms of the said policies by the selection committees duly constituted in terms of the decision made by the highest authorities. It is apt to reproduce paras 24, 27, 28 and 31 of the judgment herein:

> *"24. In our opinion, the initial appointment of the appellants can never be categorised as an irregular appointment. The initial appointment of the appellants is made in accordance with the statutory procedure contemplated under the Act. The decision to resort to such a procedure was taken at the highest level of the State by conscious choice as already noticed by us.*
>
> *25. .....*
>
> *26. .....*
>
> *27. Such a procedure making recruitments through the employment exchanges was held to be consistent with the requirement of Articles 14 and 16 of the Constitution by*

this Court in Union of India v. N. Hargopal, (1987) 3 SCC 308: 1987 SCC (L&S) 227: (1987) 4 ATC 51.

28. The abovementioned process clearly indicates it is not a case where persons like the appellants were arbitrarily chosen to the exclusion of other eligible candidates. It required all able-bodied persons to be considered by the SSP who was charged with the responsibility of selecting suitable candidates.

29. .....

30. .....

31. Therefore, we are of the opinion that the process of selection adopted in identifying the appellants herein cannot be said to be unreasonable or arbitrary in the sense that it was devised to eliminate other eligible candidates. It may be worthwhile to note that in Umadevi (3) case, this Court was dealing with appointments made without following any rational procedure in the lower rungs of various services of the Union and the States."

26. The Apex Court in the latest judgment rendered in the case titled as **Hari Nandan Prasad and Anr. versus Employer I/R to Management of FCI and Anr.,** reported in **2014 AIR SCW 1383,** has laid down the same principles. It is apt to reproduce para 34 of the judgment herein:

"34. On harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularization only because a worker has continued as daily wage worker /adhoc/temporary worker for number of years. Further, if there are no posts available, such a direction for regularization would be impermissible. In the aforesaid circumstances giving of direction to regularize such a person, only on the basis of number of years put in by such a worker as daily wager etc. may amount to backdoor entry into the service which is an anathema to Art.14 of the Constitution. Further, such a direction would not be given when the concerned worker does not meet the eligibility requirement of the post in question as per the Recruitment Rules. However, wherever it is found that similarly situated workmen are regularized by the employer itself under some scheme or otherwise and the workmen in question who have approached Industrial/Labour Court are at par with them, direction of regularization in such cases may be legally justified, otherwise, non-regularization of the left over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Art.14 of the Constitution. Thus, the Industrial adjudicator would be achieving the equality by upholding Art. 14, rather than violating this constitutional provision."

27. It is also apt to reproduce paras 20 and 23 of the latest judgment rendered by the Apex Court in **State of Jharkhand and others versus Kamal Prasad and others,** reported in **2014 AIR SCW 2513,** herein:

> *"20. We have heard the factual and legal contentions urged by the learned senior counsel for both the parties and carefully examined the findings and reasons recorded in the impugned judgment with reference to the evidence produced on behalf of the respondent-employees. The evidence on record produced by the respondent-employees would clearly go to show that they have been rendering services in the posts as ad hoc Engineers since 1987 and have been discharging their services as permanent employees with the appellants. Additional 200 posts were created thereafter by the State Government of Bihar. However, the respondents continued in their services as ad hoc employees without any disciplinary proceedings against them which prove that they have been discharging services to their employers to their satisfaction.*
>
> *The learned senior counsel on behalf of the appellants have failed to show as to how the interim orders upon which he placed strong reliance are extended to the respondents which is not forthcoming except placing reliance upon the decision of this Court in the case of Amrit Lal Berry (AIR 1975 SC 538) (supra), without producing any record on behalf of both the State Governments of Bihar and Jharkhand to substantiate the contention that the interim orders obtained by the similarly placed employees in the writ petitions referred to supra were extended to the respondent-employees to maintain parity though they have not obtained such interim orders from the High Court. Therefore, the learned senior counsel has failed to prove that the respondents have failed to render continuous services to the appellants at least for ten years without intervention of orders of the court, the findings of fact recorded by the Division Bench of the High Court is based on record, hence the same cannot be termed as erroneous in law. In view of the categorical finding of fact on the relevant contentious issue that the respondent-employees have continued in their service for more than 10 years continuously therefore, the legal principle laid down by this Court in Uma Devi's case (AIR 2006 SC 1806) (supra) at paragraph 53 squarely applies to the present cases. The Division Bench of the High Court has rightly held that the respondent-employees are entitled for the relief, the same cannot be interfered with by this Court.*
>
> *21. .....*
>
> *22. .....*
>
> *23. .....In view of the legal principles laid down in the aforesaid decisions, we are of the opinion that the decision of the High Court does not fall in either of the categories mentioned above which calls for our interference. The Division Bench of the High Court having*

> *regard to the glaring facts that the respondent-employees have continuously worked in their posts for more than 29 years discharging permanent nature of duties and they have been paid their salaries and other service benefits out of the budget allocation, no objection was raised by the CAG in this regard and therefore, it is not open for the appellants to contend that the law laid down in Uma Devi's case (AIR 2006 SC 1806) (supra) has no application to the fact situation. The action of the appellants in terminating the services of the respondent-employees who have rendered continuous service in their posts during pendency of the Letters Patent Appeals was quashed by the High Court after it has felt that the action is not only arbitrary but shocks its conscious and therefore it has rightly exercised its discretionary power and granted the reliefs to the respondent-employees which do not call for our interference. Therefore, we are of the opinion that this Court will not interfere with the opinion of the High Court and on the contrary, we will uphold the decision of the High Court both on factual and legal aspects as the same is legally correct and it has done justice to the respondent-employees."*

28. It would be profitable to reproduce paras 15 and 16 of the judgment rendered by the Apex Court in **Vireshwar Singh and others versus Municipal Corporation of Delhi and others,** reported in **2014 AIR SCW 5480,** herein:

> *"15. Learned counsel for the appellants has tried to persuade us to charter the aforesaid course by placing reliance on two decisions of this Court in Narender Chadha and others v. Union of India and others, (1986) 2 SCC 157 : (AIR 1986 SC 638), and Keshav Chandra Joshi and others v. Union of India and others, 1992 Supp (1) SCC 272 : (AIR 1991 SC 284). It is contended that the denial of benefit of long years of ad hoc service, in view of the ratio of the law laid down in the aforesaid two decisions, would be contrary to Articles 14 and 16 of the Constitution.*
>
> *16. It is the view expressed in Narender Chadha (AIR 1968 SC 638) (supra) which would require a close look as Keshav Chandra Joshi (AIR 1991 SC 284) (supra) is a mere reiteration of the said view. In Narender Chadha (supra) the lis between the parties was one relating to counting of ad hoc service rendered by the promotees for the purpose of computation of seniority qua the direct recruits. The basis of the decision to count long years of ad hoc service for the purpose of seniority is to be found more in the peculiar facts of the case as noted in para 20 of the report than on any principle of law of general application. However, in paragraphs 15-19 of the report a deemed relaxation of the Rules of appointment and the wide sweep of the power to relax the provisions of the Rules, as it existed at the relevant point of time, appears to be the basis for counting of the ad hoc service for the purpose of seniority."*

29. While applying the tests laid down by the Apex Court in the judgments (supra) and keeping in view the aim and object of the policies of the State Government, the appointments made cannot be said to be illegal, thus, can be regularized as per the mandate of the said policies.

30. In sequel to order, dated 7th July, 2014, respondents-State has filed a supplementary affidavit in CWP No. 7728 of 2013. They have also given the background of the appointment of the teachers in various categories. It is apt to reproduce paras 2, 3 and 5 of the supplementary affidavit herein:

> *"2. That in the year 2003 there were 7516 posts of teachers in different categories lying vacant in the Government Schools in the State of Himachal Pradesh.*
>
> *The position of the sanctioned posts, filled-up posts and vacant posts in the year 2003-04 in respect of all categories of teachers was as under:*

Category	*Sanctioned Posts*	*Filled up*	*Vacant*
J B Ts	*28829*	*25971*	*3257*
T G Ts	*13298*	*12143*	*1155*
C & V	*13906*	*11547*	*2359*
Lecturer (School cadre)	*7370*	*6730*	*640*
D P E	*678*	*573*	*105*

> *3. That the State Government in order to achieve the goal of free and compulsory education to all the children within the age group of 6-14 in the year 2003, the State Government came out with '**H.P. Para Teachers Policy, 2003**' for engaging Para Teachers and H.P. Prathmik Sahayak Yojna/Primary Assistant Teachers against the vacancies of Lecturers (School Cadre), T G Ts and C & V and JBT Teachers in various Government Schools of the State. The posts of such teachers remained vacant due to the unavoidable factors like transfer, retirements, deputations, secondment, promotions, deaths and up-gradation of Schools etc. The non-availability of the teachers in various Schools in the State, in-spite of best efforts by the State Government to fill up all such vacancies of teachers in the schools, adversely affected the interest of the students and has a negative impact on the quality of education. Therefore, in the interest of students and to improve the qualitative change in the education system the above policy was brought by the State Government.*
>
> *4. .....*

5. That apart from the aforementioned method, the Government had also filled up the various posts of teachers through regular appointments and promotions as well."

31. In the supplementary affidavit filed during the pendency of the appeals and the writ petitions, the respondents-State have given the existing vacancy position, which do disclose that a large number of posts are vacant in the cadres of TGTs, C&Vs, PTAs and PATs. It also discloses the reasons for formulation of the policies and the reason for their regularization. It is stated that the engagements were in the interest of public at large and it was also noticed that there was tremendous improvement in Pupil Teacher Ratio (PTR), literacy rate and reduction in dropout cases in the primary and upper primary classes. It is apt to reproduce paras 6, 7 and 9 of the supplementary affidavit herein:

6. That by adopting the aforesaid policy the State Government appointed many of the teachers in the backward and remote areas where the posts of teachers had remained vacant either due to transfer of a teacher from hard area to soft area or due to the fact that normally a fresh appointee does not prefer to join in such areas.

7. That after making of the above policy and engaging teachers in above manner, there was tremendous improvement in Pupil Teacher Ratio (P.T.R.), literacy rate and reduction in

dropout cases in the primary (1st - 5th class) and upper primary (6th-8th class).

8. .....

9. That the existing position of the number of para lecturers, TGTs, C&V, PTA's and PAT's working in different schools in the State are as under:

Category	*Total sanction posts*	*Total filled up posts*	*Para*	*PAT/ GVU*	*PTA*	*Vacant*
JBTs	*21778*	*20972*	---	*3552*	---	*806*
TGTs	*14822*	*13231*	*724*	---	*1062*	*1591*
C&V	*16019*	*12079*	*764*	---	*2943*	*4831*
Lecturer School	*16081* *13936 functional* *2145 non functional*		*508*	---	*1964*	*1980*
DPE	*1486*	*1264*	*93*	---	*323*	*222*

Lecturer College	*2240*	*1570*	---	---	*80*	*670*

32. It also contains other details and statistics, which do disclose that the State has achieved the aim and object of the said policies.

33. It is apt to record herein that the supplementary affidavit has not been rebutted by any of the writ petitioners or the respondents in the appeals.

34. A bare perusal of the supplementary affidavit (supra) do disclose that even after appointing all the said persons as teachers through various policies, a large number of vacancies are still available. It is for the writ petitioners, who have challenged the appointment/selection of these teachers, to participate in the selection process when advertisement notices are issued.

35. Learned counsel for the writ petitioners before this Court as well as before the learned Single Judge were asked to show their right or cause. The argument advanced was that the appointment/selection of the teachers appointed in the years 2001 and 2003 is illegal and they have no right to seek regularization, thus, the writ petitioners have right to challenge the same.

36. As discussed hereinabove, the writ petitioners were not even eligible at the relevant point of time, what locus do they have to question the selection/appointment of the said teachers?

37. Learned counsel for the writ petitioners argued that the writ petitioners have filed the writ petitions in the nature of Public Interest Litigation.

38. It is beaten law of land that public interest litigation is not maintainable in service jurisprudence. It is apt to reproduce paras 14 to 16 of the judgment rendered by the Apex Court in **Girjesh Shrivastava & Ors. v. State of M.P. & Ors.,** reported in **2010 AIR SCW 7001,** herein:

> *"14. However, the main argument by the appellants against entertaining WP (C) 1520/2001 and WP (C) 63/2002 is on the ground that a PIL in a service matter is not maintainable. This Court is of the opinion that there is considerable merit in that contention.*
>
> *15. It is common ground that dispute in this case is over selection and appointment which is a service matter.*
>
> *16. In the case of Dr. Duryodhan Sahu and others v. Jitendra Kumar Mishra and other (1998) 7 SCC 273: (AIR 1999 SC 114: 1998 AIR SCW 3467), a three Judge Bench of this Court held a PIL is not maintainable in service matters. This Court, speaking through Srinivasan, J. explained the purpose of administrative tribunals created under Article 323-A in the backdrop of extraordinary jurisdiction of the High Courts under Articles 226 and 227. This Court held "if public interest litigations at the instance of strangers are allowed to be entertained by the (Administrative) Tribunal, the very object of speedy disposal of service matters would get defeated" (para 18). Same reasoning applies here as a Public Interesting Litigation has been filed when the entire dispute relates to selection and appointment."*

39. The Apex Court in **State of Uttaranchal versus Balwant Singh Chaufal & Ors.,** reported in **2010 AIR SCW 1029,** has laid down tests when a Public Interest Litigation can be filed. It is apt to reproduce para 198 of the judgment herein:

> *"198. 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 P.I.L.*
>
> *(4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.*
>
> *(5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.*
>
> *(6) The court 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 court 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."*

40. The writ petitioners before this Court as well as before the learned Single Judge have specifically averred in all the writ petitions that they have a right of consideration. Meaning thereby, they have interest. Applying the ratio of the Apex Court judgments, writ in the nature of Public Interest Litigation is not maintainable in service matters. In the cases in hand, the writ petitioners do have interest, thus, on this count, the writ in the nature of Public Interest Litigation is not maintainable.

41. The argument of learned counsel for the writ petitioners that the writ petitioners were within their rights to question the said appointments by the medium of writ of quo-warranto is misconceived for the following reasons:

42. Quo warranto writ can be filed provided the petitioner has no interest and the appointment made is not in accordance with the Rules or the policy made by the Government. State has made the policies in terms of their conscious decision, the appointments came to be made in terms of the said policies, cannot be said to be illegal, back door or outcome of political favouritism, as discussed hereinabove.

43. The Apex Court in **Hari Bansh Lal versus Sahodar Prasad Mahto and others,** reported in **(2010) 9 Supreme Court Cases 655,** has held that PIL is not maintainable in service matters except by way of writ of quo warranto for which appointment must be shown to be contrary to statutory provisions and has also laid down some principles. It is apt to reproduce paras 16 to 19 and 34 of the judgment herein:

> *16. A writ of quo warranto lies only when appointment is contrary to a statutory provision. In High Court of Gujarat and Another vs. Gujarat Kishan Mazdoor Panchayat and Others, (2003) 4 SCC 712, (three-Judges Bench) Hon'ble S.B. Sinha, J. concurring with the majority view held: (SCC pp. 730-31, paras 22-23)*
>
> > *"22. The High Court in exercise of its writ jurisdiction in a matter of this nature is required to determine at the outset as to whether a case has been made out for issuance of a writ of certiorari or a writ of quo warranto. The jurisdiction of the High Court to issue a writ of quo warranto is a limited one. While issuing such a writ, the Court merely makes a public declaration but will not consider the respective impact of the candidates or other factors which may be relevant for issuance of a writ of certiorari. (See R.K. Jain v. Union of India, (1993) 4 SCC 119, SCC para 74.)*
> >
> > *23. A writ of quo warranto can only be issued when the appointment is contrary to the statutory rules. (See Mor Modern Coop. Transport Society Ltd. v. Govt. of Haryana, (2002) 6 SCC 269.)"*
>
> *17. In Mor Modern Coop. Transport Society Ltd. vs. Govt. of Haryana, (2002) 6 SCC 269, the following conclusion in para 11 is relevant: (SCC p. 275)*
>
> > *"11. ..... The High Court did not exercise its writ jurisdiction in the absence of any averment to the effect that the aforesaid officers had misused their authority and acted in a manner prejudicial to the interest of the appellants. In our view the High Court should have considered the challenge to the appointment of the officials concerned as members of the Regional Transport Authority on the ground of breach of statutory provisions. The mere fact that they had not acted in a manner prejudicial to the interest of the appellant could*

> *not lend validity to their appointment, if otherwise, the appointment was in breach of statutory provisions of a mandatory nature. It has, therefore, become necessary for us to consider the validity of the impugned notification said to have been issued in breach of statutory provision."*

18. In B. Srinivasa Reddy vs. Karnataka Urban Water Supply & Drainage Board Employees' Assn., (2006) 11 SCC 731 (2), this Court held: (SCC p. 754, para 49)

> *"49. The law is well settled. The High Court in exercise of its writ jurisdiction in a matter of this nature is required to determine, at the outset, as to whether a case has been made out for issuance of a writ of quo warranto. The jurisdiction of the High Court to issue a writ of quo warranto is a limited one which can only be issued when the appointment is contrary to the statutory rules."*

19. It is clear from the above decisions that even for issuance of writ of quo warranto, the High Court has to satisfy that the appointment is contrary to the statutory rules. In the later part of our judgment, we would discuss how the appellant herein was considered and appointed as Chairman and whether he satisfied the relevant statutory provisions.

20. to 33. .....

34. From the discussion and analysis, the following principles emerge:-

(a) Except for a writ of quo warranto, PIL is not maintainable in service matters.

(b) For issuance of writ of quo warranto, the High Court has to satisfy that the appointment is contrary to the statutory rules.

(c) Suitability or otherwise of a candidate for appointment to a post in Government service is the function of the appointing authority and not of the Court unless the appointment is contrary to statutory provisions/rules.

44. Having glance of the above discussions, it can be safely said and held that the writ petitioners and respondents in the appeals have failed to carve out a case for interference.

45. The effect of the impugned judgment is quashment of the appointment/regularization of some of the said teachers, who were not party before the learned Single Judge and are not party before this Court. Only on this count, the writ petitions filed before this Court, i.e. CWPs No. 6916 of 2011, 7728 & 8412 of 2013, merit to be dismissed and the impugned judgment merits to be set aside.

46. It is also worthwhile to mention here that all those candidates, who have been appointed, are not party before us, though, it is stated that they

have arrayed the Association as party-respondent. It is not averred in any of the writ petitions, whether all those teachers are the members of the Association and it was for the writ petitioners to plead and to substantiate, prima facie, that all of them are party to the writ petitions or members of the so called Association.

47. The learned Single Judge has also fallen in error in passing the impugned judgment in CWP No. 3303 of 2012. It is apt to reproduce the operative part of the impugned judgment herein:

> *"35. Accordingly, the writ petition is allowed. The respondent-State is directed to phase out the teachers appointed under 'The Himachal Pradesh Prathmic Sahayak Adhyapak/Primary Assistant Teacher (PAT) Scheme 2003', notified on 27th August, 2003 in a phased manner and to commence the selection process for filling up the posts of JBTs strictly as per the Recruitment and Promotion Rules, notified on 22nd August, 2000 read with notification, dated 23rd August, 2010, notified by the National Council for Teacher Education. This process shall be completed within a period of six months from today. The respondent-State is directed not to regularize the services of those teachers, who have been appointed de hors the Recruitment and Promotion Rules framed under Article 309 of the Constitution of India read with minimum qualification prescribed under the National Council For Teacher Education notification, dated 23rd August, 2010. The pending application(s), if any, also stands disposed of. No costs."*

48. Only one writ petition was filed, that too, by three petitioners. If, at all, they had carved out a case, they could have sought their selection against three posts. The persons, who came to be appointed, are not parties and how a direction can be made to phase out them without even hearing them.

49. In view of the stand taken by the State in the reply filed in CWP No. 3303 of 2012 and the stand taken in the supplementary affidavit filed in CWP No. 7728 of 2013 that a large number of posts are vacant, at best, the writ petitioners can participate in the selection process. It is also a question mark whether they can make a grade in such selection process.

50. It pains us to record here that the State Government has utilized the services of the said teachers right from the year 2003, they have lost their youth and are performing their duties with legitimate expectations and the Government, after taking note of their work and conduct, as discussed hereinabove and at the cost of repetition, came forward and regularized their services and by now, they must have crossed the age of consideration and the impugned judgment has taken away their bread, not only the bread, but has affected their matrimonial home and their family and career of their children for no fault of theirs.

51. Having said so, the impugned judgment merits to be set aside and the writ petitions deserve dismissal. Accordingly, CWPs No. 6916 of 2011, 7728 and 8412 of 2013 are dismissed, LPAs No. 504, 507, 512 of 2012 & 203 of 2014 are allowed, the impugned judgment is set aside and CWP No. 3303 of 2012 is also dismissed. Pending applications, if any, are also disposed of. Interim direction, if any, shall stand vacated.

52. Copy of this judgment be placed on each of the connected files.

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

LPA No. 378 of 2012
a/w LPA No. 126 of 2013
Decided on: 09.12.2014

LPA No. 378 of 2012

Pardeep Kumar ...Appellant.
Versus
Cipla Ltd. & others ...Respondent.

.....

LPA No. 126 of 2013

State of Himachal Pradesh & another ...Appellants.
Versus
Cipla Ltd. & others ...Respondent.

Constitution of India, 1950- Article 226- Petitioner was appointed as a Workman on temporary basis for a period of 6 months- his employment came to an end after expiry of 6 months- petitioner moved an application which was considered and he was directed to undergo training for a period of two years- when he was undergoing training, he was withdrawn on which he filed an application before the Labour Court- order of the Labour Court was questioned before the Writ Court which held that the appellant is not a workman – held, that the appellant was not workman- he had not sought any remedy after his engagement came to an end - he accepted his induction as a trainee- he was not performing any job but was undergoing training as a trainee- therefore, he was rightly held not to be a workman. (Para-2 to 6)

LPA No. 378 of 2012

For the appellant: Mr. Surinder Prakash Sharma, Advocate.

For the respondents: Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall & Mr. Sanjeev Kumar, Advocates, for respondents No. 1 and 2.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. M.A. Khan, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 3 and 4.

LPA No. 126 of 2013

For the appellants: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. M.A. Khan, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.

For the respondents: Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall & Mr. Sanjeev Kumar, Advocates, for respondents No. 1 and 2.
Mr. Surinder Prakash Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

LPA No. 378 of 2012

This Letters Patent Appeal is directed against the judgment and order, dated 13th July, 2012, made by the Writ Court in CWP No. 2401 of 2009, titled as Cipla Ltd. & another versus State of Himachal Pradesh & others, whereby the writ petition filed by the writ petitioners-respondents No. 1 and 2 herein came to be allowed by quashing the Labour Reference Order No. 11-2/93 (Lab) ID/07-Baddi (Annexure PJ to the writ petition) and order, dated 16.06.2009, made by the Presiding Officer, Labour Court, Shimla (Annexure PQ to the writ petition) (hereinafter referred to as "the impugned judgment").

2. Feeling aggrieved, the appellant has questioned the impugned judgment. It appears that the writ petitioners-respondents No. 1 and 2 herein appointed the appellant as a workman on temporary basis due to temporary increase in work in terms of order, dated 6th April, 2005 (Annexure R-1 to the writ petition) for a period of six months with effect from 6th April, 2005 to 5th October, 2005. The said employment came to an end. Thereafter, the appellant moved an application, which was considered on 28th October, 2005 (Annexure PB to the writ petition) and he was directed to undergo a training for a period of two years with effect from 7th November, 2005 to 6th November, 2007. He was undergoing the training and his training period was withdrawn/ cancelled, constraining him to invoke the jurisdiction of the Labour Court. The Labour Court made the order, which was questioned before the Writ Court and the Writ Court allowed the writ petition by holding that the appellant was not a workman.

3. The appellant was not in position as a workman. He has also not sought any appropriate remedy after his engagement came to an end in terms of the engagement order (Annexure R-1) (supra) and he accepted his induction as a trainee in terms of Annexure PB (supra), but joined late, was also found absent. He was not performing any job or duty as a workman, but was undergoing training as a trainee. He does not fall within the definition of "workman" as per the Labour Laws applicable.

4. Learned counsel for the appellant failed to carve out a case and to establish the relationship of the appellant and respondents No. 1 & 2 as workman and an employer.

5. The learned Single Judge has rightly held that the appellant was not a "workman" at the relevant point of time.

6. We have gone through the impugned judgment, is well reasoned and needs no interference.

7. Accordingly, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications.

LPA No. 126 of 2013

8. In view of the dismissal of LPA No. 378 of 2012, this appeal is also disposed of alongwith all pending applications.

****

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

Ravender Kumar Jarhyan .....Petitioner.
Versus
State of H.P. & anr. .....Respondents.

CWP No. 4026 of 2014.
Reserved on 12.11.2014
Decided on: 09.12.2014.

Constitution of India, 1950- Article 226- Petitioner joined as Assistant Engineer on the recommendations made by the H.P. Public Service Commission - Chief Engineer, Shah Nehar Project, Fatehpur sent a letter to the Superintending Engineer stating that there was no justification for providing any SE (Design) keeping in view the work load - IPH sent a letter to the Government of Himachal Pradesh stating that there was one post of SE Shahnehar Project and the work relating to Design in the Office of Chief Engineer, Shahnehar Project shall be attended to by the incumbent of the post of SE Shahnehar Project – petitioner was promoted to the post of SE (Civil) – Government amended recruitment and promotion rules for the post of Chief Engineer Class-I from 30.8.2008 stating that post of Chief Engineer would be filled up by promotion from amongst the SE (Civil) with minimum 25 years service including three years regular service or regular service combined with continuous ad-hoc service as Superintending Engineer (Civil), out of which 3 years essential service must be as Superintending Engineer (Design) - Petitioner was found ineligible as he had not served for 3 years as Executive/Superintending Engineer- petitioner contended that he was looking after the work of design in Shah Nehar Project, Fatehpur- held, that as per the letter, Superintending Engineer was to look after the work of SE (Design) in addition to his duty- petitioner had approved the design in his capacity as Superintending Engineer- therefore, service rendered by him should have been counted while considering his case for promotion- Writ Petition allowed and respondent No. 1 directed to convene a review DPC to consider the case of the petitioner.

(Para- 7 to 9)

For the petitioner: Mr. Dilip Sharma, Sr. Advocate, with Mr. Manish Sharma, Advocate.

For the respondents: Mr. M.A. Khan, Addl. AG, for the respondent-State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner joined as Assistant Engineer by way of direct recruitment on 29.6.1983 on the recommendations made by the H.P. Public Service Commission. The Chief Engineer, Shah Nehar Project, Fatehpur (SNP in short), IPH has sent a communication to the Superintending Engineer, SNP Circle Fathepur on 17.1.2000. The text reads as under:

> " The case was referred to the Govt. for posting independent Superintending Engineer (Design) alongwith other technical staff such as

Ex. Engineer (Design) and Assistant Engineer (Design) etc. While forwarding the case to the Finance Depatt., F.C-cum- Secretary (IPH) Shimla has commented that there is no jurisdiction for providing an independent SE(Design) keeping in view the work load and Superintending Engineer, Shahnehar Project Circle, Fatehpur will perform the duties of SE(Design) also in addition to his present duties. The case for remaining technical staff is stated to have been cleared by the Finance Deptt. and the same is likely to be posted on due course of time to assist you in this regard.

2. The Secretary IPH to the Govt. of Himachal Pradesh sent a communication to the Engineer-in-Chief, H.P. IPH Department on 10.4.2000 informing him that there was one post of S.E. in Shahnehar Project and due to financial constraints, it was decided that the work relating to Design and work in the Office of Chief Engineer, Shahnehar Project shall be attended to by the incumbent of the post of SE Shahnehar Project.

3. The petitioner was promoted to the post of Superintending Engineer (Civil) vide notification dated 1.4.2008. The petitioner joined as Superintending Engineer, Shahnehar Project (SNP) on 19.8.2008. A conscious decision was taken by the State Government vide notification dated 19.11.2008 whereby post of Chief Engineer, IPH (SNP), Fatehpur alongwith the post of Personal Assistant and Driver was transferred to the IPH Head Office, Shimla with the stipulation that the same would be renamed as Chief Engineer (Design and Monitoring). The addendum was also issued on 31.12.2008.

4. The Recruitment and Promotion Rules, 1965, for the post of Chief Engineer Class-I (Gazetted), were amended vide Notification dated 30.8.2008, whereby the post of Chief Engineer was to be filled up by promotion from amongst the Superintending Engineers (Civil) with minimum 25 years service in the gazetted rank including three years regular service or regular combined with continuous ad hoc service as Superintending Engineer (Civil), out of which 2 years essential service must be as Superintending Engineer (Design) in the zones or Superintending Engineer (Planning & Investigation) (Unit I & II) or Superintending Engineer (Works) failing which, on secondment basis from amongst the incumbents working in the identical pay scale on analogous posts in other H.P. Govt. Departments/Central Govt. with similar service conditions. The rules were further amended vide notification dated 14.9.2012, whereby Superintending Engineer was required to have minimum qualifying service of 25 years service in the gazetted rank including three years regular service or regular combined with continuous adhoc service as Superintending Engineer (Civil), out of which 3 years essential service must be as Superintending Engineer (Design) in the projects. The rigours of Rules were diluted vide notification dated 28.3.2014.

5. The final seniority list of Superintending Engineer (Civil) in HP IPH Department as on 31.12.2013 was issued vide Office Memorandum dated 4.3.2014. The name of the petitioner is at Sr. No. 2 and the name of respondent No. 2 is at Sr. No. 3 in the list. The Departmental Promotion Committee was convened for filling up the post of Chief Engineer on 4.3.2014. The Departmental Promotion Committee recommended the name of respondent No. 2 pursuant to which promotion orders were issued vide notification dated 23.5.2014 Annexure P-26. The petitioner has also placed on record the memorandum for consideration of Departmental Promotion Committee for promotion to the post of Chief Engineer (IPH). According to Departmental Promotion Committee proceedings, the petitioner was not found eligible to the

post of Chief Engineer as he has not served the department for 3 years as Executive/Superintending Engineer in Store & Purchase or P & I or Works or Design which was the pre-requisite as per the provisions of R & P Rules for the post of Chief Engineer. The post of Chief Engineer is a selection post and was to be filled up on merit-cum-seniority basis.

6. Mr. Dilip Sharma, Sr. Advocate, has vehemently argued on the basis of Annexures P-1 & P-2 dated 17.1.2000 and 10.4.2000, respectively, that his client was also looking after Designs in SNP, Fatehpur. He has drawn the attention of the Court to various Annexures placed on record, more particularly, Annexure P-22, whereby the petitioner has given approval to the various projects.

7. The case of the respondent-State, precisely, is that the Office of Chief Engineer (SNP), Fatehpur was shifted on 19.11.2008 to Shimla and renamed as Chief Engineer (Design and Monitoring), Shimla. It is further averred in the reply that a work of SE (SNP) Circle, was to be looked after by Chief Engineer, Dharamshala since the Chief Engineer, Dharamshala has independent post of Superintending Engineer (Design) at Dharamshala, therefore, the experience rendered by the petitioner at SNP could not be counted towards qualifying service in Drawing and Design.

8. It is evident from letter dated 17.1.2000, quoted hereinabove, that there was no justification for providing independent charge of Superintending Engineer (Design), keeping in view the work load and Superintending Engineer (SNP) Circle was to perform the duties as Superintending Engineer (Design) also in addition to his duties. The same was reiterated vide letter dated 10.4.2000. The petitioner was posted in SNP, Fatehpur on 19.8.2008. He had been looking after Drawings and Design even after the shifting of the post of Chief Engineer and renamed as Chief Engineer (Design and Monitoring), Shimla. There is no merit in the contention of Mr. M.A.Khan, Addl. Advocate General that after the shifting of the post of Chief Engineer, the Drawings were to be approved by Superintending Engineer (Design) at Dharamshala. There is no contemporaneous material placed on record by the respondent-State that Drawings/Designs have ever been forwarded by Chief Engineer Dharamshala to Superintending Engineer (Design), Dharamshala. Though the control of SNP was vested in the Chief Engineer, Dharamshala but the fact of the matter is that the Designs were approved by the petitioner. The services rendered by the petitioner after 19.11.2008 were required to be counted as qualifying service as Superintending Engineer (Design). Annexures P-1 and P-2 dated 17.1.2000 and 10.4.2000, respectively, have never been withdrawn. All the incumbents who were posted as Superintending Engineer in SNP besides discharging the duties of Superintending Engineer (Operation) were also looking after the work relating to Designs. The petitioner has made specific averment that the incumbents who have worked as Superintending Engineer and were looking after the work of Designs were given benefits towards promotion. This averment has not been denied by the respondents in the reply. It is reiterated that the petitioner had approved the structural designs as per the material available on record. The respondent-State has also sought option of the incumbents to work as Superintending Engineer (Design). The petitioner has made several representations bringing to the notice of the authorities that since he had been approving the structural designs in addition to his own duties as Superintending Engineer (Operation) and this experience was to be counted for the purpose of promotion. There was a protracted correspondence exchanged between various functionaries of the State. However, the fact of the matter is that the grievance

of the petitioner was not redressed and he was not found eligible by the DPC which met on 4.3.2014.

9. The matter is required to be considered yet from another angle. According to the reply filed, the arrangement of doing the work of Chief Engineer SNP ceased to exist on 19.11.2008 on transfer of the post of Chief Engineer SNP to Shimla and renamed as Chief Engineer (Drawing & Monitoring), Shimla. The petitioner infact had been discharging dual duties as Superintending Engineer (Operation) as well as (Design) on the basis of notifications Annexures P-1 and P-2 dated 17.1.2000 and 10.4.2000, respectively, even after the transfer of the post of Chief Engineer SNP on 19.11.2008 as Chief Engineer (Design & Monitoring), Shimla. The Drawings and Designs have never been approved by the Superintending Engineer (Design), Dharamshala, attached with the Chief Engineer, Dharamshala. Thus, the action of the respondents of not counting the period w.e.f. 19.8.2008 to 7.6.2013 as qualifying service of the petitioner for the post of Chief Engineer is illegal, arbitrary and irrational, as it is violative of Articles 14 & 16 of the Constitution of India. The services rendered by the petitioner in dual capacity could not be rendered nugatory or otiose.

8. Accordingly, the Writ Petition is allowed. Annexure P-26 dated 23.5.2014 is quashed and set aside. Respondent No. 1 is directed to convene a review DPC meeting within a period of four weeks to consider the case of the petitioner to the post of Chief Engineer by counting the services rendered by the petitioner as Superintending Engineer (Design) in addition to his duties as Superintending Engineer (Operation) in Shan Nehar Project.

9. Pending application(s), if any, shall 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.

Saruchi Sharma .....Petitioner
Versus
State of H.P. and others. ..... Respondents

CWP No. 6716 of 2014.
Reserved on decision: 3.12.2014
Pronounced on: 9.12.2014

Constitution of India, 1950- Article 226- Petitioner applied for the post of Demonstrator and was appointed as such on tenure post for a period of three years –tenure period expired on 6.9.2014 – petitioner sought extension and the Head of Department recommended her case for extension for a period of six months – however, petitioner was relieved from the post vide order dated 6.9.2014- State contended that post of the Demonstrator was tenure post for a period of three years- policy has been amended and selection has to be made on the basis of walk in interview- Dr. 'J' had been appointed as Senior Resident and no post was available- held, that post is a tenure post and petitioner has no right to claim extension in a post, which was filled up as per policy in vogue at

the relevant time - new incumbent had also joined- Writ Petition dismissed. (Para-2 to 4)

For the petitioner: Ms.Ranjana Parmar, Advocate.

For the respondents: Mr.Shrawan Dogra, Advocate General with Mr.Romesh Verma & Mr.Anup Rattan, Additional Advocate Generals & Mr. J.K. Verma, Deputy Advocate General for respondents No.1 to 3.

Mr.Ashok Sharma, Assistant Solicitor General of India, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

By the medium of present Writ Petition, the petitioner has sought writ of mandamus commanding the respondents to allow the petitioner to discharge the duties of Demonstrator in the specialty of Biochemistry in Dr.Rajender Parsad Government Medical College, Tanda (for short, Medical College, Tanda) till the said post is filled up on regular basis or for a period of six months; and also sought issuance of writ of certiorari for quashing the order, dated 6th September, 2014, whereby the petitioner has been relieved on completion of her tenure, on the grounds taken in the memo of writ petition.

2. Facts, as pleaded in the writ petition, are that the petitioner is having the degree of M.Sc.(Biochemistry) and being eligible, applied for the post of Demonstrator in the specialty of Biochemistry, was appointed as such on tenure basis for a period of three years in the Medical College, Tanda on the recommendations made by the Selection Committee. The said period of three years came to an end on 6th September, 2014. Thereafter, the petitioner sought extension and the Head of Department, on 27th August, 2014, recommended her case for extension for a period of six months. However, despite the fact that the competent Authority granted extension for six months, vide office order, dated 6th September, 2014, (Annexure P-6), the petitioner was relieved from the post of Demonstrator vide order, dated 6th September, 2014, (Annexure P-7).

3. Respondents No.1 to 3 have filed the reply and pleaded that the post of Senior Resident (Demonstrator) was a tenure post and was filled up for a period of three years and the incumbent was to be appointed/selected by the Selection Committee as per the policy framed by the Government, vide notification No.HFW-B(A)2-4/2007, dated 4.1.2012, (Annexure R-1). It is further pleaded that as per the said policy, the post in issue is not a regular post and petitioner cannot claim continuation for the reason that it is a tenure post only for a period of three years and after three years, new selection process has to be undergone and fresh recruitment is to be made. It is also pleaded that the said policy has now been amended vide notification dated 26th September, 2012, (Annexure R-2), as per which the Principal of the concerned Medical College is the Selection Authority and the selection has to be made on the basis of walk-in-interview. Further, it is contended that Dr.J.S. Chahal, in-service General Duty Officer (GDO), has been appointed as Senior Resident (Demonstrator) in the Department of Biochemistry and is in position and no post is available.

4. Thus, from the above, it is clear that the post in question is a tenure post and not a cadre post. The petitioner has no right to claim extension against a tenure post, which was filled up as per the policy in vogue at the

relevant time, only for a period of three years, read with the fact that the new incumbent has joined and is in position.

5. Having said so, no case is made out, hence the writ petition is dismissed, so also the pending application(s), if any.

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

The State of Himachal Pradesh & others ...Appellants.
Versus
Shri Kashmir Singh ...Respondent.

LPA No. 569 of 2011
Decided on: 09.12.2014

Constitution of India, 1950- Article 226- Writ Court allowed the petition of the petitioner and the respondents were directed to give the benefit of two increments- petitioner had filed a petition seeking relief that respondents be directed to give benefits of FR 22 (1) (a) (1) and to re-fix his pay with consequential benefits- held, that Writ Court had not granted the relief in accordance with relief prayed by the applicant- hence, order modified. (Para- 2 to 4)

For the appellants:	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. M.A. Khan, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.
For the respondent:	Mr. Vikas Rathore, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this Letters Patent Appeal is to the judgment and order, dated 3rd June, 2011, made by the Writ Court in CWP (T) No. 15632 of 2008, titled as Kashmir Singh versus State of H.P. and others, whereby the writ petition filed by the writ petitioner-respondent herein came to be allowed and the writ respondents were directed to give the benefit of two increments (hereinafter referred to as "the impugned judgment"), on the grounds taken in the memo of appeal.

2. The writ petitioner had sought the following reliefs amongst others on the grounds taken in the memo of writ petition:

> *"a) That the respondents may kindly be directed to give the benefit of FR 22 (1) (a) (1) to the applicant and step up his pay to a figure equal to the pay fixed for the junior after 1.1.1996.*
>
> *b) That the respondents may kindly be directed to re-fix the pay of the applicant with all consequential*

benefit including arrears in accordance with FR 22 (1) (a) (1)."

3. While going through the impugned judgment and the averments contained in the writ petition, one comes to an inescapable conclusion that the impugned judgment is not in accordance with the reliefs sought.

4. Accordingly, the impugned judgment is modified by directing the respondents to consider the case of the writ petitioner for stepping up, re-fixing his pay and releasing the benefits/arrears, in terms of the averments contained in the writ petition read with the fact that his juniors have been granted the same benefit. Consideration orders be passed within six weeks.

5. The appeal is disposed of, as indicated hereinabove, alongwith all pending applications.

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

CWP No. 7761 of 2013 along with CWP No. 7764 of 2012.
Date of Decision : 9th December, 2014.

1. CWP No. 7761 of 2013.

Sukh Ram Chandel .....Petitioner.

Versus

State of H.P. & others .....Respondents.

2. CWP No. 7764 of 2012.

R.C. Gupta and others ...Petitioners.

Versus

Himachal Pradesh Tourism Development Corporation ....Respondent.

Constitution of India, 1950- Article 226- Petitioners were serving in H.P.T.D.C. – they were superannuated in the year 2006-2010 - H.P.T.D.C. adopted the government pattern regarding the release of retirement or gratuity to the employees- Government issued a notification revising the rate of gratuity payable to the employees- petitioners claimed the revision in the gratuity at par with Government employee- held, that even if, provisions of the Payment of Gratuity Act are applicable, employee can claim a higher/better benefit on the basis of the decision of the board of directors- petitioners held entitled to the revised rate of gratuity at par with the government employee.

(Para- 2 and 3)

Case referred:

Y.K. Singla versus Punjab National Bank and others, (2013)3 SCC 472

For the Petitioners: Ms. Jyotsna Rewal Dua, Advocate in CWP No. 7761 of 2013.
Ms. Ranjana Parmar, Advocate, in CWP No. 7764 of 2012.

For respondent No.1/State: Mr. R.S. Thakur, Additional Advocate General with Mr. Vivek Singh Attri, Deputy Advocate General in CWP No. 7761 of 2013.

For respondent No.2/HPTDC: Mr. Onkar Jairath, Advocate in CWP No. 7761 of 2013 and Mr. J.L. Bhardwaj, Advocate, for respondent-corporation in CWP No. 7664 of 2012.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

Both these petitions pertain to a common subject matter, hence, they are disposed of by a common order.

2. The petitioners in both the petitions were serving in the Himachal Pradesh Tourism Development Corporation Ltd. in different capacities. They stood superannuated between the years 2006 and 2010. Annexure P-10 (annexed to CWP No.7761 of 2013 at page 134) unveils the factum of the respondent-corporation having adopted the government pattern with regard to the release of retirement or gratuity to its employees w.e.f. 26.8.2006. The decision as comprised in Annexure P-10 (annexed with CWP No. 7761 of 2013) was in consonance with the decision taken in the meeting of the Board of Directors of the respondent-corporation held on 26.8.2006. The government of Himachal Pradesh issued notification of 14th October, 2009, Annexure P-13, (annexed with CWP No.7761 of 2013 at page 180), whereby it begot a revision of the rates of gratuity payable to its employees. The petitioners, on the strength of the revision carried out under Annexure P-13 in the rates of gratuity payable to the employees serving under the Himachal Pradesh Government, claim a rate of gratuity at par with the employees of the State Government. The fulcrum for theirs claiming parity of rates of gratuity with the employees of the State Government is Annexure P-10 which as adverted to hereinabove discloses the factum of the respondent-corporation having come to adopt the government pattern with regard to release of gratuity to its employees. However, the effect of Annexure P-10, has been canvassed to be eased by the factum of a decision of the Hon'ble Division Bench of this Court rendered on 23rd July, 2008 in CWP No. 1332 of 2002 comprised in Annexure P-9, (annexed to CWP No. 7761 of 2013) wherein it has been held that qua the employees of the respondent corporation the provisions of the Payment of Gratuity Act would be applicable and when in consonance thereto the respondent-corporation came to pass a resolution comprised in Annexure P-10 (annexed to CWP No.7761 at page 141), it is, hence, amplifyingly canvassed that the respondent-corporation is no longer obliged to carry forward and implement the mandate comprised in Annexure P-10 qua the factum of its defraying to its employees gratuity at par with the rates of gratuity assessed/fixed for its employees by the government of Himachal Pradesh. However, the effect of the verdict of this Court and of the resolution of the Board of Directors in consonance thereto comprised in Annexure R-2/C (annexed to CWP No.7761 of 2013, at page 274), to the considered mind of this Court comes to be eased as well as relaxed in the face of a pronouncement of the Hon'ble Apex Court reported in ***Y.K. Singla versus Punjab National Bank and others, (2013)3 SCC 472,*** relevant paragraph No.23 whereof stand extracted hereinafter. A reading whereof discloses that even when the provisions of the Gratuity Act are applicable to an employee/class of employees, there is an inherent right vested in an employee/class of employees to make a choice of theirs being governed by some alternative provision/instrument other than the Gratuity Act for drawing the benefit of gratuity. Relevant paragraph No.23 of the judgment supra reads as under:-

> "23. Based on the conclusion drawn hereinabove, we shall endeavour to determine the present controversy. First and foremost, we have concluded on the basis of Section 4 of the Gratuity Act that an employee has the right to make a choice of being governed by some alternative provision/instrument other than the Gratuity Act, for drawing the benefit of gratuity. If an employee makes such a choice, he is provided with a statutory protection, namely, that the employee concerned would be entitled to receive better terms of gratuity under the said provision/instrument, in comparison to his entitlement under the Gratuity Act. This protection has been provided through Section 4(5) of the Gratuity Act."

3. The notification of the Government of Himachal Pradesh, Annexure P-13, (annexed to CWP No.7761 of 2013 at page 180 of the paper book) has been espoused by the learned counsel appearing for the petitioners to be conferring upon them a benefit higher than the benefit envisaged under Section 4 of the Payment of Gratuity Act. Cumulatively, hence, even if the Gratuity Act has been held by this Court to be applicable to the employees of the respondent Corporation and when in consonance thereto, even if, a resolution of the Board of Directors of the respondent corporation opines that the higher benefit envisaged by the government of Himachal Pradesh to its employees in its notification is unavailable to be accorded, yet the effect of both in the face of the verdict of the Hon'ble Apex Court (supra) is relaxed and both cannot stand in the way of the petitioners asserting a claim of theirs being treated at par with the employees of the government of Himachal Pradesh, especially when the revised rates of gratuity conferred upon the employees of the State Government contemplate a higher benefit than as envisaged under the Gratuity Act. In sequel when in consonance with the decision of the Hon'ble Apex Court, the employees of the respondent-corporation as the writ petitioners are, have an inherent right to make a choice of theirs being governed/covered by the notification issued by the Government of Himachal Pradesh comprised in Annexure P-13, which contemplates a higher rate of gratuity payable to its employees than the one envisaged in the Gratuity Act, they cannot be either debarred or estopped from doing so. Nonetheless, the resolution passed by the respondent-corporation anvilled upon the verdict of this Court may stand in the way of rendition of efficacious directions to the respondent-corporation to comply with the mandate of the notification issued by the Government of Himachal Pradesh providing a higher rate of gratuity to its employees than one which is payable to the employees of the respondent-corporation. To facilitate the petitioners to obtain a higher rate of gratuity at par with the rates of gratuity made available to the employees of the Government of Himachal Pradesh, it is directed that the respondent-corporation shall convene a meeting of its Board of Directors to consider the case of the petitioners for modifying the rates of the gratuity payable to the petitioners in terms of the notification issued by the Government of Himachal Pradesh, Annexure P-13. The respondent-corporation shall also take into consideration observations made hereinabove while dealing with the case of the petitioners. The respondent-corporation shall take a decision in the matter within three months from today. Both the petitions stand disposed of accordingly. All the pending applications, if any, also stand disposed of.

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

Karamjit Singh @ Amarjit Singh ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

Criminal Appeal No.370 of 2008
Reserved on : 25.11.2014
Date of Decision: December 10, 2014

Indian Penal Code, 1860- Section 302- Accused murdered their parents- they burnt their bodies by setting the house on fire- one of the accused confessed to the murder of his parents- police was informed on which FIR was registered – Trial Court held that motive, namely disinheritance from property, extra judicial confession, disclosure statements, which led to recovery of incriminating articles, and recovery of remnants of bodies of the deceased were duly proved- held, that case is based upon circumstantial evidence -in case of circumstantial evidence, prosecution is under a legal obligation to prove the circumstances from which the conclusion of guilt is to be drawn- Court cannot substitute suspicion in place of proof- the extra judicial confession did not inspire confidence- disinheritance from the property was also not established as the accused was issueless and was residing in his own house at Derabassi- issue of inheritance of property was settled about 8 years back – testimonies of witnesses were contradictory- Investigating Officer had not associated any independent witness- Trial Court had disbelieved the prosecution case regarding the accused- testimony of one witness was accepted qua one accused and was rejected qua other which is not permissible- therefore, in these circumstances, accused cannot be held guilty- accused acquitted. (Para-11 to 34)

Cases referred:

Brathi alias Sukhdev Singh v. State of Punjab, (1991) 1 SCC 519

State of Rajasthan v. Raja Ram, (2003) 8 SCC 180

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

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

Madhu Versus State of Kerala, (2012) 2 SCC 399

Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622

Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43

Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116

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

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

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

Harishchandra Ladaku Thange v. State of Maharashtra, (2007) 11 SCC 436

State of U.P. v. Ashok Kumar Srivastava, (1992) 2 SCC 286

Mrinal Das and others v. State of Tripura, (2011) 9 SCC 479

Prithpal Singh and others v. State of Punjab and another, (2012) 1 SCC 10

For the Appellant : Mr. Ramakant Sharma, Advocate.
For the Respondent : Mr. B.S. Parmar, Mr. Ashok Chaudhary, Mr. V.S. Chauhan, Additional Advocates General and Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Karamjit Singh alias Amarjit Singh (hereinafter referred to as accused-convict Amarjit Singh) has assailed judgment dated 29.3.2008/ 31.3.2008, passed by Additional Sessions Judge, Solan, Himachal Pradesh, in Sessions Trial No.4-NL/7 of 2007, titled as *State of Himachal Pradesh v. Karamjit Singh and others*, whereby he stands convicted of having committed an offence punishable under the provisions of Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and pay fine of Rs.20,000/- and in default thereof, to further undergo rigorous imprisonment for a period of one year.

2. It is the case of prosecution that in the night intervening 12th-13th August, 2006, convict Amarjit Singh alongwith his two other brothers, namely Paramjit Singh alias Pamma and Guljit Singh, murdered their father Shri Balwant Singh with a Barchha (spear) (Ex.P-2) and danda. Separately, they also strangulated their mother Smt. Ravinder Kaur in the fields. Thereafter, they together burnt their dead bodies by setting their hutment (Chaan/ Chhappar) on fire in village Jhida. On 13.8.2006 at about 5.30 a.m., accused Amarjit Singh went to the house of Kamal Kumar (PW-1), resident of another village, i.e. village Manjauli, Tehsil Nalagarh, District Solan, Himachal Pradesh, and confessed that "he" had burnt his parents by setting the hutment on fire, for the reason that they were not giving him his share in the land for construction of a house. Kamal Kumar (PW-1) telephonically informed the police about the incident, when Som Dutt (PW-19), SHO of Police Station, Nalagarh, proceeded to the spot. On the way, he met Kamal Kumar (PW-1) in village Maganpura and recorded his statement (Ex. PA), on the basis of which Ruka (Ex.PW-19/A) was sent to Police Station, Nalagarh, which led to registration of FIR No.204 dated 13.8.2006 (Ex. PX-VIII), under the provisions of Sections 302 and 201 of the Indian Penal Code. Superior officers of the Police Department were also informed of the incident. On the request of Som Dutt, Officers of the Forensic Department reached the spot and conducted necessary investigation. Inquest reports (Ex. PK, PK-1, Ex. PL and Ex. PL-1) were prepared; spot of crime was got photographed and videographed. Photographs (Ex. PW-16/A to PW-16/O and PW-17/C to PW-17/L), and CD (video) (Ex.PW-16/A-19) of the spot were prepared. Incriminating articles in the shape of knife (Barchha) (Ex. P-2), ashes (Ex. P-4), soil (Ex.P-6), piece of cloth, metal Kara (Ex.P-12), copper ring (Ex. P-13), allegedly worn by the deceased, were recovered. Dr. Sukhwinder Singh (PW-10) also collected samples of tissues and bones. Smt. Narmal Kaur (PW-2), daughter and Shri Yadvinder Singh (PW-6), another son of the deceased were associated during investigation.

3. On 13.8.2006 itself, accused Amarjit Singh was arrested. On 16.8.2006, accused Paramjit Singh and Guljit Singh also confessed and confided their guilt with Kamal Kumar, of having murdered their parents alongwith accused Amarjit Singh. Confessional statement (Ex. PW-19/J) was recorded by the police. Also, Amarjit Singh, in custody, made statement dated 16.8.2006 (Ex.PX-II) to the effect that his brothers Paramjit Singh and Guljit Singh were

also involved in the incident. As such, they were arrested. All three accused persons made disclosure statements, which led to recovery of button (Ex. P-7) and gold ear ring (Ex. P-16) of Smt. Ravinder Kaur from the fields. They also led the police to the place where they had murdered their parents. Incriminating articles so recovered from the spot were sent for chemical analysis and reports (Ex. PW-9/A, 10/B, 10/C and 17/A) from the Director, State Forensic Science Laboratory, Junga, pertaining to weapon of offence (Ex. P-2), ashes (Ex. P-4) and soil (Ex. P-6), pieces of flesh and bones, were obtained by the police. Also, report (Ex. PW-18/A) from the Central Forensic Science Laboratory, Chandigarh, was obtained by the police, which prima facie revealed that the accused, after murdering their parents, had burnt their bodies.

4. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

5. Accused were charged for having committed offences punishable under the provisions of Sections 302 & 201, both read with Section 34 of the Indian Penal Code, to which they did not plead guilty and claimed trial.

6. In order to establish its case, prosecution examined as many as 19 witnesses and statements of the accused under the provisions of Section 313 of the Code of Criminal Procedure were also recorded, in which they took defence of false implication. No evidence in defence was led.

7. Based on the testimonies of witnesses and the material on record, trial Court convicted accused Amarjit Singh of having committed an offence punishable under the provisions of Section 302 of the Indian Penal Code and sentenced him as aforesaid, but acquitted him of offence punishable under Sections 201 and 34 of the Indian Penal Code. Co-accused Paramjit Singh and Guljit Singh stand acquitted on all counts. Hence, the present appeal by accused Amarjit Singh.

8. Trial Court found the prosecution case, based on the following circumstances, to have been duly proved on record: (i) motive – disinheritance from property, (ii) extra judicial confession, (iii) disclosure statements, which led to recovery of incriminating articles, and (iv) recovery of remnants of bodies of the deceased. Significantly, Court found that even though Kamal Kumar (PW-1) did not support the prosecution qua guilt of co-accused Paramjit Singh and Guljit Singh, but however, his testimony, qua accused Amarjit Singh, proving extra judicial confession, was beyond doubt, fully inspiring in confidence and stood corroborated by Jaspal Singh (PW-4).

9. Trial Court found the alleged extra judicial confession (Ex. PW-19/J) made by accused Paramjit Singh and Guljit Singh not to have been proved, in fact belied by Kamal Kumar and Nirmal Kaur (PW-2). However, extra judicial confession (Ex.PA) made by accused Amarjit Singh was found to have been duly proved, through the otherwise inspiring testimony of Kamal Kumar (PW-1), duly corroborated by Jaspal (PW-4). Also trial Court found the prosecution to have proved the remnants recovered from the spot to be that of bodies of deceased Balwant Singh and Ravinder Kaur, parents of the accused. Through the testimony of Dr. Sukhwinder Singh (PW-10) and Dr. J.R. Gaur (PW-17), prosecution story of the accused having strangulated deceased Ravinder Kaur (mother) in the fields was not found to have been established on record, beyond reasonable doubt, for the reason that articles (ear-ring and button) shown to have been recovered on 16.8.2006, stood deposited in the Malkhana on 13.8.2006 itself. The fact that copy of FIR was sent to Halqua Magistrate on

14.8.2006 was found not to be fatal. Even though disclosure statement made by co-accused Paramjit Singh and Guljit Singh was found to be shrouded with suspicious circumstances, but however such statement with respect to accused Amarjit Singh was found to have been proved on record.

10. Since trial Court observed that "from the evaluation of the prosecution material discussed above, it is crystallized that the circumstantial evidence brought on record contains in it positive proof, credible sequence of events and factual truth linking the accused Amarjit Singh alias Karamjit Singh with the commission of the offence by means of doing to death his own parents. It is he who is found to have caused their death by murdering them and consigning them to flames in the chhaan (thatched hutment). Though, the possibility of other two accused cannot be ruled out, but for want of evidence, as the recoveries effected on 16.8.2006 have been found to be wanting, the benefit of doubt has been given to them. It is all probability, this sinister and diabolical plan could not be executed single handedly but due to the discrepant investigation and evidence produced on record by the prosecution the two other accused have been given benefit", on 9.7.2014, we directed the State to obtain appropriate instructions from the relevant authority. On 25.11.2014, learned Additional Advocate General, under instructions, made a statement that no appeal against the judgment of acquittal of co-accused Paramjit Singh and Guljit Singh stands filed or was sought to be filed by the State.

11. It is a settled principle of law that when allegedly several persons commit an offence in furtherance of common intention and all except one are acquitted, it is open to the appellate court to find out, on reappraisal of evidence whether some of the accused persons stood wrongly acquitted, although it would not interfere with such acquittal in the absence of any appeal by the State Government. The effect of such finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality. (See: ***Brathi alias Sukhdev Singh v. State of Punjab,*** **(1991) 1 SCC 519**).

12. That skeletal parts and ashes recovered from the spot belonged to Shri Balwant Singh and Smt. Ravinder Kaur is not an issue before us. From the remnants of dead bodies so recovered from the spot, such fact stands established on record. Testimonies of Vijay Singh Jamwal (PW-9), Gian Thakur (PW-11), Dr. J.R. Gaur (PW-17) and Dr. Sanjeev (PW-18), who have proved reports (Ex. PW-9/A, Ex. PW-11/A, Ex.PW-17/A and Ex. PW-18/A) as also Kishore Kumar (PW-8) and Dr. Sukhwinder Singh (PW-10), who have proved death certificates (Ex.PX-X & PX-XI), evidently establish such fact. Even the accused has not assailed the findings returned by the Court below on this count.

13. We are faced with a situation where trial Court disbelieved version of Kamal Kumar (PW-1) of co-accused Paramjit Singh and Guljit Singh having made any confessional statement and accepted such version with respect to appellant Amarjit Singh. In our considered view, prosecution case primarily rests upon appreciation of testimony of this witness.

14. In the instant case, there is no eye witness to the crime. Since the prosecution case primarily rests upon the alleged confessional statement and circumstantial evidence, we shall first deal with the law on the issue.

15. Law with regard to confessional statement is now well settled. The apex Court in ***State of Rajasthan v. Raja Ram,*** **(2003) 8 SCC 180**, has held thus:

> "18. Confessions may be divided into two classes, i.e. judicial and extra-judicial. Judicial confessions are those which are made before Magistrate or Court in the course of judicial proceedings. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or Court. Extra-judicial confessions are generally those made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code or a Magistrate so empowered but receiving the confession at a stage when Section 164 does not apply. As to extra-judicial confession, two questions arise : (i) were they made voluntarily ? And (ii) are they true? As the section enacts, a confession made by an accused person is irrelevant in a criminal proceedings, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceedings against him. It follows that a confession would be voluntary if it is made by the accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. It would not be involuntary, if the inducement, (a) does not have reference to the charge against the accused person, or (b) it does not proceed from a person in authority; or (c) it is not sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he could gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of Section 24. The law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which the Court has to be satisfied with is, whether when the accused made confession, he was a free man or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the Court is satisfied that (in) its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of highest credit, because it is presumed to flow from the highest sense of guilt. [See R. v. Warwickshall; (1783) Lesh 263)]. It is not to be conceived that a man would be induced

to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law. An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of the harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. (See Woodroffe Evidence, 9th Edn. Page 284). A promise is always attached to the confession, alternative while a threat is always attached to the silence-alternative; thus, in the one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the Court is to determine the absence or presence of inducment, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession. The words `appear to him' in the last part of the section refer to the mentality of the accused.

19. An extra-judicial confession, if voluntary and true and made in fit state of mind, can be relied upon by the Court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility." (Emphasis supplied)

16. In ***Jagroop Singh v. State of Punjab*, (2012) 11 SCC 768**, the apex Court has held as under:

> "29. The issue that emanates for appreciation is whether such confessional statement should be given any credence or thrown overboard. In this context, we may refer with profit to the authority in *Gura Singh v. State of Rajasthan,* (2001) 2 SCC 205, wherein, after referring to the decisions in *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh,* AIR 1954 SC 322, *Maghar Singh v. State of Punjab,* (1975) 4 SCC 234, *Narayan Singh V. State of M.P.,* (1985) 4 SCC 26, *Kishore Chand v. State of H.P.,* (1991) 1 SCC 286 and *Baldev Raj v. State of Haryana,* 1991 Supp (1) SCC 14, it has been opined that it is the settled position of law that extra judicial confession, if true and voluntary, can be relied upon by the court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extra-judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and his evidence is credible. The evidence in the form of extra-judicial confession made by the accused before the witness cannot be always termed to be a tainted evidence. Corroboration of such evidence is required only by way of abundant caution. <u>If the court believes the witness before whom the confession is made and is satisfied that it was true and voluntarily made, then the conviction can be founded on such evidence alone</u>. The aspects which have to be taken care of are the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak for such a confession. That apart, before relying on the confession, the court has to be satisfied that it is voluntary and it is not the result of inducement, threat or promise as envisaged under Section 24 of the Act or brought about in suspicious circumstances to circumvent Sections 25 and 26.
>
> 30. Recently, in *Sahadevan v. State of Tamil Nadu,* (2012) 6 SCC 403, after referring to the rulings in *Sk. Yusuf v. State of W.B.,* (2011) 11 SCC 754 and *Pancho v. State of Haryana,* (2011) 10 SCC 165, <u>a two-Judge Bench has laid down that the extra-judicial confession is a weak evidence by itself and it has to be examined by the court with greater care and caution; that it should be made voluntarily and should be truthful; that it should inspire confidence; that an extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence; that for an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities; and that such statement essentially has to be proved like any other fact and in accordance with law</u>. The Court cautioned that confession would have to be proved like any other fact, which would depend upon veracity of the witness. Also, such confession can be relied upon and conviction based thereupon, if evidence comes from the mouth of the witness, who appears to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought, which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused. The Court has to satisfy with regard to voluntariness of the confession, truthfulness thereof and corroboration, if so required. The Court further held that:-

"15.6. Accepting the admissibility of the extra-judicial confession, the Court in the case of *Sansar Chand v. State of Rajasthan* [(2010) 10 SCC 604] held that:

> "29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide Thimma and Thimma Raju v. State of Mysore, Mulk Raj v. State of U.P., Sivakumar v. State (SCC paras 40 and 41 : AIR paras 41 & 42), Shiva Karam Payaswami Tewari v. State of Maharashtra and Mohd. Azad v. State of W.B.]
>
> 30. In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872."

15.7. Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Court in the case of *Rameshbhai Chandubhai Rathod v. State of Gujarat* [(2009) 5 SCC 740], held as under :

> "It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true."

15.8. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. [Ref. *Sk. Yusuf v. State of W.B.* [(2011) 11 SCC 754] and *Pancho v. State of Haryana* [(2011) 10 SCC 165]." [**Emphasis supplied**]

17. Law with regard to circumstantial evidence is now well settled. It is a settled proposition of law that when there is no direct evidence of crime, the guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which the conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with the crime. All the links in the chain of circumstances must be established beyond reasonable doubt, and the proved circumstances should be consistent, only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, the Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [See: ***Pudhu Raja and another***

***Versus State Represented by Inspector of Police*, (2012) 11 SCC 196**; ***Madhu Versus State of Kerala*, (2012) 2 SCC 399**; ***Dilip Singh Moti Singh versus State of Gujarat*, (2010) 15 SCC 622**, ***Mulakh Raj and others Versus Satish Kumar and others*, (1992) 3 SCC 43**; and ***Sharad Birdhichand Sarda Versus State of Maharashtra*, (1984) 4 SCC 116**.].

18. Also, apex Court in ***Padala Veera Reddy v. State of Andhra Pradesh and others,* 1989 Supp (2) SCC 706**, Court held that when a case rests upon circumstantial evidence, following tests must be satisfied:

> "(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

(Also see: ***Ramreddy Rajesh Khanna Reddy v. State of A.P.,* (2006) 10 SCC 172**; ***Balwinder Singh v. State of Punjab,* 1995 Supp (4) SCC 259**; and ***Harishchandra Ladaku Thange v. State of Maharashtra,* (2007) 11 SCC 436**).

19. Each case has to be considered on its own merit. Court cannot presume suspicion to be a legal proof. In the absence of an important link in the chain, or the chain of circumstances getting snapped, guilt of the accused cannot be assumed, based on mere conjectures.

20. The apex Court in ***State of U.P. v. Ashok Kumar Srivastava,* (1992) 2 SCC 286**, while cautioning the Courts in evaluating circumstantial evidence, held that if the evidence adduced by the prosecution is reasonable, capable of two inferences, the one in favour of the accused must be accepted. This of course must precede the factum of prosecution having proved its case, leading to the guilty of the accused.

21. Applying the aforesaid principles, we are of the considered view that testimony of Kamal Kumar (PW-1) with whom accused amarjit Singh confessed his guilt, does not inspire confidence at all. He cannot be said to be a truthful witness. His testimony is not free from blemish and contradictions, which are material, bordering falsehood.

22. Accused Amarjit Singh undisputedly was issueless and used to reside in his own house at Dera Bassi (Punjab), where he was gainfully employed and doing well in life. He was well settled. This is an admitted fact. Even as per testimony of Kamal Kumar (PW-1), Smt. Nirmal Kaur (PW-2) and Yadvinder Singh (PW-6), he would seldom visit his native place, i.e. place of occurrence of the incident. According to Nirmal Kaur (PW-2) and Yadvinder Singh (PW-6), issue of inheritance of property, the alleged motive for the accused to have murdered his parents, stood settled eight years prior to the occurrence of the incident. Thus motive stands ruled out. Version of Yadvinder Singh (PW-

6) that on 12.8.2006 accused demanded his share, to say the least, is uninspiring in confidence. Why did he leave for Haridwar, remains unexplained. Also, except for uninspiring testimony of Kamal Kumar (PW-1) and Yadvinder Singh (PW-6) presence of accused in the village, on the fateful day, cannot be found to have been sufficiently explained or proved by the prosecution. Another brother, who undisputedly was in the village has not been examined. Be that as it may, both these witnesses admit that one Fateh Singh, from Bihar, employed by their father, used to look after their parents. Presence of Fateh Singh on 12.8.2006 at 7 p.m., undisputedly stands proved by Yadvinder Singh (PW-6). In fact, Smt. Nirmal Kaur also states that when she arrived on the spot, after occurrence of incident, he was present in the house. Now, surprisingly, Fateh Singh has not been examined in Court at all. Also, police did not bother to associate him during investigation and cite him as a witness. Why so? has not been explained. Police has not tried to rule out either involvement of Fateh Singh or ascertain from him what transpired after Yadvinder Singh allegedly left the house on 12.8.2006. After all he was personal attendant of the deceased and in best position to disclose events leading to the incident in question.

23. Coming back to original issue of confessional statement, we find even Kamal Kumar (PW-1) to have materially contradicted himself on the same. As per version (Ex. PA), so disclosed by him to the police, on 13.8.2006 at 5.30 a.m., accused Amarjit Singh came to his house, fell on his feet and sought help. His brothers wanted to kill him. *Accused Amarjit Singh confessed of having burnt his parents, by setting the hutment on fire, as he was deprived of his share in the property.* Soon thereafter both Paramjit Singh and Guljit Singh came, to whom he informed that Amarjit Singh had met him. Thereafter, he left his house by taking Paramjit Singh and Guljit Singh to the village, where he saw only ashes. Accordingly, he informed the police. But significantly, in Court he has deposed that: "accused Amarjeet Singh disclosed that he had come from outside only yesterday and he had sought land from his parents to construct a house. The accused told me that his mother was willing to give land for the construction of the house but the father did not want to give the same to the accused. (him). on this account there was some altercation between the parents of the accused Amarjeet Singh. *He further disclosed that he went to sleep after having food in his own house. At about mid night he saw the 'Chhaan' (thatched hutment) on fire. He further disclosed that when I reached near the hutment on fire I saw my father standing besides the hutment. My mother was inside the hutment. She was in flames. The accused Amarjeet Singh had further disclosed that on his asking his father pushed him aside and said that I will take care of you also. The accused Amarjeet further stated that on this an altercation ensued between them and I (accused) threw my father into the burning hutment (Chaan).* Because of the noisy altercation my brothers got up, because of their fear I have come to you. I asked the accused Amarjeet Singh to sit down and assured him to look into the matter". When confronted with his previous statement (Ex. PA) so recorded by the police, we find such fact not to have been recorded therein. We find the witness to have clarified that "*Amarjeet accused had only stated that he had thrown his father into the burning hutment (Chhaan)*".

24. We do not find testimony of this witness qua the present accused to be inspiring in confidence at all. Witness admits that he was not on visiting terms with the accused. He would seldom meet him. He was also not his neighbour, an influential person or a man of confidence. His house is situated at a distance of 2 kms from the spot of crime. There was no reason for accused Amarjit Singh to have confessed his guilt with him. Significantly, witness admits that Paramjit Singh and Guljit Singh met him during the course of investigation. Even then they did not say anything. He has retracted from his

statement (Ex. PW-19/G) to the effect that the said co-accused persons also confessed their guilt of having murdered their parents alongwith accused Amarjit Singh. Thus, the witness cannot be said to be truthful and his testimony reliable. His version cannot be said to be inspiring in confidence at all. On the question of disclosure statement (Ex.PW-19/J), he was declared hostile and cross-examined by the prosecution. In the circumstances, his testimony ought to have been believed or disbelieved in toto. He had informed the police that co-accused were looking for the convict, yet police did not associate this witness during investigation. Testimony of Jaspal Singh (PW-4) is in the nature of hearsay evidence and thus cannot be relied upon.

25. Court is conscious of the fact that evidence of a hostile witness need not be rejected in its entirety. Evidence, which is credible, even of a hostile witness, can form basis for conviction. It is the quality and not the quantity of witnesses, which would matter (See: ***Mrinal Das and others v. State of Tripura,* (2011) 9 SCC 479**). But then, in the instant case, we find the witness not to be worthy of credence.

26. There is no legal impediment in convicting a person on the testimony of sole witness. Evidence has to be weighed and not counted. Test is whether evidence has a ring of truth, is cogent, credible and trustworthy. If the quality of evidence is not satisfactory, Court, in discharge of its duties, would come forward to acquit the accused. (See: ***Prithpal Singh and others v. State of Punjab and another,* (2012) 1 SCC 10**).

27. Testimony of Yadvinder Singh to the effect that accused made disclosure statement is hearsay in nature and is thus not of much help to the prosecution. Version of this witness that there used to be quarrel and bickering in the family, does not inspire confidence, for the matter was never reported by anyone to the police or local panchayat.

28. There is yet another reason of disbelieving Kamal Kumar. It is the prosecution case that initially on 13.8.2006 and then on 15.8.2006, co-accused Paramjit Singh and Guljit Singh confessed of having murdered their parents. But we find this version to be belied by Jaspal (PW-4), an independent witness, according to whom, all the accused persons stood arrested by the police on 13.8.2006 itself. Now, if this were so, then obviously police record appears to have been fabricated, testimony of police officials of having conducted a fair investigation to be false and version of Kamal Kumar to be false.

29. There is yet another mitigating circumstance on record in favour of the accused-convict. In our considered view, prosecution has taken a contradictory stand. Through the testimony of Kamal Kumar, prosecution wants us to believe that after killing his wife, Balwant Singh set the hutment on fire whereafter Amarjit Singh pushed his father into the fire, but through the testimony of Jaspal (PW-4), Hukkamdin (PW-5) and Yadvinder Singh (PW-6), prosecution wants us to believe that accused murdered their parents in the fields; brought their bodies to the spot and then set the hut on fire. Recovery of button and earring so effected on 16.8.2006, allegedly belonging to the deceased, is the link evidence, produced to establish such circumstance. This version of the prosecution, though contradictory in nature, in fact stands belied by police official MHC Vishesh Kumar (PW-7), according to whom button and earring stood deposited with him in the Malkhana on 13.8.2006. Noticeably, there is no dispute about the correctness of date. Thus, this totally knocks down the prosecution case of accused Paramjit Singh and Guljit Singh of having made confessional statements (Ex. PW-19/J) as also disclosure statement(s) leading to recovery of these articles. Thus, prosecution case even on the

question of disclosure statements made by all the accused in police custody, stands falsified.

30. When we examine the testimony of Nirmal Kaur (PW-2), we find that she has contradicted herself, rendering her version in Court to be absolutely doubtful, if not false. In her examination-in-chief, she does state that upon receiving telephonic information about death of her parents, on 13.8.2006 itself she reached the spot and got identified articles, i.e. Kara (P-2) and ring (P-13) from the ashes, which she had given to them. However, in her cross-examination, she unequivocally admits of having written letter dated 10.8.2007 (Ex. DC) to the concerned Court, admitting that in fact she had reached the spot of occurrence the following day, next day, i.e. 14th and not 13th of August, 2006. This obviously renders the prosecution case of having associated her, in carrying out search and seizure operations of incriminating articles, such as Kara (P-12), ring (P-13), spear (sketches Ex. PB & PC), vide recovery memo (Ex.PF) to be false. Importantly, this witness also admits that the alleged incident of crime was witnessed by Fateh Singh, who also disclosed that deceased were strangulated by the accused. Now, if this were so, then why is it that she did not disclose such fact to the police or that police endeavoured to search for Fateh Singh and examine him in Court, for after all he was an eye witness to the occurrence of incident.

31. We find role of Investigating Officer Som Dutt (PW-19) to be intriguing and not fair. His version of having arrested co-accused Paramjit Singh and Guljit Singh on 16.8.2006 stands belied by Nirmal Kaur (PW-2) and Jaspal (PW-4). Witness admits that village Manjholi is a big village. He feigns ignorance with regard to criminal antecedents of witness Kamal Kumar (PW-1). He admits that accused-convict Amarjit Singh is gainfully employed at Dera Bassi (Punjab), where he resides permanently and that the other two accused persons reside separately. Surprisingly, he furnishes no explanation for not sending the information of murder to the concerned Magistrate, housed just at a distance of 200 metres from the Police Station. After all accused stood arrested on 13.8.2006 itself. His version of disclosure statements made by the accused, which led to recovery of incriminating articles, is absolutely uninspiring in confidence, for the reason that he did not associate any independent witness present on the spot. He also admits that on documents (Ex. PL and PK-1) name of accused was written after using fluid. In fact, he admits that till certain point of time, even he was not sure who had set the hutment on fire. Thus, not only there is interpolation in record, but also version of Kamal Kumar (PW-1) of confessional statement stands belied and the prosecution case falsified.

32. Trial Court disbelieved the prosecution case qua co-accused Paramjit Singh and Guljit Singh, finding (i) testimonies of Kamal Kumar and Nirmal Kaur to be uninspiring in confidence, and (ii) disclosure statements made by them, leading to recovery of incriminating articles, to be hit by provisions of Section 26 of the Indian Evidence Act. We do not find the reasoning to be logical or legal. Testimonies of prosecution witnesses, in the given facts and the circumstances, had to be believed or rejected in toto, for afterall, all the accused had confessed their guilt. Also, Section 27 is an exception to Section 26. Prosecution case of recovery of incriminating articles was to be disbelieved in toto.

33. In our considered view, Court below has rendered contradictory findings. While convicting accused Amarjit Singh, it believed the testimony of Kamal Kumar, holding that there was neither any threat, inducement or promise

nor did he have any motive of false implication. Very same logic and reasoning would also apply qua accused Paramjit Singh and Guljit Singh.

34. Without appreciating that accused had neither any intimacy nor any justifiable reason to confess his guilt, Court got swayed with the fact that Kamal Kumar had no reason to falsely implicate Amarjit Singh. The logic is illegal irrational and against the settled principles of law. Accused Amarjit Singh had no reason to kill his parents. He had no intimacy with the witness whom he seldom met. He was not even on visiting terms. The witness was neither influential nor powerful to have protected him. In fact, trial Court doubted the prosecution story of having recovered the incriminating articles on 19.8.2006. Under these circumstances, it seriously erred in convicting accused Amarjit Singh, causing serious prejudice to him, rendering the findings to be illegal and perverse, not borne out from the record. Finding of guilt cannot be said to be logical/legal, based on correct and complete appreciation of evidence on record.

35. Thus, in our considered view, trial Court erred in convicting Amarjit Singh of the charged offence. In the instant case, there is no motive for the accused to have committed the offence. His extra-judicial confession allegedly made to Kamal Kumar is absolutely uninspiring in confidence. Disclosure statements and recoveries pursuant thereto cannot be said to be based on cogent, clear and convincing piece of evidence. In the instant case, circumstances leading to the irresistible conclusion of guilt of the accused and to no other hypothesis, cannot be said to have been proved on record, by leading cogent, convincing and reliable piece of evidence. It is clear that the Court below erred in appreciating the testimonies of the witnesses and returning findings of guilt of accused Amarjit Singh. Material contradictions, embellishments, improvements and inconsistencies in the testimony of prosecution witnesses, namely Kamal Kumar, Nirmal Kaur, Jaspal, Yadvinder Singh and Investigating Officer Som Dutt, are apparent and glaring.

36. Thus, findings of conviction and sentence, returned by the Court below against accused Amarjit Singh, cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused.

37. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 29.3.2008/31.3.2008, passed by Additional Sessions Judge, Solan, Himachal Pradesh, in Sessions Trial No.4-NL/7 of 2007, titled as *State of Himachal Pradesh v. Karamjit Singh and others*, is set aside and accused Amarjit Singh is acquitted of the charged offences. He be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to him accordingly. Release warrants be immediately prepared. Appeal stands disposed of, so also pending application(s), if any.

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

Ranvir Singh ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.320 of 2012
Reserved on : 19.11.2014
Date of Decision: December 10, 2014.

Indian Penal Code, 1860- Section 302 read with Section 30 of Indian Arms Act- hot exchange took place between the accused and his elder son on which accused brought his gun and shot his son at the abdomen - son died at the spot- the fact that deceased had died due to gunshot was proved by medical evidence- the fact that accused possessed gun was not disputed by him- held, that the mere fact that accused had used a deadly weapon would not prove his criminal intent of murdering his own son- there was no prior hostility- the incident had taken place at the spur of the moment- hence, accused acquitted of the commission of offence punishable under Section 302 IPC and convicted of the commission of offence punishable under Section 304 (second part) of the Indian Penal Code. (Para- 14 and 24)

Cases referred:

Moti Singh v. State of Maharashtra, (2002) 9 SCC 494

Manjeet Singh v. State of Himachal Pradesh, (2014) 5 SCC 697

Vineet Kumar Chauhan v. State of U.P., (2007) 14 SCC 660

Ajit Singh v. State of Punjab, (2011) 9 SCC 462

Mohinder Pal Jolly v. State of Punjab AIR 1979 SC 577

Virsa Singh v. State of Punjab, AIR 1958 SC 465

Rampal Singh v. State of Uttar Pradesh, (2012) 8 SCC 289

For the Appellant	:	Mr. Malay Kaushal, Advocate.
For the Respondent	:	Mr. B.S.Parmar, Mr. Ashok Chaudhary, Mr. V.S. Chauhan, Additional Advocates General and Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Ranvir Singh, hereinafter referred to as the accused, has assailed the judgment dated 12.7.2012, passed by Sessions Judge, Sirmaur District at Nahan, Himachal Pradesh, in Sessions Trial No.50-ST/7 of 2011, titled as *State of Himachal Pradesh v. Ranvir Singh*, whereby he stands convicted and sentenced to undergo rigorous imprisonment for life and pay fine of Rs.10,000/-, in relation to an offence punishable under Section 302 of the Indian Penal Code; and rigorous imprisonment for a period of six months and pay fine of Rs.1,000/-, in relation to an offence punishable under the provisions of Section 30 of the Indian Arms Act, 1959. In default of payment of fine on both counts, he is required to further undergo imprisonment for a period of six months and two months, respectively.

2. It is the case of prosecution that accused used to reside separately, from his sons, in village Chuli, Tehsil Renukaji, District Sirmaur, Himachal Pradesh. On 11.5.2011, marriage of his sister's son was being solemnized in the house of his son Naresh Kumar. On a particular issue, heated exchange took place between the accused and his elder son Shamsher Singh (deceased). Resultantly, accused brought a single barrel gun from his house and shot him in the abdomen. Incident was witnessed by Dhanmanti Devi (PW-1), Ram Singh (PW-2) and Mohan Singh (PW-3). On the basis of information so furnished by Mahesh Kumar, Pradhan of Gram Panchayat, Dadahu, police reached the spot and conducted necessary investigation. Gun and samples of blood were recovered by associating Mohan Singh as a witness.

Dead body of Shamsher Singh, who died on the spot, was sent for postmortem, which was conducted by Dr. C.L. Sharma (PW-9). Inquest report (Ex. PW-11/C) was prepared. Viscera and pellets were sent to the State Forensic Science Laboratory for examination, alongwith the Gun (Ex. P-17), samples of blood stained soil (Ex. P-16 and reports (Ex. PA, PB, PC & PD) obtained by the police. 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 offences punishable under the provisions of Section 302 of the Indian Penal Code and Section 30 of the Indian Arms Act, 1959 to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 11 witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he took the following defence:

> "Except Shamsher Singh, we all were in the function of marriage and when in the morning I came to my house, I found Shamsher Singh in intoxicated condition and I asked him that he was indulging in drinking liquor whereas the marriage was being solemnized. Shamsher Singh rebuked me and entered my room and brought my muzzle loading Gun and wanted to shoot me but I grappled with Shamsher Singh and caught hold of the Gun in which process but side of the Gun came in my hands whereas barrel side was in the hands of Shamsher Singh in the process of snatching the Gun, accidental fire took place when the barrel of the Gun was just near the body of the deceased. On account of which Shamsher Singh received Gun shot injury. I had no enmity or quarrel with my son. It all happened accidentally. I had kept the Gun loaded on account of threat of wild animals. I am innocent and have not committed the offence."

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

6. It is contended that accused stands wrongly convicted. Alternatively, it is submitted that trial Court erred in convicting him under the provisions of Section 302, for he had no intent to commit murder of his own son and at best, case would fall within ambit and scope of Section 304 (second part). On the quantum of sentence, he pleads leniency.

7. On the other hand, Mr. B.S. Parmar, learned Additional Advocate General, has supported the judgment of conviction and sentence rendered by the trial Court, for the reasons assigned therein.

8. We have heard learned counsel for the parties as also perused the record.

9. In the instant case, identity of the accused and deceased is not disputed. The fact that deceased died as a result of gunshot injuries is also not disputed by the accused. In any event, such fact stands established on record through the testimony of Dr. C.L. Sharma, who while proving the postmortem report (Ex.PW-9/A), has opined as under:

> "Injury Lacerated wound in the anterior aspect of femoral region right side. Underlying femoral vessels artery and vein were found ruptured.

Massive bleed with haemotoma present charring of underlying tissue and muscles present.

Disease of deformity. 2"X 3" bone deep (femoral fracture present upper end of femur present.

Cause of death. In our opinion the cause of death of the deceased is hemorrhagic shock due to massive bleeding from femoral vessels (ruptured) due to gun shot injury."

10. According to the doctor, scorching/blackening was found around the injury with unburnt grains of gun powder. Also, cloth debris was found around the entry of the wound. Possibility of gunshot having been fired within one foot is not ruled out.

11. The fact that the gun (Ex.P-17) belonged to and was possessed by the accused is also not disputed by him. In any event, prosecution has proved such fact through the testimony of Devinder Saini (PW-7), Junior Assistant, posted in the Licence Branch in the Deputy Commissioner's Office at Nahan. Licence stands exhibited as Ex. PW-7/A.

12. That the gun was recovered from the spot alongwith other incriminating articles, including blood stained soil, is also not in dispute. Such fact stands established through the testimony of Investigating Officer, Laiq Ram (PW-11), whose testimony stands corroborated by Mohan Singh (PW-3).

13. The defence, in the instant case, cannot be said to have been probablized. Neither any evidence in defence was led nor did the prosecution witnesses even prima-facie disclose such facts. Why would an accused keep a fully loaded gun in his house? remains unexplained. He had no prior threat or fear of his life. Conviction under the Arms Act is thus sustainable in law.

14. The issue, which arises for consideration, is as to whether accused can be held guilty of having committed murder, so as to fall within the definition of Section 300 of the Indian Penal Code or not.

15. The words "bodily injury sufficient in the ordinary course of nature to cause death" would mean that death will be the most probable result of the injury, having regard to the ordinary course of nature. The difference is one of the degrees of probability of death resulting from intended bodily injury. Still further, the question, which would arise for consideration, is as to whether causing the fatal injury was accidental or unintentional or some other kind of injury was intended to be inflicted.

16. Relying upon its earlier decision in ***Moti Singh v. State of Maharashtra,* (2002) 9 SCC 494**, the Apex Court, in ***Manjeet Singh v. State of Himachal Pradesh,* (2014) 5 SCC 697**, in similar circumstances, converted the judgment of conviction under the provisions of Section 302 to that of Section 304 of the Indian Penal Code.

17. Also, while considering its earlier decisions rendered in ***Vineet Kumar Chauhan v. State of U.P.,* (2007) 14 SCC 660**; ***Ajit Singh v. State of Punjab,* (2011) 9 SCC 462**; ***Mohinder Pal Jolly v. State of Punjab*; and *Virsa Singh v. State of Punjab,* AIR 1958 SC 465**, the apex Court in ***Rampal Singh v. State of Uttar Pradesh,* (2012) 8 SCC 289**, has held that an act done with an intention of causing death or bodily injury, which the offender knows to be likely to cause death or causing bodily injury to any person, which is sufficient in the ordinary course of nature to cause death or the person causing injury knows that it is imminently dangerous that it must in all probability cause death, would only amount to murder.

18. In order to establish guilt of the accused, prosecution relies upon the testimonies of spot witnesses, namely wife of the deceased, Dhanmanti Devi (PW-1), Ram Singh (PW-2) and Mohan (PW-3).

19. Dhanmanti Devi states that on 11.5.2011 marriage of son of sister of the accused was being solemnized in the house of her brother-in-law (Devar) Naresh Kumar. After attending the *Baraat*, her family, including her husband, had just returned, when hot exchange of words took place between the accused and the deceased. Hearing the same, she immediately rushed out and saw the accused pull the trigger of single barrel gun, which hit her husband in the abdomen. Soon Mohan Singh and Ram Singh arrived on the spot, when her husband uttered last words "his children have been orphaned". After the incident, accused went (fled) to the Police Station. Thereafter, police came and conducted investigation on the spot. In cross-examination, she categorically states that accused did not aim the gun at the chest.

20. We find her version to have been corroborated by Ram Singh. Mohan Singh reached the spot after the incident, but saw the deceased lying on the ground, bleeding profusely.

21. Thus, from the conjoint reading of testimonies of all the witnesses, it is evidently clear that the accused did fire the gunshot on the abdomen of the deceased but not with intent of murdering him.

22. Having perused the material on record and keeping in view the nature and place of injury and the time of occurrence of incident, we are of the considered view that accused had no intention of causing death of the victim.

23. Injury caused was not on the head, but abdomen. No doubt, assailant used a deadly weapon, which is gun, but then such fact alone, in the absence of any other evidence on record, would not prove his criminal intent of murdering his own son. Had the accused intended to do so, he would have fired the gunshot on his head and not the abdomen. There was no prior proven hostility or differences inter se the parties. Incident occurred at the time when marriage celebrations were going on. Perhaps the spur of moment, heated exchange of words took place and the gun was shot.

24. In the instant case, we find that it was not a case of cold blooded murder, with a premeditated state of mind. The quarrel was sudden. Also after the incident, he straightway went to the police. In our considered view, trial Court erred in not appreciating these aspects of the matter, while convicting the accused on this count.

25. Hence, in view of the above discussion, appeal is partly accepted, conviction and sentence of the accused in relation to an offence punishable under the provisions of Section 302 of the Indian Penal Code, as ordered by the trial Court, is set aside. Instead, accused is convicted of having committed an offence punishable under the provisions of Section 304 (second part) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of seven years and pay fine of Rs.10,000/- and in default thereof to further undergo rigorous imprisonment for a further period of one year. Conviction of the accused for the remaining offence as ordered, and sentence for the said offence so awarded by the trial Court, is upheld. The sentence of substantive imprisonment shall run concurrently. Appeal stands disposed of, so also pending application(s), if any.

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

Tarsem Lal ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

Criminal Appeal No.392 of 2010
Reserved on : 28.10.2014
Date of Decision: December 10, 2014.

Indian Evidence Act- 1872- Section 3- Interested witness would be the one who has some direct interest in having the accused somehow or the other convicted for some animus or for some other reason- merely because, witness had an interest cannot be a ground to discard his testimony. (Para-11)

Indian Evidence Act- 1872- Section 134- When the prosecution has already led credible evidence- there was no necessity to multiply number of witnesses. (Para- 26 and 27)

Indian Penal Code, 1860- Sections 302 and 452- Accused armed with a dagger came to the house of PW-1 who was teaching her son in the verandah of her house- he inflicted a fist blow on the stomach of her son- PW-1 and deceased tried to intervene on which accused stabbed the deceased with dagger on her stomach – she was taken to Hospital at Hoshiarpur where she was declared brought dead – prosecution version was duly proved by the testimony of PW-1, her son and by other witnesses- accused got weapon of offence recovered - bodily injury was proved by Medical Officer- held that in these circumstances, prosecution version was duly proved beyond all reasonable doubt.
(Para-13 to 22, 28, 34 and 35)

Cases referred:

Pratap Singh & another v. State of M.P., (2005) 13 SCC 624
Krishan and another v. State of Haryana, 2005 Cr.L.J. 1909
State of H.P. versus Parkash Chand and others, 1997 Cri.L.J. 1979
Sakal Deep v. U.P. State, 1993 Cri.L.J. 551.
Baitullah and another v. State of U.P., (1998) 1 SCC 509
Chittar Lal v. State of Rajasthan, (2003) 6 SCC 397
Namdeo v. State of Maharashtra, (2007) 14 SCC 150
State of Maharashtra v. Tulshiram Bhanudas Kamble and others, (2007) 14 SCC 627
Takdir Samsuddin Sheikh v. State of Gujarat and another, (2011) 10 SCC 158
Rakesh and another v. State of Madhya Pradesh, (2011) 9 SCC 698
Thoti Manohar v. State of Andhra Pradesh, (2012) 7 SCC 723
Kanhaiya Lal and others v. State of Rajasthan, (2013) 5 SCC 655
Vadivelu Thevar v. The State of Madras, AIR 1957 SC 614
Govindaraju alias Govinda v. State by Sriramapuram Police Station and another, (2012) 4 SCC 722
Gurmej Singh and others versus State of Punjab, 1991 Supp (2) SCC 75

State of Rajasthan vs. Om Parkash (2002) 5 SCC 745
Jagdish Narain and another v. State of U.P., (1996) 8 SCC 199

For the Appellant : Mr. Shivank Singh Panta, Advocate.
For the Respondent : Mr. Ashok Chaudhary, Additional Advocate General; Mr. Vikram Thakur, Mr. Puneet Rajta, Deputy Advocates General; and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Tarsem Lal, hereinafter referred to as the accused, has assailed the judgment dated 29.6.2010/7.6.2010, passed by Additional Sessions Judge, Fast Track Court, Una, District Una, Himachal Pradesh, in Sessions Trial No.16/2009, titled as *State v. Tarsem Lal*, whereby he stands convicted of the offence punishable under the provisions of Sections 302 and 452 of the Indian Penal Code and sentenced to undergo imprisonment for life, in relation to an offence punishable under the provisions of Section 302 of the Indian Penal Code; imprisonment for a period of one year, in relation to offence punishable under the provisions of Section 452 of the Indian Penal Code; and pay fine of Rs.5,000/- and Rs.1,000/-, and in default thereof to further undergo simple imprisonment for a period of three months and one month, respectively.

2. It is the case of prosecution that Smt. Jiwana Kumari (PW-1), daughter-in-law of Krishna Devi (deceased), was teaching her son Master Shubham (PW-2) in the verandah of her house. On 7.7.2009 at 7 p.m., accused came with a dagger and after entering the house of the deceased gave a fist blow on the stomach of Shubham. Jiwana Kumari tried to save her son. When Krishan Devi, who was closeby, tried to intervene, accused stabbed her with a dagger on vital part of her body, i.e. stomach. Jiwana Kumari, on telephone, informed her brother-in-law. Close relatives of Krishna Devi immediately rushed to the spot and took her to the Community Health Centre, Amb, where she was referred to the Zonal Hospital, Una, for treatment vide MLC (Ex.PW-12/A). However, she was taken to the hospital at Hoshiarpur (Punjab: A bordering State), where she was declared as having been brought dead. On receipt of information about the incident, ASI Mohinder Singh (PW-16), after making entry in the Daily Diary (Ex.PW-13/A), proceeded to the hospital alongwith Dev Raj. Narinder Kumar (PW-4), son of Krishan Devi, got recorded his statement (Ex. PW-4/A), under the provisions of Section 154 of the Code of Criminal Procedure, on the basis of which FIR No.89, dated 7.7.2009 (Ex. PW-11/A), under the provisions of Section 307/452 of the Indian Penal Code, was registered at Police Station, Amb, District Una, Himachal Pradesh. Necessary investigation was conducted on the spot. Lateron inquest report (Ex. PW-8/B & 8/C) was prepared and postmortem got conducted through Dr. O.P. Ram Dev (PW-8) and report (Ex.PW8/F) taken on record. Police took into possession blood stained bed sheet and clothes of the deceased vide Memo (Ex.PW-4/A). Also, weapon of offence, i.e. dagger (Ex. P-1) was recovered vide Memo (Ex. PW-1/A), on the basis of disclosure statement (Ex. PW-7/A), made by the accused, so recorded in the presence of Kamal Kishore (PW-7) and Dev Raj (not examined). Photographs of the spot were taken. Reports of the Forensic Science Laboratory (Ex.PW-8/D and 8/E), pertaining to the articles so recovered by the police, were taken on record. With the completion of investigation, which prima facie revealed

complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Sections 452 and 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 19 witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he took up the following defence:

> "I am innocent. Complainant party intended to install public tap in front of my cow-shed to which I objected. On this, the complainant quarreled with me, abused me & Jiwana Kumari, who was possessing a knife accidentally hit Krishna Devi, although she want to stab me. Krishna Devi had pushed me, I fell down & knife accidentally hit Krishna Kumari."

No evidence was led in defence.

5. Finding the testimony of prosecution witnesses to be fully inspiring in confidence, more specifically spot witnesses, trial Court convicted the accused of the charged offence and sentenced him as aforesaid. Hence, the present appeal by the accused.

6. Assailing the judgment, Mr. Shivank Singh Panta, learned counsel for the accused, made the following submissions: (i) Master Shubham (PW-2) being a tutored witness, his testimony cannot be relied upon; (ii) testimony of Jiwana Kumari (PW-1) inspires no confidence, for immediately after the incident, she never raised any hue and cry; (iii) Manju Bala (PW-3) contradicts the version so narrated by Jiwana Kumari, thus rendering her version to be uninspiring in confidence and the witness to be unreliable; (iv) non-examination of all the witnesses to the seizure memo renders the prosecution case to be fatal; (v) in view of law laid down by Hon'ble the Supreme Court of India in ***Pratap Singh & another v. State of M.P.*, (2005) 13 SCC 624**, investigation being faulty, for the spot map did not depict exact location of eye-witnesses, accused merits acquittal; and (vi) even by way of link evidence, no case, beyond reasonable doubt, stands established to link the accused with the crime. It is urged that blood found on the weapon of offence could not be linked to the crime. In support, reliance is also sought on following decisions; (i) ***Krishan and another v. State of Haryana*, 2005 Cr.L.J. 1909**; (ii) ***State of H.P. versus Parkash Chand and others*, 1997 Cri.L.J. 1979** (HP); and (iii) ***Sakal Deep v. U.P. State*, 1993 Cri.L.J. 551.**

7. Mr. J.S. Guleria, learned Assistant Advocate General, supports the judgment based on testimonies of the witnesses, fully inspiring in confidence.

8. Having heard Mr. Shivank Singh Panta, learned counsel for the appellant-accused, as also Mr. Ashok Chaudhary, learned Additional Advocate General and Mr. J.S. Guleria, Assistant Advocate General, on behalf of the State, and minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is

neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

9. The incident in question, as per the prosecution, is witnessed by Jiwana Kumari (PW-1), her son Master Shubham (PW-2) and her sister-in-law (Devrani) Manju Bala (PW-3).

10. The fact that the aforesaid witnesses come from the same family and that relations between them and the accused were not cordial, cannot be disputed.

11. The Apex Court in ***Baitullah and another v. State of U.P.,* (1998) 1 SCC 509**, has succinctly dealt with the issue of appreciation of testimony of a victim as also an interested witness. It stands clarified that an interested witness would only be such who has some direct interest in having the accused *somehow or the other* convicted for some animus or for some other reason. The Court clarified that merely because a witness has interest, by itself, cannot be a ground to discard his testimony.

12. Apex Court also clarified the difference between an "interested witness" and a "natural witness" in ***Chittar Lal v. State of Rajasthan,* (2003) 6 SCC 397**; ***Namdeo v. State of Maharashtra,* (2007) 14 SCC 150**; ***State of Maharashtra v. Tulshiram Bhanudas Kamble and others,* (2007) 14 SCC 627**; ***Takdir Samsuddin Sheikh v. State of Gujarat and another,* (2011) 10 SCC 158**; ***Rakesh and another v. State of Madhya Pradesh,* (2011) 9 SCC 698**; ***Thoti Manohar v. State of Andhra Pradesh,* (2012) 7 SCC 723**; and ***Kanhaiya Lal and others v. State of Rajasthan,* (2013) 5 SCC 655**.

13. We find the testimonies of both PW-1 and PW-2 to be that of natural witnesses and not interested witnesses in the sense that they would ensure conviction at all cost and under any circumstances, even if they have to depose falsely.

14. Significantly, they are eye witnesses to the occurrence of the incident.

15. Jiwana Kumari states that on 7.7.2009 at about 7 p.m., she was in the verandah of her house, where her son Shubham, was studying. Accused came carrying a knife in his hand and threatened to kill all. He gave a fist blow in the abdomen of Shubham. When she tried to save him, accused caught her. At that time, her mother-in-law Krishna Devi (deceased) intervened and pushed the accused. Though the witness was rescued, but accused stabbed her mother-in-law with a knife in her stomach. Soon wife of the accused came and took him away. Then the witness went to the STD Booth and telephonically informed the incident to her husband and brother-in-law. On their arrival, Krishna Devi was taken to the Community Health Centre, Amb, where she was referred to the Zonal Hospital, Una, but was taken to the hospital at Hoshiarpur. Unfortunately, on the way, Krishna Devi died. In cross-examination, she has explained that since mobile phone was not available at home, she went to the STD Booth to make the call. She specifically denies that she was the assailant or that when deceased pushed the accused, knife blow landed on the stomach of the deceased. She denies not having raised any hue and cry. That deceased died on account of lack of proper treatment also stands denied by her. To us witness appears to be truthful. Her testimony is clear, honest, unshaky and fully inspiring in confidence. Her testimony is free from blemish or doubt.

16. To our mind, version of this witness stands corroborated by Shubham, aged 9 years. To us, witness, who appears to be intelligent, has

deposed in a truthful manner. He categorically states that accused stabbed his grandmother, at a time when both he and his mother were present. At that time, he was studying. In no unequivocal terms he states that accused gave him a fist blow. When his mother tried to save him, accused caught her from the arm. Then deceased came and pushed the accused and enquired from him as to why he was giving beatings. At that accused stabbed the deceased in the stomach. No doubt, in cross-examination, witness states that he was told by his parents to depose as such in the Court, but then on a question put by the Court, he clarifies that "I had seen the occurrence and had stated before this Court on the basis of same. My parents told me to depose the truth". Thus, this witness cannot be said to be tutored. His version is natural, truthful and free from blemish. He is categorical about the spot of crime and the events which led to the stabbing of the deceased.

17. Manju Bala states that hearing cries of Jiwana Kumari, she rushed to the spot and saw her mother-in-law lying in the verandah, bleeding profusely. Also accused, who was holding a dagger, was saying that he would kill all of them. However, In the meantime, his wife came and took him away.

18. We find testimonies of these witnesses to be absolutely inspiring in confidence. Defence taken by the accused cannot be said to have been probablized at all. Dagger (Ex. P-1) is not a kitchen knife. Accused entered the house of the deceased armed with a dagger and gave blow to the deceased without any provocation or sufficient cause. His intent was evidently clear. Occurrence is not sudden, but premeditated. No male member of the family of the victims was present in the house at that time. Finding such opportunity, accused came armed with a deadly weapon, only to cause bodily injury and kill the child and the ladies. First, he hit the child in the abdomen and then stabbed the deceased, a lady, on the vital part of her body. Testimonies of witnesses fully inspire in confidence. We do not find any contradiction therein. In one voice, they have narrated the incident, without any contradiction, variation or discrepancy. Witnesses are trustworthy and absolutely reliable.

19. We further find that Narinder Kumar (PW-4), son of the deceased, has corroborated the version of spot witnesses. It appears that decision to take the deceased to Hoshiarpur was taken by the family, after due consultation. Noticeably, Hoshiarpur is a big town, not far off from the place of incident, having all modern medical facilities.

20. Ocular version stands corroborated by way of link evidence. Weapon of offence was recovered from nearby fields, in the presence of Up Pradhan Lekh Raj (PW-5) and Prakash Chand.

21. Lekh Raj has categorically deposed that weapon of offence, identified by Jiwana Kumari, was recovered from the fields. He associated himself on the asking of police. It was the accused who got the weapon recovered vide seizure memo (Ex.PW-1/A). This version stands materially corroborated by Jiwana Devi, who further states that the accused led the police party towards the fields, where maize was sown, wherefrom dagger was recovered.

22. Investigating Officer Mohammed Arshad (PW-15) has further deposed that the accused, who was arrested on 8.7.2009, made disclosure statement (Ex. PW-7/A) in the presence of Kamal Kishore and Dev Raj, pursuant to which recovery was effected from the fields. It stands established on record, through the testimonies of these witnesses, that it was sealed with seal impression 'T'. Sample of seal stands proved on record as Ex. PW-14/D. Dagger

was kept in safe custody and sent for chemical analysis to the Forensic Science Laboratory, which fact also stands proved through the testimony of these witnesses as also MHC Jagtar Singh (PW-10).

23. Also, clothes of the deceased and the accused, i.e. bed sheet (Ex.P-2), Salwar (Ex.P-3) and shirt (Ex. P-5) were taken into possession by the police, which fact stands established by the Investigating Oficer. Report of FSL, Junga, does not establish cut marks on such clothes of the deceased to be caused by a sharp edged weapon.

24. In ***Vadivelu Thevar v. The State of Madras,*** **AIR 1957 SC 614**, the apex Court held as under:

> "11. In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act, has categorically laid it down that "no particular number of witnesses shall, in any case, be required for the proof of any fact." The legislature determined, as long ago as 1872, presumably after the consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England both before and after the passing of the Indian Evidence Act 1872, there have been a number of statutes as set out in Sarkar's 'Law of Evidence' - 9th Edition, at pages 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized on S. 134 quoted above. The section enshrines the well recognized maxim that "Evidence has to be weighed and not counted." Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:
>
> (1) Wholly reliable.
>
> (2) Wholly unreliable.
>
> (3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution."

[See also: *Gulam Sarkar v. State of Bihar (Now Jharkhand),* (2014) 3 SCC 401; *Veer Singh and others v. State of Uttar Pradesh,* (2014) 2 SCC 455; *R. Shaji v. State of Kerala,* (2013) 14 SCC 266; *Kusti Mallaih v. State of Andhra Pradesh,* (2013) 12 SCC 680; *Jagdish Prasad and others v. State of M.P.,* (1995) SCC (Cr.) 160; *Sohrabkhan v. State of Madhya Pradesh,* 1992 Supp (2) SCC 173; and *Vahula Bhushan alias Vahuna Krishnan v. State of Tamil Nadu,* 1989 Supp (1) SCC 232].

25. The apex Court in ***Govindaraju alias Govinda v. State by Sriramapuram Police Station and another,* (2012) 4 SCC 722**, held as under:

"25. Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eye-witness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty.

26. Reference in this regard can be made to the cases of Joseph v. State of Kerala (2003) 1 SCC 465 and Tika Ram v. State of Madhya Pradesh (2007) 15 SCC 760. Even in the case of Jhapsa Kabari and Others v. State of Bihar (2001) 10 SCC 94, this Court took the view that if the

> presence of a witness is doubtful, it becomes a case of conviction based on the testimony of a solitary witness. There is, however, no bar in basing the conviction on the testimony of a solitary witness so long as the said witness is reliable and trustworthy.
>
> 27. In the case of Jhapsa Kabari (supra), this Court noted the fact that simply because one of the witnesses (a 14 years old boy) did not name the wife of the deceased in the fardbayan, it would not in any way affect the testimony of the eye-witness i.e. the wife of the deceased, who had given graphic account of the attack on her husband and her brother-in-law by the accused persons. Where the statement of an eye-witness is found to be reliable, trustworthy and consistent with the course of events, the conviction can be based on her sole testimony. There is no bar in basing the conviction of an accused on the testimony of a solitary witness as long as the said witness is reliable and trustworthy."

26. In the instant case testimony of the prosecution witnesses is found to be wholly reliable. Hence there was no need for the prosecution to have examined the other independent witness. Quality and not quantity of evidence matters. In the event of credible evidence already on record there was no need for the prosecution to have multiplied the number of witnesses. We are taking this view by relying upon the ratio of law laid down by the Apex Court in ***Gurmej Singh and others versus State of Punjab,*** **1991 Supp (2) SCC 75**.

27. In ***State of Rajasthan vs. Om Parkash*** **(2002) 5 SCC 745**, the Apex Court held as under:-

> "14. In State of H.P. v Gian Chand [2000(1) SCC 71] Justice Lahoti speaking for the Bench observed that the Court has first to assess the trustworthy intention of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on though there may be other witnesses available who could have been examined but were not examined."

28. It is true that blood found on the dagger was insufficient for further examination, but then this fact would have no bearing on the outcome of the decision. The fact that deceased died as a result of stab injury cannot be disputed. In any event, such fact stands established on record through the testimony of Dr. O.P. Ram Dev (PW-8), who conducted postmortem of the dead body. According to him, deceased died as a result of haemorrhagic shock due to "haemo peritoneum and peritonitis due to injury to small intestine and omentric and mesenteric vessels leading to haemorrhage due to stab wound by sharp weapon which led to haemorrhagic shock and cardio respiratory failure". Doctor found following injuries on the body:

> Incised wound 1.75 inch in size. Pertoneal cavity was full of blood and approximately it contained 4-5 lites of blood. On opening the abdomen peritoneum showed cut 1.75 inches mesenteric artries were found to be cut through and through.
>
> Small intestine (ileum) showed cut would 3.4 inch in cirucumfrance. Mucosa and serosa and muscle layre cut margins were found to be sharp and regular.

29. Dr. Praveen Kumar (PW-17), who first examined the deceased, has also deposed that there was incised wound measuring 4 cm in length, which was dangerous to life. He issued report (Ex.PW-17/A).

30. In *Pratap Singh (supra)*, the Hon'ble Supreme Court of India, had an occasion to deal with a case where the High Court had held that any statement made in respect of a map alleged to have been prepared on the information supplied by other persons, is inadmissible in evidence being hearsay. All the statements recorded in the map are the statements of police and are not admissible in evidence under Section 162 of the Code of Criminal Procedure. The Court did not reverse such findings, but however only observed that if during investigation, it comes to notice of the Investigating Officer that some of the witnesses neither cited nor examined, who had witnessed the occurrence, the Officer was duty bound to disclose the spot from where the witnesses had seen the occurrence. The spot map had to be prepared accordingly, apart from recording their statements, under the provisions of Section 161 of the Code of Criminal Procedure. Significantly, the Court did not hold that mere failure on the part of the Investigating Officer to do so, would ipso facto render the prosecution case to be fatal.

31. Site plan has no probative value, other than statement made by a witness, to the Police Officer, during the course of investigation. The apex Court, while dealing with the issue in hand, in ***Jagdish Narain and another v. State of U.P.,* (1996) 8 SCC 199**, has held as under:

> "9. In responding to the next criticism of the trial Court regarding the failure of the Investigating Officer to indicate in the site plan prepared by him the spot wherefrom the shots were allegedly fired by the appellants and its resultant effect upon the investigation itself, the High Court observed that such failure did not detract from the truthfulness of the eye-witnesses and only amounted to an omission on the part of Investigating Officer. In our opinion neither the criticism of the trial Court nor the reason ascribed by the High Court in its rebuttal can be legally sustained. While preparing a site plan an Investigating Police Officer can certainly record what he sees and observes, for that will be direct and substantive evidence being based on his personal knowledge; but as, he was not obviously present when the incident took place, he has to derive knowledge as to when, where and how it happened from persons who had seen the incident. When a witness testifies about what he heard from somebody else it is ordinarily not admissible in evidence being hearsay, but if the person for whom he heard is examined to give direct evidence within the meaning of Section 60 of the Evidence Act, the former's evidence would be admissible to corroborate the latter in accordance with Section 157, Cr. P. C. However such a statement made to a Police Officer, when he is investigating into an offence in accordance with Chapter XII of the Code of Criminal Procedure cannot be used to even corroborate the maker thereof in view of the embargo in Section 162 (1), Cr. P. C. appearing in that chapter and can be used only to contradict him (the maker) in accordance with the proviso thereof, except in those cases where sub-section (2) of the Section applies. That necessarily means that if in the site plan P. W. 6 had even the place from which the shots were allegedly fired after ascertaining the same from the eye-witnesses it could not have been admitted in evidence being hit by Section 162, Cr. P. C. The law on this subject has been succinctly laid down by a three Judge Bench of this Court in *Tori Singh v. State of U. P.,* AIR 1962 SC 399. In that case it was contended on behalf of the appellant therein that if one looked at the sketch map, on which the place where the deceased was said to have been hit was marked, and compared it with the statements of the prosecution witnesses and the medical evidence, it would be extremely improbable for the injury which

was received by the deceased to have been caused on that part of the body where it had been actually caused if the deceased was at the place marked on the map. In repelling the above contention this Court observed, inter alia, (at p. 141 of AIR) :-

> "..... the mark on the sketch-map was put by the Sub-Inspector who was obviously not an eye-witness to the incident. He could only have put it there after taking the statements of the eye-witnesses. The marking of the spot on the sketch-map is really bringing on record the conclusion of the Sub-Inspector on the basis of the statements made by the witnesses to him. This in our opinion would not be admissible in view of the provisions of S. 162 of the Code of Criminal Procedure, for it is in effect nothing more than the statement of the Sub-Inspector that the eye-witnesses told him that the deceased was at such and such place at the time when he was hit. The sketch-map would be admissible so far as it indicates all that the Sub-Inspector saw himself at the spot; but any mark put on the sketch-map based on the statements made by the witnesses to the Sub-Inspector would be inadmissible in view of the clear provisions of S. 162 of the Code of Criminal Procedure as it will be no more than a statement made to the police during investigation."

10. While on this point, it will be pertinent to mention that if in a given case the site plan is prepared by a draftsman - and not by the Investigating Officer -entries therein regarding the place from where shots were fried or other details derived from other witnesses would be admissible as corroborative evidence as has been observed by this Court in Tori Singh's case (AIR 1962 SC 399) (supra) in the following passage (at p. 401 of AIR) :-

> "This Court had occasion to consider the admissibility of a plan drawn to scale by a draftsman in which after ascertaining from the witnesses where exactly the assailants and the victims stood at the time of the commission of offence, the draftsman put down the place in the map, in Santa Singh v. State of Punjab, AIR 1956 SC 526. It was held that such a plan drawn to scale was admissible if the witnesses corroborated the statements of the draftsman that they showed him the places and would not be hit by S. 162 of the Code of Criminal Procedure.""

[Also see: *State of Rajasthan v. Bhawani and another,* (2003) 7 SCC 291; and *Girish Yadav and others v. State of M.P.,* (1996) 8 SCC 186]

32. Decision rendered by a Division Bench of High Court of Punjab and Haryana, in *Krishan (supra)*, is based on the fact situation and is in fact inapplicable to the present case.

33. Decisions rendered in *Parkash Chand (supra)* and *Sakal Deep (supra)* were based on the fact situation, where testimony of the prosecution witnesses was found not to be inspiring in confidence. It is in this backdrop that mere recovery of weapon of offence was held not to have been proved by the prosecution, beyond reasonable doubt.

34. Hence, in our considered view, prosecution has been able to establish the guilt of the accused, in relation to the charged offence, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, not only ocular but also corroborative in the shape of recovery of weapon of offence.

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

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

Duni Chand .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 32 of 2012.
Reserved on: December 10, 2014.
Decided on: December 11, 2014.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 4.5 kg. of charas- place of incident was situated on National Highway having heavy flow of traffic- police could not give the registration number of any of the vehicles, which were stopped by them for traffic checking- version of the police that police party tried to stop vehicles but no one stopped was not believable –a tea shop was located at a short distance but no one was called from the tea shop- this shows that sincere efforts were not made to associate independent witness- in these circumstances, prosecution version not reliable-accused acquitted. (Para- 13 to 16)

For the appellant: Mr. Debinder Ghosh, Advocate.
For the respondent: Mr. P.M.Negi, Dy. AG, with Mr. Ramesh Thakur and Mr. J.S.Guleria, Asstt. Advocate Generals.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 20.8.2011, rendered by the learned Special Judge, (Addl. Sessions Judge), Mandi, H.P., in Sessions Trial No. 59 of 2010, whereby the appellant-accused (hereinafter referred to as accused) who was charged with and tried for offence under Sections 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985, has been convicted and sentenced to undergo rigorous imprisonment for a period of 14 years and to pay a fine of Rs. 1,40,000/- and in default of payment of fine to undergo simple imprisonment for a period of two years.

2. The case of the prosecution, in a nut shell, is that LHC Narpat Ram (PW-1) alongwith PW-2 Const. Roshan Lal, Const. Mahesh Kumar and PW-8 ASI Ram Lal was present at Khoti Nalla on 4.7.2010 in a private vehicle bearing registration No. HP-33B-3100. Accused came from Thalout at about 5:45 PM. He was carrying backpack Ext. P-2. He started walking briskly on seeing the police party. Accused was apprehended at a distance of about 20 meters. The place was lonely and deserted. No independent witnesses were

available on the spot. ASI Ram Lal made efforts to stop the vehicle and associate the driver and conductor but none agreed. PW-1 LHC Narpat Ram and Const. Mahesh Kumar were associated as witnesses. The police party gave its personal search to the accused. No contraband was found in their possession. Backpack Ext. P-2 was searched. It contained white coloured plastic bag. The bag was opened and it was found to be containing stick like pancake and sphere like black substance. The substance was confirmed to be cannabis. It weighed 4500 gms. The contraband was put in white coloured bag and white coloured bag was put in the backpack. Backpack was wrapped in a piece of cloth. This parcel Ext. P-1 was sealed with 12 seal impressions of seal R. NCB-1 form Ext. PW-5/C was filled in at the spot in triplicate. Seal impression was put on the NCB-1 form. Sample seal was taken on a separate piece of cloth and one such impression was Ext. PW-1/B. Rukka was prepared on the spot vide memo Ext. PW-8/A. It was handed over to Constable Roshan Lal. He took the same to Inspector Surinder Pal. He recorded FIR Ext. PW-5/A. The case file was handed over to Const. Roshan Lal with the direction to carry the same to the spot. The contraband was deposited before the Inspector Surinder Pal. He re-sealed the same with six seal impressions of seal S. He filled in relevant columns of NCB-1 form and put seal impression on it. He prepared memo of resealing vide memo Ext. PW-5/B. He handed over parcel, sample seals R & S, NCB-1 form, copy of seizure memo and FIR to PW-7 HC Anil Kumar. PW-7 HC Anil Kumar made an entry in the Malkhana register at Sr. No. 1096. He handed over the entire case property to Const. Roshan Lal, PW-2 on 6.7.2010 with the direction to carry the case property to FSL Junga vide RC No. 86/2010. The Constable Roshan Lal deposited all the articles at FSL and handed over the receipt to MHC on his return. Special report Ext. PW-4/A was prepared and it was handed over to Const. Ram Lal PW-6 to carry the same to Addl. S.P. Hira Singh Thakur. Constable Ram Lal handed over the Special Report to Addl. S.P. on 5.7.2010 through his Reader PW-4 HC Girdhari Lal. The result of chemical analysis is Ext. PW-5/E. The sample was of charas containing 32.10% W.W. resin in it. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 8 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C. The accused has denied having committed any offence. According to him, the police came to his village on 2.7.2010 and took him to the Police Station on the next day. Mohan Lal Master and Tej Ram, who used to supply charas, ran away and he was falsely implicated. The learned trial Court convicted the accused, as noticed hereinabove.

4. Mr. Debinder Ghosh, Advocate, appearing on behalf of the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. P.M.Negi, Dy. AG, has supported the judgment of the learned trial Court dated 20.8.2011.

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

6. PW-1, LHC Narpat Ram deposed that he alongwith ASI Ram Lal, Const. Mahesh Kumar, Const. Roshan Lal and Const. Kashmir Singh was present at Khoti Nalla on 4.7.2010. The accused came from Aut side towards them at about 5:45 PM. On seeing the police party, he started walking briskly. ASI Ram Lal shouted him to stop. He did not stop. ASI Ram Lal became suspicious about the possession of some stolen articles or contraband. The accused was apprehended with their help. He revealed his identity. The place

was lonely and no passer by was present. The vehicles were stopped. The occupants were asked to become witnesses but they declined. ASI Ram Lal associated him and Cont. Mahesh Kumar as witnesses. ASI Ram Lal gave his personal search and search of accompanying police officials. The accused was having a backpack on his back. It was opened and searched. It contained charas. It weighed 4500 gms. It was put back in the same plastic bag and plastic bag was put in the same backpack from which it was recovered. The bag was sealed in a parcel with 12 impressions of seal 'R'. Form NCB-1 was filled in triplicate. Seal impression was taken on the form. Seal impression was taken separately on piece of cloth and one such impression is Ext. PW-1/B. Seal was handed over to him after use. The parcel was seized vide seizure memo Ext. PW-1/C. It was handed over to Const. Roshan Lal. The accused was arrested. The site plan was prepared. The personal search of the accused was conducted and memo Ext. PW-1/E was prepared to this effect. In his cross-examination, he deposed that at about 2:00 PM, they started in a Santro Car bearing No. HP-33B-3100. They did not have any prior information. Khoti Nala is located on National Highway and there is a heavy flow of traffic. He could not narrate the registration of vehicles or name of the occupants who were stopped and inquired by them. He admitted that there was no street light at the spot. Volunteered that they had their own light.

7. PW-2 Const. Roshan Lal, also deposed the manner in which the accused was apprehended on 4.7.2010 in a '*nakabandi*'. The arrest, seizure and sampling process was completed on the spot. He carried rukka to the Police Station. He handed over the same to SHO Surinder Pal. SHO Surinder Pal registered FIR and handed over the case file to him with the direction to carry it to the spot. HC Anil Kumar handed over one parcel sealed with 12 impressions of seal 'R', form NCB-1 in triplicate, sample seal 'R' and 'S' vide RC No. 86/10 dated 6.7.2010 with the direction to carry these to FSL Junga. He deposited them in safe condition at CTL Kandaghat. He was cross-examined. He could not tell the number of the vehicles which were stopped by them between 2:45 till 5:45 PM. He did not know the registration number of any vehicle. He could not tell the registration number of the vehicles or names of the occupants who were stopped by them and who were asked to become witnesses.

8. Statements of PW-3 Const. Jeevanand and PW-4 HC Girdhari Lal are formal in nature.

9. PW-5 Inspector Surender Pal, deposed that he recorded FIR Ext. PW-5/A after receipt of the '*rukka*'. A.S.I. Ram Lal handed over the one parcel sealed with 12 impressions of seal R alongwith sample seal R and NCB-1 form to him on the same date. He resealed the parcel with six impressions of seal 'S'. Sample seal Ext. PW-5/B was taken separately on a piece of cloth. The seal impression was also taken on NCB-1 form. He filled in the relevant columns of NCB-1 form Ext. PW-5/C. He handed over the parcel alongwith sample seals 'R' and 'S' and form NCB-1 to MHC Anil Kumar. He prepared memo of reseal Ext. PW-5/D.

10. Statement of PW-6 Const. Ram Lal is formal in nature.

11. PW-7 HC Anil Kumar deposed that Insp. SHO Surender Pal handed over one parcel sealed with 12 impressions of seal 'R' and six impressions of seal 'S' to him on 4.7.2010. He made entry in the register at Sr. No. 1096, the copy of which is Ext. PW-7/A. He handed over the case property to Const. Roshan Lal on 6.7.2010 with direction to carry it to FSL Junga vide RC No. 80/10. The copy of RC is Ext. PW-7/B.

12. PW-8 ASI Ram Lal deposed the manner in which the accused was apprehended, the contraband was recovered from the bag carried by the accused, the sampling and sealing process was completed on the spot. In his cross-examination, he deposed that he checked the vehicles after 4:00 PM till 5:45 PM. He could not tell the registration number of any vehicle. He did not remember the number of cases detected at Khoti Nala under the ND & PS Act. He denied that there was one Tea Shop at the place of occurrence. Volunteered that it was located at a distance. Many vehicles crossed during their stay on the spot. He had stopped 5-7 vehicles and had asked their occupants to be witnesses. He could not tell their registration number or name of the occupants.

13. *Khoti Nalla* is situated on a National Highway. It is a busy National Highway. PW-1 LHC Narpat Ram has admitted that Khoti Nalla is located on National Highway and there was heavy flow of traffic. However, he could not narrate the registration number of any vehicle or name of any of the occupants stopped by the police party. Similarly, PW-2 Const. Roshan Lal did not remember the registration number of any of the vehicles or names of any of the occupants who were stopped and asked by the police to become witnesses. He admitted that there was a Tea Shop at some distance from the place of occurrence. PW-8 ASI Ram Lal testified that he checked the vehicles after 4:00 PM till 5:45 PM. He did not narrate the registration number of any vehicle. He denied the suggestion that there was Tea Shop at the place of occurrence. Volunteered that it was located at a distance. Many vehicles crossed during their stay on the spot. He has stopped 5-7 vehicles and had asked their occupants to be witnesses. He could not tell their registration number or name of the occupants. It is not believable that when police party signals the vehicles to stop, their occupants would not cooperate with the police. None of the witnesses knew about the registration number of any vehicle or the name of the occupants who were stopped. The National Highway, as noticed by us hereinabove, is very busy. The flow of traffic on this road is day and night. The police have not at all made any sincere efforts to associate independent witnesses by ordering the occupants of the vehicles plying on the National Highway.

14. In order to prove that the contraband was recovered from the conscious and exclusive possession of the accused, it was necessary for the police to associate independent witnesses. It is not one of those cases where the accused was apprehended at an isolated place. It has come in the statement of PW-2 Const. Roshan Lal that a Tea Shop was also there at a short distance. PW-8 ASI Ram Lal, though initially denied that there was no Tea Shop, but later admitted that Tea Shop was at a distance from the place of occurrence. It is not the case of the prosecution that PW-8 ASI Ram Lal has sent the Constables accompanying him to search for the independent witnesses. Since the police have not associated any independent witnesses, the recovery of the contraband from the accused becomes doubtful.

15. Though the version of the official witnesses can be relied upon in the absence of independent witnesses, but their statements must inspire confidence and should be trustworthy. In the instant case, it is not believable that sincere efforts were made by the police, as discussed hereinabove, to associate independent witnesses from the vicinity. Moreover, in case the occupants of the vehicles have not come forward to become witnesses, it was always open to the Investigating Officer to invoke Section 160 of the Code of Criminal Procedure, 1973, for securing their presence. The police cannot show helplessness.

16. The prosecution has failed to prove that the contraband was recovered from the exclusive and conscious possession of the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 20(b)(ii)(c) of the N.D.P.S., Act.

17. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 20.8.2011, rendered by the Special Judge (Addl. Sessions Judge), Mandi, H.P., in Sessions Trial No. 59 of 2010, is set aside. Accused is acquitted of the charges framed against him by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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

Farooq Bhutto son of Shri Z.A. Bhutto ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1271 of 2014
Order Reserved on 21st November, 2014
Date of Order 11th December, 2014

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 307, 341, 323, 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 – State contended that FIR no. 47 of 2014 and FIR No. 87 of 2014 had been registered against the applicant and applicant should not be released on bail- record showed that applicant had been acquitted in FIR no. 47 of 2014 and the criminal case was pending against the applicant regarding the FIR no. 87 of 2014- further held that mere pendency of the criminal Case is not sufficient to decline the bail to the accused - considering that applicant had joined the investigation, applicant is ordered to be released on bail. (Para- 7 to 11)

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

Manoj Narula vs. Union of India (2014)9 SCC 1

For the Applicant: Mr. Imran Khan, Advocate
For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 175 of 2014 dated 28.8.2014 registered under Sections 307, 341, 323, 504 and 506 read with Section 34 of Indian Penal Code at P.S. Sadar District Bilaspur (HP).

2. It is pleaded that investigation is complete and no recovery is to be effected from the applicant and further pleaded that applicant will join the investigation as and when required by police. It is further pleaded that bail application filed by applicant be allowed.

3. Per contra police report filed. As per police report FIR No. 175 of 2014 dated 28.8.2014 registered under Sections 307, 341, 323, 504 and 506 read with Section 34 of Indian Penal Code in Police Station Sadar District Bilaspur (H.P.) against the applicant. There is recital in police report that on dated 28.8.2014 Mohender Pal complainant along with his friend Rajesh went to Luhnu ground and at about 6.15 PM in the evening complainant and his friend thought for boating. There is further recital in police report that thereafter vehicle having registration No. HP-69A-0973 came and accused persons talked with the complainant and his friend Rajesh and enquired about name and address of complainant. There is further recital in police report that thereafter complainant demanded pen from the accused persons and told that he would write his name and address and thereafter one of co-accused caught hold the complainant and other co-accused inflicted injuries upon the head and left leg of complainant with baseball. There is further recital in police report that blood oozed out from the head of complainant and complainant also sustained incised injuries in his left leg. There is further recital in police report that after inflicting the injuries both accused persons fled from the place of incident by using the abusive and insulting language and also threatened the complainant. There is recital in police report that medical examination of injured was got conducted in Regional Hospital Bilaspur and MLC obtained. There is recital in police report that site plan was also prepared and statements of prosecution witnesses were also recorded. There is further recital in police report that injured remained as indoor patient in the hospital w.e.f. 28.8.2014 to 1.9.2014. There is further recital in police report that blood clotted T-shirt and vehicle having registration No. HP-69A-0973 were took into possession. There is further recital in police report that as per opinion of medical officer injury No. 1 sustained by the injured was grievous in nature and said injury was dangerous to life. There is further recital in police report that baseball and bat were also recovered vide seizure memo and as per opinion of medical officer injuries No. 1 and 2 could be inflicted with baseball and bat. There is further recital in police report that another FIR No. 47 of 2007 dated 24.2.2007 was registered against the applicant under Sections 279, 337, 341, 504 and 506 IPC at P.S. Ghumarwin and applicant has been acquitted by learned Judicial Magistrate 1st Class Court-3 Ghumarwin on dated 4.10.2012 and there is further recital in police report that another FIR No. 87 of 2014 dated 8.5.2014 is registered against the applicant under Sections 451, 323, 325 and 506 IPC in P.S. Ghumarwin which

is pending in the Court of learned Additional Chief Judicial Magistrate Ghumarwin. There is recital in police report that if applicant is released on bail then applicant will induce and threat the prosecution witnesses and will also destroy the evidence. 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.

5. Following points arise for determination in this anticipatory bail application:-

1. Whether the anticipatory bail application filed under Section 438 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that no recovery is to be effected in present case and present case will be decided in due course of time and on this ground anticipatory bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** Trial of the case will be completed in due course of time. It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period.

8. In view of police report that applicant has joined investigation of case and in view of police report that no recovery is to be effected from the applicant Court is of the opinion that it is expedient in the ends of justice to release the applicant on anticipatory bail. Court is of the opinion that if applicant is released on anticipatory bail then interest of State and general public will not be adversely effected.

9. Submission of learned Additional Advocate General appearing on behalf of non-applicant that two FIRs i.e. FIR No. 47 of 2014 dated 24.2.2007 and FIR No. 87 of 2014 dated 8.5.2014 were registered against the applicant in P.S. Ghumarwin and on this ground bail application filed by applicant be declined is rejected being devoid of any force for the reasons hereinafter mentioned. As per police report applicant has been acquitted in FIR No. 47 of 2014 dated 24.2.2007 registered under Sections 279, 337, 341, 504 and 506 IPC and as per further police report criminal case qua FIR No. 87 of 2014 dated

8.5.2014 is pending before learned Additional Chief Judicial Magistrate Ghumarwin. It is well settled law that pendency of criminal trial is not a ground to decline the bail to accused because accused is presumed to be innocent till convicted by competent Court of law. It was held in case reported in ***(2014)9 SCC 1 titled Manoj Narula vs. Union of India*** that accused is presumed to be innocent until proven guilt. It was held that this would apply to a person accused of one or multiple offences.

10. Another 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. Court is of the opinion that if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail strictly in accordance with law. In view of police report that no recovery is to be effected from applicant and in view of police report that applicant has joined investigation proceedings in present case it is expedient in the ends of justice to allow anticipatory bail application. In view of above stated facts, point No.1 is answered in affirmative.

Point No.2

Final Order

11. In view of findings on point No.1 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. 1 lac with two sureties in the like amount to the satisfaction of Investigating Officer on following terms and conditions. (i) That the applicant will join the investigation of case in accordance with law. (ii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which 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 not required in any other criminal case. 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 438 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.

Firoj Bhutto @ Happy son of Shri Z.A. Bhutto ....Applicant

Versus

State of H.P. ....Non-applicant

Cr.MP(M) No. 1270 of 2014
Order Reserved on 21st November, 2014
Date of Order 11th December, 2014

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 307, 341, 323, 504 and 506 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 – State contended that FIR no. 57 of 2004 and FIR No. 60 of 2004 were registered against the applicant and he should not be released on bail-record showed that applicant was acquitted in both the criminal cases-considering the nature of offence, application is allowed and the applicant is ordered to be released on bail. (Para- 7 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 2012 Cri. L.J. 702 Apex Court DB 702,

Manoj Narula vs. Union of India (2014)9 SCC 1

For the Applicant:	Mr. Imran Khan, Advocate
For the Non-applicant:	Mr. M.L. Chauhan, Additional Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 175 of 2014 dated 28.8.2014 registered under Sections 307, 341, 323, 504 and 506 read with Section 34 of Indian Penal Code at P.S. Sadar District Bilaspur (HP).

2. It is pleaded that investigation is complete and no recovery is to be effected from the applicant and further pleaded that applicant will join the investigation as and when required by police. It is further pleaded that bail application filed by applicant be allowed.

3. Per contra police report filed. As per police report FIR No. 175 of 2014 dated 28.8.2014 registered under Sections 307, 341, 323, 504 and 506 read with Section 34 of Indian Penal Code in Police Station Sadar District Bilaspur (H.P.) against the applicant. There is recital in police report that on dated 28.8.2014 Mohender Pal complainant along with his friend Rajesh went to Luhnu ground and at about 6.15 PM in the evening complainant and his friend thought for boating. There is further recital in police report that thereafter vehicle having registration No. HP-69A-0973 came and accused persons talked with the complainant and his friend Rajesh and enquired about name and address of complainant. There is further recital in police report that thereafter complainant demanded pen from accused persons in order to disclose name and address and thereafter one of co-accused caught hold the complainant and other co-accused inflicted injuries upon the head and left leg with baseball. There is further recital in police report that blood oozed out from the head of complainant and complainant also sustained incised injuries in his left leg. There is further recital in police report that after inflicting the injuries both accused persons fled from the place of incident by using the abusive and insulting language and also threatened the complainant. There is recital in

police report that medical examination of injured was got conducted in Regional Hospital Bilaspur and MLC obtained. There is recital in police report that site plan was also prepared and statements of prosecution witnesses were also recorded. There is further recital in police report that injured remained as indoor patient in the hospital w.e.f. 28.8.2014 to 1.9.2014. There is further recital in police report that blood clotted T-shirt and vehicle having registration No. HP-69A-0973 were took into possession. There is further recital in police report that as per opinion of medical officer injury No. 1 sustained by the injured was grievous in nature and said injury was dangerous to life. There is further recital in police report that baseball and bat were also recovered vide seizure memo and as per opinion of medical officer injuries No. 1 and 2 could be inflicted with baseball and bat. There is further recital in police report that FIR No. 57 of 2004 was registered against the applicant under Sections 341, 323 and 34 IPC at P.S. Barmana in which applicant has been acquitted on dated 22.4.2013 and there is further recital in police report that another FIR No. 60 of 2004 was registered against the applicant under Sections 279, 337 and 201 IPC in P.S. Ghumarwin in which also the applicant has been acquitted on dated 6.9.2013. There is recital in police report that if applicant is released on bail then applicant will induce and threat the prosecution witnesses and will also destroy the evidence. 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.

5. Following points arise for determination in this bail application:-

1. Whether bail application filed under Section 439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that no recovery is to be effected in present case and present case will be decided in due course of time and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an

indefinite period. Court is of the opinion that if applicant is released on bail at this stage 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 two FIRs i.e. FIR No. 57 of 2004 and FIR No. 60 of 2004 were registered against the applicant in P.S. Ghumarwin and on this ground bail application filed by applicant be declined is rejected being devoid of any force for the reasons hereinafter mentioned. As per police report applicant has been acquitted in both the aforesaid criminal cases. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. It was held in case reported in ***(2014)9 SCC 1 titled Manoj Narula vs. Union of India*** that accused is presumed to be innocent until proven guilt. It was held that this would apply to a person accused of one or multiple offences.

9. 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. Court is of the opinion that if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail strictly in accordance with law. In view of above stated facts, point No.1 is answered in affirmative.

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. 1 lac with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will join the investigation of case in accordance with law. (ii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which 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 not required in any other criminal case. Bail application filed under Section 439 Cr.P.C. stands disposed of. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

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

Kamal Singh son of Shri Rattan Singh ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1283 of 2014
Order Reserved on 19th November,2014
Date of Order : 11th December, 2014

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 302, 341 and 120 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 – Applicant is facing grave criminal charges and releasing him on bail will adversely affecting the investigation- hence, bail application dismissed. (Para- 7 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

For the Applicant:	Mr. Vivek Sharma, Advocate.
For the Non-applicant:	Mr. M.L. Chauhan, Additional Advocate General, Mr. Puneet Razta Deputy Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 25 of 2013 dated 14.11.2013 registered under Sections 302, 392 and 120-B IPC in Police Station Pooh District Kinnaur Himachal Pradesh.

2. It is pleaded that applicant is not having any past criminal record and further pleaded that Investigating Agency has impleaded the applicant due to ulterior purpose. It is pleaded that no recovery is to be effected from the applicant and no fruitful purpose shall be served by keeping the applicant in judicial custody. It is further pleaded that present case is based on circumstantial evidence and chain of circumstances is pre-eminently incomplete. It is pleaded that applicant will abide by all terms and conditions imposed by Court and applicant will not tamper with prosecution evidence in any manner. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report case under Section 302 IPC stands registered against the applicant in P.S. Pooh District Kinnaur H.P. vide FIR No. 25 of 2013 dated 14.11.2013. There is recital in police report that Gompa temple is constructed below 3 K.m. from National Highway No. 5 near Spiti river under a big rock. There is recital in police report that there is no residential locality nearby the Gompa temple. There is recital in police report that dead body of Priest Lamba was found and rope was tied in the neck of deceased Lamba. There is further recital in police report that on 13th and 14th November 2013 during night period theft was committed in the Buddhist Gompa (Temple) and culpable homicide amounting to murder of Priest was committed and idols kept in the temple were stolen. There is recital in police report that there was conversation between mobile Nos. 9805938921 and 9459679166. There is further recital in police report that accused is owner of mobile No. 9805938921 and mobile took into possession vide seizure memo by I.O. There is further recital in police report that applicant has given disclosure statement on

dated 28.01.2014 that applicant along with co-accused Balbir and Himal engaged a Scorpio vehicle on rent from Kandaghat on the pretext to bring labour and thereafter committed the criminal offence and also stolen three idols of Mahatma Buddha and also stolen silver and ` 7000/- (Rupees seven thousand only) from Gompa temple. There is recital in police report that all accused persons mixed some intoxicated substance in sweets and caused the death of deceased person by giving him wine when he became unconscious. There is further recital in police report that other co-accused Balbir is also arrested. There is further recital in police report that third co-accused Himal is still to be arrested in present case. There is further recital in police report that challan has been filed in Court of learned Sessions Judge Kinnaur at Reckongpeo on dated 26.4.2014. There is further recital in police report that applicant is resident of Nepal and if applicant is released on bail then trial of case would be adversely effected. 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.

5. Following points arise for determination in this bail application:-

1. Whether bail application filed under Section 439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of anticipatory bail application?

2. Final Order.

Findings upon Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete in present case and challan has also been filed and no recovery is to be effected from applicant and on this ground applicant be released on bail is rejected being devoid of any force for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In the present case applicant is facing the grave charge of culpable homicide amounting to murder which is the gravest form of criminal offence. Keeping in view the gravity of offence it is not expedient in the ends of justice to release the applicant on bail. If applicant is released on bail at this stage then interest of State and general public will be adversely effected and trial of the case will also be adversely effected.

8. Another submission of learned Advocate appearing on behalf of the applicant that there is no eye witness in present case and present case is based on circumstantial evidence and on this ground applicant be released on bail is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that criminal offence can be proved by prosecution by way

of two modes. (1) Direct eye witness (2) Circumstantial evidence. By way of proving criminal case through circumstantial evidence is permissible under criminal law. There is no provision of law that all criminal offences should be proved by prosecution by way of only direct eye evidence.

9. Submission of learned Additional Advocate General appearing on behalf of the State that keeping in view the gravity of criminal offence against the applicant bail application filed by applicant under Section 439 Cr.P.C. be rejected is accepted for the reasons hereinafter mentioned. The applicant is facing grave offence of criminal charge i.e. culpable homicide amounting to murder. Court is of the opinion that if applicant is released on bail at this stage then trial of case will be adversely effected. In view of above stated facts point No.1 is answered in negative.

Point No. 2

Final Order

10. In view of my findings upon point No. 1 bail application filed under Section 439 Cr.P.C. is rejected. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 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. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Mohan Singh. ...Appellant.

Versus

State of H.P. ...Respondent.

Cr.A. No. 426 of 2011
Reserved on: 10.12.2014
Decided on: 11.12. 2014

N.D.P.S. Act, 1985- Section 20- As per prosecution case, accused was found in possession of 1.930 kg. of charas- independent witness had not supported the prosecution version- it was proved that police Station Anni was surrounded by many residential houses and shops and there were houses in the vicinity- however, no person was associated from those houses- police officials stated that efforts were made to associate independent witness but no person was available- held, that it is unbelievable that no one was available in the house- ordinarily houses are occupied in the villages- therefore, testimony of the prosecution witnesses that they tried to associate independent witness cannot be relied upon- hence, accused acquitted. (Para-13 to 14)

For the Appellant: Mr. Suresh Kumar Thakur, Advocate.
For the Respondent: Mr. P.M. Negi, Dy. A.G.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

This appeal is directed against the judgment dated 29.10.2011 rendered by the Special Judge (II), Kinnaur at Rampur in RBT No. 60-AR/3 of

2011, whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offence punishable under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for a period of two years.

2. Case of the prosecution, in a nutshell, is that on 23.3.2011 at 12.35 P.M., police party headed by PW-5 SI Gurbachan Singh comprising of ASI Rajinder Pal, PW-2 HC Ten Singh and PW-3 HHC Kashmi Ram left Police Station, Ani in official vehicle No. HP 34-A-3830 towards Taluna side. At about 1.30 P.M., when they were present at Taluna bifurcation, vehicle No. HP-01K-6001 being driven by PW-1 Anuj Kumar came from Luhari side and stopped there. PW-1 Anuj Kumar started chatting with the police party. In the meanwhile, accused came from Taluna link road towards main Ani-Luhari road. On seeing the police party, he turned back and tried to flee. On suspicion, he was chased and over powered by the police. The place where the accused was apprehended was an isolated and secluded place. There was no habitation nearby. Therefore, SI Gurbachan Singh sent HHC Kashmi Ram in search of independent witnesses towards Haripur. He came back after ten minutes as he could not find any independent witnesses. SI Gurbachan Singh joined Anuj Kumar and HC Ten Singh as witnesses and in their presence; he informed the accused that it was intended to conduct his personal search as well as search of his bag. The accused opted to be searched by the police vide consent memo Ex.PW-2/A. Thereafter, SI Gurbachan Singh alongwith witnesses gave their personal search to the accused. No incriminating material was found from the witnesses. On checking of the accused one polythene envelope containing charas weighting 1 Kg. 930 grams was found, which was kept in the bag. The polythene envelope containing charas was put back into the same bag. It was made into parcel and sealed with seal impression 'H'. NCB form Ex.PW-5/A in triplicate was updated. Sample of seal Ex.PW-2/C was drawn and the seal was handed over to PW-1 Anuj Kumar. Rukka Ex.PW-2/D was prepared. It was sent to the Police Station, FIR Ex.PW-3/B was registered. The case property was deposited in the Malkhana by the police. The contraband was sent to F.S.L., Junga. The report of F.S.L. Ex.PW-5/D was received. Police investigated the case and the challan was put up in the court after completing all the codal formalities.

3. Prosecution examined as many as 8 witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He has denied the case of the prosecution in entirety. Learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Mr. Suresh Kumar Thakur, learned counsel for the appellant has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. P.M. Negi, learned Deputy Advocate General has supported the judgment passed by the trial Court.

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

7. PW-1 Anuj has deposed that he was employed as a Driver in Taxi No. HP-01K-6001. He was plying this vehicle between Ani and Luhari. On 23.3.2011, he was going from Luhari to Ani. The police met him at Haripur and

boarded his vehicle. They alighted from his vehicle at Ani. The police did not apprehend the accused in his presence near Taluna link road nor his search was conducted by the police in his presence. He was declared hostile. He was cross-examined by the learned Public Prosecutor. He has denied the suggestion that on 23.3.2011, police had joined him in raiding party. He has denied the suggestion that at 1.30 P.M. when the police patrolling party was present at Taluna link road, accused came from the side of Taluna road and on seeing the police party he turned back and tried to escape. He has also denied that accused was apprehended by the police by chasing him for about 30 meters. He has denied that when the accused was apprehended, he was scared and he had concealed one pink colour bag inside his jacket. He has denied that SI Gurbachan Singh sent HHC Kashmi Ram towards Haripur to bring local witnesses. However, he came back after ten minutes and told that no witness was available. He has also denied that SI Gurbachan Singh joined him and Ten Singh as witnesses and informed the accused orally as well as in writing that it was intended to conduct his personal search and search of the bag. He has also denied the suggestion that accused opted to be searched by the police on the spot. He has also denied the suggestion that he alongwith SI Gurbachan Singh and HC Ten Singh gave their personal search to the accused. He has also denied the suggestion that the bag of the accused was searched in which one polythene envelope was contained in which charas in the shape of balls was kept and it weighed 1 kg 930 grams. He has denied the sealing on the spot. He has also denied the suggestion that SI Gurbachan Singh prepared Rukka and sent the same to the Police Station through HHC Kashmi Ram. However, he has admitted consent memo mark 'A' and seizure memo mark 'C'. He has denied the suggestion that he has signed these documents admitting them to be correct. He did not go through the contents of these documents before signing the same. He has signed the documents at Police Station, Ani. When he put his signatures on mark 'C' it was half written and the remaining portion of the document was blank. In his cross-examination by the learned defence counsel, he has admitted that Police Station, Ani is surrounded by many residential houses. He has also admitted that residential houses were situated at a distance of about 50 meters from Taluna bifurcation. The House of Pradhan, Gram Panchayat, Taluna was situated below the road near Taluna bifurcation. He has admitted that he has signed all the documents in the Police Station at one time.

8. PW-2 HC Ten Singh has testified that on 23.3.2011, he alongwith ASI Rajinder Pal, HHC Kashmi Ram and SI Gurbachan Singh was present at Taluna link road in connection with routine patrol duty and traffic checking duty. At about 1.30 P.M; vehicle No.HP-01K-6001 came from Luhari side which was being driven by Anuj. The vehicle was stopped. . Anuj started talking to them. In the meanwhile, accused came from Taluna side. He tried to run away. He was chased. He disclosed his identity. SI Gurbachan Singh sent HHC Kashmi Ram in search of local witnesses as the place where the accused was apprehended was an isolated and secluded place. However, HHC Kashmi Ram came back after ten minutes and told that no witness was available. SI Gurbachan Singh joined him and Anuj as witnesses. The accused was informed about his right to be searched before Magistrate or Gazetted Officer. Accused consented to be searched by the Police Officer vide memo Ex.PW-2/A. SI Gurbachan alongwith him and Anuj Kumar gave their personal search to the accused. The bag of the accused was searched. It contained charas. It was put back in the same bag and the bag was made into a parcel which was sealed with seal impression 'H'. NCB from in triplicate was updated by SI Gurbachan Singh. Thereafter, he obtained specimen of seal Ex.PW-2/C and handed over the seal to Anuj Kumar. In his cross-examination, he has admitted that a house was

situated below Taluna bifurcation. However, he was not aware that the house belonged to Ex-Pradhan of Gram Panchayat, Taluna. The house of Shambu Ram retired police constable was situated at a distance of 250 meters from the spot. One or two houses were situated near the house of Shambu Ram on both the sides of road. Those houses were situated from Taluna bifurcation towards, Ani. He did not recollect in which direction HC Kashmi Ram had gone in search of witnesses.

9. PW-3 Kashmi Ram has deposed the manner in which accused was apprehended, search was conducted and contraband was recovered. According to him, the place where the accused was apprehended was an isolated and secluded place. SI Gurbachan Singh sent him to bring independent witnesses. He went towards Haripur side in search of independent witnesses. No witness was available and he returned after ten minutes. In his cross-examination, he has admitted that at a distance of about 250 meters from the spot there was a house of retired police constable Shambu Ram and near his house there were one or two houses on both the sides of road. He did not call any witness from those houses because nobody was available. The house of Ex-Pradhan of Taluna was situated at a distance of about 250 meters below the road at Taluna bifurcation.

10. Statement of PW-4 HHC Jia Lal is formal in nature.

11. PW-5 SI Gurbachan Singh has deposed the manner in which accused was apprehended and the contraband was recovered. It was sealed and seizure memo was prepared. According to him, the place where the accused was apprehended was an isolated and secluded place. There was no habitation, therefore, he sent HHC Kashmi Ram in search of independent witnesses towards Haripur. He came back after ten minutes and told that he could not find any independent witness. Thereafter, he joined Anuj Kumar and HC Ten Singh. In his cross-examination, he has admitted that the house of Shambu Ram retired police constable was situated on the road at a distance of about 100-150 meters from the Taluna bifurcation towards Ani. He has also admitted that one or two houses were also situated besides the house of Shambu Ram. Volunteered that the house of Shambu Ram and others were not visible from the spot. HHC Kashmi Ram had gone in search of witnesses towards Ani side.

12. Case of the prosecution has not been supported by independent witness PW-1 Anuj Kumar. His presence on the spot on 23.3.2011 is also doubtful. However, in his cross-examination by the learned counsel appearing on behalf of the accused has admitted that the Police Station, Ani was surrounded by many residential houses and shops. He has also admitted that residential houses were situated at a distance of about 50 meters from Taluna bifurcation. He has also admitted that he has signed all the documents in the Police Station at one time. PW-2 HC Ten Singh has deposed that SI Gurbachan Singh had sent HHC Kashmi Ram in search of local witnesses as the place where the accused was apprehended was an isolated and secluded. HHC Kashmi Ram came back after ten minutes and told that no witness was available. In his cross-examination, he has admitted that a house was situated below Taluna bifurcation. However, he was not aware that the house belonged to Ex-Pradhan of Gram Panchayat, Taluna. He has also admitted that the house of Shambu Ram retired police constable was situated at a distance of 250 meters from the spot. One or two houses were situated near the house of Shambu Ram on both the sides of road. Those houses were situated from Taluna bifurcation towards Ani. PW-3 Kashmi Ram has deposed that the place where the accused was apprehended was isolated and secluded. He was asked

by SI Gurbachan Singh to go in search of independent witnesses. He went towards Haripur side in search of independent witnesses, but no witness was available. He returned after ten minutes. In his cross-examination, he has admitted that at a distance of about 250 meters from the spot, there was a house of retired police constable Shambu Ram. There were one or two houses on both the sides of the road. He did not call any witness from those houses because nobody was available in those houses at that time. The house of Ex-Pradhan of Taluna was situated at a distance of about 250 meters below the road at Taluna bifurcation. PW-5 SI Gurbachan Singh has also admitted that the house of Sambhu Ram retired police constable was situated on the road at a distance of about 100 to 150 meters from the Taluna bifurcation towards Ani. He has also admitted that one or two houses were also situated besides the house of Shambu Ram. Volunteered that the house of Shambu Ram and others were not visible from the spot.

13. It is evident from the statements of PW-1 Anuj Kumar, PW-2 HC Ten Singh, PW-3 HHC Kashmi Ram and PW-5 SI Gurcharan Singh that the residential house of one retired police constable Sambhu Ram was at a short distance. The other houses were situated near the house of Sambhu Ram. According to PW-3 Kashmi Ram, he had gone towards Haripur side in search of independent witnesses, but could not find any independent witness. According to him, he had gone to the house of Sambhu Ram. However, none was available. It is not believable that no one was available in the house of Sambhu Ram and in other houses situated near the house of Sambhu. Ordinarily, in villages, the houses are always occupied and it is not believable that no one was available in those houses as per the version of PW-3 HHC Kashmi Ram. It is not one of those cases that independent witnesses were not available. The independent witnesses were available near the place of occurrence but the police has not made the efforts to associate them during the search and seizure. It is not proved that the contraband was recovered from the exclusive and conscious possession of the accused. The sincere efforts were required to be made by the police to associate independent witnesses. PW-3 Kashmi Ram has deposed that he had gone in search of witnesses, but came back after ten minutes.

14. Though the version of the official witnesses can be relied upon in the absence of independent witnesses, but their statements must inspire confidence and should be trustworthy. In the instant case, it is not believable that sincere efforts were made by the police, as discussed hereinabove, to associate independent witnesses from the nearby villages.

15. Consequently, in view of analysis and discussion made hereinabove, the prosecution has failed to prove the case for offence under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 beyond reasonable doubt against the accused.

16. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 29.10.2011 rendered in RBT No. 60-AR/3 of 2011 is set aside. Accused is acquitted of the charge framed against him by giving him benefit of doubt. Fine amount, if already deposited, be refunded to the accused. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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

Mohit Kumar son of Shri Dalip Singh ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1242 of 2014
Order Reserved on 19th November, 2014
Date of Order 11th December, 2014

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 307, 341, 323, 504 and 506 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–in the present case, investigation is complete- challan has been filed in the Court- therefore, it would not to be appropriate to detain the applicant in custody- hence, the applicant is ordered to be released on bail.

(Para-6 to 11)

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. K.B. Khajuria, 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 is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 51 of 2014 dated 12.6.2014 registered under Sections 307, 341, 323, 504 and 506 of Indian Penal Code at P.S. Talai District Bilaspur (HP).

2. It is pleaded that applicant is innocent and he did not commit any offence. It is pleaded that mother of applicant has given an affidavit that she was attacked by some unknown person in the dark and applicant tried to rescue his mother from the clutches of assailant. It is pleaded that applicant will abide by terms and conditions imposed by the Court. It is further pleaded that applicant undertakes that he would not tamper with prosecution evidence and will not threat the prosecution witnesses in any manner and will not hamper the case of prosecution if bail is granted. It is also pleaded that applicant also undertakes that he would appear before the Court as directed by the Court. Prayer for acceptance of bail application filed under Section 439 Cr.P.C. is sought.

3. Per contra police report filed. As per police report, FIR No. 51 of 2014 dated 12.6.2014 registered under Sections 307, 341, 323, 504 and 506 of Indian Penal Code in Police Station Talai District Bilaspur (H.P.) against the

applicant. There is recital in police report that Shri Dalip Singh son of Chokas Ram is resident of village Majher Tehsil Jhandula District Bilaspur H.P. There is further recital in police report that Dalip Singh is agriculturist by profession and he has two sons and both are married. There is recital in police report that Mohit Kumar is elder son of Dalip Singh and he is posted in Forest Department at Sarkaghat Circle. There is recital in police report that Mohit Kumar used to come in residential house in intoxicated condition and used to abuse the entire family members and also used to quarrel. There is also recital in police report that on dated 11.6.2014 at 11 PM night Mohit Kumar accused came in intoxicated condition and started abusing his mother Sunita Devi and also used abusive language. There is further recital in police report that Dalip Singh and Sunita Devi requested the accused not to use abusive language. There is further recital in police report that thereafter accused dragged his mother outside from the room and inflicted injuries upon head, arms and other parts of his mother with sticks. There is recital in police report that when mother of accused tried to run away from the place of incident then accused obstructed his mother and beaten his mother with sticks. There is recital in police report that blood oozed out from the head of injured i.e. mother of accused and right arm of mother of accused got fractured due to injuries given by accused. There is further recital in police report that thereafter accused stood in the sehan and threatened that if any person uttered anything against the accused then he would kill him. There is recital in police report that medical examination of injured was conducted and MLC was obtained. There is also recital in police report that injured was referred to regional hospital Hamirpur and thereafter injured was referred to Medical College Tanda. There is further recital in police report that place of incident was inspected by Investigating Officer and site plan was prepared and photographs took. There is recital in police report that shirt, salwar, scarf and bra clotted with blood of injured took into possession and sealed in parcel. There is recital in police report that report of FSL sought and as per FSL report blood Group B was found upon the clothes of injured person and human blood was also found upon the sticks used in commission of criminal offence. There is also recital in police report that blood was also found upon the bangles of injured and it is also found that wife of accused is residing in her parental house along with her children. There is recital in police report that proceedings under Sections 107 and 151 of Code of Criminal Procedure are also initiated against the applicant. There is also recital in police report that challan has been filed in the Court and if applicant is released on bail then applicant will induce and threat the prosecution witnesses. 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.

5. Following points arise for determination in this bail application:-

1. Whether the bail application filed under Section 439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

<u>Findings on Point No.1</u>

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete in present case and challan has already been filed in the Court and any condition imposed by Court upon the applicant will be binding upon applicant 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.*** Trial of the case will be completed in due course of time. It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period.

8. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. In view of the fact that investigation has been completed in present case and in view of the fact that challan has been filed in present case and in view of the fact that trial will be concluded in due course of time it is held that it is not expedient in the ends of justice to keep the applicant in jail. Court is of the opinion that if applicant is released on bail at this stage then interest of State and general public will not be adversely affected in present case.

9. 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. Court is of the opinion that if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail strictly in accordance with law.

10. Another submission of learned Additional Advocate General appearing on behalf of the non-applicant that if the applicant is released on bail then applicant will commit the similar offence 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 that applicant will not commit the similar offence qua which he is accused. Court is of the opinion that if applicant will commit similar offence after grant of bail then prosecution will be at liberty to file application for cancellation of bail. In view of above stated facts, point No.1 is answered in affirmative.

Point No.2

Final Order

11. 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. 1 lac with

two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will attend the proceedings of learned trial Court regularly till conclusion of trial in accordance with law. (ii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address in written manner to the Investigating Officer and Court. (vi) That applicant will not beat his family members in intoxicated condition in the residential house. Applicant be released only if not required in any other criminal case. Bail application filed under Section 439 Cr.P.C. stands disposed of. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

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

Jaskaran Singh son of Shri Swaran Singh ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1330 of 2014
Order Reserved on 3rd December, 2014
Date of Order 12th December, 2014

Code of Criminal Procedure, 1973- Section 439 - An FIR was registered against the accused for the commission of offences punishable under Sections 279, 337, 338, 304-A, 489-B and 489-C read with Section 34 of IPC- applicant is facing trial before the Court- case is listed for recording the statement of the accused under Section 313 Cr.P.C. - 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- the applicant is facing trial for counterfeiting currency notes, which is an offence against the society and Nation- the fact that trial is at last stage is not sufficient to release the applicant on bail, however the court can be directed to conduct the trial expeditiously- hence, bail application rejected and trial Court directed to dispose of the case within the period of one month. (Para-6 to 9)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration) AIR 1978 SC 179
The State Vs. Captain Jagjit Singh AIR 1962 SC 253

For the Applicant: Mr. N.K. Thakur, Sr. Advocate with Mr. Ramesh Sharma,Advocate
For the Non-applicant: Mr. R.P. Singh, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 67 of 2013 dated 24.5.2013 registered under Sections 279, 337, 338, 304-A, 489-B and 489-C read with Section 34 of Indian Penal Code at P.S. Amb, District Una (HP).

2. It is pleaded that prosecution has concluded its evidence on dated 21.8.2014 and case was posted for recording the statement of accused under Section 313 Cr.P.C. for dated 22.9.2014. It is pleaded that case was again adjourned for recording statement of accused under Section 313 Cr.P.C. for dated 29.10.2014 and again on dated 18.11.2014. It is pleaded that thereafter case is posted for recording statement of applicant under Section 313 Cr.P.C. on dated 23.12.2014. It is also pleaded that only non-bailable offence is under Section 489-B IPC which is with respect to use the forged currency as genuine. It is pleaded that entire prosecution evidence is closed and one of co-accused Roop Lal already granted pre-arrest bail. It is pleaded that bail application of applicant was rejected by the Court. It is also pleaded that since four months statement of applicant under Section 313 Cr.P.C. not recorded prayer for acceptance of bail application is sought.

3. Per contra police report filed. As per police report FIR No. 67 of 2013 dated 24.5.2013 registered under Sections 279, 337, 338, 304-A, 489B, 489C read with Section 34 of Indian Penal Code and 196 of Motor Vehicles Act in Police Station Amb District Una (H.P.) against the applicant. There is recital in police report that on dated 24.5.2013 complainant was present in his shop and at about 8.50 PM a vehicle having registration No. PB08V-4000 Indica came in very fast speed from Una side and struck with motor cycle. There is recital in police report that person travelling upon motor cycle sustained injuries. There is further recital in police report that person travelling in vehicle No. PB08V-4000 Indica left the vehicle from the place of incident. There is further recital in police report that during investigation place of incident was inspected and site plan was prepared and photographs obtained. There is further recital in police report that during investigation vehicle having registration No. PB08V-4000 Indica and motor cycle were took into possession vide seizure memo and both vehicles were mechanically examined. There is further recital in police report that in the dash board of vehicle No. PB08V-4000 counterfeit currency notes were found and during investigation it was found that vehicle having registration No. PB08V-4000 was driven by Jaskaran and it was also observed that vehicle No. PB08V-4000 was owned by Jaskaran applicant. There is further recital in police report that counterfeit currency notes were sent for examination to RFSL Dharamshala and as per chemical report all currency notes were counterfeit and were not genuine. It is pleaded that due to absence of water marks, due to absence of ultraviolet due to absence of intaglio printing due to difference in size due to printing colour combination currency notes were not found genuine and were counterfeit. There is further recital in police report that counterfeit currency notes were obtained by Jaskaran applicant from Amarjeet Singh @ Sonu son of Nishan Singh resident of village Rasoolpur P.O. Panjgrai Tehsil Batala District Gurdaspur to the tune of Rs.6000/- (Rupees six thousand only) and Rs. 10,000/-(Rupees ten thousand only). There is further recital in police report that even as per disclosure statement Jaskaran had disclosed that he has obtained the counterfeit currency notes from Amarjeet @ Sonu. There is further recital in police report that proceedings for declaring Amarjeet as proclaimed offender

already initiated. There is also recital in police report that applicant deals in counterfeit currency notes business and commercial business of currency notes affected the economy of country. There is further recital in police report that challan against co-accused Jaskaran and Roop Lal already stood filed in the Court of learned Sessions Judge, Una and same is fixed for recording statement under Section 313 Cr.P.C. on dated 23.12.2014. There is further recital in police report that if applicant is released on bail at this stage then applicant would not appear in Court and trial of case will be adversely effected. 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.

5. Following points arise for determination in this bail application:-

1. Whether bail application filed under Section 439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that prosecution has concluded its evidence on dated 21.8.2014 and thereafter criminal case was listed for recording statement of applicant under Section 313 Cr.P.C. several times but still statement of applicant was not recorded under Section 313 Cr.P.C. by learned trial Court and on this ground bail application filed by applicant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In present case since criminal case is in last stage and prosecution evidence already stood closed therefore direction would be issued to learned trial Court to dispose of the case expeditiously within one month in accordance with law. It is held that it is not expedient in the ends of justice to release the applicant at this state when prosecution evidence already stood closed.

7. Another submission of learned Advocate appearing on behalf of the applicant that even prosecution did not support the prosecution story and offence under Section 489-B and 489-C IPC is not proved and on this ground bail application filed by applicant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that whether offence under Section 489-B and 489-C IPC is proved or not will be decided by learned trial Court when criminal case will be disposed of finally by learned trial Court after giving due opportunity to both the parties to lead evidence in support of their case. It is held that in view of the fact that criminal case is in last stage of disposal it is not expedient in the ends of justice to release the applicant on bail at this stage. It is further held that if applicant is released on bail then interest of State and general public will be adversely effected because present case is a case of counterfeit currency notes and the offence of counterfeit currency notes is the offence against the economy of Nation.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that applicant is facing the trial of counterfeit currency notes which is an offence against the Nation and on this ground bail application filed by applicant be rejected is accepted for the reasons hereinafter mentioned. Offence under Section 489-B is relating to forged currency which is offence against the society and Nation and no one can be allowed to commit such type of offence in order to get personal commercial gain at the cost of Nation and Society. In view of above stated facts point No.1 is answered in negative.

Point No.2

Final Order

9. In view of my findings on point No.1 bail application filed by applicant under Section 439 Cr.P.C. is rejected in the ends of justice. However learned trial Court is directed to dispose of the case finally within one month after the receipt of certified copy of this order. Learned Additional Registrar (Judicial) is directed to transmit the certified copy of this order to learned trial Court for compliance. Bail application filed under Section 439 Cr.P.C. stands disposed of. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

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

Rafiq Hussain son of Babu Khan ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1263 of 2014
Order Reserved on 3rd December,2014
Date of Order 12th December, 2014

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the applicant for the commission of offences punishable under Section 307 of IPC and Section 25 of Arms Act- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- the allegations against the applicant are grave and heinous in nature- it is alleged that applicant attempted to murder the injured- the injured is under medical treatment- investigation is at initial stage- custodial interrogation of the applicant is necessary- hence, bail application rejected. (Para- 9 to 11)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration) AIR 1978 SC 179

The State Vs. Captain Jagjit Singh AIR 1962 SC 253

For the Applicant: Mr. Arvind Sharma, Advocate.
For the Non-applicant: Mr. R.P. Singh Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 125 of 2014 dated 19.9.2014 registered under Section 307 IPC and 25-54-59 of Arms Act in Police Station Nadaun District Hamirpur Himachal Pradesh.

2. It is pleaded that complaint has been filed just to harass and humiliate the applicant and applicant does not own any gun and even family members of applicant also do not own any gun. It is pleaded that applicant is innocent and is not connected with any criminal offence. It is pleaded that in fact applicant is victim of enmity between the complainant and Subhash Chand. It is pleaded that applicant will join the investigation of case and further pleaded that applicant will not tamper with prosecution evidence and will abide by all terms and conditions imposed by Court. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. As per police report case under Section 307 IPC and under Section 25-54-59 of Arms Act is registered against the applicant in P.S. Nadaun vide FIR No. 125 of 2014 dated 19.9.2014. There is recital in police report that Smt. Kamlesh Kumari has two sons and one daughter. There is further recital in police report that daughter of complainant Kamlesh Kumari stood married and her two sons are bachelor. There is further recital in police report that elder son of complainant namely Kamlesh Kumari is posted as Panchayat Secretary at Jolsappad and younger son of complainant namely Kamelsh Kumari is driver by profession. There is further recital in police report that on dated 18.9.2014 at 5 PM Susheel Kumar telephoned complainant Kamlesh Kumari that he would come to the house and he also requested to prepare the meal. There is further recital in police report that at 11 PM again telephone of Susheel Kumar came and complainant inquired about whereabouts of Susheel Kumar, but he could not reply properly. There is further recital in police report that thereafter complainant and her son Manoj Kumar went to a well which was situated nearby the path and thereafter complainant saw that Susheel Kumar was fell upon the path and blood was oozing out from the mouth of Susheel Kumar. There is further recital in police report that thereafter injured Susheel Kumar was brought to Hamirpur for his medical treatment and thereafter injured was referred to Medical College Tanda. There is further recital in police report that thereafter CT scan of complainant was conducted and as per CT scan report injured had sustained injury from the gun upon his mouth. There is also recital in police report that thereafter injured was referred to IGMC and case was registered under Section 307 IPC and under Sections 25-54-59 of Arms Act and matter was investigated. There is also recital in police report that during investigation site plan was prepared and blood clotted earth and sample of blood were took into possession vide seizure memo and statements of witnesses under Section 161 Cr.P.C. recorded. There is recital in police report that injured was operated and injured disclosed the name of accused persons. There is further recital in police report that injured is under treatment in PGI Chandigarh. 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.

5. Following points arise for determination in this bail application:-

1. Whether anticipatory bail application filed under Section 438 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of anticipatory bail application?

2. Final Order.

Findings upon Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that applicant is victim of enmity between the complainant and Subhash Chand and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. The fact whether complaint has been filed due to enmity or not cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

8. Another submission of learned Advocate appearing on behalf of the applicant that present complaint has been filed due to ill-will against the applicant and his family members and on this ground anticipatory bail application filed by applicant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Fact whether the complaint has been filed due to ill-will cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

9. Another submission of learned Advocate appearing on behalf of the applicant that applicant will not tamper with prosecution evidence and will abide by all terms and conditions imposed by Court and on this ground anticipatory bail application filed by applicant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In present case allegations against the applicant are very grave and heinous in nature. Allegations against the applicant are that applicant attempted to murder injured namely Susheel Kumar through gun and there is prima facie evidence on record that injured had sustained injuries by way of gun fire upon his mouth and injured is still under medical treatment. The punishment under Section 307 IPC is imprisonment for life when hurt is caused to injured person. Court is of the opinion that in view of gravity of offence punishable under Section 307 IPC it is not expedient in the ends of justice to grant anticipatory bail to applicant because investigation is at

the initial stage of case. Court is of the opinion that if anticipatory bail is granted to the applicant at this stage then investigation of the case will be adversely affected. Court is also of the opinion that if anticipatory bail is granted to the applicant during the initial stage of investigation then interest of State and general public will also be adversely affected.

10. Submission of learned Additional Advocate General appearing on behalf of the State that if applicant is released on anticipatory bail at this stage then applicant will induce and threat the prosecution witness and on this ground anticipatory bail application be rejected is accepted for the reasons hereinafter mentioned. There is apprehension in the mind of Court that if applicant is released on bail then applicant will induce and threat the prosecution witnesses.

11. In view of gravity of offence under Section 307 IPC in which the punishment is for life imprisonment and in view of the fact that injured had sustained gun shot injuries upon his mouth and in view of the fact that injured is still as indoor patient it is held that custodial interrogation is essential in present case in the ends of justice. Point No.1 is answered in negative.

Point No. 2

Final Order

12. In view of my findings upon point No. 1 anticipatory bail application filed under Section 438 Cr.P.C. is rejected. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this anticipatory bail application filed under Section 438 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.

Cr.MP(M) Nos. 1362, 1363, 1364, 1365 and 1366 of 2014
Order Reserved on 5th December, 2014
Date of Order 12th December, 2014

1. Cr.MP(M) No. 1362 of 2014
Sachin son of Partap Singh ....Applicant
Versus
State of H.P. ....Non-applicant

2. Cr.MP(M) No. 1363 of 2014
Ajeet Singh son of Shri Bihari Lal ....Applicant
Versus
State of H.P. ....Non-applicant

3. Cr.MP(M) No. 1364 of 2014
Vipin Kumar son of Shri Chet Ram ....Applicant
Versus
State of H.P. ....Non-applicant

4. Cr.MP(M) No. 1365 of 2014
Ravinder Kumar son of
Shri Durga Singh Verma ....Applicant
Versus
State of H.P. ....Non-applicant

5.Cr.MP(M) No. 1366 of 2014

Biri Singh son of Shri Roop Lal ....Applicant

Versus

State of H.P. ....Non-applicant

Code of Criminal Procedure, 1973- Section 439 - An FIR was registered for the commission of offences punishable under Sections 363, 342, 376D, 323, 201 and 511 IPC and Sections 6 and 17 of the Protection of Children from Sexual Offences Act 2012- the allegations against the applicants are that they had committed gang rape upon minor prosecutrix- such offences are increasing in the society and should be viewed strictly- mere fact that statements under Section 164 Cr.P.C are contradictory is not sufficient to discard the prosecution case at the stage of bail- considering the gravity of the offence and the impact on society, bail application rejected. (Para-6 to 12)

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(s): Mr. K.S. Thakur Advocate with Mr.Vijay Verma, Advocate.

For the Non-applicant: Mr. R.P. Singh Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

All bail applications have been filed qua FIR No. 19 of 2014 dated 21.1.2014 registered under Sections 363, 342, 376D, 323, 201 and 511 IPC and Sections 6 and 17 of the Protection of Children from Sexual Offences Act 2012. All bail applications are consolidated and disposed of by same order in order to avoid repetition.

2. It is pleaded that applicants are innocent and they have been falsely implicated in present case. It is further pleaded that investigation of the case is complete and charge sheet has been filed in the month of March 2014 and it is further pleaded that no recovery is to be effected from the applicants. It is also pleaded that both FIRs No. 23 of 2014 dated 20.01.2014 and 19 of 2014 dated 21.01.2014 are contradictory to each other. It is further pleaded that as per FIR No. 23 of 2014 occurrence took place at Hotel Monal Mandi and as per FIR No. 19 occurrence took place in the house of prosecutrix at Dharampur which is approximately at a distance of 90 Kms. and hence prosecution story did not inspire any confidence. It is further pleaded that statement of complainant was recorded on 28.1.2014 wherein complainant stated before learned Magistrate that except co-accused Ravi all four accused have committed rape upon her in the intervening night of 17.1.2014 while fifth co-accused Ravi attempted to commit rape with other prosecutrix. It is pleaded that on contrary as per statement of other prosecutrix recorded under Section 164 Cr.P.C. before learned Magistrate co-accused Beer committed rape with other prosecutrix and

she did not name any other co-accused involved in the criminal offence. It is pleaded that even other prosecutrix has not stated anything qua attempt of rape with her. It is further pleaded that in view of contradictory statements of both prosecutrix no offence under IPC and POCSO Act is made out. It is pleaded that neither identification of accused persons established nor any test identification parade was conducted. It is further pleaded that medical examination of prosecutrix was conducted on dated 21.1.2014 when first FIR was lodged at Mandi and as per medical certificate no rape or attempt to rape was committed and further pleaded that MLC of complainant did not suggest any injury on any part of the body of prosecutrix except small abrasion on right little finger. It is pleaded that deep rooted conspiracy has been hatched against accused persons. It is pleaded that applicants will join the investigation of the case as and when required and applicants will not tamper with prosecution witnesses in any manner. Prayer for acceptance of bail applications is sought.

3. Per contra police report filed. As per police report FIR No. 19 of 2014 dated 21.01.2014 registered under Sections 363, 342, 376D, 323, 201 and 511 IPC and Sections 6 and 17 of POCSO Act 2012 in Police Station Sarkaghat District Mandi (H.P.) against the applicants. There is recital in police report that all accused persons took two minor prosecutrix to Monal Hotel situated at Mandi and thereafter on the intervening night of 17.1.2014 and 18.1.2014 all five accused persons have committed gang rape with minor prosecutrix. There is further recital in police report that medical examination of prosecutrix was got conducted and MLC obtained. There is further recital in police report that on dated 21.1.2014 as per location shown by prosecutrix place of incident was inspected and site plan was prepared and videography was conducted. There is further recital in police report that bed sheet was also took into possession vide seizure memo and vehicle No. HP-28-8982 along with driving licence also took into possession. There is further recital in police report that statements of minor prosecutrix under Section 164 Cr.P.C. were recorded by Additional Chief Judicial Magistrate Sarkaghat and copies of birth certificates of minor prosecutrix and family register were also obtained. There is recital in police report that statements of prosecution witnesses under Section 161 Cr.P.C. recorded. There is recital in police report that as per birth certificates minor prosecutrix were born on dated 8.9.1999 and on dated 27.8.1997 respectively and both prosecutrix are minors. There is further recital in police report that challan under Sections 363, 342, 376D, 323, 201 and 511 IPC and Sections 6 and 17 of POCSO Act 2012 also filed against accused persons which is pending before learned Sessions Judge Mandi (H.P.).

4. Court heard learned Advocate appearing on behalf of the applicants and learned Additional Advocate General appearing on behalf of the State and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether bail applications filed under Section 439 Cr.P.C. are liable to be accepted as mentioned in memorandum of grounds of bail applications?

2. Final Order.

<u>Findings on Point No.1</u>

6. Submission of learned Advocate appearing on behalf of applicants that statements of both prosecutrix recorded under Section 164 Cr.P.C. by learned Additional Chief Judicial Magistrate Sarkaghat on dated 28.1.2014 are contradictory to each other qua place of incident and on this ground bail

applications filed by applicants be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that fact of contradictory statements of two minor prosecutrix qua place of incident recorded under Section 164 Cr.P.C. will be considered at the time of final disposal of case and same cannot be considered in bail matter because statements recorded under Section 164 Cr.P.C. could be used only for corroboration or contradiction purpose during the trial of the case as per law.

7. Another submission of learned Advocate appearing on behalf of the applicants that applicants are innocent and they did not commit any offence cannot be decided at this stage. Same fact will be decided when the criminal case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

8. Another submission of learned Advocate appearing on behalf of the applicants that applicants are young youths and their future prospects are at stake and on this ground bail applications be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that allegations against the applicants are for commission of criminal offence of gang rape upon two minor prosecutrix. Gang rapes are increasing in the society day by day. It is well settled law that gang rape offences are stigma on the society. It is well settled law that every girl and woman has legal right to live in the society with honour and dignity. It is also well settled law that no one can be allowed to attack upon the dignity of minor girls or women in the society in order to maintain harmony in the society and in order to maintain majesty of law in the society.

9. Another submission of learned Advocate appearing on behalf of the applicants that investigation in present case is complete and charge sheet has been filed and on this ground bail applications filed by applicants be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that in view of gravity of offence against the applicants under Section 376D IPC i.e. gang rape and in view of allegations of criminal offence under Sections 6 and 17 of POCSO Act 2012 i.e. aggravated penetrative sexual assault upon minor prosecutrix it is not expedient in the ends of justice to release the applicants on bail at this stage.

10. Another submission of learned Advocate appearing on behalf of the applicants that identification of accused persons was not established and identification parade was not conducted and on this ground bail applications filed by applicants be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. As per Section 54-A of the Code of Criminal Procedure 1973 identification parade is conducted if the same is necessary for the purpose of investigation of the case. It is well settled law that identification parade is not mandatory in all criminal offences.

11. Another submission of learned Advocate appearing on behalf of the applicants that MLC of minor prosecutrix did not suggest any injury on any part of body of minor prosecutrix except small abrasions on right little finger and on this ground bail be granted to applicants is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that opinion of medical officer is only advisory in nature and even as per Section 30 of Protection of Children from Sexual Offence Act 2012 the Court shall presume culpable mental state of accused. It is well settled law that POCSO Act 2012 is a special Act and it is also well settled law that when there is conflict between the special law and general law then special law always prevails upon the general law.

12. Another submission of learned Advocate appearing on behalf of the applicants that learned trial Court has not considered the medical evidence, contents of FIR and statements of both girls under Section 164 Cr.P.C. and on this ground bail be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that medical evidence is proved as per testimony of medical officer and till date statement of medical officer is not recorded in present case therefore it is not expedient in the ends of justice to release applicant on bail. Similarly contents of FIR and contents of statements recorded under Section 164 Cr.P.C. could be used only for corroboration and contradiction purpose during trial of the case. 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.***

13. Submission of learned Additional Advocate General appearing on behalf of the State that in view of gravity of offence against the applicants under Sections 363, 342, 376D, 323, 201 and 511 IPC and Sections 6 and 17 of POCSO Act 2012 bail application filed by applicants be rejected is accepted for the reasons hereinafter mentioned. Keeping in view the allegations of gang rape and in view of allegations of aggravated penetrative sexual assault upon minor prosecutrix as per POCSO Act 2012 and in view of the fact that both minor prosecutrix were minor at the time of commission of alleged offence Court is of the opinion that it is not expedient in the ends of justice to release the applicants on bail at this stage till testimonies of minor prosecutrix are not recorded in trial Court. Court is also of the opinion that if applicants are released on bail at this stage then trial of case will be adversely effected and there is apprehension in the mind of Court that if applicants are released at this stage then applicants will induce and threat the prosecution witnesses. Facts of case law cited by learned Advocate appearing on behalf of the applicant i.e. ***2012(1) SCC page 40 titled Sanjay Chandra vs. Central Bureau of Investigation*** and facts of present case are entirely different and distinguishable and are not applicable in present case. Case reported in ***2012(1) SCC page 40 titled Sanjay Chandra vs. Central Bureau of Investigation*** did not relate to gang rape case upon minor prosecutrix under Section 376D IPC and also did not relate to aggravated penetrative sexual assault upon minor prosecutrix under POCSO Act 2012. In view of above stated facts point No.1 is answered in negative.

Point No.2

Final Order

14. In view of my findings on point No.1 bail applications Nos. 1362 of 2014 titled Sachin vs. State of H.P., 1363 of 2014 titled Ajeet Singh vs. State of H.P., 1364 of 2014 tilted Vipin Kumar vs. State of H.P., 1365 of 2014 titled Ravinder Kumar vs. State of H.P. and 1366 of 2014 titled Biri Singh vs. State of H.P. filed by applicants under Section 439 Cr.P.C. are rejected. Bail applications filed under Section 439 Cr.P.C. stand 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 these bail applications filed under Section 439 of Code of Criminal Procedure 1973. Certified copy of order be placed in each connected file forthwith. All pending application(s) if any also disposed of.

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

Safi Mohammed son of Babu Khan ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1264 of 2014
Order Reserved on 3rd December,2014
Date of Order 12th December, 2014

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the applicant for the commission of offences punishable under Section 307 of IPC and Section 25 of Arms Act- held, that while granting bail Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- the allegations against the applicant are grave and heinous in nature- it is alleged that applicant attempted to murder the injured- the injured is under medical treatment- investigation is at initial stage- custodial interrogation of the applicant is necessary- hence, bail application rejected. (Para- 9 to 11)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration) AIR 1978 SC 179.
The State Vs. Captain Jagjit Singh AIR 1962 SC 253

For the Applicant: Mr. Arvind Sharma, Advocate.
For the Non-applicant: Mr. R.P. Singh Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 125 of 2014 dated 19.9.2014 registered under Section 307 IPC and 25-54-59 of Arms Act in Police Station Nadaun District Hamirpur Himachal Pradesh.

2. It is pleaded that complaint has been filed just to harass and humiliate the applicant and applicant does not own any gun and even family members of applicant also do not own any gun. It is pleaded that applicant is innocent and is not connected with any criminal offence. It is pleaded that in fact applicant is victim of enmity between the complainant and Subhash Chand. It is pleaded that applicant will join the investigation of case and further pleaded that applicant will not tamper with prosecution evidence and will abide by all terms and conditions imposed by Court. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. As per police report case under Section 307 IPC and under Section 25-54-59 of Arms Act is registered against

the applicant in P.S. Nadaun vide FIR No. 125 of 2014 dated 19.9.2014. There is recital in police report that Smt. Kamlesh Kumari has two sons and one daughter. There is further recital in police report that daughter of complainant Kamlesh Kumari stood married and her two sons are bachelor. There is further recital in police report that elder son of complainant namely Kamlesh Kumari is posted as Panchayat Secretary at Jolsappad and younger son of complainant namely Kamelsh Kumari is driver by profession. There is further recital in police report that on dated 18.9.2014 at 5 PM Susheel Kumar telephoned complainant Kamlesh Kumari that he would come to the house and he also requested to prepare the meal. There is further recital in police report that at 11 PM again telephone of Susheel Kumar came and complainant inquired about whereabouts of Susheel Kumar, but he could not reply properly. There is further recital in police report that thereafter complainant and her son Manoj Kumar went to a well which was situated nearby the path and thereafter complainant saw that Susheel Kumar was fell upon the path and blood was oozing out from the mouth of Susheel Kumar. There is further recital in police report that thereafter injured Susheel Kumar was brought to Hamirpur for his medical treatment and thereafter injured was referred to Medical College Tanda. There is further recital in police report that thereafter CT scan of complainant was conducted and as per CT scan report injured had sustained injury from the gun upon his mouth. There is also recital in police report that thereafter injured was referred to IGMC and case was registered under Section 307 IPC and under Sections 25-54-59 of Arms Act and matter was investigated. There is also recital in police report that during investigation site plan was prepared and blood clotted earth and sample of blood were took into possession vide seizure memo and statements of witnesses under Section 161 Cr.P.C. recorded. There is recital in police report that injured was operated and injured disclosed the name of accused persons. There is further recital in police report that injured is under treatment in PGI Chandigarh. 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.

5. Following points arise for determination in this bail application:-

1. Whether anticipatory bail application filed under Section 438 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of anticipatory bail application?

2. Final Order.

<u>Findings upon Point No.1</u>

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that applicant is victim of enmity between the complainant and Subhash Chand and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. The fact whether complaint has been filed due to enmity or not cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

8. Another submission of learned Advocate appearing on behalf of the applicant that present complaint has been filed due to ill-will against the applicant and his family members and on this ground anticipatory bail application filed by applicant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. The fact whether the complaint has been filed due to ill-will cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

9. Another submission of learned Advocate appearing on behalf of the applicant that applicant will not tamper with prosecution evidence and will abide by all terms and conditions imposed by Court and on this ground anticipatory bail application filed by applicant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In present case allegations against the applicant are very grave and heinous in nature. Allegations against the applicant are that applicant attempted to murder injured namely Susheel Kumar through gun and there is prima facie evidence on record that injured had sustained injuries by way of gun fire upon his mouth and injured is still under medical treatment. The punishment under Section 307 IPC is imprisonment for life when hurt is caused to injured person. Court is of the opinion that in view of gravity of offence punishable under Section 307 IPC it is not expedient in the ends of justice to grant anticipatory bail to applicant because investigation is at the initial stage of case. Court is of the opinion that if anticipatory bail is granted to the applicant at this stage then investigation of the case will be adversely affected. Court is also of the opinion that if anticipatory bail is granted to the applicant during the initial stage of investigation then interest of State and general public will also be adversely affected.

10. Submission of learned Additional Advocate General appearing on behalf of the State that if applicant is released on anticipatory bail at this stage then applicant will induce and threat the prosecution witness and on this ground anticipatory bail application be rejected is accepted for the reasons hereinafter mentioned. There is apprehension in the mind of Court that if applicant is release3d on bail then applicant will induce and threat the prosecution witnesses.

11. In view of gravity of offence under Section 307 IPC in which the punishment is for life imprisonment and in view of the fact that injured had sustained gun shot injuries upon his mouth and in view of the fact that injured is still as indoor patient it is held that custodial interrogation is essential in present case in the ends of justice. Point No.1 is answered in negative.

Point No. 2

Final Order

12. In view of my findings upon point No. 1 anticipatory bail application filed under Section 438 Cr.P.C. is rejected. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this anticipatory bail application filed under Section

438 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.

Susheel Kumar son of Shri Chet Ram ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1278 of 2014
Order Reserved on 26th November, 2014
Date of Order 12th December, 2014

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 316, 498-A, 325 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- In the present case, investigation has been completed- challan has been filed- therefore, it would not be proper to keep applicant in custody- bail granted. (Para- 7 to 9)

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. Ramakant Sharma, Advocate
For the Non-applicant: Mr. Puneet Razta Deputy Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 70 of 2014 dated 16.5.2014 registered under Sections 316, 498-A, 325 read with Section 34 of Indian Penal Code at P.S. Barmana District Bilaspur (HP).

2. It is pleaded that complainant is wife of applicant and applicant has two daughters. It is pleaded that complainant and her sister have been married to real brothers at Ghagas and both of them do not want to reside there. It is pleaded that wife of applicant and her sister are compelling the family of applicant to give property so that they could settle at Chandigarh. It is pleaded that since parents of applicant refused to give property to the wife of applicant and her sister they have involved the applicant as well as his mother in false

case. It is also pleaded that applicant did not accompany the complainant to Leelavati Hospital for sex determination. It is pleaded that applicant and his mother did not commit any offence under Section 498-A IPC and under Section 325 IPC. It is pleaded that applicant will not tamper with prosecution witnesses in any manner and will not induce and threat the prosecution witnesses in any manner. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. As per police report FIR No. 70 of 2014 dated 16.5.2014 registered under Sections 316, 498A, 325 read with Section 34 of Indian Penal Code in Police Station Barmana District Bilaspur (H.P.) against the applicant. There is recital in police report that complainant Priynka filed a complaint against the accused persons pleaded therein that accused persons are very cruel persons and they did not provide food to her and to her kids. There is further recital in police report that complainant Priynka was medically examined and on dated 09.05.2014 husband of complainant and mother-in-law of complainant inflicted injuries upon the complainant with fist blows and leg blows and killed the child in womb. There is further recital in police report that as per medical officer report it could not be opined whether fetus died due to beatings or died due to some other cause because at the time of medical examination there were no visible injuries seen on any part of body. There is recital in police report that dead body of fetus was in the uterus of complainant and as per medical report fetus was of three months. There is recital in police report that as per further medical report fetus was expelled due to heavy bleeding. There is further recital in police report that statements of prosecution witnesses recorded under Section 161 Cr.P.C. and version of complainant is corroborated by her elder sister. There is recital in police report that even as per statement of complainant recorded under Section 164 Cr.P.C. her sex determination test was conducted in Leelawati Hospital Ghumarwin through Dr. R.D. Sharma. There is further recital in police report that copy of compromise between the complainant and accused was also obtained. There is further recital in police report that investigation is complete and challan has been filed in competent Court of law.

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:-

1. Whether bail application filed under Section 439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete and challan already stood filed in the criminal Court and case will be disposed of in due course of time and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence

of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period.

8. In view of the fact that investigation is already completed and challan already stood filed in criminal Court and in view of the fact that criminal case will be disposed of by learned trial Court in due course of time it is not expedient in the ends of justice to keep the applicant in judicial custody. Court is of the opinion that if applicant is released on bail at this stage then interest of State and general public will not be adversely effected.

9. 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. Court is of the opinion that if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail strictly in accordance with law. It is well settled law that accused is presumed to be innocent until convicted by competent Court of law. In view of above stated facts point No.1 is answered in affirmative.

Point No.2

Final Order

10. In view of findings on point No.1 bail application filed by 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. 1 lac with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will attend the proceedings of trial Court regularly as and when called upon 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 Court at which address the applicant would be available at short notice. (vi) Applicant will not commit any cruelty mentally or physically upon complainant namely Prinyka Kapoor. Applicant be released only if not required in any other criminal case. Bail application filed under Section 439 Cr.P.C. stands disposed of. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

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

Praveen Bharti and another. ...Petitioners.
Versus
State of H.P. and others. ...Respondents.

CWP No. 6864 of 2014
Reserved on: 27.11.2014
Decided on: 3.12. 2014

Constitution of India, 1950- Article 226- Respondent No. 3 issued an advertisement inviting applications for filling up the post of Junior Engineers- petitioners, members of the scheduled castes, participated in the selection process - they qualified the test and were called for interviews - Petitioners were successful but the appointment letters were not issued to them on the basis of instructions dated 9.6.2014- held, that selection process had commenced on 20.5.2014- test was held on 10.1.2014- Interviews were held on 24.3.2014 and 25.3.2014 and the result was declared on 20.4.2014- selection process had commenced and the instructions would only apply prospectively- further held that the reservation of the ex-servicemen is horizontal in nature- the persons have to be first selected against the respective quotas in favour of Ex-servicemen, physically handicapped persons and thereafter depending upon the fact as to which of the reserved categories under Article 16(4) or the residuary general category, they belong to, they have to be adjusted against those categories- Writ petition allowed and respondent directed to fill up the posts of Junior Engineer from the category of scheduled caste ex-servicemen (unreserved) and if the candidates of ex-servicemen scheduled caste are not available, the posts are permitted to be filled up from the candidates belonging to scheduled caste category. (Para-5 to 7)

For the Petitioners: Mr. Adarsh K. Vashishta, Advocate.
For the Respondents: Mr. M.A. Khan, Addl. A.G. with
Mr. P.M. Negi, Dy. A.G. for respondents No.1 and 2.
Ms. Archana Dutt, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Respondent No.3 issued an advertisement No. 25/2013 dated 20.5.2013 whereby applications were invited for filling up the posts of Junior Engineers in IPH/HIMUDA. The last date of receipt of applications was 20.6.2013. Petitioners also participated in the selection process. They belonged to scheduled caste category. Written test was held on 10.1.2014. They qualified the written test and were called for interviews on 24.3.2014 and 25.3.2014, respectively. The result was declared on 20.4.2014. Petitioners were declared successful/suitable by respondent No.3. However, fact of the matter is that

appointment letters were not issued to the petitioners purportedly on the basis of instructions issued on 9.6.2014.

2. Mr. Adarsh Vashistha, learned counsel for the petitioners, has drawn the attention of the Court to page 228 of the *Handbook on Personnel Matters Volume-II (Second Edition).* It reads as under:

> **"From 8.11.1994 there is Vertical Reservation in favour of Scheduled Castes, Scheduled Tribes and the Other Backward Classes under Article 16 (4) of the Constitution. The reservation provided to Ex-servicemen, children/grand children of freedom fighters, physically handicapped persons, antodaya/IRDP and outstanding sportsmen under Article 16 (1) of the Constitution is treated as Horizontal Reservation. The Horizontal Reservation is to be dove tailed with vertical reservation in the following manner:-**
>
> > **"The persons concerned have to be first selected against the respective quotas in favour of Ex-servicemen, physically handicapped persons etc. provided by Horizontal reservations under Article 16 (1) and thereafter depending upon the fact as to which of the reserved categories under Article 16(4) (whether scheduled castes, scheduled tribes or other backward classes) or the residuary general category, they belong to, they have to be suitably adjusted against the said categories."**

3. In continuation to this, the State Government has also issued suitable instructions on 23.10.2010. The text of instructions dated 23.10.2010 read as under:

> **"I am directed to refer to your letter No.H.P.SSSB-B(2)-392/06-17:86 dated 7th September, 2010 on the subject cited above and to say that the horizontal reservation is dove-tailed with the vertical reservation. In the event of non-availability of suitable candidate(s) for appointment against the vacancy under horizontal reservation, the said vacancy can be filled up from the candidate of respective category to whom this vacancy/post originally belong/earmarked by following proper procedure. This Department (Appointment-III) has issued detailed instructions on the subject from time to time and case to case viz. Per (AP.II) B (19)-3/85 dated 14.7.1988 (appearing at page 802 of HB on personnel Matter Vol-II), No. Per (AP) C-F (4)-4/96 dated 12.5.1997 and No. 2-11/72-DP (A.II) dated 28.5.1999 vide letter dated 28th May, 1999, a photocopy each of these letters is annexed. It is requested that the matter may please be examined and decided accordingly."**

4. Mr. M.A. Khan, learned Additional Advocate General has drawn the attention of the Court to instructions Annexure R-II. These instructions are dated 14.7.1998. The crux of the instructions is that in cases where it is obvious that ex-servicemen will not at all be available for appointment to any category of posts, the posts so reserved for ex-servicemen may be filled by dependent sons, daughters and wives of ex-servicemen in the first attempt with the prior concurrence of the ex-servicemen cell in the Labour and Employment Department, Himachal Pradesh, Shimla. In case, sons, daughters and wives of ex-servicemen for posts authorized to be filled in the first attempt are not available then the reservation would be carried forward to four calendar years, as at present.

5. We have gone through these instructions quoted hereinabove. Petitioners have been declared successful/ suitable as per result declared on 20.4.2014. The instructions on the basis of which petitioners have been denied the appointment are dated 9.6.2014. The selection process has commenced vide advertisement No.25/2013 dated 20.5.2013. Written test was held on 10.1.2014. Interviews were held on 24.3.2014 and 25.3.2014. The result was

declared on 20.4.2014. The reservation of the ex-servicemen is horizontal in nature. From 8.11.1994 onwards, the persons concerned have to be first selected against the respective quotas in favour of Ex-servicemen, physically handicapped persons etc. provided by horizontal reservations under Article 16 (1) and thereafter depending upon the fact as to which of the reserved categories under Article 16(4) (whether scheduled castes, scheduled tribes or other backward classes) or the residuary general category, they belong to, they have to be suitably adjusted against those categories.

6. Similarly, as per instructions dated 23.10.2010, in the event of non-availability of suitable candidate(s) for appointment against the vacancy, under horizontal reservation, that vacancy can be filled up from the candidate of respective category to whom the post originally belonged/earmarked by following proper procedure. According to advertisement, six posts of scheduled caste (wards of ex-serviceman) were advertised. No ward of scheduled caste ex-serviceman was available. In the event of non-availability of candidate belonging to scheduled caste (wards of ex-servicemen), the post was to be filled up from the respective category, i.e. ex-servicemen scheduled caste (unreserved) and if candidates of ex-servicemen scheduled caste (unreserved category) were not available, then from scheduled caste category. The primary reservation as stipulated under Article 16 (4) to scheduled caste, scheduled tribe and other backward classes is vertical in nature whereas the reservation provided to ex-servicemen, physically handicapped persons, sportsmen etc. is horizontal reservation. In the present case, there was no need to carry forward the posts reserved for wards of ex-servicemen. The posts were to revert back in the eventuality the candidates belonging to scheduled caste (wards of ex-servicemen) were not available to scheduled caste ex-servicemen (unreserved) and if this category was not available to scheduled caste category. The general principle is that the horizontal reservation is required to be dove-tailed with the vertical reservation. The action of the respondents not to offer appointment letters to the petitioners is legal. Moreover, the selection process has commenced vide advertisement No. 25/2013 on 20.5.2013 and Annexure R-III was issued on 9.6.2014. This would apply prospectively.

7. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is disposed of. Respondents are directed to fill up the posts of Junior Engineer from the category of scheduled caste ex-servicemen (unreserved) within a period of four weeks from today as per advertisement No. 25/2013 dated 20.5.2013 and if the ex-servicemen scheduled caste candidates are not available, the posts are permitted to be filled up from the candidates belonging to scheduled caste category. 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 DHARAM CHAND CHAUDHARY, J.

Seeta Ram and others. .....Appellants

Versus

Ashok Kumar and others. ...Respondents

RSA No. 610 of 2007
Decided on: 5th December, 2014

Code of Civil Procedure, 1908- Order 22 Rule 4- One of the proforma defendants died on 9.12.2006 during the pendency of the appeal before district judge- this fact was not brought to the notice of the Court- when the notice of the appeal was issued by High Court, it was found that one of the defendants had already died-

held, that question regarding the abatement can only be decided by the Court where the lis is pending at the time of death- judgment passed in favour or against the dead person is a nullity - matter remanded to the Trial Court with the direction to decide the question of the substitution or abatement. (Para- 2 to 9)

Cases referred:

Jagan Nath and others versus Ishwari Devi, 1988(2) Shim.L.C. 273

Karam Chand and others versus Bakshi Ram and others, 2002(1) Shim.L.C. 9.

Kishun @ Ram Kishun (dead) versus Bihari (D), AIR 2005 Supreme Court, 3799

For the appellants:	Mr. K.D. Sood, Senior Advocate with Mr. Naresh. K. Sharma, Advocate.
For the respondents:	Mr. N.K. Thakur, Senior Advocate with Mr. Surender Sharma, Advocate for respondents No. 1, 2, 6 & 9 to 11. Mr. Virender Verma, Addl. A.G with Mr. Pushpinder Jaswal, Dy. A.G for respondent No. 46.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge. (Oral)

CMP No. 3122 of 2014 & RSA No. 610 of 2007

Defendants are in second appeal before this Court. They are aggrieved by the judgment and decree dated 8.10.2007 passed by learned Additional District Judge, Fast Track Court, Una in Civil Appeal No. 61/2K RBT 65/04/2000. The appellants-defendants suffer the decree passed by learned Sub Judge 1st Class, Court No. (I), Amb, District Una, whereby the plaintiffs and proforma defendants, (respondents herein) have been declared owner in possession of the suit land measuring 48 kanals 3 marlas entered in Khewat No. 418min, Khatoni No. 1813, Khasra Nos. 6281, 10899/6283 and 6284, situate in Village Lohara, Tehsil Amb, District Una. Learned lower appellate Court has dismissed the appeal and affirmed the judgment and decree passed by the trial Court.

2. One of the respondents-proforma defendants Harnam Singh (respondent No. 21) had expired on 09.12.2006 during the pendency of the appeal in the lower appellate Court. The appellants-defendants and respondents-plaintiffs failed to report the factum of the death of respondent-defendant Harnam Singh in the lower appellate Court nor consequential steps taken and to the contrary the appeal came to be decided by learned lower appellate Court without taking notice of his death and substituting his legal representatives. It is when notice of this appeal issued to respondent-defendant Harnam Singh, it transpired that he has already expired. Initially, the appellants-defendants have filed application CMP(M) No. 867 of 2008, with a prayer to delete his name from the array of parties. The same, however, was allowed to be withdrawn with liberty reserved to file fresh one vide order passed on 24.02.2014.

3. It is in this backdrop, the application (CMP No. 3122 of 2014) aforesaid came to be filed on behalf of the appellants-defendants with a prayer that the name of deceased respondent Harnam Singh may be ordered to be deleted from the array of parties and the question of abatement of the appeal on account of his death is ordered to be determined in accordance with law.

4. The application has been contested and resisted on various grounds, however, mainly that the deceased was a proforma defendant and there being no clash of interest inter-se the respondents-plaintiffs and the deceased and also that in view of his brother Baldev Singh is on record as respondent No. 24, coupled with the factum of their rights in the suit land joint and indivisible his estate was sufficiently represented and, as such, there is no question of abatement of the appeal. It has also been pointed out that the appellants-defendants cannot be allowed to take benefit of their own wrongs, as it was an obligation on their part to bring on record the legal representatives of deceased respondent in the lower appellate Court. The name of deceased respondent has, therefore, been sought to be deleted from the array of parties.

5. Admittedly, Harnam Singh, respondent No. 21 in the lower appellate Court had died during the pendency of the appeal in the lower appellate Court. There is again no quarrel so as to his predecessor was ex-parte in the lower appellate Court and he did not contest the suit. Similarly, on substitution of deceased respondent No. 21 Harnam Singh, he also opted for not putting appearance and contest the suit. In the lower appellate Court also he was ex-parte. The fact, however, remains that the suit has not only been decreed in favour of plaintiffs-respondents No. 1 to 11 but also in favour of deceased respondent Harnam Singh along with other proforma defendants-respondents. Meaning thereby that irrespective of his brother Baldev Singh is there on record, the right to sue survives in favour of legal representatives, if any, of the deceased respondent Harnam Singh. The appeal stands abated on his death or not, is also a question, which cannot be gone into by this Court and rather the Court where the lis was pending at the time of his death. Otherwise also, in view of the constant legal position settled by this Court and also the apex Court in various judicial pronouncements, as and when the question of abatement of the suit or appeal arises, such question can only be gone into and decided by the Court where the suit or appeal was pending at the time of death of a party. It has been held so by a Co-ordinate Bench of this Court in ***Jagan Nath and others*** versus ***Ishwari Devi, 1988(2) Shim.L.C. 273*** and in ***Karam Chand and others*** versus ***Bakshi Ram and others, 2002(1) Shim.L.C. 9***.

6. Even the decree passed in favour of a dead person is also nullity. It has been held so by the apex Court in ***Kishun @ Ram Kishun (dead)*** versus ***Bihari (D), AIR 2005 Supreme Court, 3799***, which reads as follows:

> "5. As rightly pointed out by learned counsel for the appellants and fairly agreed to by learned senior counsel for the respondent, the decree passed by the High Court against a party who was dead, is obviously a nullity. It is conceded that the legal representatives of neither of the parties were brought on record in the second appeal and the second appeal stood abated. On this short ground this appeal is liable to be allowed and the decision of the High Court set aside.
>
> 7. We think that in this case, a proper enquiry as to whether there was a compromise or an adjustment of the dispute, in terms of the proviso to order XXIII, Rule 3 of the Code is warranted. The decision in the Second Appeal is also a nullity since it was passed in favour of a deceased appellant against a deceased respondent."

7. On the death of a party to a suit or appeal and for want of consequential steps, suit/appeal abates because abatement is automatic after the expiry of limitation prescribed for substitution of LRs of deceased party and setting aside the abatement. In the case in hand, respondent No. 21 had expired on 09.12.2006 during the pendency of the appeal in the lower appellate Court. The limitation prescribed for taking consequential steps and setting

aside the abatement has expired long back. In view of the judgment and decree under challenge is in favour of deceased respondent Harnam Singh also, the right to sue survives in favour of his legal representatives. The appeal, for want of consequential steps within the period of limitation stood dismissed having been abated qua deceased Harnam Singh in the lower appellate Court, whereas, vide judgment and decree under challenge, the suit has been decreed in favour of respondents-plaintiffs and surviving proforma respondents-defendants. There cannot be two judgments in one case.

8. In view of the legal as well as factual position discussed supra, this Court is left with no other and further option except to hold that the judgment and decree under challenge being in favour of a dead person is nullity, hence not legally sustainable.

9. Consequently, the judgment and decree under challenge in this appeal, being in favour of a dead person is nullity and is hereby quashed and set aside. The case is remanded to the lower appellate Court with a direction to the appellants-defendants herein to take consequential steps on the death of deceased respondent Harnam Singh and thereafter to decide the question of substitution of legal representatives and also the question of abatement of the appeal, if any, after affording the parties an opportunity of being heard. The parties through learned counsel representing them are directed to appear before learned lower appellate Court on ***23rd December, 2014***. Record be sent back so as to reach in the lower appellate Court well before the date fixed. Learned lower appellate Court is directed to dispose of the appeal as expeditiously as possible as but not later than the quarter ending ***31st March, 2015***.

10. The appeal stands disposed of accordingly. Pending application(s), if any, shall also stand disposed of.

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

Bias Dev ...Appellant.
Versus
Munshi Ram and others. ...Respondents.

RSA No. 419/2010
Reserved on: 25.11.2014
Decided on: 9.12. 2014

Limitation Act, 1963- Article 65- Plaintiff filed a civil suit stating that he is owner in possession of suit land and the defendants have no concern with the same- entries in favour of defendants were wrong and illegal- defendants claimed that they are in open, peaceful and continuous possession of the suit land since time immemorial- they have become owners by way of adverse possession- jamabandi showed that suit land was recorded in possession of defendant since 1987-1988- entries were repeated in the subsequent jamabandies – land was earlier cultivated by the father of the defendant and the house was constructed over a portion of the land- there is no entry of payment of rent by the predecessor-in-interest of the defendants to the plaintiff – held, that in these circumstances the plea of the adverse possession is duly proved. (Para-11)

For the Appellant: Mr. Sanjeev Bhushan, Advocate.

For the Respondents: None for respondents.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is directed against the judgment and decree dated 21.7.2005 rendered by the Presiding Officer, Fast Track Court, Mandi in Civil Appeal No. 84/99, 104/2004.

2. "Key facts" necessary for the adjudication of this appeal are that predecessor-in-interest of the appellant-plaintiff (herein after referred to as 'plaintiff ' for convenience sake), Sh. Janardhan filed a suit for declaration with consequential relief of possession against the respondents-defendants (hereinafter referred to as 'defendants' for convenience sake). According to the plaintiff, he was recorded owner in possession of the suit land and the defendants have no right, title and interest in the same. The entries showing the defendants in possession were wrong and illegal and not binding on the plaintiff. Defendants have raised construction over the suit land as stated in para 3 of the plaint without his consent and permission in the year 1990-91 whereas the remaining land was in possession of the plaintiff. Defendants have got themselves recorded as encroacher over the Government land during the settlement and rights to cut the grass have been conferred upon the defendants under the garb of wrong revenue entries.

3. The suit was contested by the defendants. According to the defendants, the suit land was in open, peaceful and continuous possession of the defendants since the time immemorial. The revenue entries in the revenue record were correct. Defendants have admitted that they have constructed a house over a portion of the suit land. However, it is stated that no objection was raised by the plaintiff at the time of raising construction. It was denied that the plaintiff was in possession of the suit land, but stated that the suit land was earlier Government land and the fore-father of the defendants occupied the suit land and since then he remained in continuous possession of the same. Father of the defendants died in the year 1965.

4. The replication was filed by the plaintiff. Issues were framed by the Sub Judge 1st Class on 20.4.1996. He dismissed the suit on 24.4.1999. Plaintiff preferred an appeal before the Presiding Officer, Fast Track Court, Mandi. He dismissed the same on 21.7.2005. Hence, the present Regular Second Appeal.

5. Mr. Sanjeev Bhushan, on the basis of substantial questions of law framed, has vehemently argued that both the courts below have not correctly appreciated the oral as well as documentary evidence led by the parties. According to him, defendants have not proved the ingredients of adverse possession.

6. I have heard the learned counsel for the appellant and have gone through the records carefully.

7. Plaintiff has appeared as PW-1. According to him, defendants have raised the construction prior to 1992-93. They were asked not to raise the construction. The demarcation was obtained. He has proved copy of Jamabandi for the year 1987-88 Ex.PA.

8. DW-1 Nathu Ram has deposed that the suit land was in joint possession of the defendants since the time of their ancestor. Earlier their father was in possession of the suit land. His father has made the land cultivable. They have raised the construction about 10-11 years back. No one had objected when they raised the construction. DW-1 Nathu Ram was not

cross-examined regarding the fact that the suit land was in possession of the defendants since the time of their father.

9. DW-2 Bansi Ram and DW-3 Sohan Singh have deposed that the suit land was previously in possession of Daya Ram. He has made it cultivable. The house was constructed 8-9 years back.

10. DW-4 Kali Dass has deposed that he has carved out a plot on the suit land 9-10 years back.

11. The settlement, as per the record, has taken place in the year 1968. According to Jamabandi for the year 1987-88 Ex.P-1, the suit land was owned by Janardhan, predecessor-in-interest of the plaintiff and the same was recorded in possession of the defendants. Same entries were repeated in Missal Haquiat Bandobast Jadid Ex. DA and Ex. DD and also in the copies of jamabandis for the year 1992-93 Ex.DB and Ex.DC. Thus, it is amply proved that the suit land was recorded to be in possession of the defendants. It is duly established that defendants have been shown in possession of the suit land even 30 years back. The land was earlier cultivated by the father of the defendants and the house was constructed over a portion of the suit land. It was in the knowledge of the predecessor-in-interest of the plaintiff. The plaintiff has not led any tangible evidence on record to establish that his father has delivered the possession of the suit land to the predecessor-in-interest of the defendants. There is no corresponding entry of payment of rent by the predecessor-in-interest of the defendants to the plaintiff or his predecessor-in-interest.

12. Mr. Sanjeev Bhushan has vehemently argued that the defendants have admitted the title of the plaintiff over the suit land. Defendants have admitted the description of the suit land. They have admitted that according to Jamabandi, plaintiff's father was shown in ownership and the predecessor-in-interest was shown in possession of the suit land. It does not establish that defendants have admitted the title of the plaintiff. Defendants have pleaded that they have acquired their title by way of adverse possession being in open, peaceful, continuous and hostile possession. Defendants have led sufficient evidence that they are in adverse possession of the suit land for more than 12 years. Both the courts below have correctly appreciated the oral as well as documentary evidence led by the parties. There is no need to interfere with the well reasoned judgments rendered by both the courts below.

13. In view of the analysis and discussion made hereinabove, there are no substantial questions of law much less to say substantial question of law involved in the present Regular Second Appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Rajinder Singh and others. ...Petitioners.

Versus

State of H.P. and others. ...Respondents.

CWP No. 4037 of 2014
Reserved on: 5.12.2014
Decided on: 9.12. 2014

Constitution of India, 1950- Article 226- An advertisement was issued for 25 posts of unskilled workers on contract basis- petitioner participated in the selection process- however, selection process was

cancelled- held, that selection process once commenced cannot be stopped - no cogent reasons were given for cancelling the selection process- respondent directed to continue and conclude the selection process. (Para- 4 to 10)

Cases referred:

Shankarsan Dash versus Union of India, (1991) 3 SCC 47

A.P. Aggarwal Vs. Government of NCT of Delhi and another, (2000) 1 SCC 600

Food Corporation o India and others Vs. Bhanu Lodh and others, (2005) 3 SCC 618

K.M. Babu Vs. Election Commission of India and others, AIR 2006 Kerala 226

For the Petitioners:	Mr. Vijender Katoch, Advocate.
For the Respondents:	Mr. M.A. Khan, Addl. A.G. with Mr. P.M. Negi, Dy. A.G. for respondent No.1. Mr. Rajinder Singh Thakur, Advocate for respondents No.2 and 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

25 posts of unskilled workers on contract basis in Resin and Turpentine Factory, Nahan were advertised in newspapers, i.e. The Tribune and Amar Ujala on 2.6.2012. Petitioners also participated in the selection process. Petitioners participated in 25 KMs walk test and physical test on 21.82012 and 22.8.2012. Call letters were issued to the petitioners and similarly situate persons on 21.7.2012 to appear in the interview/viva voce for the post of unskilled workers on 16.10.2012 and 17.10.2012 in R&T Factory, Nahan. However, fact of the matter is that respondent-corporation vide letter dated 30.8.2014 has cancelled the selection process initiated on the basis of advertisement dated 2.6.2012. The Model Code of Conduct was imposed on 30.10.2012. Respondent-corporation requested the Principal Secretary (Forests) to the Government of Himachal Pradesh to clarify whether the interview could be conducted on the scheduled date or not. The matter remained under consideration. The Principal Secretary (Finance) to the Government of Himachal Pradesh asked the respondent-corporation to internally locate the surplus staff. The text of letter dated 17.6.2014 reads as under:

> **"I am directed to refer to your office letter No.HPSFDC/Estt-3618 dated 19th May 2014 on the subject cited above and to say that the above matter was referred to the Finance Department for their concurrence and the Finance Department has opined as under:**
>
> > **"Examined. Finance Department regrets its inability to concur in the Department's proposal for filling up of vacant posts in R&T factory Nahan and Bilaspur. However, the Department may consider locating surplus staff from Forest Corporation to do the job."**

2. A meeting of Board of Directors of the respondent-corporation was held on 11.7.2014. The Board of Directors directed that the requirement be got assessed by the administrative department first and then the matter be referred to the Service Committee. The General Manager of R&T Factory was informed on 26.7.2014 that no action with regard to filling up of unskilled workers on contract basis be taken up and fresh process will be started as soon as the instructions are received from A.D. The Managing Director sent a

communication to the Principal Secretary (Forests) to the Government of Himachal Pradesh on 1.8.2014. Letter dated 1.8.2014 reads as under:

> **"Kindly refer to your office letter No.FFE-A(B)15-02/2011-Part dated 17.6.2014 on the subject cited above.**
>
> **2. In this connection, it is submitted that the matter was again placed before the Board of Directors of the corporation in its meeting held on 11.7.2014 vide memo No.16/183 (Copy enclosed as Annexure-A) and the Board of Directors have decided as under.**
>
> > **"The Board directed that the need be assessed by the Administrative Department first and then matter be referred to the Service Committee."**
>
> **3. Since 63 vacant posts of unskilled workers in R&T Factories, Nahan and Bilaspur are urgently required to be filled up as they are directly linked with production, therefore, necessary approval to fill up at least 25 posts of unskilled workers in R&T Factory, Nahan and 19 posts in R&T Factory, Bilaspur under first phase as already requested vide this office letter No.HPSFDC/Estt./3618 dated 19.5.2014 may kindly be accorded at the earliest convenience so that the matter may then be placed before the Service Committee and Board of Directors for approval."**

3. The Managing Director informed the General Managers of R&T Factory, Nahan and Bilaspur not to fill up the posts of unskilled workers on contract basis on 30.8.2014.

4. The process was initiated on the basis of advertisement dated 2.6.2012. Petitioners have participated in the selection process. They have undertaken 25 KMs walk and endurance test. In fact, they were also issued interview letters on 21.7.2012. The process once commenced could not be stopped merely after coming into force of Model Code of Conduct on 30.10.2012. The respondent-corporation could only defer the issuance of appointment letters, but could not keep the entire selection process at abeyance. The Finance Department has regretted its inability to concur in the department's proposal for filling up of vacant posts in R&T Factory Nahan and Bilaspur. No cogent reasons have been assigned for not giving consent for filling up the posts. Since the process had commenced, the posts of unskilled workers were required to be filled up on contract basis. The Managing Director of the respondent-corporation has informed the Principal Secretary (Forests) vide letter dated 1.8.2014 that 63 posts of unskilled workers in R&T Factories, Nahan and Bilaspur were urgently required to be filled up as these were directly linked with the production and he had sought approval to fill up at least 25 posts of unskilled workers in R&T Factory, Nahan and 19 posts in R&T Factory, Bilaspur under first phase. It is amply proved on the basis of communications placed on record that at least 25 posts of unskilled workers in R&T Factory, Nahan and 19 posts in R&T Factory, Bilaspur were urgently required to be filled up on contract basis in order to maintain production in R&T Factories, Nahan and Bilaspur. In fact the requirement was for 63 posts.

5. It is true that selection process could be cancelled, but there has to be cogent and convincing reasons for doing the same. The respondent-corporation firstly deferred the selection process only on the ground that Model Code of Conduct has come into force as on 30.10.2012 and thereafter has waited for two long years to get the permission.

6. Their Lordships of the Hon'ble Supreme Court in ***Shankarsan Dash*** versus ***Union of India,*** (1991) 3 SCC 47 have held that unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the

licence of acting in any arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for appropriate reasons. Their Lordships have held as under:

> **"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha, (1974) 1 SCR 165: (AIR 1973 SC 2216), Miss Neelima Shangla v. State of Haryana, (1986) 4 SCC 268: (AIR 1987 SC 169), or Jitendra Kumar v. State of Punjab, (1985) 1SCR 899 : (AIR 1984 SC 1850)."**

7. Their Lordships of the Hon'ble Supreme Court in ***A.P. Aggarwal*** vs. ***Government of NCT of Delhi and another***, (2000) 1 SCC 600 have held that State action, in order to survive, must not be susceptible to the vice of arbitrariness. This is the crux of Article 14 and basic to the rule of law, the system which governs this country. Their Lordships have held as under:

> **"12. It is well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. (vide Shrilekha Vidyarthi v. State of U.P., (1991) 1 SCC 212 : (AIR 1991 SC 537)."**

8. Their Lordships of the Hon'ble Supreme Court in ***Food Corporation o India and others*** vs. ***Bhanu Lodh and others***, (2005) 3 SCC 618 have held that the decision not to fill up the vacancies has to be taken bona fide and must pass the test of reasonableness so as not to fail on the touchstone of Article 14 of the Constitution of India. Their Lordships have held as under:

> **"14. Merely because vacancies are notified, the State is not obliged to fill up all the vacancies unless there is some provision to the contrary in the applicable rules. However, there is no doubt that the decision not to fill up the vacancies, has to be taken bona fide and must pass the test of reasonableness so as not to fail on the touchstone of Article 14 of the Constitution. Again, if the vacancies are proposed to be filled, then the State is obliged to fill them in accordance with merit from the list of the selected candidates. Whether to fill up or not to fill up a post, is a policy decision, and unless it is infected with the vice of arbitrariness, there is no scope for interference in judicial review. (See in this connection Govt. of Orissa v. Haraprasad Das and State of Orissa v. Bhikari Charon Khuntia.)"**

9. The Division Bench of Kerala High Court in ***K.M. Babu*** Vs ***Election Commission of India and others***, AIR 2006 Kerala 226 has held as under:

"3. There is also force in the submission of the petitioner that pay revision granted as per the Pay Commission report is not a financial grant and, therefore, implementation of the Pay Commission report as announced in the budget speech on 10.2.2006 will not amount to a financial grant coming under paragraph VII, clause (vi) (a) of the Model Code of Conduct. Salary revision to be given in implementation of the pay commission report are expected by the Government employees for long time and it cannot be stated that implementation of the Pay Commission report and pay revision is a financial grant so as to offend the Model Code of Conduct. Above all, it is not the ruling party alone, but opposition also wanted immediate implementation of the Pay Commission report. In this connection, the learned Advocate General produced before us a copy of the resolution unanimously adopted by the Kerala Legislative Assembly on 15.3.2006. The above resolution is quoted below.

"This Legislative Assembly request to the Central Election Commission to grant permission to implement immediately the recommendations of Pay Revision Commission in the circumstance that, it has been declared in the Budget Speech of the Finance Minister in the Legislative Assembly on 10.2.2006 in respect of the pay revision, which was to be given on 1.3.2002 in Kerala where the principle of implementation of pay revision once in every 5 years is accepted, and the required amount is allocated in 2006-2007 Budget.

The Cabinet meeting held on 1st March, 2006 accepted the recommendations of the Pay Revision Commission in principle and deferred it for the consideration of the Special Cabinet meeting of 2nd March.

This Legislative Assembly unanimously request to the Election Commission to grant approval for the decision of the Government that, the recommendations of the Pay Revision Commission submitted on 22.2.2006 to the Government alone need be implemented, in the circumstance that the declaration of election has been issued."

This shows that all the parties (whether ruling or opposition) including independent MLAs are in favour of implementation of the Pay Commission report itself. Therefore, it cannot be stated, on the facts of this case that implementation of the same was intended for influencing the voters in favour of the party in power.

4. In the above circumstances, we are of the view that the restriction imposed in implementation of the Pay Commission report by the Election Commission on the basis of Model Code of Conduct will not stand. There is no necessity for the employees to wait till the elections are over to receive the pay revision benefits merely because an election came in between and direction to the contrary by the Election Commission are set aside. Both the writ petitions are allowed."

10. Accordingly, the writ petition is allowed. Letter dated 1.8.2014 is quashed and set aside. Respondents are directed to continue and conclude the selection process commenced on the basis of advertisement dated 6.2.2012 within a period of eight weeks from today. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Deemanu Ram and others. ...Appellants.
Versus
Bilwa Mangal. ...Respondent.

RSA No. 71 of 2002
Reserved on : 8.12.2014
Decided on: 10.12. 2014

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 2 (10)- Plaintiff claimed that land was mortgaged – the mortgage was redeemed and the possession was delivered on 18.9.1992- defendants or their predecessor-in-interest were never inducted as tenants- defendants claimed that they were in possession prior to the mortgage- evidence showed that land was mortgaged by the predecessor-in-interest with Sardar of Shamirpur – it was proved that defendants were inducted as tenant by mortgagee and not by mortgagor- held, that tenant of a mortgagee does not acquire any right of ownership- tenants of the mortgagee do not become the tenants of the mortgagor. (Para-19 to 21)

Cases referred:

Kanta Devi versus Khushia, 1996 (2) Sim.L.C.

Thakar Singh (D) by LRs and another vs. Sh. Mula Singh (D) through LR and others, 2014 (2) RCR 371

Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148

For the Appellants: Mr. R.K. Gautam, Sr. Advocate with
Mr. Vikrant Chandel, Advocate.
For the Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 27.9.2001 rendered by the District Judge Kangra at Dharmashala in Civil Appeal No. 94-K/XIII/1999.

2. According to the plaintiff, he was owner in possession of the suit land bearing Khata No.54 min, Khatauni No. 124, Khasra No.89 measuring 0-33-29 hectares situated in Mohal Jogiballa, Mauza Shamirpur, Tehsil and District Kangra, as per Jamabandi for the year 1987-88 and the entry of defendants in column of tenancy existing in the revenue record was illegal and unauthorized. Defendants or their predecessor-in-interest were never inducted as tenants by the plaintiff or his predecessor-in-interest since the land was under mortgage with the mortgagees and the same was redeemed vide civil suit No. 158/1974. The possession was delivered on 18.9.1992 on the basis of judgment rendered in Civil Suit No. 158 of 1974.

3. Suit was contested by the defendants. According to the defendants, plaintiff was not in possession of the suit land and the defendants were tenants prior to the mortgage.

4. Suit was decreed by the Sub Judge 1st Class on 21.4.1999. An appeal was filed by the defendants. Suit was remanded for fresh trial by framing additional issues by the first appellate court. The appeal was preferred before this Court. Learned District Judge passed the following order on 24.4.2001:

> **"24.4.2001**
>
> **Present : Shri Sunder Aggarwal, Adv. Ld. Counsel for the appellants.**
>
> **Sh. Rakesh Soni, Ad. Vice counsel for the respondent.**
>
> **In view of the remand of the case by Hon'ble High Court, following additional issues are framed:-**
>
> **2-B If issue No.2-A is not proved, whether the tenancy was created by the mortgagees in favour of the predecessor-in-interest of the defendants, as an act of good management, as alleged? If so, its effect? OPD.**
>
> **2-C Whether the tenancy was created by the mortagees with the knowledge and consent of the mortgagors, in favour of the predecessor-in-interest of the defendants, as alleged? If so, its effect? OPD**
>
> **2-D Whether the defendant has become owner of the land in dispute by operation of the H.P. Tenancy and Land Reforms Act. OPD"**

5. Newly framed issues were decided by the Sub Judge 1st Class on 25.6.2001. Thereafter, the matter came up before the learned District Judge, Kangra at Dharamshala. He dismissed the appeal on 27.9.2001. Hence, the present Regular Second Appeal. It was admitted without framing the substantial questions of law on 8.3.2002. This appeal now deemed to have been admitted on the substantial questions of law framed alongwith grounds of appeal.

6. Mr. R.K. Gautam, learned Senior Counsel for the appellants, on the basis of the substantial questions of law framed, has vehemently argued that both the courts below have misconstrued the evidence led by the parties. According to him, the findings given by the courts below that defendants have ceased to be tenants after redemption of the suit land are wrong and illegal.

7. Mr. Ajay Sharma, has supported the judgments and decrees passed by both the courts below.

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

9. Since all the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

10. PW-1 Amar Chand has produced copy of power of attorney. According to him, the suit land was 8-11 kanals. It was owned by Sandhya Devi. The land was under mortgage with Kuldeep etc. A suit for redemption of the mortgage was filed. It was decreed. The possession of the suit land was taken. Entries in the name of defendants were wrong. Defendants have no right, title or interest over the suit land. Sandhya Devi has become owner in the year 1960-61 as the land was purchased by her and at that time the land was under mortgage. The preliminary decree was passed in the year 1980. The final decree was passed in the year 1981.

11. Dumanu Ram has appeared as DW-1. According to him, the land was cultivated by his father. They started cultivating the suit land after the death of their father. The land was owned by Hardyal. It was given to his father by Hardyal. They were paying rent for the cultivation of the suit land and the tenancy was never surrendered. No suit was filed by Sandhya Devi against them. The last ***Galla*** was paid to Kulbhushan and Kuldeep etc. He has admitted that the land was under mortgage with Kuldeep and Kulbhushan etc. He was not aware that since the year 1965, plaintiff was in litigation with Kulbhushan and Kuldeep. He was also not aware that the land was got redeemed by Sandhya. He has denied the suggestion land was under cultivation of Sandhya. According to him, tenancy was being claimed to have been created by Hardyal in favour of his father, but he did not disclose as to what were the terms of the tenancy. He did not disclose when the last ***Galla*** was paid. He has deposed that they were paying ***Galla*** to Kuldeep etc. The amount of ***Galla*** has not been stated.

12. DW-2 Bihari Lal has deposed that for the last 50 years, the land was in cultivatory possession of defendants. Earlier the land was owned by Chaudhary Hardyal. Chaudhary Hardyal had mortgaged the land with Sardars who were Rajput by caste. They were residents of Shamirpur. They used to pay ***Galla*** to Hardyal. He was not aware about the month and year of the mortgage. According to him also, the ***Galla*** was paid in the year 1992 to Kulbhushan and Kuldeep. Receipt was prepared, though DW-1 could not produce the receipt. If the receipt had been obtained, the same should have been produced before the Court.

13. According to Rapat Rojnamcha Ex.P-2, the possession of suit land was handed over to plaintiff. The mutation was also attested. The land was in possession of the mortgagee as per judgment Ex.P-4. Defendants have failed to prove that they were tenants of the suit land and they were entitled to be conferred with proprietary rights.

14. Dumnu has appeared twice. According to him, his father Mali was inducted as tenant by Chaudhary Hardyal. However, he has omitted to depose that Mali or he used to pay rent. According to him, the rent was paid to Sardars regularly.

15. DW-2 Bihari has also appeared twice. He has also admitted that land was mortgaged by Hardyal with Sardars and Mali and after his death his sons were paying rent to Sardars.

16. DW-5 Jagdish has deposed that the land was owned by Hardyal and was cultivated by Mali. He has also stated that the land was mortgaged by Hardyal with Sardars of Shamirpur but Mali's cultivation remained uninterrupted. In the copies of jamabandis for the year 1917-18 and 1890-91, name of the persons cultivating the land has not been disclosed. According to Jamabandi for the year 1959-60 Ex.P-4, land was under mortgage with Kuldeep Singh, Kulbhushan Singh, Kuljeet Singh etc. and Mali has been described as "Gair Maurusi" tenant. It is not stated therein whether he was tenant under the mortgagor or tenant inducted by mortgagee.

17. The entire evidence only proves that defendants were inducted as tenants by the mortgagee and not by the mortgagor.

18. Mr. R.K. Gautam, learned Senior counsel has vehemently argued that plaintiff was never in possession of the suit land. The person, who had gone to execute the warrant, has not been examined. According to Ex.P-6, the possession was delivered on the spot. The parties were informed at the time of delivery of possession as per Ex.P-2. Defendants have thus failed to prove that they were inducted as tenants prior to mortgage. The entries have come into effect after 1980-81. There is no material on record that defendants were tenants before this period.

19. This Court in ***Kanta Devi*** versus ***Khushia***, 1996 (2) Sim.L.C. has held as under:

> **"18. Section 2 (10) of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 defines "land owner" as meaning a person defined as such in the Himachal Pradesh Land Revenue Act, 1953 or the Punjab Land Revenue Act, 1887, as the case may be and shall include the predecessor or successor in interest of the land owner'. The definition of the word "land owner" as contained in section 4 (9) of the Himachal Pradesh Land Revenue Act, 1953 as well as in section 3 (2) of the Punjab Land Revenue Act, 1887 is practically the same. Both the sections provide that "land owner" does not include a tenant or an assignee of land revenue but does include a person to whom a holding revenue or of a sum recoverable as such an arrear, and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any share or portion thereof, or in the enjoyment of any part of the profits of an estate. This definition, prima facie, does not include a mortgagee. Therefore, a person holding the land as a tenant under the mortgagee cannot be deemed to be a tenant under a landowner. Therefore, the protection which was available to the tenant inducted by the mortgagee in Bhagat Ram's case (supra), cannot be extended to the defendant in the present case.**
>
> **19. Similarly in Prabhu v, Ramdeo and others, AIR 1966 SC 1721, the protection to the tenant inducted by the mortgagee was extended by virtue of section 15 of the Rajasthan Tenancy Act, 1955, which had come into force before the redemption of the mortgage by the mortgagor The statutory benefit was thus extended to the tenant inducted by the mortgagee in view of the relevant provisions of the Rajasthan Tenancy Act, 1955 and it was held that the tenant inducted by the mortgagee would become a tenant under the owner-mortgagor after the redemption of the mortgage. No such statutory protection, as stated above, is available to the defendant in the present case under any provision of the law as inforce at the time of the redemption of the mortgage."**

20. It is reiterated that defendants were the tenants of mortgagee and not of the mortgagor. Thus, they have not acquired any rights. The suit land was purchased by the plaintiff. The suit land was redeemed by filing a civil suit. The possession was handed over to the plaintiff.

21. Their Lordships of the Hon'ble Supreme Court in ***Thakar Singh (D) by LRs and another*** vs. ***Sh. Mula Singh (D) through LR and others***, 2014 (2) RCR 371 have held that when mortgagor authorized the mortgagee to induct tenants, after redemption tenants of mortgagee do not become tenants of mortgagor even though mortgagor received rent from tenants. Their Lordships have delivered this judgment while interpreting sections 60, 62, 73 and 111 of Transfer of Property Act. Their Lordships have held as under:

> **"8. On the facts of this case, it will be seen that the mortgagees were entitled to create tenancies by virtue of the mortgage deed dated 9th March 1942. However, there is nothing in the language of the mortgage deed to indicate clearly that the tenancies created by the mortgagees would be binding on the mortgagors. At the highest, after redemption, and after possession is taken, the mortgagor or mortgagors will also be entitled to receive rent in future. It will be seen that the mortgagor's right to get back possession is expressly recognized by the mortgage deed without any clear and unambiguous language entitling tenants created by the mortgagees to become tenants of the mortgagors. The entitlement to receive**

rent in future can by no stretch be held to create a tenancy between the mortgagor and the tenants of the mortgagees. This phrase has to be reconciled with the expression immediately preceding it namely "on taking possession". It is clear that taking of possession from the mortgagees and his tenants is completely antithetical to recognizing the mortgagees' tenants as the mortgagors' tenants. If the clause is to be read in the manner that the High Court has read it, the mortgagors would not be able to get back possession on redemption which would in fact be a serious interference with their right to redeem the property inasmuch as the mortgagors would have to evict such tenants after making out a ground for eviction under the Rent Act. Such ground can only be bonafide requirement of the landlord or some ground based on a fault committed by the tenant such as non-payment of rent or unlawful subletting etc. Further, such ground may never become available to the mortgagor/landlord or may become available only after many years. It has already been seen that a mortgagee continuing in possession after redemption as tenant of the mortgagor is regarded as a clog on redemption. The position is not different if the mortgagee's tenants continue in possession after redemption. This would necessarily have to be disregarded as a clog on redemption as the right to redeem would in substance be rendered illusory. In the circumstances, the judgment of the Punjab and Haryana High Court dated 31st March 2004 is set aside. All other issues are left open and can be agitated before the High Court. It will be open to all parties to raise such pleas as are available to them in law. Considering that the cause of action in the suit arose in 1969, the High Court is requested to take up RFA No.238/1979 to decide the other issues as early as possible and preferably within six months from the date of delivery of this judgment."

CMP No. 323/2011

22. Appellant has also filed an application under Order 41 Rule 27 Code of Civil Procedure; plaintiff has filed the detailed reply to the same. Appellant wanted to produce on record copy of proceedings conducted by Land Reforms Officer, Kangra dealing with form No. L.R.-V under the H.P. Land Reforms Act and Rules. According to the appellant, plaintiff has admitted that defendant is tenant and had applied for redemption of land under H.P. Tenancy and Land Reforms Act. The Civil Suit was instituted on 2.3.1993 and the application filed is belated. These documents are not necessary for the adjudication of the matter.

23. Their Lordships of the Hon'ble Supreme Court in ***Union of India*** vs. ***Ibrahim Uddin and another***, (2012) 8 SCC 148 have held that party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court. There must be satisfactory reasons for non-production of the evidence in trial court for seeking production thereof in appellate court. Their Lordships have held as under:

"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a

discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).

37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).

38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary

provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.

44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336).

45. In The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:

> **"We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence." (Emphasis added)**

A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad and Ors., AIR 2008 SC 1108.

46. A Constitution Bench of this Court in K. Venkataramiah (Supra), while dealing with the same issue held:

> **"It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."**
>
> **(Emphasis added)**

In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.

48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

Stage of Consideration :

49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or

defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053)."

24. Therefore, the present application is dismissed.

25. The substantial questions of law are answered accordingly.

26. 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 RAJIV SHARMA, J.

Sh. Kanahya Lal & ors. .....Appellants.
Versus
Sh. Kirpa Ram & ors. .....Respondents.

RSA No. 10 of 2004.
Reserved on: 08.12.2014.
Decided on: 10.12.2014.

Specific Relief Act, 1963- Section 34- Plaintiffs claimed that they are joint owners in possession of the suit land with defendant No. 1 to the extent of half share and that the land was never partitioned – predecessor-in-interest of the defendants had sold the suit land exceeding his share vide sale deed dated 1.3.1983- defendant claimed that land was mortgaged prior to the sale- plaintiff had no right, title or interest over the suit land- according to recital in the sale deed, vendor had half share over the suit land, however, he had sold the entire suit land- held, that only half share could have been sold and not the whole. (Para-9 to 11)

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

For the respondents: Mr. K.D.Sood, Sr. Advocate, with Mr. Mukul Sood, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Solan, dated 14.11.2003, passed in Civil Appeal No. 31-S/13 of 2003.

2. Key facts, necessary for the adjudication of this regular second appeal are that the appellants-plaintiffs (hereinafter referred to as the plaintiffs, for the convenience sake), have instituted a suit against the predecessor-in-interest Sh. Nathu Ram of respondents-defendants (hereinafter referred to as the defendants), Beli Ram, Kala, Shalu and Gorkhu. The predecessor-in-interest died during the pendency of the suit before the learned Senior Sub Judge, Solan, thus his legal representatives, namely, Beli Ram, Kala, Shalu and Gorkhu were brought on record. According to the plaintiffs, the suit land comprised in Kh. No. 92 measuring 2-15 bighas situated in Mauja Dehal, Pargana Haripur, Tehsil and Distt. Solan, H.P. The plaintiffs have claimed to be

the joint owners in possession of the suit land with defendant No. 1 Nathu Ram to the extent of ½ share of land. The land was never partitioned, however, defendant Nathu Ram predecessor-in-interest of defendants, namely, Beli Ram, Kala, Shalu and Gorkhu, in connivance with the revenue staff have sold the suit land exceeding to his share to defendant No. 2 Sh. Kirpa Ram, vide sale deed No. 100 dated 1.3.1983. The mutation was attested on 28.4.1983. The plaintiffs have also pleaded and claimed that the defendants have no right, title to change the nature of the suit land and claimed joint possession with defendant No. 2, to the extent of his share.

3. The suit was contested by defendant No. 2. According to him, Nathu Ram had mortgaged the suit land with possession prior to the sale thereby the plaintiffs have no right, title or interest over the suit land. The defendant has denied any interference with the suit land. According to him, the plaintiffs have no right to sale proceeds of '*Khair*" tree.

4. The replication was filed by the plaintiffs. The learned Senior Sub Judge, Solan, framed the issues on 2.5.1997. The learned Senior Sub Judge, Solan, decreed the suit on 26.9.2002. The defendant Kirpa Ram preferred an appeal against the judgment and decree dated 26.9.2002 before the learned District Judge, Solan. The learned District Judge, Solan, allowed the appeal and set aside the impugned judgment and decree vide judgment dated 14.11.2003. Hence, this regular second appeal.

5. This regular second appeal was admitted on the following substantial question of law on 12.10.2004:

> "Whether a co-sharer even if found in exclusive possession of the whole of the land can validly sell the area more than his share in such land?

6. Mr. Neeraj Gupta, Advocate, has supported the judgment and decree of the learned trial Court dated 26.9.2002. According to him, defendant Nathu Ram could only sell the land falling to his share to defendant Kirpa Ram. On the other hand Mr. K.D. Sood, learned Senior Advocate, alongwith Mr. Mukul Sood, has supported the judgment passed by the learned first Appellate Court dated 14.11.2003.

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

8. One of the plaintiffs Sh. Kanhaya Ram has appeared as PW-1. According to him, Sh. Bhagat Ram and Sh. Bharat Ram were his real brothers. The suit land was joint. The ½ share of the land is owned by defendant No. 1. They have joint ownership and possession. The land was never partitioned. The defendant No. 1 has sold this land to defendant No. 2. He had only right to sell his share. The defendant No. 1 has only ½ share in Kh. No. 92. The entry/classification of the land was '*Ghasni*'. The registration was illegal. The mutation attested on the basis of the registration was also bad in law. They came to know about the sale in the year 1995. Thereafter, he collected the documents. He proved copy of mutation Ext. PW-1/B and copy of the sale deed as Mark-A. He has denied the suggestion in the cross-examination that Nathu Ram was in possession of entire Kh. No. 92.

9. Kirpa Ram has appeared as DW-1. According to him, he was owner of the suit land. He has purchased this land from Nathu vide Ext. PX. The possession was handed over to him by Nathu Ram. Before that, the land was in possession of Nathu Ram. The suit land adjoins his land. He has verified the status of the land from Patwari. Nathu Ram was in exclusive possession of the suit land. In his cross-examination, he deposed that he has purchased Kh. No. 92. He has seen the revenue papers. He admitted in his cross-examination that Nathu Ram was owner of ½ share of the land and thus, he could only sell his share. Volunteered that since he was in possession of the

entire suit land, he could sell the entire suit land. He did not know the nature of the joint ownership of the land between the parties. Volunteered that it could be 34-35 bighas which would be in joint ownership. He did not know of which khasra number, plaintiff and defendant Nathu Ram were in possession.

10. A copy of the sale deed dated 1.3.1983 is Ext. PX. The defendants have placed on record copy of Jamabandi for the year 1976-77 Ext. D-1, copy of Jamabandi for the year 1985-86 Ext. D-2, copy of Jamabandi for the year 1990-91 Ext. D-3, copy of Jamabandi for the year 1981-82 Ext. D-4, copy of Jamabandi for the year 1985-86 Ext. D-5. According to the recital in the Sale deed Ext. PX, the vendor was having ½ share over the suit land but having possession in the family partition. He sold the entire suit land. According to the defendant- Kirpa Ram, he is a bonafide purchaser. He has got the status of the land verified from the Patwari. The defendant has neither pleaded nor proved that there was any family arrangement/partition of the suit land at the time of effecting sale deed on 1.3.1983. The plaintiffs and defendant No. 1 Nathu Ram have been shown as co-sharers having ½ share and remaining the plaintiffs have been shown owner to the extent of ½ share, as per Jamabandi for the year 1976-77. However, the fact of the matter is that the sale deed has been executed qua the entire suit land. The share of Nathu Ram was only 1 bigha 7 biswas.

11. PW-1 Kanhaya Ram has categorically deposed that the land was in joint ownership and he alongwith the defendant Nathu Ram was co-sharers. The land was never partitioned. DW-1 Kirpa Ram has admitted in his cross-examination that since the defendant No. 1 was in possession of ½ share, he could sell his share only. He was not aware as to whether Kh. No. 92 was ever partitioned, as per the revenue papers. He has not seen the revenue papers to ensure that Kh. No. 92 was ever partitioned. He has also admitted that at the time of registration, he has not sought the permission of the plaintiff nor he has apprised him of this fact. The defendants have failed to prove that the land was ever partitioned. The learned first Appellate Court has taken into consideration the revenue record i.e. Jamabandis Ext. D-1 to D-5. According to these entries, the plaintiffs have been shown as co-sharers with Sh. Nathu Ram in the column of ownership. According to the learned first Appellate Court, it appeared that the family arrangement has taken place, whereby the parties came into separate possession of the joint holding. There is no contemporaneous material placed on record to establish the partition or family arrangement qua the suit land. The defendant Nathu Ram was never in exclusive possession of the whole of the suit land. Thus, he could sell only ½ share of the suit land and not the entire suit land. The substantial question of law is answered accordingly.

12. Consequently, the regular second appeal is allowed. The judgment and decree passed by the learned first Appellate Court dated 14.11.2003 is set aside. Judgment and decree of the learned Senior Sub Judge, Solan, dated 26.9.2002, is affirmed.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Gilja Ram .....Appellant.
Versus
Barfi Devi & Others ...Respondent.

RSA No. 359 of 2003.
Decided on: 11th November, 2014

Indian Succession Act, 1925- Section 63- Defendant No.1 claimed that deceased had executed a Will in his favour- he was

looking after the deceased during his life time- the trial Court and the Appellate Court held that the Will was shrouded in suspicious circumstances – it was proved on record that defendant No. 2 was looking after the deceased during his life time- deceased was residing alone and defendant No. 2 was married at a walk-able distance of 5 minutes from the house of the deceased- version of the witnesses regarding the visit to Sub Registrar by deceased was also contradictory- scribe stated that the Will was earlier written in favour of all real brothers- 3-4 persons came who quarreled with the deceased on which the deceased tore the earlier Will and executed a fresh Will in the name of the defendant No. 1 – the fact that deceased had got the Will executed in favour of all brothers showed that she never executed the Will in favour of the defendant No. 1- defendant No. 1 is the client of DW-1- DW-3 is his clerk, therefore, their testimonies cannot be relied upon- in these circumstances, Will was rightly held to be not proved.

(Para-9 to 18)

Case referred:
Krishan versus Tulki Devi, 2013 (1) Him.L.R, 338

For the appellant	:	Mr. Dushyant Dadwal, Advocate.
For the respondents	:	Mr. K. D. Sood, Senior Advocate with Mr. Rajneesh K. Lall, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Defendant No.1 Gilja Ram is in second appeal before this Court. He is aggrieved by the judgment and decree dated 7.6.2003 passed by learned District Judge, Kangra at Dharamshala in civil appeal No. 25-G/XIII/2001, whereby the trial Court judgment and decree dated 29.12.2000 passed in civil suit No.60/99/94, has been affirmed and the appeal dismissed.

2. Plaintiffs and defendant No.2 are real sisters. They are daughters of deceased Relo born to her from the loins of Masadi. Defendant No.1 Gilja Ram is step brother of plaintiffs and defendant No.2, born to one Rani with whom the deceased Masadi had solemnized customary marriage. The deceased Relo was owner-in-possession of the land to the extent of ½ share comprised in Khata No.28, Khatauni No.69 to 76, Khasra Nos. 54, 178, 321, 324, 364, 369, 1052, 1054, 1069, 53, 60, 168, 169, 175, 359, 461, 500, 1070 to 1072, 1079, 1081, 1087, 1122, 52, 172 179, 459, 1038, 1039, 1049, 1073, 1077, 1083, 1124, 51, 59, 61, 173, 361, 458, 1034, 1035, 1048, 1050, 1074, 1076, 1082, 1025, 501, 507, 55, 63, 174, 176, 362, 460, 1036, 1037, 1045, 1051, 1078 1080, 1123, 170, 171, 49, 50, 56, 58, 64, 177, 499, 5.5, 1019, 1020, 1044, 1054 Kitta 78 area 0-03-19 Hectares, situated in Mohal Jee, Mauza Kathog, Tehsil Dehra, District Kangra, H.P. Plaintiffs claimed that they were entitled to succeed the suit land in the share of their mother Relo along with defendant No.2 in equal shares on the basis of natural succession, however, defendant No.1 managed to execute a false, fictitious and frivolous Will (Ex.DW-1/A) from her on 7.4.1988. He even managed to get the mutation of the suit land attested in his favour vide mutation No.118 and 92 on 8.1.1994. They allegedly asked him to admit their claim so far as the suit land is concerned, but of no avail. Hence the suit.

3 The stand of the contesting defendant No.1 Gilja in a nut shell is that Relo was being looked after by him during her life time, therefore in lieu of the services he rendered to her, she bequeathed the suit land to him by executing the Will on 7.4.1988, which according to him, is genuine and authentic document.

4 Learned Trial Judge framed the following issues:-

"1. Whether deceased Smt. Relo has executed a valid 'Will' in favour of defendant No.1? OPD-1

2. Whether the plaintiffs are entitled to the relief of declaration? OPP

3. Whether the plaintiffs are estopped by their act and conduct from filing the present suit? OPD

4. Whether the plaintiffs are entitled for permanent injunction? OPP

5. Relief."

5 The parties were put to trial on the issues so framed and after recording the evidence on both sides as well as affording due opportunity of being heard to the parties on both sides dismissed the suit vide judgment and decree dated 29.12.2000.

6 Learned lower appellate Court in appeal preferred by defendant No.1 against the judgment and decree passed by learned trial Court, has affirmed the same and dismissed the appeal.

7 Defendant No.1 is now before this Court with the submissions that Will Ex.DW1/A is valid and genuine document having been duly proved so, from the evidence available on record, however, both the Courts below allegedly failed to appreciate the evidence available on record in its right perspective, on account of which the judgment and decree under challenge has vitiated and even perverse also and as such has been sought to be quashed being not legally and factually sustainable.

8 The appeal has been admitted on the following substantial question of law:-

"1. Whether the Courts below erred in holding that the will was surrounding by suspicious circumstances simply because other natural heirs have been excluded and that the beneficiary of the will was present at the time of execution of the will?

2. Whether the findings of the courts below that the attestator was not in sound disposing mind are perverse and not supportable by evidence on record."

9. It is seen from the record that both the Courts below have not declared the Will Ex.DW-1/A as illegal, null and void only on account of the same excludes the natural heirs of the testatrix deceased Relo, but also on account of shrouded by suspicious circumstances. Both the Courts below have formulated such opinion on appreciation of the oral as well as documentary evidence available on record. The present, as a matter of fact, is a case of concurrent findings. It is well settled at this stage, if both Courts below have recorded concurrent findings on appreciation of the evidence available on record the same should normally be not interfered with by the High Court in second appeal unless and until perverse or not based upon proper appreciation of the evidence.

10. This Court in ***Krishan*** versus ***Tulki Devi, 2013 (1) Him.L.R, 338***, has discussed in detail as to what constitutes the execution of a legal and valid Will.

11 It is thus crystal clear that in terms of the provisions contained under Section 63 of the Indian Succession Act, the Will, a solemn document, the conditions precedent to constitute legal and valid execution thereof are that the testator while in sound disposing mind must get the Will scribed into writing and admit the contents thereof to be true and correct as well as the sign the same in token thereof in the presence of two marginal witnesses. The marginal witnesses must see the testator while putting his signature on the Will whereas he should see the marginal witnesses while putting their signatures thereon. The propounder should not take any part in execution of the Will. The other factors such as the integrity of the marginal witnesses, veracity of the evidence having come on record by way of their statements, reasons for exclusion of natural heirs, if any, and the quality of other and further evidence available on record also weigh in the mind of the Court while considering the question of authenticity and genuineness of a document like Will.

12. As noticed hereinabove, it is urged that the declaration of the Will Ex. DW-1/A as illegal, null and void on account of exclusion of natural heirs i.e. plaintiffs and defendant No.2 and that the testatrix was not in sound disposing mind, is not supported by any legal and acceptable evidence and on account of that the judgment and decree is vitiated and being perverse is not legally sustainable. Such grounds raised to challenge the legality and validity of the impugned judgment and decree are, however, without any substance for the reason that both Courts below on appreciation of the evidence available on record in its right perspective have arrived at a conclusion that the Will is not a valid and genuine document and rather forged, fictitious and shrouded by suspicious circumstances. The manner in which the Will in dispute has been executed is doubtful right from the very beginning for the reason that cogent and reliable evidence suggesting that it is defendant No.2 alone, who used to look after the deceased during her life time is not proved on record beyond all reasonable doubt because one of the plaintiffs i.e. plaintiff No. 2 Misan Devi, while in the witness box as PW-2 tells us that it is she, who used to look after her mother deceased Relo during her life time, who according to her was living alone. It has come in her statement that she has been married nearby, at a walkable distance of five minutes from the house of deceased Relo. Therefore, it can reasonably be believed that the testatrix was not being looked after by the propounder defendant No.1, but by her daughter. PW-2 has further deposed that two of them were married by Masadi during his life time and the expenses incurred upon the marriage of remaining two sisters were born out by deceased Relo and by the two married sisters including herself.

13. The manner in which deceased Relo went to Tehsil for getting the Will executed in favour of defendant No.1 is also highly doubtful because it is difficult to believe that she went to Tehsil alone and was not accompanied by the propounder i.e. the defendant-appellant as he himself and Shri R.C. Dhiman have stated while in the witness-box as DW-4 and DW-1, respectively for the reason that Shri Lekh Raj DW-3, clerk of Shri R.C. Dhiman, Advocate in his cross-examination has stated that Relo came to them on foot with Gilja (defendant No.1). This discards the testimony of defendant No.1 and also Shri R.C. Dhiman, Advocate DW-1 that she had come alone to Tehsil.

14 On the other hand, PW-5 Ram Prakash a taxi driver, tells us that Gilja hired his taxi on 7.4.1988 by representing that he had to take his mother to Hospital. His mother was brought by Kaur Chand, the brother of Gilja on his back. She was not able to move here and there being paralytic. Her eyesight was also not good. She was also not in her senses. She was made to board his taxi which was got parked adjoining to the building of Tehsil, where some green papers were brought by Gilja and Kaur Chand. Something was got written

therein from one person having beard. Relo remained seated throughout in the vehicle. Her thumb impressions were taken on those documents and she was not apprised anything about the contents of the documents. Shri Balbir Singh is a registered medical practitioner. Though he is not having any diploma or degree in medical side, however, practicing since 1982. He has disclosed his licence No.11849/84. As per his version also Relo was paralytic, hence she was not in sound disposing mind. The evidence, therefore, produced by the plaintiffs reveals that the Will Ex.DW-1/A is not the last Will of deceased Relo being shrouded by suspicious circumstances.

15. True it is that the defendant, in order to prove the execution of the Will by Relo, has examined the scribe Shri Jagan Nath DW-2 and the attesting witnesses S/Shri R.C. Dhiman, Advocate DW-1 and his clerk Lekh Raj, DW-3. The scribe DW-2, while in the witnesses box, had disclosed an altogether different story as according to him, the Will initially was reduced into writing in the names of Ami Chand, Gilja (Defendant No.1), Kaur Chand and Gian Chand, all real brothers, however, 3-4 persons came there and they quarreled with Relo. She on being annoyed, torn out the earlier scribed Will and executed the Will Ex.DW-1/A in the name of defendant No.1. The scribing of Will in the names of all the four brothers including defendant No.1 and the same thereafter torn out, itself is a circumstance, which reveals that the testatrix had no intention to bequeath her property to defendant No.1 alone. It remained unexplained as to who were the 3-4 persons quarreled with Relo. Such evidence rather leads to the only conclusion that the testatrix never executed any Will in the name of defendant No.1 on 7.4.1988.

16. Interestingly, defendant No. 1 is the client of Shri R.C. Dhiman, Advocate, DW-1. Not only in some previously instituted litigation, but represented the defendant in this case also. DW-3 Lekh Raj is his clerk. They both, in my considered opinion, are interested witnesses and as such both Courts below have rightly refused to rely upon their testimony. It cannot be believed that the testatrix during her life time used to come to the Court with defendant No.1 to defend the cases pertaining to him. When DW-3 admits that Relo had nothing to do with the cases pertaining to defendant therefore, it is highly unbelievable that Relo used to come to DW-1 or for that matter his Clerk DW-3. The story has been invented to give a colour to the whole issue and pursue the Court to believe that the Will Ex.DW-1/A being executed in their presence is legal and valid document. The execution of the Will, therefore, has not been proved, in accordance with law, at all. Both Courts below have not committed any illegality and irregularity in belying the stand of defendant No.1.

17. True it is that the exclusion of the legal heirs by the testatrix is not a valid ground to declare the Will as illegal, null and void, however, in the case in hand when it is not proved beyond all reasonable doubt that it is the propounder i.e. defendant No.1 alone was looking after and maintaining the testatrix during her life time and it is on account of the services he rendered to her, she bequeathed her entire property in his name by way of Will Ex.DW-1/A. The exclusion of four daughters, i.e. plaintiffs and defendant No.2 by deceased Relo is not at all supported by the record. As a matter of fact, it is not the exclusion of the natural heirs alone, which weigh in the minds of both Courts below while holding the Will as illegal, null and void, but also the other circumstances, such as active participation of the propounder in the execution of the Will, association of interested persons as marginal witnesses to the will and at the apex the execution of Will initially not only in the name of defendant No.1, but also in the names of his real brothers namely Ami Chand, Kaur Chand and Gian Chand.

18. The reappraisal of the given facts and circumstances and also the oral as well as documentary evidence available on record leads to the only conclusion that the Courts below have not committed any illegality and irregularity in decreeing the suit against the appellant-defendant. The

impugned judgment and decree is neither perverse nor vitiated on account of misreading of the oral as well as documentary evidence available on record and rather deserves to be upheld.

19. In view of the above this appeal fails and the same is accordingly dismissed. Pending application(s), if any, shall also stand disposed of. No order so as to costs.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

CWP No. 536 of 2013 & COPC No. 176 of 2013
Date of decision: 11.12.2014

CWP No. 536 of 2013	
Satish Dadwal	...Petitioner
Versus	
State of H.P. and others	...Respondents
CPC No. 176 of 2013	
Smt. Satish Dadwal	....Petitioner
Versus	
Shri P.C. Dhiman and others	....Respondents

Constitution of India, 1950- Article 226- Petitioner joined as a Manager with respondent No. 3, a Society- her pay was ordered to be reduced in view of the orders passed by the Deputy Registrar, Cooperative Societies- she filed a writ petition in which a statement was made that reduction will not be applicable to the petitioner- when new Director joined, he passed various resolutions reducing the salary of the petitioner-record showed that resolutions enhancing the salary were passed without seeking approval of the Registrar- it was stated in the writ petition that petitioner need not refund the enhanced salary received by her-no statement was made regarding the future salary- income of the society was Rs. 28,000/- and the petitioner claimed salary of Rs. 40,000/- held, that no fault can be found with the resolutions reducing the salary of the petitioner. (Para-5 to 8)

Constitution of India, 1950- Article 226- A Writ Petition is not maintainable against a co-operative society. (Para-9)

Cases referred:

Chandresh Kumar Malhotra Vs. H.P. State Cooperative Bank and others, (1993(2 SLC 243

Vikram Chauhan Vs. Managing Director, Latest H.L.J 2013 (HP) 742 (FB)

S.S. Rana Vs. Registrar Co-operative Societies and Another, (2006) 11 SCC 634

Laxmi Narain and others Vs. Kuldeep Singh and othes, LPA No. 236 of 2011

Sanjeev Kumar and others Vs. State of H.P. and others, CWP No. 6709 of 2013

For the Petitioner:	Mr. Ajay Sharma, Advocate.
For the Respondents:	Mr.V.K. Verma, Mr. Rupinder Singh, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General, for respondents No. 1 and 2.

Mr. N.K. Thakur, Senior Advocate with Mr. Surinder Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (Oral).

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

> *"(i) The impugned resolutions dt. 10.7.2012, 28.7.2012, 11.8.2012, 28.8.2012 and 10.9.2012 and further orders dt. 10.9.2012, available in annexure P-2, may very kindly be quashed and set aside having been passed by overstepping the jurisdiction vested in respondent and further being in violation of the orders passed in CWP No. 266 of 2004 with directions to the respondents to allow the petitioner to continue in service drawing enhanced salary and taking as if there is no suspension orders and chargesheet against the petitioner.*
>
> *(ii) That Board of Directors of respondent No. 3 may very kindly be proceeded against as per sections 11 and 12 of Contempt of Courts Act to upkeep the majesty of law in highest esteem."*

2. The case of the petitioner as set out in the writ petition is that, she joined as Manager with the respondent No. 3, Society in the year 1992. In the year 2004 her pay was ordered to be reduced in view of the orders passed by the Deputy Registrar, Cooperative Societies, Kangra, which order was challenged by her by way of CWP No. 266 of 2004. This Court on the basis of statement made by the learned Additional Advocate General on the instructions of the Registrar Cooperative Societies held the impugned reduction in pay to be not applicable to the petitioner and therefore, petitioner was entitled to enhanced salary which she continued to draw till 31.5.2012. It is then claimed that new Director assumed office in the month of June, 2012 and for reasons best known to him began harassing the petitioner. The respondents passed various resolutions, which were in disobedience to the judgment passed in CWP No. 266 of 2004. These illegal actions of the Society were challenged before the Deputy Registrar, Cooperative Societies, but the said petition was dismissed. It is on the basis of such allegations that the petitioner has sought the reliefs as set out herein above.

3. The respondent Society filed its reply, wherein it was submitted that the services of the petitioner were initially engaged as Assistant Secretary on lump sum wages of Rs.1000/- per month. The petitioner misguided the then Management of the Society in the year 2002 and got her salary enhanced to Rs.3000/- and thereafter Rs.6000/-, knowing fully well that this salary is only available to the persons working in category 'AA' society, while the respondent Society did not fall under the said category. It is averred that in the year 2004 on her own adopting the Rules of 'AA' class Society, she again got her wages increased from Rs.6,000/- to Rs.16,000/-. Not only this, thereafter she got her wages fixed at Rs.40,000/- per month, beside Rs.2500/- PPF, whereas the income of the Society was not equivalent to the wages drawn by the petitioner. In so far as the order passed by this Court in CWP No. 266 of 2004 is concerned, it is submitted that it was on the statement of the Registrar that the order came to be passed by this Court providing therein that the recovery would not be affected from the petitioner. Lastly, it is submitted that in the Society 51% share is of the Ex-servicemen, who have not been paid even a penny for the last 40 years and the sole income of the Society is from the rent of the godown, which is about Rs.28,000/- per month and no other activity is being carried out by the Society.

4. The respondent No. 1 also contested the petition by filing reply, wherein this respondent has raised the question of jurisdiction in view of the judgment passed by Division Bench of this Court in ***Chandresh Kumar Malhotra Vs. H.P. State Cooperative Bank and others, (1993(2 SLC 243,*** as upheld by the Full Bench of this Court in ***Vikram Chauhan Vs. Managing Director, Latest H.L.J 2013 (HP) 742 (FB),*** as well as decision of Hon'ble Supreme Court in ***S.S. Rana Vs. Registrar Co-operative Societies and Another, (2006) 11 SCC 634.***

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

5. Undisputedly, the entire case of the petitioner hinges around the order passed by this Court on 18.11.2006, therefore, the said order is being reproduced in extenso and reads as follows:-

"18.11.2008: Present: Mr. Ajay Sharma, Advocate for the petitioner.

Mr. R.K. Sharma, Sr. Addl. A.G. with Mr.Rajinder Dogra, Additional A.G. for respondents No. 1 to 3.

Mr. Ramakant Sharma, Advocate for respondent No. 4.

It is not disputed by the parties that the Rules relating to terms of the working conditions of the Shivalik Cooperative Rosin and General Mills Limited, Gagret, Tehsil Amb, District Una have been framed during the pendency of this writ petition. It is also not disputed by the parties that the petitioner was granted higher salary on the basis of resolutions dated 26.6.2001 and 11.1.2003. The only controversy involved is whether this hike could be given to the petitioner without seeking permission of the State Government under rule 56 (3) of the Himachal Pradesh Cooperative Societies Rules, 1971. In order to mitigate the hardship of the petitioner, on the previous date of hearing, the Court observed that the learned Senior Additional Advocate General may seek instructions whether the salary which has already been enhanced on the basis of two resolutions dated 26.6.2001 and 11.1.2003 could be regularized or not. The learned Senior Additional Advocate General on the basis of the instructions imparted to him by the Registrar, Cooperative Societies, Himachal Pradesh submits that the enhanced/hiked salary on the basis of two resolutions dated 26.6.2001 and 11.1.2003 need not be refunded by the petitioner. In other words, the petitioner has been held entitled to this enhanced salary.

Accordingly, in view of the observation made hereinabove, the present writ petition has become infructuous and the same is dismissed having become infructuous. However, if the petitioner is still aggrieved, in any manner, she has absolute liberty to approach the appropriate forum for the redressal of her grievances. There will, however, be no order as to costs."

The contention of the petitioner is that once this Court had adjudicated upon the resolutions dated 26.6.2001 and 11.1.2003, the respondent-Society could not have withdrawn these resolutions and this amounts to willful disobedience of the orders passed by this Court.

6. I have perused the order and find that this Court has in no manner adjudicated upon the validity of resolutions dated 26.6.2001 and 11.1.2003. It appears that these resolutions which proposed the hike in salary had been passed without seeking the prior approval of the Registrar as contemplated under Rule 56 (3) of the Himachal Pradesh Co-operative Societies Rules, 1971, which reads as follows:-

> *"56 (3) No Co-operative society shall employ a salaried officer or servant with total monthly emoluments exceeding rupees 'one hundred' without the previous permission of the Registrar. The promotion of an employee to a higher post shall be deemed to be an appointment under this sub-rule."*

7. It was in order to mitigate the hardship of the petitioner at that time the Registrar had been asked as to whether the two resolutions aforesaid could be regularized or not. The Registrar had categorically stated that the enhanced/hiked salary on the basis of the aforesaid two resolutions need not be refunded by the petitioner and consequently for this period the petitioner had been held entitled to this enhanced salary.

8. This is a classical example of *"fence eating the crop"*. The order passed by this Court has been totally misread by the petitioner to claim enhanced salary. The petitioner knowing fully well that the total income of the Society is only Rs.28,000/-, would still claim continuity of the enhanced salary of Rs.40,000/-, that too by misinterpreting the order passed by this Court. How the society runs its affairs is best left to do the Society to decide and the Courts would loathe to interfere in such matters. Even while passing order on 18.11.2008 (supra), the Registrar had only informed that the salary paid to the petitioner need not be refunded by her for the period she had been paid enhanced salary but nowhere had this Court upheld her claim for enhanced salary for the future.

9. That apart, the present petition would not be maintainable in view of the reliefs sought by the petitioner, which are primarily directed against the respondent No. 3-Cooperative Society, in view of the ratio laid down by the Hon'ble Supreme Court and this Court not only in the judgments referred to by respondent No. 1 in its reply, (as quoted herein above) but also in view of the subsequent judgment delivered by Division Bench of this Court in ***Laxmi Narain and others Vs. Kuldeep Singh and othes, LPA No. 236 of 2011*** and ***Sanjeev Kumar and others Vs. State of H.P. and others, CWP No. 6709 of 2013.***

Accordingly, I find no merit in this petition and the same is dismissed leaving the parties to bear their costs.

COPC No. 1076 of 2013

10. By way of this petition, the petitioner has sought to initiate proceedings of contempt against the respondents on the strength of the following observations made by this Court while adjudicating CWP No. 266 of 2004, decided on 18.11.2008:-

> *"In other words, the petitioner has been held entitled to this enhanced salary."*

11. It is claimed that the respondent No. 3 by passing the resolutions on 10.7.2012, 18.7.2012, 11.8.2012, 28.8.2012 and order dated 10.9.2012 has set at naught the order passed by this Court on 18.4.2008, thereby denied the due and admissible salary to the petitioner.

12. I have already held above that the order passed by this Court on 18.11.2008 only states that no recovery shall be made from the petitioner for the period she has worked on the enhanced salary, but the said order in no manner adjudicates upon the rights of the petitioner to claim the said salary after the

passing of the order. In other words, it only adjudicates upon the rights of the petitioner for the salary already received by her, which was sought to be recovered. In fact the petitioner by quoting a stray sentence has tried to mislead this Court to claim the enhanced salary. The entire order dated 18.11.2008 has already quoted in extenso (herein above) does not support the claim of the petitioner. Accordingly there is no merit in this petition also and the same is dismissed.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Vikas Kumar ..... Petitioner
Vs.
State of H.P. & ors. ..... Respondents

CWP No. 7214 of 2010.
Date of decision: 11.12.2014.

Constitution of India, 1950- Article 226- Petitioner applied for the post of Constable under OBC category- respondent No. 4 and 5 applied for the post under the category of OBC reserved for Antyodya and IRDP categories- respondent No. 4 secured higher marks than the petitioner and he was considered against the IRDP (general) OBC category – respondent No. 4 was appointed against the OBC (IRDP) category- petitioner contended that respondent No. 5 could not have been considered against the post of OBC (IRDP) category because this post was already filled up by respondent No. 4- State contended that both respondents No. 4 and 5 belong to the OBC (IRDP) category and because the respondent No. 4 had secured higher marks, his case was considered against the OBC un-reserved post as per rules and instructions of the government- petitioner had secured less marks than respondent No. 4- therefore, he could not be selected against the OBC (unreserved) category- respondent No. 5 had secured less marks than the petitioner but he was selected against the OBC (IRDP) category and not against OBC (unreserved) category – held, that reservation in favour of OBC is under Article 16 (4) of the Constitution and would be termed as vertical reservation, reservation thereafter in favour of other categories like Ex-serviceman, IRDP and Home Guard within the OBC category would be considered as horizontal reservation- horizontal reservations cut across the vertical reservations - therefore, even after providing for the horizontal reservations, the percentage of reservations in favour of OBC would still remain the same - proper course for the respondents was to fill up all the vacancies on the basis of merit and thereafter to fill up special reservations like Ex-serviceman, IRDP and Home Guard - if the quota fixed for horizontal reservation was already satisfied, no question would arise further but in case there was a shortfall, the number of special reservation candidates were required to be taken and adjusted/ accommodated against their respective categories- name of the respondent No. 4 could not have been considered against the OBC un-reserved category- the seat vacated by him

could not have been offered to respondent No. 5- respondent No. 5 could not have been considered against the post of OBC (IRDP) - the seat vacated by respondent No. 4 was to be filled up from OBC (unreserved) category – since, petitioner was next in merit, therefore, he was required to be appointed in place of respondent No. 5. (Para-9 to 11)

Cases referred:

Indra Sawhney vs. Union of India 1992 Supp (3) SCC 217

Anil Kumar Gupta vs. State of U.P. (1995) 5 SCC 173,

Rajesh Kumar Daria vs. Rajasthan Public Service Commission and others (2007) 8 SCC 785

Public Service Commission, Uttaranchal vs. Mamta Bisht and others (2010) 12 SCC 204

V. Balasubramaniam and others vs. Tamil Nadu Housing Board and others (1987) 4 SCC 738

N.T. Devin Katti and others vs. Karnataka Public Service Commission and others (1990) 3 SCC 157

S.B.Sarkar and others vs. Union of India and others (1990)3 SCC 168

Ram Sewak Prasad vs. State of U.P. and others AIR 1991 SC 1818

For the petitioner : Mr. Vijay Bhatia, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General with M/s Virender Kumar Verma, Rupinder Singh, Additional Advocate Generals and Ms. Parul Negi, Dy. Advocate General, for respondents No. 1 to 3.

Mr. V.D.Khidtta, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner applied for the post of constable under the OBC category, while the respondents No. 4 and 5, who too belonged to OBC category, applied under the category of OBC reserved for Antodaya and IRDP categories. The relative marks obtained by the parties are as under:-

Petitioner = 71.33%

Respondent No.4 = 71.83%

Respondent No.5 = 68.67%

The total number of posts and their break up is as under:-

Category	Break up of posts as per vertical reservation	Ex-Service man	IRDP	Sportsman	Wards of Freedom fighter	Home Guard	Other
General	33	4	5	1	-	6	17
SC	11	2	1	-	-	1	7
ST	1	-	-	-	-	-	1

OBC	10	1	1	-	-	1	7
Total	55	7	7	1	-	8	32

2 It appears that respondent No. 4, who admittedly, had secured higher marks than the petitioner was considered for the post of OBC (IRDP) category, but then in view of his higher percentage, he was considered against the IRDP in general OBC category and respondent No. 5 who had obtained only 68.67% marks came to be appointed in the OBC (IRDP) category. The grievance of the petitioner is that the candidature of respondent No. 5 could not have been considered against the post of OBC (IRDP) category because that slot had already been occupied by respondent No. 4, as admittedly respondent No. 4 had applied under the OBC (IRDP) category and not in OBC (Un-reserved) category.

3 The official respondents in their reply filed to the petition contended that both the respondents No. 4 and 5 belong to the OBC (IRDP) category and because the respondent No. 4 secured 71.83 marks, his candidature was considered against OBC (Un-reserved) post as per the rules of reservation and instructions of the government. The rules provide that in case a person from the reserved category secures more marks from the candidates of unreserved category, the candidature of such candidate could be considered against the unreserved post. The petitioner had secured 71.33% marks, which was less than the marks secured by respondent No. 4 and therefore he could not be selected against the OBC (unreserved) category, whereas the respondent No. 5 though had secured less marks than the petitioner, but he was selected against the OBC (IRDP) category and not against OBC (unreserved) category.

4 I have heard Mr. Vijay Bhatia, learned counsel for the petitioner and Mr. Shrawan Dogra, learned Advocate General assisted by S/Sh. Virender Kumar Verma, Rupinder Singh, learned Additional Advocate Generals and Ms. Parul Negi, learned Deputy Advocate General for respondents No. 1 to 3, and Mr. V.D.Khidtta, learned counsel for respondent No. 5.

5 At the very out set this court has no hesitation to observe that respondents have totally misconstrued and misinterpreted the very concept of horizontal and vertical reservation. The principle of horizontal reservation was explained by the Hon'ble Supreme Court in the celebrated case of **Indra Sawhney** vs. **Union of India 1992 Supp (3) SCC 217** in the following terms:-

> *"All reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes [(under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped (under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against the quota will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same."*

6 The method of implementing the special reservation, which is a horizontal reservation, cutting across vertical reservations, was explained by the Hon'ble Supreme Court in **Anil Kumar Gupta** vs. **State of U.P. (1995) 5 SCC 173,** in the following terms:-

"The proper and correct course is to first fill up the Open Competition quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an overall horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.).

[Emphasis supplied]"

7 Now what would be the difference between the nature of vertical reservation and horizontal reservation has been succinctly dealt with by the Hon'ble Supreme Court in **Rajesh Kumar Daria** vs. **Rajasthan Public Service Commission and others (2007) 8 SCC 785,** in the following terms:-

"9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide - Indira Sawhney (Supra), R. K. Sabharwal vs. State of Punjab [(1995 (2) SCC 745]), Union of India vs. Virpal Singh Chauvan [(1995 (6) SCC 684] and Ritesh R. Sah vs. Dr. Y. L. Yamul [(1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example :

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to

disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four.]"

8 The controversy regarding vertical and horizontal reservation again came up for consideration before Hon'ble Supreme Court in **Public Service Commission, Uttaranchal** vs. **Mamta Bisht and others (2010) 12 SCC 204,** wherein 35 posts of Civil Judge (Junior Division) had been advertised with the stipulation that number of vacancies may be increased or decreased. It was clarified that reservation policy adopted by the State in favour of SC/ST/OBCs and horizontal reservation in favour of physically handicapped and women etc. belonging to Uttaranchal would be applicable. Respondent Mamta Bisht applied and sought benefit of reservation in favour of Uttaranchal women. She qualified the written examination and faced interview held by the Commission. The final result of the selection was declared on 31.7.2003 and respondent No.1 was not selected. Instead of filling up 35 vacancies, the recommendation to fill up 42 vacancies was made as the decision had been taken in this regard prior to the declaration of the result. Out of 42 posts, 26 were filled up by general category and 16 by reserved category candidates, some women candidates stood selected in the general category while the other was given the benefit of horizontal reservation being residents of Uttaranchal. Respondent Mamta Bisht being aggrieved, preferred writ petition before the High Court of Uttaranchal seeking quashment of select list mainly on the ground that women candidates belonging to Uttaranchal had secured marks making them eligible to be selected in the general category and had it been done so she would have been selected in the reserved category being woman of Uttaranchal. The High Court accepted her submission and came to the conclusion that the last selected woman candidate who was given the benefit of horizontal reservation for Uttaranchal woman had secured marks higher than the last selected candidate in the general category. Thus the said candidate ought to have been appointed against the general category vacancy while the respondent Mamta Bisht ought to have been offered the appointment giving her the benefit of horizontal reservation for Uttaranchal woman. In appeal, the Hon'ble Supreme Court held as follows:

"11. All the 42 vacancies had been filled up, implementing the reservation policy. All the women candidates selected from reserved category indisputably belong to Uttaranchal and none of them is from another State.

12. The High Court decided the case on the sole ground that as the last selected candidate, receiving the benefit of horizontal reservation had secured marks more than the last selected general category candidate, she ought to have been appointed against the vacancy in general category in view of the judgment of this Court in Indra Sawhney Vs. Union of India, AIR 1993 SC 477, and the Division Bench judgment of High Court of Uttaranchal in Writ Petition No.816/2002 (M/B) (Km. Sikha Agarwal Vs. State of Uttaranchal & Ors.) decided on 16.4.2003, and respondent no.1 ought to have appointed giving benefit of reservation thus, allowed the writ petition filed by respondent No.1.

13. In fact, the High Court allowed the writ petition only on the ground that the horizontal reservation is also to be applied as vertical reservation in favour of reserved category candidates (social) as it held as under:

> *"In view of above, Neetu Joshi (Sl.No.9, Roll No.12320) has wrongly been counted by the respondent No.3/Commission against five seats reserved for Uttaranchal Women General Category as she has competed on her own merit as general candidate and as 5th candidate the petitioner should have been counted for Uttaranchal Women General Category seats."*

Admittedly, the said Neetu Joshi has not been impleaded as a respondent. It has been stated at the Bar that an application for impleadment had been filed but there is nothing on record to show that the said application had ever been allowed. Attempt had been made to implead some successful candidates before this Court but those applications stood rejected by this Court."

9 The reservation in favour of OBC classes is under Article 16(4) of the Constitution and would be termed as vertical reservation, whereas the reservation thereafter in favour of other categories like Ex-serviceman, IRDP and Home Guard within the OBC category would be considered as horizontal reservation. The horizontal reservations cut across the vertical reservations- what is called as interlocking reservations. The persons selected against the quota will be placed in that quota by making necessary adjustment. Therefore, even after providing for these horizontal reservations, the percentage of reservations in favour of OBC would still remain the same and should remain the same.

10 The proper and correct course for the respondents in this case was to have first filled up all the ten vacancies on the basis of merit and then fill up the special reservations i.e. Ex-serviceman, IRDP and Home Guard. If the quota fixed for horizontal reservation was already satisfied, no further question would arise. But in case there was a shortfall and the reservation had not been satisfied, the requisite number of special reservation candidates were required to be taken and adjusted/ accommodated against their respective categories i.e. Ex-serviceman, IRDP and Home Guard by deleting the corresponding number of candidates therefrom.

11 This admittedly having not been done, it can safely be concluded that respondents have not correctly applied the vertical and horizontal reservations. The name of respondent No. 4 could not have been considered against the OBC (unreserved) category and consequently the seat so vacated by him could not have been offered to respondent No.5. The respondent No. 4 had already occupied the slot reserved for OBC (IRDP) and his case thereafter could not have been considered for the post of OBC (unreserved). Likewise respondent No. 5 could not have been considered against the post of OBC (IRDP) by pushing up and considering the case of respondent No. 4 in the category of OBC (unreserved). After respondent No.4 had been appointed to the post of OBC (IRDP) then the seat vacated by him was essentially required to be filled up from OBC (unreserved) category. Indisputably the petitioner was next in merit and was therefore required to be appointed in place of respondent No.5.

12 In view of the aforesaid discussion, there is merit in this petition and the same is allowed and official respondents are directed to consider and appoint the petitioner to the post of police constable against OBC (unreserved) category. Accordingly, the appointment of respondent No. 5 to the post of OBC (IRDP) is quashed and set-aside. Similarly, the appointment of respondent No. 4 to the post of OBC (General) is also quashed and set-aside and he will be considered to have been appointed to the post of OBC (IRDP). This order be complied with within six weeks and needless to say that petitioner shall be entitled to all consequential benefits.

13 At this stage, it may be noticed that there has been no misrepresentation on the part of respondent No.4 and even otherwise no fault can be attributed to him as he came to be appointed by the official respondents by wrongly applying the principle of horizontal and vertical reservations. The petitioner has been working with the respondents for the last more than four years. The Hon'ble Supreme Court in **V. Balasubramaniam and others** vs. **Tamil Nadu Housing Board and others (1987) 4 SCC 738** in similar circumstances while allowing a claim for promotion which would have resulted in the reversion of the promoted candidate had directed that instead of reverting the candidate a supernumerary post, if necessary, be created till such time he becomes eligible to be promoted to the said post. It will be apt to reproduce para-18 of the judgement, which reads thus:-

> *"18. We, however, make it clear that if in the process of reviewing the promotions already made in accordance with the directions issued by the learned single Judge it becomes necessary to revert any Junior Engineer from the post which he is now holding we direct that he shall not be so reverted but he shall be continued in the post which he is now holding by creating a supernumerary post, if necessary, until such time he becomes again eligible to be promoted to the said post. The continuance of such Junior Engineer in the post which he is now holding as per this direction shall not, however, come in the way of the petitioners in the writ petitions or any other employee of the Board getting the promotion due to him and the seniority to which he is entitled in accordance with law. These appeals are accordingly allowed. There shall, however, be no order as to costs."*

14 In **N.T. Devin Katti and others** vs. **Karnataka Public Service Commission and others (1990) 3 SCC 157** the Hon'ble Supreme Court in similar circumstances after setting aside the appointment of respondent had directed the State government to create a supernumerary post, as would be clear from the following observations:-

> *"15. During the pendency of the writ petition before the High Court, appointments were made to the posts of Tehsildars on the basis of the revised list prepared by the Commission in accordance with the directions of the State Government dated 23rd of the High Court the appointment orders contained a specific term that the appointments would be subject to the result of the writ petition filed by the appellants. Since the appellants have succeeded, the respondents' appointment is liable to be set aside. The respondents have been working for a period of about 14 years, it would cause great hardship to them if their appointment is quashed, and they are directed to vacate the office which they have been holding during all these years. At the same time the appellants have been wrongly denied their right to the posts of Tehsildars. Having regard to these facts and circumstances, we are of the opinion that. it would be expedient in the interest of justice not to interfere with the respondents' appointment but at the same time steps should be taken to enforce the appellants' right to the posts of Tehsildars. In this view, we direct the State Government to appoint the appellants on the posts of Tehsildars with retrospective effect, but if no vacancies are available the State Government will create supernumerary posts of Tehsildars for appointing the appellants against those Posts. We further direct that for purposes of seniority the appellants should. be placed below the last candidate appointed in l976 but they will not be entitled to any backwages. The appellants will be entitled to promotion if otherwise found suitable."*

15 Similarly in **S.B.Sarkar and others** vs. **Union of India and others (1990)3 SCC 168,** the promotions already made were not disturbed by the Hon'ble Supreme Court and it was further held that in case there was any short-fall, the adequate number of additional posts be created, as would be clear from the following observations:-

> *"11. In the result this appeal is disposed of by directing that the respondent authorities shall grant promotional benefit to those 204 SMs- who had exercised option before 1983 in the same manner as it would have been if option had not been abolished in accordance with the earlier procedure provided they fulfilled the other requirements. While doing so those who had been promoted shall not be disturbed as directed by this Court on 30th July, 1987. Further if as a result of this exercise posts in higher grade fall short, the respondents shall create adequate number of additional posts to overcome the difficulty. The respondents are further directed to complete all this exercise within six months. Persons promoted in pursuance of this order shall be entitled to all consequential benefits from the due dates. Appellants shall be entitled to consolidated costs which are assessed at Rs. 5,000 to be payable by respondent No. 2."*

16 In **Ram Sewak Prasad** vs. **State of U.P. and others AIR 1991 SC 1818** the promotions of the candidates who otherwise were required to be reverted were protected and the State government was directed to create additional post to accommodate the petitioner and other similar persons, as would be clear from the following observations:-

> *"12. We make it clear that none of the respondents who have already been promoted to the higher rank of Excise Superintendents or Assistant Excise Commissioners be reverted to accommodate the petitioner or any other person similarly situated. The State Government shall create additional posts in the cadre of Excise Superintendents and Assistant Excise Commissioners to accommodate the petitioner and other similar persons, if necessary."*

17 Though this court has quashed and set-aside the appointment of respondent No.5, however, the official respondents may consider the desirability of not dispensing with his services and may consider his case by creating a supernumerary post or adjust the said respondent against some future vacancy.

The writ petition is allowed in the aforesaid terms, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Smt. Anjna Kumari ...Petitioner
Versus
State of H.P. and others ...Respondents

CWP No. 6777 of 2012
Date of decision: 12.12.2014

Constitution of India, 1950- Article 226- Petitioner claimed that she belongs to a BPL family – she is landless and has a preferential right to be appointed- interview committee had wrongly awarded 6 marks to respondent No. 4 and one mark to her (petitioner)- it was further claimed that respondent No. 4 is a member of joint family and is getting pension- family income of the respondent No. 4 is more than Rs. 12,000/- per month- respondent No. 4 claimed that she is widow and has five children- she is residing separately from her mother-in-law- held, that no allegations of favoritism or mala-fide were made in the petition- it was for the Selection Committee to award the marks- merely because less marks were awarded to the petitioner cannot lead to an inference that assessment is

unfair- further, the petitioner had taken a chance and was not selected, hence, she cannot question the selection – petition dismissed. (Para- 5 to 7)

Case referred:
Madan Lal and others Vs. State of J & K and others, (1995) 3 SCC 486

For the Petitioner:	Mr. Ashwani Pathak, Advocate.
For the Respondents:	Mr.V.K. Verma, Mr. Rupinder Singh, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General, for respondents No. 1 to 3. Mr. Vivek Singh Thakur, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (Oral).

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

> *"(i) That the appointment of respondent No. 4 as part time Water Carrier in Govt. Primary School, Samtehan, Tehsil Dasra, Distt. Bilaspur, H.P. may kindly be quashed/set aside and the petitioner may kindly be appointed as such in the said school being eligible as part time Water Carrier."*

2. Interview for the post of part time Water Carrier in Government Primary School, Samtehan in District Bilaspur was to be held on 18.2.2012 and the Selection Committee was to comprise of the following members:-

Elementary Education Department

1. SDO (C) concerned Area, Chairman
2. Centre Head Teacher of the concerned school, member
3. President, School Management Committee of the concerned school, member.

It was further provided that the interview marks shall be awarded to the candidates out of 30 and the distribution of marks was as under:-

1.	For candidates of village/town at distance:	
	(a) Up to 1.5 KMs from school	10 Marks
	(b) Up to 2 KMs from school	8 Marks
	(c) Up to 3 KMs from school	6 Marks
	(d) Up to 4 KMs from school	4 Marks
	(e) Up to 5 KMs from school	2 Marks
2.	For candidates whose families have donated land for school.	5 Marks
3.	Candidates belonging to SC/ST/ OBC/BPL	3 Marks
4.	Candidates belonging to unemployed families	5 Marks

5.	Interview/Viva	7 Marks

Interview for the post in question was conducted by the Selection Committee, headed by the SDM as the Chairman, in which six candidates appeared in the interview and respondent No. 4 having been awarded the highest marks was ordered to be selected and was consequently appointed.

3. Petitioner claims to be belonging to BPL family and that apart being landless and therefore, had a preferential right to be appointed. It is claimed that the interview committee had illegally awarded 6 marks in the interview to respondent No. 4 in order to defeat the legal and genuine claim of the petitioner, who was only awarded only 1 mark. It is further claimed that respondent No. 4 is a member of joint family, which is headed by her mother-in-law, who is in receipt of pension, since her husband was in service of BBMB. The family income of respondent No. 4 is more than Rs.12000/- per annum and therefore, she was not entitled to be appointed.

4. The official respondents have filed their reply, wherein it has been specifically averred that the selection of respondent No. 4 has been made with the prior approval of the Government by a duly constituted committee, wherein the selection was made purely on merits.

5. Respondent No. 4 on the other hand has filed separate reply, wherein she has claimed herself to be a widow and having five children (3 daughters, 2 sons) and it is further claimed that she has been separated by her mother-in-law after death of her husband and there is none to support her children. While the petitioner on the other hand at least has her husband by her side, therefore, she is better placed. It is further claimed that she is not possessed of any agricultural land, as she had been ousted from the joint family in the year 2009. Thereafter she had applied to Gram Panchayat, Tarsooh for separation in record on 2.3.2011, however, the proceedings culminated only in the year 2012. This respondent has further re-iterated that her income is far less than Rs.12,000/- per annum and therefore, apart from having selected on merits, she is entitled to the post after taking into consideration her insecurity.

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

6. The only contention raised by the petitioner during the course of arguments is that the petitioner had been awarded only 1 mark in the interview, while respondent No. 4 had been awarded 6 marks just to defeat the legal and genuine claim of the petitioner. At this stage, it may be notice that there are no allegations of favoritism or malafide and therefore, the said allegations cannot be declared to be bad as this Court is not likely to interfere in the selection process. Now in so far the question of awarding marks in the interview is concerned, the same was in the realm of assessment of the relative merits of candidates concerned by the Selection Committee before whom the candidates appeared for the viva voce. Merely on the basis of petitioner's apprehension or suspicion that she was deliberately given less mark in the oral interview as compared to the rival candidates, it could not be said that the process of assessment is vitiated.

7. As already noticed above, there is no whisper in the entire petition about any favoritism, bias or malafide. Therefore, this contention of the petitioner cannot be countenanced. Moreover, the petitioner has already taken a chance and having not been selected, cannot question the selection. Both the aforesaid contentions are squarely answered by the Hon'ble Supreme Court in ***Madan Lal and others Vs. State of J & K and others, (1995) 3 SCC 486*** in the following terms***:-***

> "10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be

unsuccessful. It is also to be kept in view that in this petition we cannot sit as a court of appeal and try to reassess the relative merits of the candidates concerned who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed, in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly nor acting as a court of appeal over the assessment made by such an expert committee."

8. In view of the aforesaid discussion, this Court finds no merit in this petition and the same is dismissed, leaving the parties to bear their costs.

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

Union of India & Others .....Petitioners.
Versus
Tej Ram ....Respondent.

CWP No. 7097 of 2014
Reserved on : 5.12.2014
Decide on : 12.12.2014

Constitution of India 1950- Article 226- Petitioner sought promotion as JE as per Military Engineering Services (Superintendents (Electrical Mechanical) Grade I and Grade II) Recruitment Rules , 1983- petitioner had appeared in the diploma Course, the result of which was declared on 6.2.2001 after the cut-off date- however, examination was conducted in the month of December, 2000 prior to cut-off date- held, that petitioner was eligible to be considered for promotion and relevant date is the date of taking of the examination and not the date of pronouncement of the results. (Para-2 and 3)

For the Petitioners: Mr. Ashok Sharma, ASGI.

For the Respondent: Mr. Vinod Kumar Chauhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The respondent herein claimed promotion as JE (Electrical/Mechanical) against the vacancies of 2001-2002, as per Recruitment Rules, issued vide notification No. S.R.O 302 of 17.11.1983, nomenclatured as Military Engineering Services (Superintendents (Electrical Mechanical) Grade I and Grade II) Recruitment Rules , 1983.

2. The deterrent which beset the petitioner herein to not consider the claim of the respondent herein for being promoted to the post of J.E

(Electrical/ Mechanical) was the purported factum of the respondent herein having not acquired the germane eligibility criteria, inasmuch, as, his having not at the apposite stage acquired the relevant diploma on or before 1st Jan, 2001 as was enjoined to be possessed by him. On the anvil of the respondent herein having not acquired the germane eligibility criteria on or before 1.1.2001, hence, the petitioner herein considered the claim of the respondent herein, for promotion to the post of JE (Electrical/Mechanical), to be untenable. The substratum of the projection by the petitioner herein of the respondent herein having not acquired the germane educational qualification, inasmuch, as, his having not passed his diploma in December, 2000 is anchored upon the factum of the result of the examination in which the respondent herein had participated having come to be declared after the cut off date inasmuch as on 6.2.2001. A perusal of Annexure P-4 which is the diploma awarded in favour of the respondent herein proclaiming the fact of his having completed the part time Diploma in Electrical Engineering magnifies the fact of the respondent herein having acquired the germane, relevant educational qualification in December, 2000. Consequently, when Annexure P-4 makes an amplifying disclosure of the respondent herein having successfully passed the examination in which he participated in December, 2000. Therefore, his having fulfilled the germane educational criteria before 1.1.2001, hence was eligible to be considered for promotion to the post of JE (Electrical/Mechanical) for the vacancies which occurred for the year 2001-2002. Even though, the counsel for the petitioner contends that the reckonable, computable date for gauging the time/period of acquisition of the germane educational qualification by the respondent herein is comprised in the date of declaration of the result of the examination in which he participated. However the said contention has no force in face of a judgment reported in 2004 (6) SLR 803: 2005(1) S.C.T 289, titled as State of Karnataka vs. T. Chandrashekhar, the relevant para of which is extracted hereinafter and which upsurges an inference that the relevant date/time for construing whether the aspirant successfully cleared/passed the departmental examination is the date on which he takes the examination and not the date when the result of the examination is announced.

> "*The dictum that a Govt. Servant passes the departmental examination on the date when he takes up the exam and not on the date when the result of the examination is announced stems from the fact that the person's knowledge over a particular subject is tested on the date of the examination and not on the date of the announcement of the result. It would be a travesty to state otherwise and even where the results are announced after a long period of time, for one reason or the other, the date of passing of the examination is always construed and mentioned in the result sheet as the date of examination. We answer the issue accordingly.*"

3. Consequently, even when the result of the examination in which the respondent herein had participated was declared on 6.2.2001, hence, subsequent to 1.1.2001, the factum of declaration of result would not either impinge upon or detract from the efficacy of Annexure P-4, which declares the respondent herein to have successfully passed his diploma in December, 2000, hence, prior to 1.1.2001, rendering him, as such, eligible to be considered for promotion to the vacancies which occurred in 2001-2002. In sequel, the contention of the petitioner herein that the reckonable or computable date for construing the time/period of acquisition of the germane educational criteria is fathomable or gaugeable from date of declaration of result of examination in which the respondent had participated, is to be discountenanced. Further more the learned Central Administrative Tribunal having considered the entire factual matrix in a wholesome manner and it also having accurately applied to it the apposite law, its order hence cannot be faulted on any score. Consequently, there is no merit in the petition, the same is accordingly dismissed and the

impugned order rendered by the learned Central Administrative Tribunal is maintained and affirmed.

All pending applications stand disposed of accordingly.

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

Bakshi Ram and others ...Appellants/defendants.

Vs.

Julfi Ram since deceased through his LR's and others .....Respondents/Plaintiffs.

RSA No. 55 of 2002.
Reserved on: 3rd December, 2014.
Decided on: 15th December, 2014.

Specific Relief Act, 1963- Section 34- Suit land was recorded in the name of respondents No. 7 to 11- A sale deed was executed by respondents No. 7 to 9 in favour of defendants No. 3 to 5- plaintiffs claimed that earlier a suit was filed by defendants No. 7 to 9 against them regarding the cultivation of the land- a compromise was arrived in the appeal and as per compromise, plaintiff and defendants No. 1 and 2 had paid money to the previous owner and had become owners of their share in the suit land- defendants became the owners to the extent of half share, whereas plaintiffs became owners of remaining half share – entries in favour of defendants are wrong- defendants denied the possession as well as the compromise- held, that once it was determined that plaintiffs are entitled to half share and defendants no. 1 & 2 are entitled to half share, the same question cannot be re-agitated. (Para-9 to 10)

For the Appellants: Mr. K.D. Sood, Senior Advocate with Mr. Sanjeev Sood, Advocate.
For the Respondents: Mr. B.M. Chauhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

This appeal is directed against the impugned judgment and decree, rendered on 21.12.2001 by the learned District Judge, Hamirpur, H.P., in Civil Appeal No. 17 of 1993, whereby, the learned District Judge allowed the appeal preferred by the plaintiffs/respondents and reversed the findings of the learned trial Court rendered on 19.12.1992 in Civil Suit No. 41 of 1988.

2. Briefly stated the facts of the case are that the suit land comprised in khata No.3 min, Khatauni No.4 min, khasra No.181 and 193, measuring 7 Kanals and 9 Marlas is stated to shown in the names of defendants No.7 to 11 and as per the further entries, mutation No.192 thereof has been shown to be entered on the basis of the sale thereof by defendants No.7 to 9 in favour of defendants No.3 to 5. According to the plaintiffs, previously, a civil suit was filed by defendants No.7 to 9 against them. The dispute therein was so as to the cultivation of the suit land. The suit was decreed in favour of the defendants No.7 to 9. The plaintiffs, however, filed Civil Appeal No.64 of 1983 in the Court of learned District Judge, Hamirpur and the same was decided on

20.8.1984. As a matter of fact, it is the plaintiffs and defendants No.1 and 2, who were stated to be cultivating the suit land as tenant-at-will under the previous owners Mansha Ram and others in equal shares. During the pendency of Civil Appeal No.64 of 1983 in the Court of District Judge, Hamirpur, a compromise was arrived at in between the parties. The statements of the previous owners Bihari Lal, Suresh Kumar, Asha Devi, Mansha Ram and Khazana Ram etc., were recorded. The statements of the plaintiffs as well as that of defendants No.1 and 2 were also recorded regarding the compromise. As per the compromise, the plaintiffs and defendants No.1 and 2 have paid money to the previous owners Mansha Ram etc. The defendants No.1 and 2 thus because owners qua their share in the suit land which was in their possession i.e. half of the suit land, whereas the plaintiffs came to be in possession of the remaining half share i.e. measuring 3 Kanal and 15 Marlas till date, to the knowledge of the defendants. The plaintiffs came to know for the first time in the month of May, 1987 that their names have not been entered in the revenue record and that there exists an entry with respect to Mutation No. 192 qua the suit land. It is in the month of June, 1987, the defendants No.1 to 6 started causing interference in the possession of the plaintiffs over the suit land at the pretext that the same was purchased by them from defendants No.7 to 11. As per further case of the plaintiffs, as a matter of fact, the said defendants had left with no title in the suit land after the decision of Civil Appeal No.64 of 1983 vide judgment dated 20.8.1984. The said judgment was binding on the defendants. Thus, any sale of the suit land after the decision of the aforesaid appeal, according to them, is null and void and not binding on the plaintiffs. Mutation No.192 entered on the basis thereof is also claimed to be void. It has also been submitted that no interference in their possession has been caused by defendants No.7 to 11, however, it is defendants No.1 to 6 who are interfering in the suit land. The plaintiffs even requested the said defendants to get the entries with respect to the suit land corrected and even notices were also served upon them, but of no avail. It has been submitted that the plaintiffs have also paid the money in lieu of the price of the suit land in their share. The defendants have thus no legal right to cause any sort of interference therein. In view of this back drop, the plaintiffs have sought a decree for declaration to the effect that they are owners in possession of the suit land with consequential relief of permanent prohibitory injunction restraining defendants No.1 to 6 from causing any sort of interference over the suit land.

3. The defendants No.1 to 5 and 7 to 11 have contested the suit. They filed the written statement and raised preliminary objections that the suit is not maintainable in the present form, suit is bad for non joinder of necessary parties, no cause of action exists in favour of the plaintiffs to file the suit and that they are estopped from instituting the same by their act and conduct. On merits, it is admitted that a Civil Suit was filed by defendants No.7 to 9 and that the same was decreed in their favour. It is, however, submitted that the suit land was never in possession of the plaintiffs. No compromise is also stated to be arrived at between them and the plaintiffs in the Court of District Judge, Hamirpur. The plaintiffs were stated to be never in possession of the suit land and as such, there is no question of causing any interference in their possession by the defendants. The defendants No.1 to 6 are stated to be not bound by the result of previous litigation qua the suit land, if any, because of they purchased the same for consideration. The suit has thus been sought to be dismissed.

4. Defendant No.6 in his separate written statement has also raised the preliminary objections so as to the suit is not maintainable, barred by limitation, there exists no cause of action in favour of the plaintiffs to file the suit and that since he as well as his brothers are bona fide purchaser under registered sale deed dated 22.8.1983 in respect of the suit land and as such, the compromise, if any, arrived at between the plaintiffs and previous owner, is not binding upon them. Also that he as well as his two brothers have spent a sum of Rs.9000/- for the improvement of the suit land. It has also been submitted that

the plaintiff is estopped by his acts, deeds and conduct from filing the present suit. On merits, defendant No.6 has offered denial to the averments in the plaint.

5. The plaintiffs/respondents filed replications to the written statements of the defendants/appellants, wherein, they denied the contents of the written statements and re-affirmed and re-asserted the averments, made in the plaint.

6. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

9. Whether the plaintiffs are entitled to the relief of permanent injunction, as prayed for? .....OPP

10. Whether the plaintiffs are owner in possession of the suit land, as alleged? .....OPP

11. Whether the suit is not maintainable in the present from, as alleged in preliminary objections No.1 and 2? ....OPD

12. Whether the suit is bad for non-joinder of necessary parties?.....OPD

13. Whether the suit is time barred? ...OPD

14. Whether the plaintiffs have no cause of action, as alleged? OPD

15. Whether the alleged compromise decree is based on fraud as alleged? OPD 1 to 5,7.

16. Whether the plaintiffs are estopped by their act and conduct from filing this suit? OPD

17. Whether defendant No.6 along with his two brothers is a bonafide purchaser of the suit land as alleged, if so, its effect?OPD-6

18. Whether the defendants have made any improvement over the suit land as alleged, if so, to what extent and effect? OPD

10.A. Whether the compromise has no legal force, as alleged? OPD.

19. Relief.

7. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/respondents. In appeal, preferred against the judgment and decree of the learned trial Court by the plaintiffs/respondents before the learned first Appellate Court, the learned first Appellate Court allowed the appeal and reversed the findings recorded by the learned trial Court.

8. Now the defendants/appellants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeal came up for admission on 18.6.2002, this Court, admitted the appeal instituted by the defendants/appellants against the judgment and decree rendered by the learned first Appellate Court on the hereinafter extracted substantial questions of law:-

2. Whether the unsigned compromise can be held to be a valid compromise and the judgment passed on such compromise not confirming the mandatory requirements of Order 23 is illegal and invalid?

3. Whether the appellants No.3 to 5 are the bonafide purchasers as per sale deed dated 22.8.1983 and are not bound by the alleged

compromise which was arrived in the year 1994 when such persons had left with no interest?

4. Whether the impugned judgment and decree is vitiated for mis construction and misinterpretation of sale deed Ex.DW1/A and the Ex.P-4 judgment dated 20.8.1994?

Substantial questions of Law No.1 to 3.

9. The plaintiffs herein were defendants in a previous suit whereas the defendants herein were plaintiffs therein. In an appeal bearing Civil Appeal No.64 of 1983, preferred by the plaintiffs herein against the judgment and decree of 11.4.1983 of the learned Sub Judge, Hamirpur, the learned District Judge in his judgment comprised in Ex. P-3 on the strength of the statements of the parties, dismissed the suit of the plaintiffs, defendants herein. The previous suit inter se the parties at lis before this Court, though in contradistinct capacities, aforesaid, was also qua the suit land analogous to the suit land in the instant suit. Even though, the learned trial Court in its judgment and decree had answered issue No. 10 (A) in favour of the defendants, however, the learned District Judge, Hamirpur in his judgment and decree impugned before this Court reversed the findings recorded by the learned trial Court. The learned counsel for the appellants contends with force and vigour that the strength and sinew of the previous judgment recorded by the District Judge, Hamirpur in a lis inter se the parties at lis before this Court though in contradistinct capacities aforesaid anvilled purportedly on the statements of the parties stands eroded, in the face of their being no demonstrative evidence on record to portray that the previous judgment and decree comprised in Ex. P-3 for lending it legal force and tenacity within the meaning of Order 23, was preceded by statements of the contesting parties therein. The above argument is highly fallacious and is bereft of legal vigour. Consequently, it ought to stand disapprobation from this Court for the following reasons:-

(a) The factum of PW-1 Shri B.D Rattan who at the relevant time was the Reader of the learned District Judge, Hamirpur as well as the deposition of PW-2 Shri Subhash Chand, who was posted as translator in the Court of the learned District Judge, Una and who was on tour to Hamirpur along with the then learned District Judge while the latter having the charge of Hamirpur Civil and Sessions Division having both unanimously deposed that the statements of the parties were recorded at the dictation of the Presiding Officer besides their having proceeded to also depose that the statements of the parties to the lis in an appeal before the learned District Judge, Hamiprur who thereupon rendered his judgment and decree are comprised in Ex. P3, bear Exts. PW-1/A, 1/B, 2/A and 2/B, which aforesaid exhibits comprise certified copies thereof. In face thereof when there is dearth of evidence or in fact abysmal lack of evidence to portray that the certified copies of the statements of the parties to the lis are shorn of their authenticity, therefore, it is to be concluded as aptly done by the learned First Appellate Court that it was on the strength of the statements of the parties to the lis in the previous litigation that the learned District Judge rendered a compromise decree comprised in Ex.P3. In sequel and also in face of the fact that even if assuming that any taint of illegality was, as such, acquired by the judgment and decree of the then learned District Judge, Hamirpur while rendering a compromise decree comprised in Ex.P3, the validity thereof was impeachable at the instance of the aggrieved by resorting to file an appeal or petition under Order 23, Rule 3 CPC. However, the aggrieved has omitted to take recourse to the aforesaid provisions of law for assailing or impeaching the legality of the decree rendered by the learned District Judge, Hamirpur comprised in Ex.P3. Consequently, for omission on the part of the aggrieved to assail it by taking recourse to the legally ordained measures, they are now estopped as well as barred from assailing

the validity of the judgment and decree rendered by the learned District Judge, Hamirpur comprised in Ex.P-3.

10. In aftermath, the judgment and decree, rendered by the learned District Judge, Hamirpur comprised in Ex.P-3 qua analogous suit land inter partes, the parties at lis before this Court acquires finality as well as conclusiveness. It having determined the plaintiffs herein, who were defendants therein to be entitled to the ½ share i.e. 3 kanals and 15 marlas in the suit land in their capacity as tenants in possession, is too a clinching factum which precludes its reopening or re-determination. Though, during the pendency of the civil appeal, a sale deed comprised in Ex.DW1/A was executed qua the suit land inter se the defendants No.4 to 6 as vendees under defendants No.7 to 11, however, the factum of execution of sale deed comprised in Ex.DW1/A does not either abrogate, detract or dilute the effect of a previous conclusive determination comprised in Ex.P3, inter se the parties at lis herein, who previously were therein in inter se contradistinct capacities aforesaid. Preponderantly further more the effect of EX.DW1/A in not begetting any dilution of the verdict comprised in Ex.P-3 in the previous litigation inter se the parties at lis wherein the rights of the plaintiffs herein, who were defendants therein were left intact to the extent of ½ share in the suit land gets aggravated strength from the factum of the Ex.DW1/A having been executed inter se the defendants No. 4 to 6 and 7 to 11 preceding the rendition of the compromise decree comprised in Ex.P3 by the learned District Judge, Hamirpur. Its having been hence executed during the pendency of the appeal inter se the parties at lis, though in contradistinct capacities therein, is obviously hit by the doctrine of *lis pendens*. In aftermath as aptly concluded by the learned first Appellate Court in its impugned judgment and decree it vests no right, title or interest in the vendees qua the suit land. Consequently, the findings of the learned first Appellate Court are based upon a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication. Accordingly, the substantial questions of law No. 1 to 3 are answered against the defendants/appellants and in favour of the plaintiffs/respondents.

11. The result of the above discussion is that the appeal preferred by the defendants/appellants is dismissed and the judgment and decree rendered by the learned first Appellate Court is affirmed and maintained. Record of the learned Courts below be sent back forthwith. All pending applications, if any, are also disposed of. No costs.

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

1. Cr. Appeal No.706 of 2008.
2. Cr. Appeal No. 740 of 2008.

Judgment reserved on: 16.9.2014.
Date of Decision: December 15, 2014

1.Cr.A. No. 706 of 2008.

Nikhil Soni son of
Sh. Pardeep Soni. .....Appellant.

Vs.

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

For the Appellant: Mr. Satyen Vaidya, Advocate.
For the respondent: Mr.B.S.Parmar, Addl. Advocate General with Mr. Ashok Chaudhary, Addl. AG, Mr. Vikram Thakur,

Dy. AG and Mr. J.S.Guleria, Asstt. Advocate General.

2. Cr.A. No. 740 of 2008.

Sanjiv Soni son of
Sh Santosh Kumar. ....Appellant
Vs.
State of H.P. .....Respondent.

Indian Penal Code, 1860- Section 302 read with Section 34- As per prosecution case, accused caused the death of Rajesh Kumar in the shop at Sujanpur- PW-1 heard the cries and ran towards the place- she found that accused were beating Rajesh Kumar with kicks and fist blows and he was lying on the ground with face towards the sky- she raised hue and cries on which the accused ran away - deceased was taken for treatment to CHC, Sujanpur from where he was referred to Dr. Rajinder Prasad Medical College, Tanda- he died on the way to the Hospital- prosecution version was duly proved by the testimony of PW-1 and was corroborated by PW-3, PW-4 and PW-5 - PW-9, a medical officer proved that deceased was brought to the hospital in unconscious condition- PW-18 found ante mortem injuries on the person of the deceased near left side area of spleen and small intestines caused with fist blows- held that in these circumstances, prosecution case was proved beyond reasonable doubt. (Para- 10 to 21)

Code of Criminal Procedure, 1973- Section 154- Investigating Officer sought information from the medical officer, whether the injured was in a position to make statement or not- Medical Officer certified that the injured was not fit to make the statement- Investigating Officer recorded the statement of PW-1 which was treated as FIR – held, that in these circumstances, there was no delay in recording the FIR. (Para-26)

Indian Evidence Act- 1872- Section 134- No particular number of witnesses are required for proof of any fact- when the testimony of a witness is wholly reliable, there is no need for corroboration. (Para-36)

Indian Evidence Act- 1872- Section 3- Testimony of relative witness cannot be equated to interested witnesses- conviction can be based on the testimony of related witnesses, if the same is found to be reliable and trustworthy. (Para-38)

For the Appellant: Mr. C.N.Singh, Advocate.

For the respondent: Mr.B.S.Parmar, Addl. Advocate General with Mr. Ashok Chaudhary, Addl. AG, Mr. Vikram Thakur, Dy. AG and Mr. J.S.Guleria, Asstt. Advocate General.

Cases referred:
Lalu Manjhi and another Vs. State of Jharkhand AIR 2003 SC 854
Jose Vs. the State of Kerala AIR 1973 SC 944
Masalti and others Vs. State of Uttar Pradesh AIR 1965 SC 202
Vadivelu Thevar Vs The State of Madras AIR 1957 SC 614
Chakko Vs. State of Kerala AIR 2004 SC 2688
State of Rajasthan Vs. Kalki AIR 1981 SC 1390
Hari Obula Reddi and others Vs. The State of Andhra Pradesh 1980 Cr.L.J. 1330
State of UP Vs. Iftikhar Khan and others AIR 1973 SC 863
Bhanuprasad Hariprasad Dave and another Vs. The State of Gujarat AIR 1968 SC 1323
Gurcharan Singh and another Vs. State of Punjab AIR 1956 SC 460
The State of Punjab Vs. Hari Singh and another AIR 1974 SC 1168
Bhupendra Singh Vs. State of Punjab AIR 1968 SC 1438
Mst. Balbir Kaur and others Vs. State of Punjab AIR 1977 SC 472
Molu and others Vs. State of Haryana AIR 1976 SC 2499
Sarwan Singh and others Vs. State of Punjab AIR 1976 SC 2304

The following judgment of the Court was delivered:

P.S. Rana Judge

Both appeals filed against the same judgment and sentence passed by learned Sessions Judge Hamirpur in sessions Trial No. 12 of 2008 titled State of HP Vs. Nikhil Soni and another decided on 25.10.2008. Hence both appeals are consolidated and dispose of by way of same judgment in order to avoid repetition.

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by the prosecution that on dated 16.4.2008 at about 8.30 PM at Sujanpur near Post Office the accused persons intentionally and knowingly caused the death of Rajesh Kumar son of Sh Hari Chand resident of Ward No. 2 Baba Swarup Gir locality Sujanpur District Hamirpur HP. It is alleged by prosecution that deceased Rajesh Kumar @ Kaku was working along with his father in the tea shop at Sidhu Chowk Sujanpur and on dated 16.4.2008 he had gone to the market at Sujanpur at about 8.15 PM and sister of deceased Seema Kumari had gone to the shop for cleaning utensils and was sitting on a bench outside the shop and her parents were sitting inside the shop. It is alleged by prosecution that accused persons came on a bike from post office side towards the shop of deceased Rajesh Kumar. It is alleged by prosecution that PW1 Seema Kumari heard the cries of quarrel and on hearing such cries she ran towards the place from where the cries were coming and when she reached near post office Tyala (Small platform) she found that accused persons were giving beating to deceased Rajesh Kumar with kick and fist blows and deceased was lying on the ground with face upward the sky. It is alleged by prosecution that PW1 Seema Kumari asked accused persons as to why the accused persons were beatings her brother deceased Rajesh Kumar and thereafter she cried for help and when she raised alarm accused persons driven the bike on the road by pushing PW1 Seema Kumari and fled away towards Hamirpur side. It is alleged by prosecution that PW1 Seema Kumari asked her deceased brother Rajesh Kumar about the reason of beating by accused persons and thereafter deceased told his sister PW1 Seema Kumari that accused persons had called the deceased a drunkard and in reply the deceased called accused persons as blind thereupon quarrel took place. It is alleged by prosecution that thereafter deceased Rajesh Kumar became unconscious. It is alleged by prosecution that thereafter PW1 Seema Kumari came back to the shop and she called her mother. It is alleged by prosecution that thereafter mother and father

of deceased Rajesh Kumar also came at the spot. It is alleged by prosecution that thereafter PW1 Seema Kumari also called her brother Raj Kumar and her sister Sunita Devi to the spot and thereafter deceased was lifted from the spot to the shop where he was laid on a bench. It is alleged by prosecution that thereafter Sh Surjit Singh medical practitioner was called to the shop who checked deceased Rajesh Kumar and advised them to take the deceased to hospital for medical treatment and thereafter deceased Rajesh Kumar was took to CHC Sujanpur. It is alleged by prosecution that thereafter medical officer CHC Sujanpur informed the police by way of telephone and thereafter daily diary report Ext PW5/A was recorded and ASI Karam Singh along with other police officials were deputed to visit the hospital. It is alleged by prosecution that thereafter ASI moved an application Ext PW11/A for conducting medical examination of deceased Rajesh Kumar and also sought the opinion of the medical officer whether the deceased was fit to make the statement or not. It is alleged by prosecution that medical officer had given the opinion that deceased was not fit to make the statement. It is alleged by prosecution that thereafter medical officer referred deceased Rajesh Kumar to Rajinder Prasad Medical College and Hospital Tanda. It is alleged by prosecution that thereafter statement of PW1 Seema Kumari Ext PW1/A was recorded and thereafter FIR Ext PW20/A was registered against accused persons at Police Station Sujanpur. It is alleged by prosecution that deceased Rajesh Kumar died in the way to Tanda hospital and inquest papers Ext PW8/A and Ext PW21/A were prepared and an application Ext PW18/A was filed for conducting autopsy on the body of deceased Rajesh Kumar. It is alleged by prosecution that post mortem of deceased Ext PW18/B was conducted and final opinion Ext PW18/D was obtained. It is alleged by prosecution that thereafter Investigating Officer visited at the spot on dated 17.4.2008 and prepared spot map Ext PW22/B. It is alleged by prosecution that dead body of the deceased was got photographed vide Ext PW6/A-1 to A-5 and negatives are Ext PW6/A-6 to A/10. It is alleged by prosecution that MHC sent the viscera of deceased Rajesh Kumar along with relevant papers to Forensic Science Laboratory Junga vide road certificate Ext PW13/C. It is alleged by prosecution that thereafter application Ext PW16/A was moved to Tehsildar for obtaining tatima and jamabandi and thereafter tatima Ext PW16/B and jamabandi Ext PW16/C obtained from halqua Patwari namely Prabhat Chand. Charge was framed against the accused persons by learned Sessions Judge Hamirpur on dated 7.8.2008 under Section 302 read with Section 34 IPC. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined as many as twenty two witnesses in support of its case:

Sr.No.	Name of Witnesses
PW1	Smt. Seema Kumari
PW2	Smt. Reshma Devi
PW3	Vinod Kumar
PW4	Pankaj
PW5	Kuldeep Kumar
PW6	Surinder Kumar
PW7	Sunil Kumar
PW8	Sanjay Kumar
PW9	Dr. Surjit Singh
PW10	Vipan Kumar @ Vikku
PW11	Dr. Gopal Beri
PW12	Dr. Renu Sharma
PW13	HC Ranjit Singh
PW14	Constable Malkiat Singh
PW15	Constable Suresh Kumar

PW16	Parbhat Chand
PW17	Jiwan Rishi
PW18	Dr. D.P.Swami
PW19	Raj Kumar
PW20	SI Anil Kumar Verma
PW21	ASI Shamsher Singh
PW22	ASI Karan Singh

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description.*
Ext.PW1/A	*State of Smt. Seema Devi under Section 154 Cr PC*
Ext.PW3/A	*Statement of Vinod Kumar under Section 161 Cr PC*
Ext.PW4/A	*Statement of Pankaj under Section 161 Cr PC*
Ext.PW5/A	*Statement of Kuldeep Kumar under Section 161 Cr PC*
Ext PW6/A-1 to A5	*Photographs of dead body*
Ext. PW6/A-6 to A-10	*Negatives*
Ext.PW7/A-1 to A-10	*Photographs of the spot*
Ext PW8/A & PW21/A	*Inquest papers*
Ext PW11/A	*Application address to Medical Officer*
Ext PW11/B	*MLC*
Ext PW12/A	*Application address to Medical Officer*
Ext PW12/B&C	*MLCs.*
Ext PW13/A&B	*Abstracts of Register No.19*
Ext PW13/C	*Road Certificate*
Ext.PW15/A	*Copy of rapat No.34*
Ext PW16/A	*Letter addressed to Tehsildar*
Ext PW16/B	*Shajra Latha*
Ext PW16/C	*Copy of jamabandi*
Ext PW17/A	*Recovery memo qua motorcycle*
Ext PW18/A	*Application for postmortem*
Ext PW18/B	*Postmortem report*
Ext PW18/C	*FSL Report*
Ext PW19/A	*Statement of Raj Kumar under Section 161 Cr PC*

Ext PW20/A	*Copy of FIR*
Ext PW22/B	*Spot map*
Ext. DA & DB	*Copy of statements of Sanjay Kumar*

5. Learned trial Court convicted both the appellants under Section 302 IPC read with Section 34 IPC and sentenced both the accused persons to undergo rigorous imprisonment for life and to pay fine of Rs.25,000/- (Twenty five thousand) each under Section 302 IPC read with Section 34 IPC. Learned trial Court further directed that in default of payment of fine both accused persons would undergo further simple imprisonment for one year.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court convicted persons filed present appeals.

7. We have heard learned Advocate appearing on behalf of the appellants and learned Addl. Advocate General appearing on behalf of the State and also perused entire record carefully.

8. Points for determination in both present appeals are whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and caused miscarriage of justice to the appellants as alleged in the grounds of appeal.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9 PW1 Seema Kumari has stated that she was married on dated 21.4.2008. She has stated that her father is running a tea shop at Sidhu Chowk at Sujanpur and her younger brother deceased Rajesh Kumar @ Kaku was working along with her father. She has stated that when she was unmarried she used to go to shop for cleaning utensils. She has stated that on dated 16.4.2008 at about 6 PM she went to the shop. She has stated that her parents were present inside the shop. She has stated that she inquired about her deceased brother and her parents told that deceased had gone to market and would come after some time. She has stated that at about 8.15 PM when she was sitting on a bench outside the shop accused persons came on a bike from post office side and she heard cries of quarrel. She has stated that thereafter she ran towards the place from where the cries came and she saw that both accused persons were giving beating with kick and fist blows to deceased Rajesh Kumar who was lying on the ground with face upwards the sky. She has stated that she asked the accused persons as to why they were beating her deceased brother and thereafter accused persons did not stop beatings and when she raised alarm accused persons went back by pushing her upon a bike. She has stated that accused persons fled towards Hamirpur road and thereafter she asked deceased Rajesh Kumar as to why the accused persons have beaten him. She has stated that deceased told her that accused persons had called him a drunkard and deceased Rajesh Kumar called the accused persons as blind and thereafter accused persons beaten the deceased. She has stated that thereafter deceased Rajesh Kumar fell unconscious and thereafter she called her mother and her mother came at the spot. She has stated that thereafter her brother Raj Kumar also came at the spot and she sent her brother Raj Kumar to call her father from the shop. She has stated that thereafter her sister Sunita Devi, Viku and Hunny also came at the spot and they lifted deceased Rajesh Kumar and took him to the shop. She has stated that thereafter one Sh Surjit Singh medical practitioner was called who checked deceased Rajesh Kumar and advised them to take the deceased to hospital. She has stated that thereafter they took the deceased in a vehicle to CHC Sujanpur. She has stated that thereafter medical officer informed the investigating agency and investigating agency came to the hospital. She has stated that she gave statement Ext PW1/A to the police. She has stated that thereafter deceased was referred to Dharamshala for medical treatment from

CHC Sujanpur. She has stated that deceased had sustained injuries on his forehead, face and on his eye. She has stated that deceased had died on the way to hospital. She has stated that investigating agency also inspected the spot in her presence. She has stated that she is the only eye witness of the incident of beating. She has denied suggestion that no talk took place between deceased Rajesh Kumar and herself. She denied suggestion that deceased Rajesh Kumar had died due to fall after intake of excessive alcohol.

9.1. PW2 Reshma Devi has stated that deceased Rajesh Kumar was her son. She has stated that deceased Rajesh Kumar was working in the shop along with her husband. She has stated that in the evening she and her daughter PW1 Seema Kumari used to visit the shop for cleaning utensil. She has stated that on dated 16.4.2008 she went to the shop at about 5 PM and her husband and deceased Rajesh Kumar were present in the shop. She has stated that after some time deceased Rajesh Kumar left towards the local market from shop. She has stated that PW1 Seema Kumari came at the shop at about 6 PM. She has stated that Seema Kumari was sitting on a bench outside the shop and she and her husband were sitting inside the shop. She has stated that at about 8 PM PW1 Seema Kumari went towards the place of incident and told that accused persons were beating deceased Rajesh Kumar. She has stated that thereafter she went to the spot. She has stated that her deceased son was lying unconscious. She has stated that thereafter her son Raj Kumar and daughter Sunila also came at the spot. She has stated that Hunny and Vikku also came at the spot. She has stated that thereafter deceased Rajesh Kumar was lifted and brought to the shop and thereafter deceased Rajesh Kumar was checked by Surjit Singh medical practitioner who advised them to take deceased Rajesh Kumar to government hospital. She has stated that thereafter deceased Rajesh Kumar was shifted to Sujanpur hospital and thereafter he was shifted to medical college Tanda. She has stated that investigating agency recorded her statement in the hospital. She has stated that her husband, son Raj Kumar and other persons accompanied deceased Rajesh Kumar to Tanda hospital where he was declared brought dead. She has stated that deceased Rajesh Kumar had sustained injuries on eye, head and other parts of the body. She has stated that her son Rajesh Kumar died due to beating given by accused persons. She has stated that no quarrel between accused persons and her son Rajesh Kumar took place in her presence. She has stated that she did not talk with deceased Rajesh Kumar at the spot because he was unconscious. She has denied suggestion that people present at the spot were saying that deceased Rajesh Kumar had fallen from Tyala (Small platform) on the stones due to intake of liquor. She denied suggestion that accused persons have not assaulted deceased Rajesh Kumar. She denied suggestion that being mother of deceased Rajesh Kumar she deposed falsely before the Court.

9.2. PW3 Vinod Kumar has stated that he is running a shop at Sujanpur. He has stated that on dated 16.4.2008 at about 7.30 PM he was at his shop. He has stated that deceased Rajesh Kumar and co-accused Nikhil Soni had caught hold of the collars of shirt of each other. He has stated that co-accused Chhotu @ Sanjiv was standing near a bike at some distance. He has stated that Raj Kumar has separated them. He has stated that he told them to go away to their houses. He has stated that he asked Chhotu @ Sanjiv to take co-accused Nikhil Soni to his house and deceased Rajesh Kumar went away with Raj Kumar towards his house. He has stated that thereafter he did not know what happened. Witness was declared hostile. He denied suggestion that co-accused Nikhil Soni gave fist blows to deceased Rajesh Kumar near Tyala (Small platform). He denied suggestion that thereafter he and Pankaj went to the spot. He denied suggestion that he, Pankaj and Raj Kumar rescued deceased Rajesh Kumar from the clutches of co-accused Nikhil Soni. He has stated that during night he received a telephone call from the brother of deceased Rajesh Kumar that Rajesh Kumar was serious and he died during that night. He has stated that he is familiar with accused persons since childhood because they are

residing at the same locality. He has stated that deceased Rajesh Kumar was also known to him from childhood. He has denied suggestion that he deposed falsely intentionally to save accused persons. He has stated that both the parties were abusing to each other. He has stated that Raj Kumar brother of deceased Rajesh Kumar is posted in Home Guard department.

9.3. PW4 Pankaj has stated that he is running a hotel near Venu Gate Sujanpur along with his father. He has stated that about 3/4 months back deceased Rajesh Kumar and co-accused Nikhil Soni were quarrelling amongst themselves in front of the shop of Vinod Kumar at Sujanpur. He has stated that co-accused Chhotu @ Sanjiv was also standing at one side with a motor cycle. He has stated that he, Bhola and Raj Kumar separated them. He has stated that deceased Rajesh Kumar and Raj Kumar went towards Sidhu Chowk and thereafter he returned to his shop. He has stated that he did not go near Tyala (Small platform). Witness was declared hostile. He has admitted that accused persons are familiar with him since his childhood. He has denied suggestion that he deposed falsely to help accused persons. He has stated that he called co-accused Chhotu @ Sanjeev and asked him to take away co-accused Nikhil Soni.

9.4. PW5 Kuldip Kumar has stated that he is working as labourer with Rana Trading Company at Sujanpur. He has stated that on dated 16.4.2008 at about 7.40 PM he was coming from the market with vegetables. He has stated that he came to the Venu Gate from the market and there were 5/7 persons present near Tyala (Small platform) near the post office. He has stated that co-accused Nikhil Soni was quarrelling with deceased Rajesh Kumar and co-accused Sanjiv Soni was at a distance with his motorcycle and thereafter he went away towards his residence. He has denied suggestion that he deposed falsely to help the accused persons. He has admitted that deceased Rajesh Kumar was of heavy weight and healthy person.

9.5. PW6 Surender Kumar has stated that he is running a shop for the last five years. He has stated that on dated 17.4.2008 he was called by the investigating agency to Tanda hospital for taking photographs of the dead body. He has stated that he took the photographs of dead body in the dead house. He has stated that positive photographs are Ext PW6/A-1 to Ext PW6/A-5 and its negatives are Ext. PW6/A-6 to Ext PW6/A-10 and the same were handed over to police.

9.6. PW7 Sunil Kumar has stated that he is running a shop of photograph at Sujanpur in the name of Jagriti Digital studio for the last seven years. He has stated that on dated 17.4.2008 in the morning he was called by police to post office near Tyala (Small platform) at Sujanpur. He has stated that he took photographs of the spot by digital camera. He has stated that photographs are Ext PW7/A-1 to Ext PW7/A-10. He has stated that photographs were handed over to the police.

9.7. PW8 Sanjay Kumar has stated that on dated 16.4.2008 at about 8.45 PM while he was at home he came to know that deceased Rajesh Kumar who was his cousin was beaten by accused persons. He has stated that he also went to post office near Tyala (Small platform) where he found that deceased Rajesh Kumar was lying unconscious and his cousin sister Seema Kumari, uncle Hari Chand, aunt Reshma Devi and other people were present at the spot. He has stated that thereafter deceased Rajesh Kumar was lifted to the shop of the father of deceased where he was laid on a bench and Dr. Surjit Singh was called who advised them to take deceased Rajesh Kumar to CHC Sujanpur. He has stated that thereafter deceased Rajesh Kumar was referred to Tanda hospital. He has stated that he reached at Tanda hospital at about 11.30 PM where deceased Rajesh Kumar was declared dead. He has stated that he also identified dead body of deceased Rajesh Kumar before the medical officer. He

has denied suggestion that he did not go to the spot. He denied suggestion that being a cousin of deceased Rajesh Kumar he deposed falsely.

9.8. PW9 Dr. Surjit Singh has stated that he is B.A M.S and running a private clinic near Sidhu Chowk Sujanpur. He has stated that on dated 16.4.2008 at about 8.45 PM he was called to the house of father of deceased Rajesh Kumar by a relative of deceased Rajesh Kumar. He has stated that deceased Rajesh Kumar was lying unconscious. He has stated that he advised his family members to take deceased Rajesh Kumar to government hospital. He has stated that rigor mortis was not present on the body of deceased Rajesh Kumar when he checked him. He has stated that pulse was alive. He has stated that he did not give first aid to deceased Rajesh Kumar.

9.9. PW10 Vipan Kumar has stated that on dated 16.4.2008 at about 8.45 PM he and Kapish were returning to home. He has stated that when they reached near post office deceased Rajesh Kumar was lying unconscious. He has stated that his mother was also present at the spot. He has stated that mother of deceased Rajesh Kumar asked them to lift him up to the shop. He has stated that they tried to lift deceased Rajesh Kumar but they could not do so. He has stated that thereafter his father and sisters Seema Devi and Sunita of deceased Rajesh Kumar also came at the spot. He has stated that all of them lifted deceased Rajesh Kumar and made him lie on a bench outside the shop. He has stated that thereafter he and Kapish left to their house.

9.10. PW11 Dr.Gopal Beri has stated that he remained posted as Medical Office in CHC Sujanpur Tihri w.e.f. April 2006 to September 2008. He has stated that on dated 16.4.2008 on the request of investigating agency vide application Ext PW11/A he examined deceased Rajesh Kumar son of Sh Hari Chand at about 9 PM. He has stated that deceased Rajesh Kumar was very serious. He has stated that B.P and pulse of deceased Rajesh Kumar was not recordable but the heart auscultation was 96 and pupils on both sides were normal and he noticed the following injuries. He has stated that there was a diffused swelling bluish pinkish in colour about 10 inch in diameter with a pinkish abrasion over it of the size of 5cm x 4cm in the left lower half of back on upper part of gluteal region. He has stated that there was another diffuse swelling of the size of about 5 cm diameter in the right parieto occipital region of the scalp. He has stated that another bluish pink abraded contusion over the posterior aspect of the middle of right forearm was found. He has stated that left eye was black and the patient was stuperous and irritable and was unable to speak. He has stated that for these injuries X-ray of skull, C.T.Scan of skull and then ultra-sound of abdomen and CT scan of abdomen was advised. He has stated that weapon used for the above injuries was blunt and probable duration of the injuries was within 24 hours. He has stated that he issued MLC Ext PW11/B and bears his signature. He has stated that above stated injury was caused with fist and kick blows. He has stated that deceased Rajesh Kumar was referred to medical college Tanda as his condition was serious. He has stated that he could not state that injured was under the influence of liquor at the time of examination. He has stated that he did not collect blood or urine sample of the injured as there was no facility for taking out blood or other investigation therefore patient was referred to Medical College Tanda.

9.11. PW12 Dr. Renu Sharma has stated that PW12 was posted as Medical Officer CHC Sujanpur on dated 17.4.2008. PW12 has stated that on application Ext PW17/A co-accused Nikhil Soni was medically examined. PW12 has stated that co-accused Nikhil Soni was complaining pain and tenderness at the root of nose and nasal bridge and there was no swelling or external sign of any injury. PW12 has stated that co-accused Nikhil Soni also complaining of pain on the left temporal region and no external signs of injury were found. PW12 has stated that there was abrasion of the size of 1x5 cm over distal phalanx of left middle finger and swab was not formed movements of phalanx were normal. PW12 has stated that there was an abrasion of the size of 3 x.5cm

over upper 1/3rd of left shin and scab was not formed and movements of knee joint were normal. PW12 has stated that patient was referred for expert Radiologist opinion and management and final opinion was kept reserved. PW12 has stated that weapon used was hard blunt. PW12 has stated that probable duration of the injuries was less than 12 to 24 hours. PW12 has stated that he issued MLC of co-accused Nikhil Soni Ext PW12/B and also issued MLC of co-accused Sanjiv Kumar Ext PW12/C.

9.12. PW13 Ranjit Singh has stated that he was posted at Police Station Sujanpur w.e.f. 2008. He has stated that on dated 17.4.2008 ASI Shamsher Singh deposited with him three parcels duly sealed with seal impression DHD. He has stated that the entry was made in rapat roznamcha register vide entry Ext PW13/A. He has stated that on dated 19.4.2008 ASI Karam Singh had deposited with him motor cycle No. HP-22B-2000 which was entered in rapat roznamcha Ext PW13/B. He has stated that one parcel containing viscera of deceased Rajesh Kumar along with one sealed envelop containing copy of FIR, copy of MLC, post mortem report and sample seal DHD were sent to FSL Junga through constable Malkiat Singh vide RC No. 43 of 2008 on dated 22.4.2008. He has stated that after depositing the above case property he handed over RC to him. He has stated that case property was not tampered with in any manner.

9.13. PW14 Malkiat Singh has stated that he was posted at Police Station Sujanpur for the last six months. He has stated that MHC Ranjit Singh handed over to him three sealed parcels on dated 22.4.2007 vide RC No. 43 of 2008 for handing over the same at FSL Junga. He has stated that seals of the samples were not tampered. He has stated that rukka Ext PW1/A was also brought by him on dated 16.4.2008 from Sujanpur hospital and he handed over the same to Station House Officer on the basis of which FIR was registered. He has stated that thereafter he took the file to hospital and handed over to ASI Karan Singh. He has stated that his statement under Section 161 Cr PC was recorded on dated 16.6.2008.

9.14. PW15 Suresh Kumar has stated that he brought original rapat roznamcha register on dated 16.4.2008 and Ext PW15/A which is correct copy of rapat No.34 dated 18.4.2008.

9.15. PW16 Prabhat Chand has stated that on the request of Investigating Officer vide application Ext PW16/A he prepared tatima Ext PW16/B and copy of jambandi Ext. PW16/C of the spot and thereafter he handed over the same to police.

9.16. PW17 Jeevan Rishi has stated that on dated 19.4.2008 police took into possession motor cycle No.HP-22B-2000 vide memo Ext PW17/A.

9.17. PW18 Dr. D.P Swami has stated that he was lecturer in Medical College since August 1998. He has stated that on dated 17.4.2008 on the application Ext PW18/A along with inquest form Ext PW8/A he had conducted post mortem on the body of deceased Rajesh Kumar. He has stated that body of deceased Rajesh Kumar was brought by police officials and was identified by one Sanjay Kumar. He has stated that there was a history of beating by Nishu son of Pradeep Kumar and Chhotu son of Sant Ram on dated 16.4.2008 at 8.30 PM and injured had undergone unconscious at the spot. He has stated that injured was declared dead on dated 16.4.2008 at 11.45 PM. He has stated that rigor mortis were fully developed. He has stated that injuries were anti mortem. He has stated that he observed the following injuries. He has stated that there was a black eye left side 2x1 reddish in colour and there was a bruise 2x2 inches on left temporal area and reddish irregular. He has stated that there was bruise on right mid forearm, irregular reddish 1.75 x 1 inches with grazed irregular abrasion on outer side. He has stated that there was bruises 2x1 inches on right upper arm outer side reddish and grazed abrasion on right side of elbow outer

side and irregular 2x1 inches reddish. He has stated that scratch on right mid, upper inguinal region was one inch long and reddish oblique. He has stated that there was bruise with abrasion, irregular on left lower mid back 2 x 1.1/2 inches reddish and bruise 1.1/2x1/2 inch reddish on lower right back and the brain was congested. He has stated that in his opinion deceased Rajesh Kumar died by hemorrhagic shock due to anti mortem injuries to mesenteric vessels near left side area of spleen and small intestines caused with fist blows. He has stated that probable time between injury and death was 1-2 hours and between death and post mortem was 12-24 hours. He has stated that shirt, trousers and under wear were handed over to the police after sealing the same with seal mark DHD. He has stated that body was handed over to police with original post mortem report. He has stated that he also handed over to police three sample seals, cloths packet, viscera packet and forwarding letter addressed to FSL Junga. He has stated that he issued post mortem report Ext PW18/B which bears his signature. He has stated that after going through FSL report Ext PW18/C dated 2.6.2008 in his final opinion deceased Rajesh Kumar died by hemorrhagic shock and due to anti mortem injuries caused near left side area of spleen and small intestines caused with fist blows. He has stated that contribution towards death is approximately 20% due to consumption of alcohol and 80% due to injury. He has stated that injuries were caused by fist and kick blows. He has stated that injuries were sufficient to cause death in the ordinary course of nature. He has stated that in the present case the quantity of alcohol consumed by deceased Rajesh Kumar was mild. He has denied suggestion that injury could be caused due to fall on stones. He has stated that he could not state that injury could be caused by other than kick and fist blows. He has denied suggestion that a person having injury on spleen area, liver or cranium could survive if immediate medical treatment is provided. He has admitted that if spleen and liver parts are damaged including intestines then timely medical help would save the person subject to the condition of injured and standard of treatment given to the injured.

9.18. PW19 Raj Kumar has stated that he is a labourer. He has stated that on dated 16.4.2008 there was a Jagrata (Religious function) at Sujanpur and he had gone to bring vegetables from the market. He has stated that when he reached 'Venu Gate' deceased Rajesh Kumar was abusing co-accused Nikhil Soni. He has stated that he requested both of them to go to their houses but they did not accept his request. He has stated that co-accused Nikhil Soni was also accompanied by co-accused Sanjiv Soni. He has identified both accused persons in Court. He has stated that he took deceased Rajesh Kumar up to the shop of Vinod Kumar @ Bhola. He has stated that in the meantime both accused persons again came at the place of incident. He has stated that both parties again grappled with each other. He has stated that in the meantime Vinod Kumar @ Bhola arrived at the spot and he separated the parties. He has stated that thereafter deceased Rajesh Kumar went away from the place of incident. He has stated that thereafter shoes of co-accused Nikhil Soni were misplaced and they searched for the shoes. He has stated that thereafter co-accused Nikhil Soni kept on standing near the shop. He has stated that after some time accused persons found the shoes and thereafter both accused persons again followed deceased Rajesh Kumar on the motor cycle. He has stated that when accused persons reached nearby deceased Rajesh Kumar he slapped co-accused Nikhil Soni and his spectacles were broken. He has stated that thereafter deceased Rajesh Kumar and co-accused Nikhil Soni again started physical quarreling. He has stated that thereafter he and Vinod Kumar @ Bhola again went at the spot and separated them. He has stated that thereafter both accused persons went from place of incident on a motor cycle. He has stated that he requested deceased Rajesh Kumar to go to his house but deceased Rajesh Kumar kept standing at the place of incident. He has stated that the shop of the father of deceased Rajesh Kumar was nearby the place of incident. He has stated that thereafter he informed the parents of deceased Rajesh Kumar

thereafter his parents came to Tyala (Small platform) where deceased Rajesh Kumar was present. He has stated that thereafter sister of deceased Rajesh Kumar also came at the place of incident. He has stated that thereafter he went to his house. He has stated that thereafter the parents of deceased Rajesh Kumar called him to help them to lift injured Rajesh Kumar from the place of incident. He has stated that in the meantime other local boys also came at the spot. He has stated that deceased Rajesh Kumar was not in a position to walk and he was made to lie on a bench outside the shop.

9.19 PW20 Anil Kumar has stated that he was posted as SHO in Police Station Sujanpur since 2007. He has stated that on dated 16.4.2008 at about 4 PM telephonic information was received by him from Medical Officer CHC Sujanpur that deceased Rajesh Kumar was brought to hospital in an injured condition. He has stated that he entered information in daily diary Ext PW15/A and thereafter he sent ASI Karan Singh to hospital along with other police officials to look into the matter. He has stated that thereafter he received rukka Ext PW1/A. He has stated that FIR Ext. PW20/A was registered. He has stated that on completion of investigation he prepared challan.

9.20. PW21 Shamsher Singh has stated that he accompanied injured Rajesh Kumar to Tanda hospital. He has stated that Rajesh Kumar was declared dead in the hospital. He has stated that thereafter he moved application Ext PW18/A for conducting post mortem and also filed inquest reports Ext PW8/A and Ext PW21/A. He has stated that he recorded the statements of Sanjay Kumar, Rajneesh and photographer Surinder Kumar. He has stated that he also brought parcels of the case property from the hospital and deposited the same with MHC.

9.21. PW22 Karan Singh has stated that he was posted as Investigating Officer in Police Station Sujanpur since April 2008. He has stated that on dated 16.4.2008 he was deputed by SHO Anil Verma to CHC Sujanpur along with other police officials. He has stated that when he went to hospital deceased Rajesh Kumar was in the hospital. He has stated that he moved application Ext PW1/A to the Medical Officer and sought opinion whether deceased Rajesh Kumar was fit to make the statement. He has stated that thereafter he recorded the statement of Seema Devi Ext PW1/A and sent the same through Constable Malkiat Singh after making endorsement Ext PW22/A for registration of FIR. He has stated that injured was referred to Tanda hospital for further medical treatment. He has stated that statement of Reshma Devi was also recorded in the hospital. He has stated that thereafter spot was inspected. He has stated that thereafter accused persons were arrested and interrogated. He has stated that information was received that deceased Rajesh Kumar had died during the night and thereafter the case was converted into under Section 302 IPC. He has stated that on the next day he prepared site plan Ext PW22/B and also recorded supplementary statement of PW1 Seema Kumari. He has stated that on dated 19.4.2008 one Pradeep produced motor cycle along with its documents which was took into possession vide Ext PW17/A. He has stated that on dated 16.4.2008 deceased Rajesh Kumar and co-accused Nikhil Soni had indulged in a quarrel at about 7.30 PM near Veno Gate. He has stated that again quarrel took place between deceased Rajesh Kumar and co-accused Nikhil Soni near the shop of Vinod Kumar. He has stated that thereafter both accused persons went away and returned after some time. He has stated that thereafter accused persons gave beatings to deceased Rajesh Kumar. He has stated that thereafter PW1 Seema Kumari and accused persons left from the place of incident. He has stated that quarrel took place several times between deceased and accused persons hence incident was pre planned by accused persons.

Findings in Criminal Appeal No. 706 of 2008 titled Nikhil Soni Vs. State of HP

Testimony of PW1 Seema Kumari is fatal to appellant Nikhil Soni

10. In the present case eye witness PW1 Seema Kumari who is the sister of deceased Rajesh Kumar has specifically stated that accused persons have given beatings to her deceased brother Rajesh Kumar in her presence by way of kick and fist blows. PW1 Seema Kumari eye witness has specifically stated in positive manner that deceased Rajesh Kumar had sustained injury upon his body. Testimony of PW1 Seema Kumari is trust worthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW1 Seema Kumari.

Testimony of PW3 Vinod Kumar another eye witness of the incident is fatal to appellant Nikhil Soni_

11. PW3 Vinod Kumar eye witness of the incident has specifically stated in positive manner that deceased Rajesh Kumar and appellant Nikhil Soni have caught hold the collars of shirt of each other in his presence. Testimony of PW3 Vinod Kumar that appellant Nikhil Soni had caught hold the collars of shirt of deceased Rajesh Kumar in his presence is fatal to the appellant. Hence the testimony of PW3 is trustworthy, reliable and inspires confidence of Court and there is no reason to disbelieve the testimony of PW3.

Testimony of PW4 Pankaj eye witness also fatal to appellant Nikhil Soni

12. PW4 Pankaj has specifically stated in positive manner that deceased Rajesh Kumar and appellant Nikhil Soni were quarrelling in front of the shop of PW3 Vinod Kumar at Sujanpur. Testimony of PW4 Pankaj is trust worthy, reliable and inspires confidence of Court and there is no reason to disbelieve the testimony of PW4.

Testimony of PW5 Kuldeep Kumar eye witness is also fatal to appellant Nikhil Soni

13. PW5 Kuldeep Kumar has specifically stated in positive manner that appellant Nikhil Soni was quarreling with deceased Rajesh Kumar and there is no reason to disbelieve the testimony of PW5.

Testimony of PW9 Dr. Surjit Singh is fatal to appellant Nikhil Soni

14. PW9 Dr. Surjit Singh has specifically stated in positive manner that immediately after the incident on dated 16.4.2014 at about 8.45 PM he examined deceased Rajesh Kumar. He has stated that deceased Rajesh Kumar was lying unconscious and he advised the family members of deceased to take deceased Rajesh Kumar to government hospital for his medical treatment. Testimony of PW9 Dr. Surjit Singh that he examined deceased Rajesh Kumar in unconscious condition immediately after the incident on dated 16.4.2008 at 8.45 PM is also trusty worthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW9. There is no evidence on record in order to prove that PW9 Dr. Surjit Singh has hostile animus against appellant Nikhil Soni.

Testimony of PW11 Dr. Gopal Beri is fatal to appellant Nikhil Soni

15. PW11 Dr. Gopal Berri has specifically stated in positive manner that on dated 16.4.2008 he examined deceased Rajesh Kumar immediately after the incident. He has stated that deceased Rajesh Kumar was in very very serious condition. Testimony of PW11 Dr. Gopal Beri is also trust worthy, reliable and inspires confidence of Court and there is no reason to disbelieve the testimony of PW11 who examined deceased Rajesh Kumar in very very serious condition due to injury inflicted by appellant Nikhil Soni.

Testimony of PW18 Dr.D.P.Swami is also fatal to appellant Nikhil Soni_

16. PW18 Dr.D.P.Swami has specifically stated in positive manner that he conducted post mortem of deceased Rajesh Kumar. He has stated that injured had undergone unconscious at the spot and injured was declared dead

on dated 16.4.2008 at about 11.45 PM. PW18 has specifically stated in positive manner that injuries were anti mortem. PW18 has specifically stated that deceased Rajesh Kumar had died by hemorrhagic shock due to anti mortem injuries sustained by deceased Rajesh Kumar near left side area of spleen and small intestines caused with fist blows. PW18 has specifically stated in positive manner that probable time between injury and death was within 1 to 2 hours and between death and post mortem was 12 to 24 hours. PW18 has specifically stated in positive manner that contribution of injuries towards death was 80% and he has specifically stated in positive manner that injuries were sufficient in ordinary course to cause death.

Testimony of PW19 Raj Kumar is also fatal to appellant Nikhil Soni

17. PW19 Raj Kumar eye witness has specifically stated that deceased Rajesh Kumar and appellant Nikhil Soni physically started quarrelling in his presence. The factum of quarrel between deceased Rajesh Kumar and appellant Nikhil Soni is proved on record as per testimony of PW19 Raj Kumar.

Testimony of corroborative witness is also fatal to appellant Nikhil Soni

18. PW8 Sanjay Kumar has specifically stated that on dated 16.4.2008 at about 8.45 PM deceased Rajesh Kumar was lying unconscious at the spot and thereafter he was brought to medical hospital. Even PW10 Vipan Kumar corroborative witness has stated in positive manner that deceased Rajesh Kumar was unconscious at the spot and deceased was initially laid down upon a bench and thereafter he was brought to hospital for medical treatment. PW13 Ranjit Singh has specifically stated in positive manner that parcels were deposited containing viscera, post mortem report and sample of seals in Forensic Science Laboratory Junga. PW14 Malkiat Singh has specifically stated in positive manner that he deposited parcels in the office of chemical examiner Forensic Science Laboratory Junga. As per testimony of PW15 Suresh Kumar rapat roznamcha Ext.PW15/A is also proved on record beyond reasonable doubt. As per testimony of PW16 Prabhat Chand tatima Ext PW16/B and copy of jamabandi Ext PW16/C are also proved on record beyond reasonable doubt. It is held that testimonies of corroborative witnesses are also fatal to appellant Nikhil Soni.

Post mortem report Ext PW18/D is fatal to appellant Nikhil Soni

19. As per post mortem report deceased Rajesh Kumar died due to hemorrhagic shock and due to anti mortem injuries sustained by deceased Rajesh Kumar near left side of spleen and small intestines. As per post mortem report the probable time lapsed between injury and death was 1 to 2 hours. Hence as per post mortem report the deceased had died due to injuries given by appellant Nikhil Soni with kick and fist blows upon spleen and small intestines of deceased Rajesh Kumar.

Time gap between death and injuries are fatal to appellant Nikhil Soni

20. As per testimony of medical officer and as per post mortem report time gap between injuries sustained by deceased and death was between 1-2 hours only. It is held that deceased had died due to direct effects of injuries given by appellant.

80% contribution of injuries to death is fatal to appellant Nikhil Soni

21. As per medical officer testimony there was 80% effects of injuries for death and same fact is fatal to appellant.

22. Submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that learned trial Court has wrongly believed the testimony of PW1 Seema Kumari and failed to appreciate the statement of PW3 Vinod Kumar, PW4 Pankaj, PW5 Kuldeep and PW19 Raj Kumar and on this ground

appeal be accepted is rejected being devoid of any force for the reason hereinafter mentioned. In the present case it is proved on record that quarrel took place four times after short intervals. Initially the quarrel took place at 7.35 PM in the presence of different witnesses and last quarrel took place in the presence of PW1 Seema Kumari. Hence it is held that testimony of PW1 Seema Kumari could not be disbelieved in view of the testimony of PW3 Vinod Kumar, PW4 Pankaj, PW5 Kuldeep Kumar and PW19 Raj Kumar because when last quarrel took place between deceased Rajesh Kumar and appellant Nikhil Soni at that time only PW1 Seema Kumari was present at the place of incident.

23. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that it was the mother of deceased Rajesh Kumar who reached first at the place of incident followed by the father of deceased and thereafter PW1 Seema Kumari reached at the spot and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is proved beyond reasonable doubt that in the last fight PW1 Seema Kumari reached at the spot and thereafter she went back to call her mother and other relatives and thereafter when the deceased was lying unconscious after the incident the mother of deceased followed by the father of deceased reached at the spot. It is proved on record that when father and mother of deceased Rajesh Kumar reached at the spot by that time appellant has left the place of incident after committing criminal offence and after causing fatal injuries upon deceased Rajesh Kumar who died due to fatal injuries caused by the appellant within 1 and 2 hours as per testimony of post mortem report placed on record.

24. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that learned trial Court has illegally disbelieved the testimony of PW3 Vinod Kumar, PW4 Pankaj and PW19 Raj Kumar and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. In the present case it is proved on record that quarrel took place between deceased Rajesh Kumar and appellant four times after short intervals and when the last quarrel took place between deceased Rajesh Kumar and appellant Nikhil Soni at that time PW3 Vinod Kumar, PW4 Pankaj and PW19 Raj Kumar were not present and at that time only PW1 Seema Kumari was present who had witnessed the last quarrel between deceased Rajesh Kumar and appellant.

25. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that PW1 Seema Kumari has improved her statement and her testimony is not trust worthy is also rejected being devoid of any force for the reason hereinafter mentioned. There is no material improvement in the testimony of prosecution witness. It is well settled law that minor contradictions are bound to come in a criminal case when testimony of the witnesses recorded after a gap of lapse of sufficient time. In the present case incident took place on dated 16.4.2008 and testimony of the prosecution witnesses were recorded on 4.9.2008 after a gap of four months.

26. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that statement of PW1 Seema Kumari under Section 154 Cr PC was recorded after due deliberation and consultation is also rejected being devoid of any force for the reason hereinafter mentioned. In the present case first Investigating Officer tried to record the statement of injured but injured was in unconscious condition and medical officer had reported that injured was not in a position to give his statement and thereafter Investigating Officer under compelling circumstances recorded the statement of PW1 Seema Kumari who was the eye witness of last quarrel which took place between deceased Rajesh Kumar and appellant.

27. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that PW1 Seema Kumari is not eye witness of the

incident and prosecution has suppressed the genesis of the incident and on this ground the appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. The plea of the appellant that prosecution has suppressed the genesis of the incident is not proved on record and the same is defeated on the concept of ipse dixit (Assertion made without proof)

28. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that finding of the learned trial Court that PW1 Seema Kumari eye witness was first to reach at the spot is contrary to the evidence on record and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that fight took place between deceased Rajesh Kumar and appellant four times after short intervals and it is also proved on record that earlier three fight took place between the deceased and appellant in the presence of other witnesses but last fight took place between deceased Rajesh Kumar and appellant in the presence of PW1 Seema Kumari. It is proved beyond reasonable doubt that in the last fight other prosecution witnesses were not present as they have gone to their houses due to night period i.e. 8.30 PM.

29. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that as per testimony of PW19 Raj Kumar appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of PW19 Raj Kumar. It is well settled law that testimony of witness should not be read in isolation but it should be read as a whole. It is well settled law that Court is under legal obligation to take grain from chaff and court is not under legal obligation to take chaff from the grain. PW19 has specifically stated in positive manner that deceased Rajesh Kumar and appellant Nikhil Soni started practically quarrelling with each other in his presence and thereafter he and PW3 Vinod Kumar @ Bhola separated deceased Rajesh Kumar and appellant Nikhil Soni. PW19 has specifically stated in positive manner that thereafter both the accused persons went away from the place of incident upon a motor cycle. PW19 has specifically stated in positive manner that deceased Rajesh Kumar was not in a position to walk so he was made to lie on a bench outside the shop. There is no evidence on record in order to prove that thereafter any third person inflicted injury upon deceased Rajesh Kumar. It is proved on record that deceased died within 1 and 2 hours after the incident due to hemorrhage shock and anti mortem injury caused upon spleen and intestines of deceased Rajesh Kumar. There is no explanation as to how the deceased had sustained anti mortem injury upon the spleen and small intestines. There is proximity of death and anti mortem injury sustained by deceased Rajesh Kumar. There is no evidence on record in order to prove that some other persons have inflicted injury upon deceased Rajesh Kumar because at the spot the deceased became unconscious and thereafter he died within 1 and 2 hours due to anti mortem injuries sustained by deceased Rajesh Kumar upon his spleen and small intestines.

30. Another submission of learned Advocate appearing on behalf of the co-appellant Nikhil Soni that medical evidence of PW18 Dr. D.P.Swami qua the number of injuries and evidence of PW11 Dr. Gopal Beri qua injuries are contrary and on this ground appeal filed by appellant Nikhil Soni be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of PW11 Dr. Gopal Beri and PW18 Dr. D.P.Swami. PW11 Dr. Gopal Beri has specifically stated that on dated 16.4.2008 at about 9 PM he examined injured Rajesh Kumar and the condition of injured Rajesh Kumar was very very serious. PW18 Dr. D.P.Swami has specifically stated that all the injuries were anti mortem. Hence both PW11 Dr. Gopal Beri and PW18 Dr. D.P.Swami have proved the fact that deceased Rajesh Kumar died immediately after the incident due to anti mortem injuries. Deceased Rajesh Kumar was medically examined by Dr. Gopal Beri when he was unconscious condition. PW11 Dr. Gopal Beri has stated that condition of deceased Rajesh

Kumar was very very serious when he examined deceased immediately after the incident. We are of the opinion that minor contradiction is not fatal to the prosecution in the present case because it is proved on record that deceased was unconscious and he did not regain consciousness after the incident. It is proved on record beyond reasonable doubt that deceased had died within 1 and 2 hours after the incident due to anti mortem injuries sustained by deceased Rajesh Kumar upon his spleen and small intestines caused by the appellant.

31. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that even if the prosecution is believed in the manner as urged by the prosecution the present case is not a case of culpable homicide amounting to murder because there was no pre plan evidence to kill deceased Rajesh Kumar and there is no evidence on record that appellant intended to kill the deceased or intended to cause bodily injury and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. In the present case it is proved on record that quarrel took place between deceased Rajesh Kumar and appellant Nikhil Soni four times after short intervals and appellant came on motor cycle No. HP-22B-2000 four times after short intervals and thereafter caused fatal injuries with kick and fist blows upon spleen and small intestines of deceased Rajesh Kumar. The fact that appellant came four times after short intervals upon his motor cycle No. HP-22B-2000 proves the fact of culpable homicide amounting to murder on the part of appellant Nikhil Soni. Even PW18 Dr.D.P.Swami has specifically stated in positive manner that injuries were sufficient in ordinary course to cause death. The kick blows with hard sole shoes and fist blows with force upon spleen and small intestines upon deceased Rajesh Kumar were sufficient to cause death in the ordinary course of nature. It is held that appellant had knowledge that fist blow and kick blow with hard sole shoes upon spleen and small intestines would cause death of deceased Rajesh Kumar. Hence it is held that present case is the case of culpable homicide amounting to murder on the part of appellant Nikhil Soni.

32. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that deceased Rajesh Kumar had consumed wine and he felled upon the stone and thereafter he died and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. As per testimony of PW18 Dr. D.P Swami contribution of death due to alcohol was 20% and contribution of death due to injury was 80%. PW18 Dr D.P Swami has specifically stated in positive manner that deceased had died due to 80% injuries caused by appellant Nikhil Soni upon the body of deceased Rajesh Kumar. Hence it is held that 80% injuries were caused by appellant Nikhil Soni with fist and kick blows upon spleen and small intestines of deceased Rajesh Kumar which were fatal to deceased and caused death of deceased

33. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that learned trial Court has illegally held that accused persons have common intention of causing bodily injury upon deceased Rajesh Kumar which was sufficient in the ordinary course of nature to cause death and on this ground appeal be accepted is rejected being devoid of any force for the reason hereinafter mentioned. All the prosecution witnesses have stated in positive manner that both accused persons came at the spot on motor cycle No. HP-22B-2000 four times after short intervals. The fact that both accused persons came at the spot in four times upon motor cycle No. HP-22B-2000 after short intervals, the fact that deceased Rajesh Kumar became unconscious at the spot due to fatal anti mortem injuries and the fact that deceased had died within 1 and 2 hours after the incident and the fact that co-accused Sanjiv Soni did not try to rescue deceased Rajesh Kumar prove common intention to commit culpable homicide amounting to murder on the part of both accused persons.

34. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that there is material contradiction and improvement in the prosecution case and on this ground appeal filed by the appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Learned Advocate appearing on behalf of the appellant did not point out any material contradiction which goes to the root of the case. It is well settled law that principle of falsus in uno falsus in omnibus is not applicable in criminal trial. See AIR 1980 SC Bhe Ram Vs. State of Haryana. Also see AIR 1971 SC 2505 titled Rai Singh Vs. State of Haryana. It was held in case reported in AIR 1987 SC 1328 titled Dalbir Singh and others Vs. State of Punjab that there is no hard and fast rule which could be laid down for appreciation of evidence and it was held that each case should be decided as per proved facts.

35. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that learned trial Court took into account inadmissible evidence and failed to appreciate the oral as well as documentary evidence in a proper manner is also rejected being devoid any force for the reason hereinafter mentioned. We have carefully perused the judgment and sentence passed by learned trial Court. Learned trial Court has properly appreciated the oral as well as documentary evidence adduced by the parties in accordance with law with cogent, positive and reliable reason.

36. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that conviction could not be sustained on the testimony of the prosecution witnesses in the present case is also rejected for the reason hereinafter mentioned. As per Section 134 of the Indian Evidence Act 1872 no particular number of witnesses shall be required for the proof of any act. It was held in case reported in ***AIR 2003 SC 854 titled Lalu Manjhi and another Vs. State of Jharkhand*** that court may classify the oral testimony into three categories (1) Wholly reliable (2) Wholly un-reliable (3) Neither wholly reliable nor wholly unreliable. It was held that in the first two categories there would be no difficulty in accepting or discarding the testimony of single witness. It was held in case reported in ***AIR 1973 SC 944 Jose Vs. the State of Kerala*** that conviction could be given on the testimony of single witness in criminal case if testimony of single witness is trust worthy, reliable and inspires confidence of the Court. Also See ***AIR 1965 SC 202 titled Masalti and others Vs. State of Uttar Pradesh*** and also see ***AIR 1957 SC 614 titled Vadivelu Thevar Vs The State of Madras***. It was held in case reported in ***AIR 2004 SC 2688 titled Chakko Vs. State of Kerala*** that conviction could be given on testimony of single witness if the testimony of single witness is reliable. It was held that culpable homicides are of three degrees (1) Culpable homicides of the first degree is the gravest form of culpable homicide which is defined in Section 300 IPC as 'murder'. (2) Culpable homicide of the second degree is punishable under the first part of Section 304 IPC. (3) Culpable homicide of the third degree is lowest type of culpable homicide punishable under second part of Section 304 IPC. It is held that learned trial Court had properly appreciated oral as well as documentary evidence against appellant Nikhil Soni. It is held that there is no illegality and no miscarriage of justice in the judgment and sentence passed by learned trial Court qua appellant Nikhil Soni.

<u>Findings in Criminal Appeal No. 740 of 2008 titled Sanjiv Soni Vs. State of HP</u>

37. Submission of learned Advocate appearing on behalf of the co-appellant Sanjiv Soni that in view of the testimony of independent witnesses PW3 Vinod Kumar, PW4 Pankaj, PW5 Kuldip Kumar and PW19 Raj Kumar appeal filed by appellant Sanjiv Soni be accepted is rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of PW3 Vinod Kumar, PW4 Pankaj, PW5 Kuldip Kumar and PW19 Raj Kumar. PW3, PW4, PW5 and PW19 have specifically stated in positive manner that both accused persons came on motor cycle No HP-22B-2000 at the place of incident after short intervals continuously for four times. It is proved on record

beyond reasonable doubt that quarrel took place four times between deceased Rajesh Kumar and co-appellant Nikhil Soni after short intervals continuously. It is also proved on record that after first quarrel accused persons left the place of incident and thereafter again they came upon motor cycle No HP 22B-2000 after short interval at the place of incident continuously and committed quarrel with deceased Rajesh Kumar. It is also proved on record that thereafter deceased Rajesh Kumar had sustained fatal injury upon his spleen and small intestines caused with kick and fist blows. It is proved on record that thereafter at the place of incident deceased became unconscious and he did not regain consciousness till his death. It is proved on record that deceased died within 1 and 2 hours after the incident. It is also proved on record that injuries were sufficient in the ordinary course to cause death. It is proved beyond reasonable doubt that all the injuries were anti mortem in nature. Appellant Sanjiv Soni has been charged for offence punishable under Section 302 IPC read with Section 34 IPC. PW1 Seema kumari who is the eye witness of the last quarrel has specifically stated in positive manner that accused persons have inflicted injuries upon deceased Rajesh Kumar with kick and fist blows in her presence. She has specifically stated in positive manner that thereafter deceased Rajesh Kumar became unconscious and he did not regain consciousness and died after 1 and 2 hours after the incident due to anti mortem injuries sustained upon spleen and small intestines of deceased Rajesh Kumar. Hence we are of the opinion that in view of the above stated facts it is not expedient in the ends of justice to acquit co-appellant Sanjiv Soni on the testimony of PW3, PW4, PW5 and PW19 because co-appellant Sanjiv Soni had actively participated in commission of crime by way of coming along with co-accused Nikhil Soni four times after short intervals upon motor cycle. Testimony of PW1 Seema Kumari is trust worthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW1 Seema Kumari. There is no evidence on record in order to prove that PW1 Seema Kumari has hostile animus prior to the incident or after the incident against co-appellant Sanjiv Soni.

38. Another submission of learned Advocate appearing on behalf of the co-appellant Sanjiv Soni that PW1 Seema Kumari and PW2 Reshma Devi are interested witnesses being sister and mother of deceased Rajesh Kumar is also rejected being devoid of any force for the reason hereinafter mentioned. We are of the opinion that testimony of PW1 Seema Kumari and PW2 Reshma Devi are corroborated by the testimony of PW9 Dr. Surjit Singh, PW11 Dr. Gopal Beri and PW18 Dr. D.P Swami. It was held in case reported in ***AIR 1981 SC 1390 titled State of Rajasthan Vs. Kalki*** and another that relative witnesses are not equivalent to interested witnesses. It was held in case reported in ***1980 Cr.L.J. 1330 titled Hari Obula Reddi and others Vs. The State of Andhra Pradesh*** that testimony of relative could be the basis of conviction if the testimony of relative witness is reliable and trustworthy. It was held in case reported in ***AIR 1973 SC 863 titled State of UP Vs. Iftikhar Khan and others*** that evidence of relative witness need not necessarily be disbelieved and it was held that merely because the witnesses are partisan or interested their evidence is not liable to be discredited. Also see ***AIR 1968 SC 1323 titled Bhanuprasad Hariprasad Dave and another Vs. The State of Gujarat***. Also see ***AIR 1965 SC 202 titled Masalti and others Vs. State of Uttar Pradesh***. Also see ***AIR 1956 SC 460 titled Gurcharan Singh and another Vs. State of Punjab***. Also see ***AIR 1974 SC 1168 titled The State of Punjab Vs. Hari Singh and another***. Also see ***AIR 1968 SC 1438 titled Bhupendra Singh Vs. State of Punjab***. See ***AIR 1977 SC 472 titled Mst. Balbir Kaur and others Vs. State of Punjab***. Also see ***AIR 1976 SC 2499 titled Molu and others Vs. State of Haryana***. Also See ***AIR 1976 SC 2304 titled Sarwan Singh and others Vs. State of Punjab***.

39. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that deceased Rajesh Kumar had consumed alcohol at the time of incident and he was not in a position to state anything and on this

ground appeal be accepted is also rejected being devoid of any force the reason hereinafter mentioned. PW18 Dr. D.P Swami has specifically stated that contribution of death was 20% due to alcohol and 80% was due to injuries inflicted by accused persons. The testimony of PW18 Dr. D.P Swami to this effect is also trust worthy, reliable and inspires confidence of Court. In the present case it is proved on record that contribution of death was 80% due to fatal injuries sustained by deceased Rajesh Kumar in his left side spleen and small intestines caused with kick and fist blows by accused persons.

40. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that benefit of doubt be given to the appellant in the present case is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that appellant has been charged for the offence culpable homicide amounting to murder with common intention as defined under Section 34 IPC. It is proved on record that accused persons came four times at the place of incident after short intervals upon motor cycle No. HP-22B-2000 on dated 16.4.2008 between 7.30 PM to 8.30 PM. Hence common intention of both accused persons to commit culpable homicide amounting to murder is proved on record when they came at the place of incident four times after short intervals. It is well settled law that to attract Section 34 IPC it is not necessary that each one of the accused must assault injured. In the present case it is proved on record that motor cycle No. HP-22B-2000 after short intervals was used for the commission of culpable homicide amounting to murder by accused persons. It is proved on record that appellant Sanjiv Soni came along with appellant Nikhil Soni four times at the place of incident upon motor cycle No.HP-22B-2000 after short intervals. Hence common intention of both accused persons to cause fatal injury to deceased Rajesh Kumar is proved beyond reasonable doubt in the present case. It is proved on record that co-accused Sanjiv Soni had took active part in the commission of offence when he came along with co-accused Nikhil Soni four times at the place of incident upon motor cycle No. HP-22B-2000 after short intervals. It was held in case reported in AIR 2004 SC 2764 titled State of M.P. Vs. Deshraj and others that a direct proof of common intention is not available and therefore such intention could only be inferred from the circumstances appearing from the proved facts of the case. In the present case it is proved beyond reasonable doubt that appellant Sanjiv Soni came along with appellant Nikhil Soni on motor cycle No. HP-22B-2000 in four times at the place of incident after short intervals and thereafter injuries were inflicted upon deceased Rajesh Kumar and thereafter deceased Rajesh Kumar became unconscious and he died due to anti mortem injury within 1 and 2 hours of injuries given by accused persons. It is well settled law that Section 34 IPC imposes vicarious liability upon the co-accused persons.

41. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that there was no motive on behalf of the appellant to commit the crime and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that motive to commit criminal offence is not material in the presence of eye witness. In the present case PW1 Seema Kumari has specifically stated in positive manner that accused persons have inflicted injuries upon deceased Rajesh Kumar in her presence with kick and fist blows and immediately thereafter deceased became unconscious. It is proved on record that after the incident deceased did not regain consciousness and he died within 1 and 2 hours due to anti mortem injuries sustained by deceased Rajesh Kumar on the left side of spleen and small intestines.

42. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that there is difference in number of injuries in the MLC report and post mortem report and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. In the present case the MLC of deceased Rajesh Kumar was issued by PW11

Dr.Gopal Beri and post mortem report of deceased Rajesh Kumar was prepared by PW18 Dr. D.P Swami. PW11 Dr. Gopal Beri has specifically stated in positive manner that deceased Rajesh Kumar was in very very serious condition when he was brought to hospital on dated 16.4.2008 at about 9 PM. PW18 Dr. D.P Swami has specifically stated in positive manner that deceased Rajesh Kumar had died due to anti mortem injuries sustained by deceased upon spleen and small intestines caused with kick and fist blows.

43. Another submission of learned Advocate appearing on behalf of the co-appellant Sanjiv Soni that witnesses Hari Chand, Sunita Devi, Raj Kumar, Kuldip Singh, Kapish Chaudhry, Rajneesh Kumar and Pradeep Soni have not been examined and adverse inference be drawn against the prosecution is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that in order to prove the fact number of witness is not required as per Section 134 of the Indian Evidence Act. Appellant was at liberty to examine the witness in defence but appellant has stated before the learned trial Court that he does not want to lead any evidence in defence despite opportunity granted by learned trial Court to adduce evidence in defence.

44. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that deceased Rajesh Kumar was himself aggressor and deceased was abusing appellant Nikhil Soni and deceased has slapped appellant Nikhil Soni and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the medical certificate of appellant Nikhil Soni placed on record. Appellant Nikhil Soni was not medically examined on dated 16.4.2008 on the date of incident. Appellant Nikhil Soni was examined on dated 17.4.2008 at 10.30 AM after the death of deceased Rajesh Kumar. As per medical certificate appellant Nikhil Soni did not sustain any external injury and had sustained only abrasion. On the contrary deceased Rajesh Kumar had sustained fatal injury upon his spleen and small intestines and death of deceased Rajesh Kumar took place within 1 and 2 hours of the incident and deceased did not regain consciousness after incident. Even appellant did not took the plea of self defence during cross examination and the plea of self defence is not proved on record in the present case as required under law. It is well settled law that in right of private defence injury which is inflicted by a person exercising the right of private defence should be commensurate with the injury with which accused was threatened. See AIR 2012 SC 2181 titled Arjun Vs. State of Maharashtra.

45. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that learned trial Court did not examine the father of the deceased as a Court witness and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Appellant did not file any application before learned trial Court to examine the father of deceased Rajesh Kumar. On the contrary the appellant has stated in positive manner before the learned trial Court that he does not want to lead any defence evidence.

46. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that appellant Sanjiv Soni took away appellant Nikhil Soni from the spot and acted as a saviour and he could not be convicted with the aid of Section 34 IPC is also rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that both accused persons came at the spot for four times continuously after short intervals. No reason has been assigned by accused persons as to why they came four times upon motor cycle No.HP-22B-2000 at the place of incident continuously after short intervals. The fact that accused persons came at the place of incident for four times continuously after short intervals proves common intention on the part of co-appellant Sanjiv Soni for the commission of criminal offence i.e. culpable homicide amounting to murder because deceased died within 1-2 hours after sustained ante mortem injuries upon his body .

47. Another submission of learned Advocate appearing on behalf of the co-appellant Sanjiv Soni that deceased Rajesh Kumar was healthy and well built man of heavy weight and he had fallen down on the road due to intoxication and sustained injuries is also rejected being devoid of any force for the reason hereinafter mentioned. The plea of the appellant that deceased Rajesh Kumar himself fallen on the road in intoxication condition and sustained injuries is defeated on the concept of ipsi dixit (An assertion made without proof). In the present case criminal case is proved against accused persons as per trustworthy and reliable testimony of eye witnesses.

48. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that learned Sessions Judge did not frame issues for consideration and on this ground appeal be accepted is also rejected for the reason hereinafter mentioned. Learned trial Court has framed point for determination in para-25 of the judgment and thereafter learned trial Court has given findings in the judgment. It is held that in criminal law issues are not framed but points are framed for determination. Learned trial Court has framed the points as required under criminal law. Issues are framed only in civil cases and issues are not framed in criminal cases and in criminal cases points are framed for determination by the criminal Courts.

49. Another submission of learned Advocate appearing on behalf of the co-appellant Sanjiv Soni that learned trial Court has failed to frame proper and necessary charge against co-appellant Sanjiv Soni and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the charge framed by learned trial Court against co-appellant Sanjiv Soni. We are of the opinion that there is no infirmity in framing the charges against co-appellant Sanjiv Soni. Even as per Section 215 of the Code of Criminal Procedure 1973 there is no effect of errors in the charge in criminal trial unless the accused was in fact misled by such error or omission and unless it occasion failure of justice. In the present case we are of the opinion that appellant is not misled by any error or omission in framing the charge and we are of the opinion that no failure of justice is caused to co-appellant Sanjiv Soni in framing the charge. Even co-appellant Sanjiv Soni during the trial did not file any application before learned trial Court for amendment of charge. No reason has been assigned by the co-appellant Sanjiv Soni as to why he did not file application before learned trial Court for amendment of criminal charge.

50. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that all incriminating circumstances have not been put to the co-appellant Sanjiv Soni under Section 313 Cr PC and the same have caused prejudice to the co-appellant Sanjiv Soni in his defence is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that if accused has well understood all circumstances appearing against him and had met them squarely in cross examination then failure of putting any question to the accused under Section 313 would not entail any irregularity. In the present case co-appellant Sanjiv Soni did not point out any failure of justice by way of not putting any question to co-appellant Sanjiv Soni. It is held that co-appellant Sanjiv Soni had understood all circumstances appearing against him and had met them in cross examination. It is held that no failure of justice has been caused to the co-appellant Sanjiv Soni by way of non-putting any question under Section 313 Cr PC.

51. In view of the above stated facts it is held that learned trial Court has properly appreciated oral as well as documentary evidence placed on record. It is held that learned trial Court did not cause any miscarriage of justice to both appellants. Both appeals i.e. Criminal Appeal No. 706 of 2008 titled Nikhil Soni Vs. State of HP and Criminal Appeal No. 740 of 2008 titled Sanjiv Soni Vs. State of HP are dismissed. Judgment and sentence passed by learned trial Court are affirmed. Pending miscellaneous application(s) if any also stands disposed of.

Certified copy of this judgment be placed in Criminal Appeal No. 740 of 2008 titled Sanjiv Soni Vs. State of HP. Record of learned trial Court along with certified copy of judgment be sent back forthwith.

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

Pawan Kumar ...Appellants/Defendants.
VERSUS
Sh. Rajinder Lal and others ...Respondents.

RSA No. 50 of 2003.
Reserved on: 8th December, 2014.
Decided on: 15th December, 2014.

Specific Relief Act, 1963- Section 34- Plaintiff claimed that he and defendants No. 4 and 8 are owners in possession of suit land- order passed by Settlement Officer, Dharamshala and consequent mutation attested in favour of defendants No. 1 and 3 are wrong- defendants claimed that suit land was the subject matter of consolidation – the predecessor-in-interest of the plaintiff and defendants No. 4 and 5 and others had filed a revision petition before the State Government- Khasra Nos. 221 and 222 were re-allotted- order is binding upon the plaintiff- record showed that only Khasra Nos. 221, 222 and 223 were re-allotted- thus the order would not apply to other Khasra numbers- plaintiff claimed that order was passed by settlement Officer without hearing him- trial Court held that in absence of the file, the version of the plaintiff could not be relied upon- held, that in absence of file, version of the plaintiff that he was not heard prior to passing of the order cannot be brushed aside – further, the fact that suit land was allotted to defendants No. 1 to 3 beyond entitlement would show that plaintiff was not heard, otherwise, plaintiff would have pointed out this fact to the Settlement Officer.

(Para- 9 to 10)

For the Appellants: Mr. O.P. Sharma, Senior Advocate with Mr. J.P. Sharma, Advocate .
For Respondent No.1: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

This appeal is directed against the impugned judgment and decree, rendered on 3.12.2002 by the learned Additional District Judge-II, Kangra at Dharamshala, H.P., in Civil Appeal No. 85-K/99 whereby, the learned District Judge allowed the appeal preferred by the respondent/plaintiff and reversed the judgment and decree of the learned trial Court rendered on 24.8.1999 in Civil Suit No. 278/91/98.

2. Briefly stated the facts of the case are that the plaintiff and defendants No.4 and 8 are the owners in possession of the land comprising in khata No.24 min, Khatoni No.37 min, khasra Nos. 505/189, 506/189 and 508/193, kita 3 measuring 0-01-08 hectares, situated in Mohal Ustehar, Mauza Kothi Jhikli, Tehsil and District Kangra (hereinafter referred to as the suit land) and are entitled to remain so in future as well, therefore, the order of Settlement Officer, Dharamshala, passed in file No.516/SO, dated 31.1.1976 and on its basis mutation No.22, dated 5.10.1976 attested in favour of defendants No.1 to 3 is wrong, null and void as well as without jurisdiction, therefore, is liable to be set aside. The plaintiff has prayed for the relief of permanent prohibitory injunction against defendants No.1 to 3 for restraining them from interfering in his possession over the suit land. In the alternative, the plaintiff has sought the relief of possession of the suit land, in case the defendants No.4 to 8 are found in possession of the suit land or defendants No.1 to 3 are found in possession or they succeed in taking possession of the suit land during the pendency of the suit. It has been averred that the suit land was in the recorded ownership and possession of Dina Nath, the predecessor-in-interest of plaintiff and defendants No.4 and 5 and Tulsi Ram, the predecessor-in-interest of defendants No.7 and 8 and One Mohan Lal, who sold his share to the plaintiff and defendant No.4. During the settlement took place in the year 1973-74, the suit land comprised in khasra No.189/1, measuring 0.00.55 hectares, khasra No.189/2 measuring 0-00-10 hectares and Khasra No. 192/1 measuring 0-00-43 hectares, total are measuring 0-01-08 hectares, was wrongly ordered to be included in the ownership of defendants No.1 to 3 vide mutation No.22 attested on 5.10.1976. It has been further averred that this mutation was attested in pursuant to the order of the Settlement Officer dated 31.1.1976 which was rendered without hearing the plaintiff and defendants No.4 to 8, as such, the same is not binding upon them and the same deserves dismissal. The suit land is the Agwahra and Pichwarha of the plaintiff and defendant No.4 and the same is in their possession since long.

3. The defendants contested the suit and filed separate written statements. Defendant No.1 to 3 in their written statement have taken preliminary objections inter alia estoppel, maintainability, cause of action, non-joinder of parties etc. On merits, it has been pleaded that the suit land was the subject matter of consolidation. The predecessor-in-interest of the plaintiff and defendants No.4 and 5 and others, filed a revision before the State Government, as provided under the said Act and there, re-allotment of the land comprising in khasra No.221 and 222 was ordered vide order dated 13.1.1970. It has been further pleaded that the order dated 13.1.1970 of State Government was executed and implemented, therefore, the same is also binding upon the plaintiff. It has been further averred that in the meanwhile, the settlement also started in the area and Settlement Officer gave effect to the already existing order passed by the consolidation authorities and the mutation No.22, has been attested in pursuance of the order passed by the consolidation authorities. It has been averred that no new order has been passed by the Settlement Officer. Defendants No.1 to 3 have claimed possession over the suit land and have denied the right, interest and title of the plaintiff and defendants No.4 to 8 over the suit land.

4. Defendants No.4 and 5 by filing their joint separate written statement have admitted the case of the plaintiff as set out in the plaint and they have prayed that a decree be passed in his favour.

5. The plaintiff/respondent filed replication to the written statement of the defendants/appellants, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

6. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

20. Whether the land in suit is owned by the plaintiff and defendants No.4 to 8 and is possessed by plaintiff and defendant No.4, as alleged? OPP
21. Whether the mutation No.22 sanctioned on 5.10.1976 is wrong illegal and not binding on the plaintiff and defendants No.4 to 8, as alleged , if so its effect? OPP
22. Whether the order passed by Settlement Officer dated 31.1.1970 in file NO.516, is illegal as have been passed behind the back of the plaintiff and other interested parties, as alleged, if so, its effect? OPP
23. Whether the plaintiff is entitled to a relief of injunction, as claimed? OPP
24. In case the plaintiff is not found entitled to a relief as prayed for in prayer 'A" whether the plaintiff is entitled to a decree for possession, as prayed for in prayer 'B"?OPP
25. Whether the suit is within time? OPP
26. Whether the act and conduct of the plaintiff is a bar to the present suit? OPD
27. Whether the suit is not maintainable in the present form? OPD
28. Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD
29. Whether the suit is bad for non joinder of necessary and proper parties? OPD
30. Whether the suit has no jurisdiction to try and decide the present suit? OPD
31. Whether the suit is property valued for the purpose of court fee and jurisdiction? OPP
32. Whether the sale made by Mohan Lal to defendant No.4 is illegal, invalid and not binding as alleged? OPD
33. Whether the plaintiff, defendants No.4 to 8 and other have got no share in the suit land, as alleged? OPD
34. Whether the defendants No.1 to 3 are owners and in possession of the suit land? OPD
35. Whether the land in suit has been allotted to the defendants No.1 to 3 in consolidation (Prevention of Fragmentation of Holdings), if so, its effect? OPD
36. Relief.

7. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the respondent/plaintiff. In appeal, preferred by the respondent/plaintiff against the judgment and decree of the learned trial Court before the learned first Appellate Court, the learned first Appellate Court allowed the appeal and reversed the findings recorded by the learned trial Court.

8. Now the defendants/appellants have instituted the instant Regular Second Appeal before this Court assailing the findings recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeal came up for admission on 07.11.2003, this Court, admitted the appeal instituted by the defendants/appellants, against the judgment and decree, rendered by the learned first Appellate Court on the hereinafter extracted substantial question of law:-

5. Whether the judgment and decree of the first appellate Court is result of mis reading of the documentary and oral evidence which vitiated the findings?

Substantial question of Law No.1:

9. Under Ex. D-9, the Deputy Commissioner, Bilaspur, who while exercising the powers of the State Government for the purpose of Section 42 of the Consolidation of Holding and Prevention of Fragmentation Act (hereinafter referred to as the Act) ordered the re-allotment of the land comprised in khasra Nos. 221 and 222. The order comprised in Ex.D-9 was rendered on 13.01.1970. Uncontrovertedly, the orders comprised in Ex.D-9 remained un-assailed at the instance of the aggrieved in the higher echelons of the hierarchy of revenue officers constituted under the Act aforesaid. Consequently, with the orders comprised in Ex.D-9 having remained un-assailed in the higher echelons of the hierarchy of revenue officers constituted under the Act aforesaid, they attained conclusiveness and finality. The finality, hence, garnered by Ex.D-9 would seal the fate of the plaintiff to claim any right, title or interest over and upon the suit land, in case, it is also further established that the order comprised in EX.D-9 is qua khasra numbers analogous to the khasra numbers in the instant suit. In the face of revelation in Ex. D-9 of khasra numbers therein being not khasra numbers analogous to the khasra numbers comprising the suit land in the instant suit, obviously then the force and effect of Ex. D-9 in whittling down, abrogating or extinguishing the rights of the plaintiff qua the suit land stands dwindled. Rather a perusal of Ex. D-9 reveals that it was rendered qua khasra numbers 221, 222 and 223. The khasra numbers aforesaid comprised in Ex. D-9 manifestly are as apparent on a reading of khasra numbers comprising the suit land in the instant suit, not analogous khasra numbers. For reiteration, in face of incongruity of khasra numbers qua the suit land in the instant suit and of the khasra numbers comprised in Ex. D-9 rather leaves open room for an apt conclusion that, even if, Ex. D-9 , acquires a clinching force, finality as well as conclusiveness for lack of its being not assailed in the higher echelons of the hierarchy of revenue officers constituted under the Act aforesaid, the factum of its having acquired clinching force and finality as well as conclusiveness is only qua khasra numbers 221, 222 and 223 and not qua other khasra numbers which are the khasra numbers of the suit land in the instant suit. In after math, the ensuing, concomitant and invincible inference which is to be marshaled as well as mobilized by this Court is that the effect of Ex. D-9 is that it does not erode or dwindle or extinguish the rights of the plaintiff/respondent qua the suit land.

10. The plaintiff anvilled his claim on the score of an order rendered in File No.516/SO of 31.1.1976 and consequent mutation anchored thereupon comprised in mutation No.22 of 5.10.1976 acquiring no legal force so as to impinge upon the rights of the plaintiff/respondent herein over and upon the suit land, inasmuch as it having been rendered behind the back of the predecessor-in-interest of the plaintiff/respondent besides per se it garnering vitiation on the score of it in dire derogation of the openly proclaimed rights of the plaintiff in the suit land, having ordered the recording of defendants No.1 to 3 to be owners to the extent of 6 marlas of land, even when they were not entitled to the same. The claim of the plaintiff was dislodged by the learned trial Court on the score of non-adduction of the original file whose adduction would have propelled succor to the inference that the order of the Settlement Officer in file No. 516/SO of 31.1.1976 was vitiated on the score of it having infracted the principles of natural justice, inasmuch as it having come to be rendered even when the aggrieved/plaintiff in the suit were not heard prior to its rendition. However, the said reasoning as adopted by the learned trial Court to non-suit the plaintiff is per se perverse as non-adduction of file No. 516/SO of 31.1.1976 especially when it stood destroyed could not stand in the way of facilitating an inference in favour of the plaintiffs in the instant suit to claim a right over the

suit land. More so, when its non-adduction was not within his reach. Even otherwise the deposition of PW-1 voices the factum of the order rendered by the Settlement Officer in file No. 516/SO of 31.1.1976 have been rendered behind his back, even if the said file came to be destroyed and, hence, its non-adduction may facilitate an inference that the Settlement Officer while rendering orders in the file aforesaid in favour of the defendants herein qua the suit land may have adhered to or complied with the principles of natural justice. However the said inference cannot be stretched ahead to abrogate or prejudice the rights of the plaintiffs in the instant suit qua the suit land especially when the plaintiff PW-1 has in his deposition on oath deposed that in the Settlement Officer rendering orders in favour of the defendants in file No. 516/SO of 31.1.1976 had condemned him unheard which factum deposed on oath does, hence, acquire tenacity. Consequently, the non suiting or dislodging of the claim of the plaintiff in the instant suit by the learned trial Court on the score of the plaintiff having omitted to adduce into evidence the orders rendered in file No. 516/SO of 31.1.1976 for under scoring the factum of it while displaying the fact that in its rendition it was not preceded by a notice served upon the plaintiff in the suit, hence, was in infraction of the principles of natural justice appears to have been done by the learned trial Court in a slip shod manner in open conflict to the deposition of PW-1 who on oath deposed that preceding its rendition, the Settlement Officer had not either issued or served notice upon them. As such, when obviously, the plaintiff in the proceedings preceding its rendition did not participate therein, the orders rendered in file No. 516/SO of 31.1.1976 were in conflict with and were rendered in infraction of the principles of natural justice, naturally they acquire the taint of illegality and are void ab initio necessitating their reversal. Moreover, a reading of mutation comprised in Ex. D-2 attested on strength thereof does also per se prove that title qua six marlas of land comprised in the suit land stood vested in favour of defendants No.1 to 3, who as apparent on a reading of the oral as well as documentary evidence on record as aptly concluded by the learned first Appellate Court were not entitled to the said area of land mutated in their favour as owners, rather when evidence has come on record that the plaintiff has a right to the said area of six marlas of land, hence, also it appears that the orders rendered in file No. 516/SO of 31.1.1976 were rendered behind the back of the plaintiff in the instant suit, for in case he was heard, the factum of it having beyond the entitlement of defendants No.1 to 3 in the suit land held them so would not have occurred. Concomitantly, the findings of the learned first Appellate Court do not suffer from any perversity or absurdity and do not warrant any interference from this Court. The substantial question of law is answered in favour of the plaintiff/respondent and against the defendants/appellants.

11. The result of the above discussion is that the appeal, preferred by the defendants/appellants is dismissed and the judgment and decree, rendered by the learned first Appellate Court, is affirmed and maintained. Record of the learned Courts below be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Italian Thai Development Public Company Ltd. ...Non-applicant/plaintiff

Versus

Shri Jala Ram, Engineering Enterprises ...Applicant/Defendant

OMP No. 58 of 2014 IN
Civil Suit No. 76 of 2012
Reserved on 12.12.2014
Date of decision:16.12.2014

Code of Civil Procedure, 1908- Section 10- Defendant contended that he had already instituted a civil suit for recovery of Rs. 27,14,302.60 along with interest @ 18% in the Court of learned Civil Judge (S.D.) at Vadodara- matter in issue in the suit pending before the High Court and the previous suit is substantially the same-record showed that suit filed at Vadodara relates to spare parts supplied by defendant to the plaintiff for which no sale consideration was paid- suit was filed before the High Court on the premises that the spare parts were not genuine- this shows that cause of action in the two suits is not identical- application dismissed. (Para-3 to 6)

Cases referred:

Aspi Jal and Another Vs. Khushroo Rustom Dadyburjor (2013) 4 SCC 333
Pukhraj D. Jain and Others Vs. G. Gopalakrishna (2004) 7 SCC 251

For the Non applicant :	Mr. C.N. Singh, Advocate.
For the Applicant :	Mr.Karan Singh Kanwar, Advocate, for applicant/defendant No. 1. Ms. Godawari, Advocate, vice Mr.Vijay Arora, Advocate, for defendant No. 2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This application under Section 10 of the Code of Civil Procedure has been filed by the defendant for staying the present proceedings on the ground that the defendant has already instituted a suit for recovery of Rs.27,14,302.60 along with interest @ 18% in the Court of learned Civil Judge (S.D.) at Vadodara, which suit was presented on 3.8.2009 and was registered as special summary suit No. 451/2009. It is further submitted that on receipt of summons by the plaintiff, it filed an application for grant of leave to defend the suit and therefore, the plaintiff cannot feign ignorance regarding the said suit. It is lastly submitted that the matter in issue in the present suit is directly and substantially in issue in the aforesaid suit, because the controversy involved in both the suits is same, as ultimately what is to be judged is the genuineness of the spare parts.

2. The plaintiff/non-applicant has filed reply raising therein preliminary objections that the suit under adjudication before this Court and the summary suit pending trial at Vadodara is not identical and therefore, the application is not maintainable. It is also pleaded that the plaintiff has initiated the present proceedings for recovery of money for unused substandard spare parts lying in stock, for which parts, the entire sale consideration had been paid, whereas, the lis at Vadodara is for the spare parts received by the plaintiff, for which the sale consideration has not been paid. It is further pleaded that there is no identity of matter in issue and whole of the subject matter in both these proceedings are not identical and therefore, the application deserves to be dismissed. On merits, it is claimed that the initiation of recovery suit at Vadodara by the applicant/defendant is for an ulterior and malafide motive simply in order to harass, humiliate and blackmail the plaintiff, who has no dealing with the applicant in the State of Gujrat. The suit is abuse of process of law and an act to pressurize and illegally extract money from the non-applicant.

The applicant/defendant despite knowing fully well that the Courts at Gujarat have no jurisdiction to deal with the issue in hand has still opted to file a suit at Gujarat.

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

3. The essential ingredients of Section 10 of the Code of Civil Procedure are as follows:-

Firstly, the matter in issue in the suit is directly and substantially in issue in a previously instituted suit between the same parties;

Secondly, the previously instituted suit is pending-

i) in the same Court in which the subsequent suit is brought; or

ii)in any other Court in India (whether superior, inferior or co-ordinate); or

iii) in any Court beyond the limits of India established or continued by the Central Government; or

iv) before the Supreme Court; and

Thirdly, where previously instituted suit is pending in any of the Courts mentioned in clause (b) or clause (c), such Court is a Court of jurisdiction competent to grant the relief claimed in the subsequent suit.

4. Section 10 of the Code of Civil Procedure envisages that no Court will proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between the parties under whom they or any one of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief.

5. The parties are not at variance that in so far as the suit pending in the Court at Vadodara is concerned, the same relates to the spare parts supplied by the defendant to the plaintiff, for which sale consideration has not been paid. Whereas, the suit pending before this Court has been filed on the premise that the spare parts supplied by the defendant were not genuine, therefore, it can be safely concluded that the cause of action in both the suits is entirely distinct and different, though there is some common issue directly or substantially in issue in both the suits. But, then the mere fact that only some common issue arises for consideration would not be sufficient because the entire subject matter of the two suits must be the same, in view of the judgment of Hon'ble Supreme Court in ***Aspi Jal and Another Vs. Khushroo Rustom Dadyburjor (2013) 4 SCC 333***, wherein the Hon'ble Supreme Court has observed as under:-

"9. Section 10 of the Code which is relevant for the purpose reads as follows:

> *"**10. Stay of suit**.- **No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.***
>
> *Explanation.- The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."*

From a plain reading of the aforesaid provision, it is evident that where a suit is instituted in a Court to which provisions of the Code apply, it shall not proceed with the trial of another suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. For application of the provisions of Section 10 of the Code, it is further required that the Court in which the previous suit is pending is competent to grant the relief claimed. The use of negative expression in Section 10, i.e. "no court shall proceed with the trial of any suit" makes the provision mandatory and the Court in which the subsequent suit has been filed is prohibited from proceeding with the trial of that suit if the conditions laid down in Section 10 of the Code are satisfied. The basic purpose and the underlying object of Section 10 of the Code is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the plaintiff to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to protect the defendant from multiplicity of proceeding.

10. *The view which we have taken finds support from a decision of this Court in National Institute of Mental Health & Neuro Sciences vrs. C. Parameshwara, (2005) 2 SCC 256 in which it has been held as follows:*

> *"8. The object underlying Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The object underlying Section 10 is to avoid two parallel trials on the same issue by two courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. The language of Section 10 suggests that it is referable to a suit instituted in the civil court and it cannot apply to proceedings of other nature instituted under any other statute. The object of Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res-judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject-matter in both the suits is identical. The key words in Section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue". Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical."*

11. *In the present case, the parties in all the three suits are one and the same and the court in which the first two suits have been instituted is competent to grant the relief claimed in the third suit. The only question which invites our adjudication is as to whether "the matter in issue is also directly and substantially in issue in previously instituted suits". The key words in Section 10 are "the matter in issue is directly and substantially in issue in the previously instituted suit". The test for applicability of Section 10 of the Code is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. To put it differently one may ask, can the plaintiff get the same relief in the subsequent suit, if the earlier suit has been dismissed? In our opinion, if the answer is in affirmative, the subsequent suit is not fit to be stayed. However, we hasten to add then when the*

matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.

***12**. As observed earlier, for application of Section 10 of the Code, the matter in issue in both the suits have to be directly and substantially in issue in the previous suit but the question is what "the matter in issue" exactly means? As in the present case, many of the matters in issue are common, including the issue as to whether the plaintiffs are entitled to recovery of possession of the suit premises, but for application of Section 10 of the Code, the entire subject-matter of the two suits must be the same. This provision will not apply where few of the matters in issue are common and will apply only when the entire subject matter in controversy is same. In other words, the matter in issue is not equivalent to any of the questions in issue. As stated earlier, the eviction in the third suit has been sought on the ground of non-user for six months prior to the institution of that suit. It has also been sought in the earlier two suits on the same ground of non-user but for a different period. Though the ground of eviction in the two suits was similar, the same were based on different causes. The plaintiffs may or may not be able to establish the ground of non-user in the earlier two suits, but if they establish the ground of non-user for a period of six months prior to the institution of the third suit that may entitle them the decree for eviction. Therefore, in our opinion, the provisions of Section 10 of the Code is not attracted in the facts and circumstances of the case.*

***13.** Reference in this connection can be made to a decision of this Court in Dunlop India Limited vrs. A.A.Rahna & Anr. (2011) 5 SCC 778 in which it has been held as follows:*

> *"35. The arguments of Shri Nariman that the second set of rent control petitions should have been dismissed as barred by res judicata because the issue raised therein was directly and substantially similar to the one raised in the first set of rent control petitions does not merit acceptance for the simple reason that while in the first set of petitions, the respondents had sought eviction on the ground that the appellant had ceased to occupy the premises from June 1998, in the second set of petitions, the period of non-occupation commenced from September 2001 and continued till the filing of the eviction petitions. That apart, the evidence produced in the first set of petitions was not found acceptable by the appellate authority because till 2-8- 1999, the premises were found kept open and alive for operation, The appellate authority also found that in spite of extreme financial crisis, the management had kept the business premises open for operation till 1999. In the second round, the appellant did not adduce any evidence worth the name to show that the premises were kept open or used from September 2001 onwards. The Rent Controller took cognizance of the notice fixed on the front shutter of the building by A.K.Agarwal on 1-10-2001 that the Company is a sick industrial company under the 1985 Act and operation has been suspended with effect from 1-10-2001; that no activity had been done in the premises with effect from 1- 10-2001 and no evidence was produced to show attendance of the staff, payment of salary to the employees, payment of electricity bills from September, 2001 or that any commercial transaction was done from the suit premises. It is, thus, evident that even though the ground of eviction in the two sets of petitions was similar, the same were based on different causes. Therefore, the evidence produced by the parties in the second round was rightly treated as sufficient by the Rent Control Court and the appellate authority for recording a finding that the appellant had ceased to occupy the suit premises continuously for six months without any reasonable cause."*

(emphasis supplied)

There is yet another reason why the present suit cannot be stayed.

6. It is the specific contention of the plaintiff that the suit at Vadodara has been filed simply to harass the plaintiff, who otherwise has no business dealings at Gujarat. The defendant on the other hand, has moved this application for stay of the proceedings. The mere filing of an application under Section 10 CPC, does not in any manner put an embargo on the power of the Court to examine the merits of the matter. The object of this Section is only to prevent the Courts concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The Section inacts merely a rule of procedure and a decree passed in contravention thereof is not a nullity. It is not for a litigant to dictate to the Court as to how the proceedings should be conducted, it is for the Court to decide what will be the best course to be adopted for expeditious disposal of the case. It was always open to the Court to decide the relevant issues and not to keep the suit pending which has been instituted with an oblique motive and to cause harassment to the other side. In taking this view, I am supported by the judgment of the Hon'ble Supreme Court in ***Pukhraj D. Jain and Others Vs. G. Gopalakrishna (2004) 7 SCC 251:-***

> *"4. We have heard learned counsel for the parties and have perused the records. In our opinion, the view taken by the High Court is wholly erroneous in law and must be set aside. The proceedings in the trial of a suit have to be conducted in accordance with provisions of the Code of Civil Procedure. Section 10 CPC no doubt lays down that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed. However, mere filing of an application under Section 10 CPC does not in any manner put an embargo on the power of the Court to examine the merits of the matter. The object of the section is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The section enacts merely a rule of procedure and a decree passed in contravention thereof is not a nullity. It is not for a litigant to dictate to the Court as to how the proceedings should be conducted, it is for the Court to decide what will be the best course to be adopted for expeditious disposal of the case. In a given case the stay of proceedings of later suit may be necessary in order to avoid multiplicity of proceedings and harassment of parties. However, where subsequently instituted suit can be decided on purely legal points without taking evidence, it is always open to the Court to decide the relevant issues and not to keep the suit pending which has been instituted with an oblique motive and to cause harassment to the other side.*

7. In view of the aforesaid discussion, there is no merit in this application and accordingly the same is dismissed, leaving the parties to bear their costs.

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

Jyoti Gautam .....Appellant.

versus

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

LPA No.162 of 2014.

Decided on: December 16, 2014.

Constitution of India, 1950- Article 226- Petitioner appeared for the post of Physiotherapist – she was not offered appointment on the ground that the veracity of her certificates was to be verified- petitioner had obtained the diploma in physiotherapy from Allahabad Agricultural Institute which was recognized till 2005- petitioner appeared in examination during the academic session 2005-2006 and 2006-2007- no document was placed on record to show that recognition was extended to sessions 2005-2006 and 2006-2007- course in Physiotherapy is technical one which cannot be undergone in a distant mode- held, that in these circumstances, petition was rightly dismissed.

(Para- 3 to 9)

Case referred:

Annamalai University represented by Registrar vs. Secretary to Government, Information and Tourism Department and others, (2009) 4 SCC 590

For the Appellant: Mr.Ashwani K. Sharma, Advocate.

For the Respondents: Mr.Romesh Verma & Mr.Anup Rattan, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No.1 and 2.

Mr.S.K. Banyal, Advocate, for respondent No.3.

Ms.Archana Dutt, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Challenge in this Letters Patent Appeal is to the judgment and order, dated 17th June, 2013, passed by a learned Single Judge of this Court, in CWP No.8917 of 2012, titled Jyoti Gautam vs. State of H.P. and others, whereby the writ petition of the appellant/writ petitioner came to be dismissed, (for short, the impugned judgment).

2. Facts of the case, in brief, are that the respondents issued advertisement notice, dated 3rd June, 2011, whereby applications were invited for filling up the posts of Physiotherapist on contract basis through Rogi Kalyan Samiti. The qualification prescribed was 10+2 with Medical Science or its equivalent from a recognized University/Board and diploma in Physiotherapy from an institute, duly recognized by the Central/State Government. Candidates, including the writ petitioner applied and the selection process was taken to its logical end. However, the petitioner was not offered appointment on the ground that the veracity of her certificates was to be verified.

3. Admittedly, the petitioner had obtained the diploma in Physiotherapy from Allahabad Agricultural Institute (Deemed University), which was recognized in terms of Annexure P-15 upto the year 2005 and thereafter provisional recognition was granted for the academic year 2007-08. The petitioner appeared in the said examination during the academic session 2005-06 and 2006-07. The petitioner has not placed any document on record supporting her claim that the recognition was granted by Indira Gandhi National Open University to the said Institute for the session 2005-06 and 2006-07.

4. It is also moot question whether course in Physiotherapy can be gone through by distant mode, which, of course, is a para medical course and technical one.

5. The Apex Court in **Annamalai University represented by Registrar vs. Secretary to Government, Information and Tourism Department and others, (2009) 4 SCC 590,** has dilated on the issue, which decision has been discussed in paragraph 12 of the impugned judgment.

6. The course in Physiotherapy is a technical one and such a course cannot be undergone by the distant mode.

7. This Court in CWP No.1771 of 2012, decided on 31st December, 2012, has taken the similar view.

8. The Writ Court has gone into all these aspects, including the judgments made by this Court and by the Apex Court, in paragraphs 11 and 12 of the impugned judgment and has rightly dismissed the writ petition.

9. Having said so, no case for interference is made out. Accordingly, the appeal is dismissed and the impugned judgment is upheld.

10. Pending CMPs, if any, also stand disposed of.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Rattan Chand (deceased) through his LRs Smt. Kunti Devi and others
...Appellants/Defendants.

Versus

Pawan Kumar and others ...Respondents/Plaintiffs

R.S.A. No. 89 of 2003
Judgment reserved on: 11.12.2014.
Date of decision: December 16th, 2014

H.P. Town and Country Planning Act, 1977- Section 16 (c)- Plaintiff filed a civil suit seeking specific performance of the contract entered into between the predecessor-in-interest of the plaintiffs and defendants regarding the land situated within the jurisdiction of Town and Country Planner – held that there is no blanket bar in the planning area to sell, gift, exchange, lease or mortgage with possession any land if its Sub-Division is duly approved by the Director – further, held that separate khasra no. can be alienated without seeking permission from Town and Country Planning Department. (Para-11)

Limitation Act, 1963- Section 54- where the purchasers had stated that they were ready to perform their part of the contract and had kept the money for registration expenses- seller admitted that sale consideration was received by him and contract did not provide that time was the essence of the contract, suit cannot be said to be barred by limitation.

(Para-13 to 19)

Code of Civil Procedure, 1908- Order 1 Rule 13- A plea of misjoinder of necessary parties has to be taken at the earliest possible opportunity and in any case prior to the settlement of issues- where such plea was not taken or no issue was raised

regarding non-joinder of necessary party, plea is deemed to have been waived. (Para-20 and 21)

Cases referred:

Chand Rani (Smt.) (dead) by LRs vs. Kamal Rani (Smt.) (dead) by LRs (1993) 1 SCC 519

Hind Construction Contractors vs State of Maharashtra (1979) 2 SCC 70

Swarnam Ramachandran (Smt.) and another vs. Aravacode Chakungal Jayapalan (2004) 8 SCC 689

Gomathinayagam Pillai and others vs. Palaniswami Nadar AIR 1967 SC 868

Bibi Jaibunisha vs. Jagdish Pandit and others (1997) 4 SCC 481

For the Appellants	:	Mr. K.D.Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate.
For the Respondents	:	Mr. Sameer Thakur, Advocate, for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The appellants are the defendants, who are aggrieved by the judgment and decree dated 2.9.2002 passed by learned District Judge, Hamirpur, H.P. in Civil Appeal No. 139 of 1995 whereby he reversed the judgment and decree dated 15.9.1995 passed by learned Senior Sub Judge, Hamirpur, H.P. in Civil Suit No. 360-I of 1991.

2. The facts, in brief, are that the plaintiffs filed a suit for specific performance of the agreement dated 11.4.1986 on the ground that the land comprised in Khata No.6 min, Khatauni No. 15 min, Khasra No. 174 measuring 121.67 sq. mtrs. situated in Tika Up Mahal, Choula Khurd, Tappa Bajuri, Tehsil and District Hamirpur, H.P. (hereinafter referred to as the suit land) has been shown in the ownership and possession of the defendants in the revenue record. It was averred in the plaint that the defendants agreed to sell 51.67 sq. mtrs. land out of the suit land shown as Khasra No. 174/1 in favour of deceased Sh. Jagar Nath, predecessor in interest of the plaintiffs vide agreement dated 11.4.1986. However, the said Jagar Nath died in the year 1990. It was averred that as per the agreement it was agreed upon that the defendants would get the exchange entered in the revenue record and in case it is not accepted or mutation is not sanctioned then the deceased Jagar Nath would be entitled to get the sale deed executed. Further case of the plaintiffs is that at the time of execution of the agreement, a sum of Rs.8456/- was paid by their predecessor-in-interest to the defendants in cash. The mutation of exchange was rejected somewhere in 1988-89. Thereafter, they were always ready and willing to perform their part of agreement as they kept the money required for registration expenses and stamps etc., but it is the defendants, particularly defendant No.1, who was not ready and willing to perform their part of the contract. The plaintiffs had to serve the defendants with the notice in the year 1987 to get the mutation attested but they failed to do so. The defendant No.3 was also requested time and again to execute the sale deed but he paid no heed to the requests of the plaintiffs. It was averred that the plaintiffs got the knowledge of the said agreement after the death of Jagar Nath in the month of October, 1991 when the defendant No.3 refused to execute the sale deed, hence the suit.

3. The defendants contested the suit by filing separate written statements. The defendants No.1 and 2 averred that the agreement to sell was

executed and the other averments were denied. The defendant No.3 contested the suit of the plaintiffs and submitted that the suit is time barred and as such not maintainable. It is averred that the defendant No.3 is in possession over the suit land since the time when the defendants No. 1 and 2 were not owners thereof. It is admitted that the agreement was executed by defendant No.3 with the deceased Jagar Nath in the year 1986 but the aforesaid deceased never tried to enforce the agreement during his life time and hence the agreement has no force in the eye of law. The exchange as alleged is admitted. It is alleged that the plaintiffs are trying to take forcible possession of the suit land by taking advantage of the aforesaid agreement. It is admitted that a sum of Rs. 8456/- was handed over to the defendants by the deceased but lateron the deceased refused to exchange the land as per the agreement. It is also submitted that the defendant was never served with any notice by the plaintiffs in the year 1987.

4. The plaintiffs filed the replication to the written statements filed by the defendants and denied all the allegations made in the written statements and reaffirmed the averments made in the plaint.

5. On 25.9.1992 the learned trial Court framed the following issues:

1. Whether the plaintiffs are estopped by their act and conduct from filing this suit? OPD
2. Whether no cause of action accrued to the plaintiffs? OPD
3. Whether the suit in present form is not maintainable? OPD
4. Whether the suit is within limitation? OPP
5. Whether the plaintiffs are entitled to the specific enforcement of the contract? OPP
6. Relief.

6. After recording the evidence and evaluating the same, the learned trial Court dismissed the suit of the plaintiffs. Aggrieved by the judgment and decree dated 15.9.1995, the plaintiffs filed an appeal before the learned lower Appellate Court. The learned lower Appellate Court vide judgment and decree dated 2.9.2002 set-aside the judgment and decree passed by the learned trial Court.

7. Aggrieved by the judgment and decree passed by the learned lower appellate Court, the appellants have come up before this Court in second appeal.

8. This Court on 20.3.2003 admitted the appeal on the following substantial questions of law:

1. *Whether alleged agreement in sale (Ex.PW-3/A) can be executed in violation of mandatory provisions of law contained under Section 16 (c) of the H.P. Town & Country Planning Act, 1977, if not, whether the judgment and decree passed by the learned Appellate Court below is unsustainable in the eyes of law being contrary to law?*
2. *Whether the suit is time barred whereby the specific performance of the agreement dated 11.4.86 (Ex. PW-3/A) has been instituted on 28.11.1991?*
3. *Whether the suit is maintainable when there has been mis-nonjoinder of necessary parties, when PW-1 himself has admitted that the part of the suit land is in the possession of one Smt. Koshalaya Devi?*

9. I have heard learned counsel for the parties and have also gone through the records carefully and meticulously.

10. Section 16 (c) of the Himachal Pradesh Town and Country Planning Act, 1977 (for short 'Act') reads as follows:

> *"16.* ***Freezing of land use – On the publication of the existing land use map under Section 15 (C) No Registrar or the Sub-Registrar, appointed under the Indian Registration Act, 1908, shall in any planning area constituted under Section 13, register any deed or document of transfer of any sub-division of land by way of sale, gift, exchange, lease or mortgage with possession unless the sub division of land is duly approved by the Director subject to such rules as may be framed in this behalf by the State Government.***
>
> ***Provided that the Registrar or the Sub Registrar may register any transfer.-***
>
> ***(i) Where the land is owned by a person and the transfer is made without involving any further divisions,***
>
> ***(ii) Where the partition/sub-division of land is made in a Joint Hindu Family,***
>
> ***(iii) Where the lease is made in relation to a part of whole of a building;***
>
> ***(iv) Where the mortgage is made for procuring the loans for construction or improvements ever the land either from the Government or from any other financial institution constituted or established under any law for the time being in force or recognized by the State Government."***

11. Notably the point regarding jurisdiction was only raised for the first time by the defendant when he stepped into the witness box and there was no plea whatsoever raised by him to this effect in the written statement nor any issue in this behalf had been framed. Anyhow, irrespective of there being any pleadings in this behalf in the written statement, the learned lower Appellate Court dealt with this question and concluded that there was no blanket bar even in the planning area qua sale, gift, exchange, lease or mortgage with possession of land. It is further held that as in case the sub division of any such land is duly approved by the Director, Town and Country Planning, the same can be alienated by way of sale, gift, exchange or mortgage with possession. The learned lower Appellate Court further came to the conclusion that since the land had been denoted by separate khasra number as per Tatima Ex.P-2, the same was covered under proviso (i) to Section 16 (c) as no further division thereof was required as all the co-owners were ready and willing to execute the sale deed in favour of the plaintiffs and it was only the defendant No.3 who had refused to do so.

12. Learned counsel for the appellants could not convince this Court as to how and in what manner the findings recorded by the learned lower Appellate Court regarding interpretation of Section 16 (c) of the Act, is in any manner erroneous or faulty. Therefore, this substantial question of law is decided against the appellants.

Substantial question of law No.2:

13. Article 54 of the Limitation Act prescribes as under:

Description of suit	Period of limitation	Time from which period begins to run

54. For Specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

Whether in a contract the time is the essence of the contract has been the subject matter of interpretation in number of cases, but the proposition can be said to have been settled by the decision of the Constitution Bench of the Hon'ble Supreme Court in case titled ***Chand Rani (Smt.) (dead) by LRs*** vs. ***Kamal Rani (Smt.) (dead) by LRs (1993) 1 SCC 519*** wherein the Hon'ble Court outlined the principle thus:

> ***"19. It is a well-accepted principle that in case of sale of immoveable property, time is never regarded as the essence of the contract. As, in fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.***

14. In ***Hind Construction Contractors*** vs ***State of Maharashtra (1979) 2 SCC 70*** the Hon'ble Supreme Court while discussing the question as to whether the time would be the essence of the contract, held as follows:

> ***"7....that question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract....(See Halsbury's Laws of England, 4th Edn., Vol.4, para 1179.)"***
>
> ***8.... even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read alongwith other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental;...(See Lamprell v. Billericay Union (1849) 3 Exch 283, Exch at p. 308; Webb v. Hughes (1870) LR 10 Eq 281 ; Charles Rickards Ltd. v. Oppenheim (1950) 1 KB 616.)"***

15. The respondents had specifically stated that they were ready and willing to perform their part of the contract and had kept the money for registration expenses and stamp expenses and for other expenses in connection with execution of sale deed ready, but the defendants are not ready to do so. The defendant No.3, who was the sole contesting defendants, had admitted the agreement but had claimed that deceased Jagar Nath during his life time never tried to enforce that agreement, therefore, this agreement had no force under law. He also admitted the receipt of ` 8456/- and further claimed that deceased Jagar Nath, who refused to exchange the land as per the agreement. He also denied the receipt of notice in the year 1987. However, in the entire length and breath of the written statement never was the plea of time being the essence of the contract ever raised. Though, an omnibus preliminary objection was taken to the effect that the '*suit is time barred'* and accordingly even an issue to this effect was framed.

16. It was incumbent upon the appellants to have pleaded and proved that time the essence of the contract and in taking this view, I am supported by the following observations of the Hon'ble Supreme Court in ***Swarnam Ramachandran (Smt.) and another*** vs. ***Aravacode Chakungal Jayapalan (2004) 8 SCC 689*** wherein it was observed as under:

> *"12. That time is presumed not to be of essence of the contract relating to immovable property, but it is of essence in contracts of reconveyance or renewal of lease. The onus to plead and prove that time was the essence of the contract is on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of essence...."*

17. A perusal of the issues framed at the time of trial of the suit would show that there is no issue framed with respect to the time being the essence of the contract. Though, the learned counsel for the appellants would strenuously argued that the same was covered under issue No.4 – *Whether the suit is within limitation.* But I am afraid that this plea of the appellants cannot be accepted in view of the judgment passed in ***Swarnam Ramachandran*** case (supra).

18. That apart, the Hon'ble Supreme Court in ***Gomathinayagam Pillai and others*** vs. ***Palaniswami Nadar AIR 1967 SC 868*** has categorically held that in absence of specific pleadings or issues raised before the trial Court, question whether the time is of the essence of the contract or not, cannot be raised before the High Court.

19. The question as to whether the plea that the suit was time barred would lead to an inference as containing the plea of time being the essence of the contract was specifically dealt with by the Hon'ble Supreme Court in ***Bibi Jaibunisha vs. Jagdish Pandit and others (1997) 4 SCC 481*** and it was held that the plea having not been specifically raised cannot be construed to be inclusive or contained in the objection that the party had not performed its terms of the contract within time as there has to be specific pleadings and issues framed to this effect. This would be clear from the following observations:

> "4. *The question, therefore, is : whether the view taken by the trial Court and the High Court that the time is the essence of the contract is correct in law? No doubt, the High Court has framed the point in paragraph 8 of the judgment and recorded the finding that the time was the essence of the contract. It is an admitted position that the plea was not specifically raised, though it was stated in the written statement that the appellant had not performed his terms of the contract within time. Admittedly, no issue was raised in this behalf. The question, therefore, is: whether the High Court would be justified in coming to the conclusion that the time was the essence of the contract? It is now well settled legal position that in the matter of enforcement of the agreement or agreement of reconveyance, time is not always the essence of the contract unless the agreement specifically stipulates and there are special facts and circumstances in support thereof. It must be specifically pleaded and issue raised so that the other party has a right to lead evidence. There is no express plea in in the written statement nor any issue raised in that behalf. Consequently, there was no opportunity to the appellant to aduce rebuttal evidence that time was not the essence of the contract.*
>
> *5. This Court in Smt. Indira Kaur & Ors. vs. Sheo Lal Kapoor [(1988) 2 SCC 488] in paragraph 6 held as under: (SCC p.496).*
>
> > *"On the question whether the time is of the essence of the contract or not we are satisfied that the High Court was in error in allowing the respondents to raise this question in the absence of specific pleadings or issues raised before the trial court and when the case of time being the essence of the contract was not put forward by*

the respondent in the trial court. Apart from the absence of pleadings we do not find any basis for the plea of the respondents in the trial court. Apart from the absence of pleadings we don not find any basis for the plea of the respondents that the time was of the essence of the contract."

6. This Court held that the plea cannot be raised, for the first time, in the High Court when it is not a matter of pleading or issue in that behalf. We find that the same ratio applies to the facts in this case. Accordingly, the finding that the time was the essence of the contract and non-suiting the appellant on that finding is clearly in error."

Therefore, in absence of pleadings or issue in this behalf, this Court cannot go into the question and accordingly the substantial question of law No.2 is answered against the appellants/defendants.

Substantial question of law No.3:

20. It is settled law that plea of misjoinder of necessary parties has to be taken at the earliest possible opportunity and in case where the issues are settled at or before such settlement, otherwise such objection is deemed to have been waived. Merely raising a plea of non-joinder of parties without making any effort to prove the said plea is not sufficient. Order 1 Rule 9 of the Code provides that no suit shall be defeated by reasons of misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as it relates to the rights and interests of the parties actually before it.

Order 1 Rule 13 CPC reads as under:

"13. Objections as to non-joinder or misjoinder.- All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

21. Now, reverting to the facts of the case, it would be seen that the appellants have raised the objection regarding mis-joinder and non-joinder of parties only for the sake of objection because at no stage did they seriously pursue this objection. This would be borne out from the fact that even an issue to this effect had not been framed. Therefore, this objection is deemed to have been waived. The Court at this stage would loath to interfere unless there is a total violation of justice. This being the position, this substantial question of law is also answered against the appellants.

22. Inconsequenti, there is no merit in this appeal and the same is dismissed, so also the pending applications, if any. The parties are left to bear their own costs.

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

Dharam Sain .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 28 of 2011.
Reserved on: December 17, 2014.
Decided on: December 18, 2014.

Indian Penal Code, 1860 - Sections 376 and 506 IPC- Accused committed rape upon the prosecutrix- she narrated this fact to her parents who lodged the FIR – incident had taken place on 31.3.2007- FIR was lodged on 4.4.2007- no satisfactory explanation was given for delay- medical evidence did not corroborate the prosecution version-it was stated that as per forensic report and examination of the victim, there was no sign of recent sexual intercourse- prosecutrix was minor and in case of forcible intercourse with her, there was every possibility of swelling of labia majora/labia minora- held, that in these circumstances, prosecution version was not proved beyond reasonable doubt- accused acquitted. (Para- 21 to 30)

Cases referred:

Aman Kumar and another vs. State of Haryana, (2004) 4 SCC 379
Tarkeshwar Sahu vs. State of Bihar (now Jharkhand), (2006) 8 SCC 560
Yerumalla Latchaiah vs. State of A.P. (2006) 9 SCC 713
Narender Kumar vs State (NCT of Delhi), (2012) 7 SCC 171
K. Venkateshwarlu vs. State of Andhra Pradesh (2012) 8 SCC 73

For the appellant: Mr. Satyen Vaidya, Advocate.
For the respondent: Mr. P.M.Negi, Dy. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 23.12.2010, rendered by the learned Addl. Sessions Judge, Kinnaur at Rampur, H.P., in Sessions Trial No. 25-AP/7 of 2008/2010, whereby the appellant-accused (hereinafter referred to as the accused) who was charged with and tried for offences under Sections 376 & 506 of the IPC, was convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 10,000/- and in default to further undergo simple imprisonment for one year under Section 376 IPC. He was further sentenced to rigorous imprisonment for 2 years and to pay fine of Rs. 5,000/- and in default to further undergo simple imprisonment for 6 months under Section 506 IPC. The amount realized from the accused was ordered to be paid to the prosecutrix as compensation.

2. The case of the prosecution, in a nut shell, is that on 4.4.2007, complainant Sohan Lal visited Police Station Nirmand alongwith the prosecutrix, his daughter aged 11 years. He lodged the report. He had been living in a rented house at Village Thachwa alongwith his family for the last two years. On 3.4.2007, when he came back to his quarter at 7/8 PM after doing labour work at Jagatkhana, his wife Kamla Devi told him that the prosecutrix had told her during day time that she was feeling pain in her private part and on inquiry she told her that on 31.3.2007, during day time, when no family member was present in the quarter, the accused person came there and committed rape on her and threatened to do away with her life in case she disclosed this incident to any other person. The complainant also made inquiry from the prosecutrix, who narrated him the same story. Thereafter, he alongwith the prosecutrix visited Police Station Nirmand and reported the matter to the police, on the basis of which, FIR No. 35 of 2007 under Sections 376 and 506 IPC was registered. The prosecutrix was got medically examined. The case property was sent to FSL,

Junga. The investigation was completed and challan was put up against the accused after completing all the codal formalities.

3. The prosecution has examined as many as 16 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. His case is of simpliciter denial. The learned Trial Court convicted and sentenced the accused, as stated hereinabove. Hence, the present appeal.

4. Mr. Satyen Vaidya, Advocate, appearing for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. P.M.Negi, Dy. Advocate General, has supported the judgment of the learned Addl. Sessions Judge, Kinnaur at Rampur, H.P. dated 23.12.2010.

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

6. PW-1, Mohinder Singh deposed that on 5.4.2007, police moved an application Ext. PW-1/A for obtaining the birth certificate of the prosecutrix. He issued certificate Ext. PW-1/B and copy of Nakal Parivar Register Ext. PW-1/C & Ext. PW-1/D. The date of birth of the prosecutrix was 17.9.1995.

7. PW-2 Dr. Yashoda Anand, deposed that on 4.4.2007 Lady Constable brought the prosecutrix with the alleged history of sexual intercourse with her on 31.3.2007 at about 1:30 PM. She was aged about 11 years and 4 months. According to her opinion, there were no signs of recent sexual intercourse and she reserved the final opinion to be given after examining the samples. On 12.6.2007, after perusing the forensic report, she opined that there were no signs of sexual intercourse. The police again took her opinion on 25.6.2007 regarding point No. 3. She opined that hymen was partially ruptured and healed. She also gave opinion that rupture of hymen could also occur due to sudden stretching like due to fall and sport injury. She gave another opinion on 18.7.2007 at the request of the police. She opined that hymen was ruptured and healed. The pain could be due to some other causes. Exact period of injury could not be given. The redness and tenderness could be due to uncleanness of the external genitalia or due to some other reason. According to her, it could not be clearly stated that there was penetration/partial penetration. She has given the opinions on 12.6.2007 vide Ext. PW-2/D, on 25.6.2007 vide Ext. PW-2/E and on 18.7.2007 vide Ext. PW-2/F. She had given the final opinion Ext. PW-2/D on 12.6.2007 on the basis of the FSL report, Mark "XY". In her cross-examination, she admitted that in case the victim is minor or virgin and she is subjected to forcible sexual intercourse by an adult male, in that event, there is every possibility of injuries to the labia majora/labia minora. She did not notice any injuries on labia majora/labia minora. She did not notice any tear on the edges of hymen.

8. PW-3 Dr. D.S.Billawria, has examined the accused. He has issued MLC Ext. PW-3/B.

9. PW-4 Uma Sharma has issued the date of birth certificate vide Ext. PW-4/B. The date of birth of the prosecutrix was 17.9.1995.

10. PW-5 Sh. Devender Sahani has issued date of birth certificate of the accused Ext. PW-2/B. The date of birth of the accused was 2.5.1983.

11. PW-6 Sohan Lal is the father o the prosecutrix. According to him on 3.4.2007, he had gone to Jagatkhana for doing labour work and after finishing his work, he returned to his quarter at about 7-8 PM. His wife told him that the prosecutrix had complained of pain in her vagina. On asking by her mother, the prosecutrix told her mother that on 31.3.2007 at about 1-1:30 PM, the accused came to their quarter and he had committed sexual intercourse with the prosecutrix in the bath room. He also inquired from the prosecutrix in

the presence of his wife. The prosecutrix disclosed him that the accused had committed rape upon her and also threatened her. The FIR could not be lodged due to night time. He went to the Police Station next day. FIR Ext. PW-6/A was registered. In his cross-examination, he deposed that accused was his immediate neighbourer. The mother of Dharam Sain used to reside with him in his house. He has not informed anyone after the alleged occurrence as there was none who should have been informed by him. His elder brother was residing at Tunan village and he has no telephone facility. He has told the mother of the accused regarding the occurrence but mother of the accused alongwith accused and younger brother of the accused had assembled to beat him and his family members. The younger brother of the accused was having *danda* in his hand but he and his family was not given beatings by the younger brother of the accused. He has told this fact to the police. However, he did not know why the police has not recorded this fact in FIR. The distance between Thachwa and Jagatkahana is about one kilometer and it takes 15 minutes to reach Jagatkahana on foot. The contents of the FIR were read over to him.

12. PW-7 is the prosecutrix. She deposed that on 31.3.2007, she was alone in her house. She had gone to fetch water from the tank. She kept the same in the bath-room. The accused was already present in the bath-room. He gagged her mouth with cloth. He caught hold of her from her both arms and laid her on the floor of the house in the bathroom. She tried to raise alarm. Accused opened the string of her salwar forcibly and committed sexual intercourse with her and blood started oozing out of her vagina which spread over the salwar. The accused thereafter threatened her to do away with her life in case she disclosed about the incident to her parents. The quarter of the accused was adjoining to their rented accommodation. She was not feeling well after 3.4.2007 and her mother asked her as to why she was not feeling well. On this she started crying and narrated the incident to her mother. Her mother further disclosed this incident to her father. Her father in the presence of her mother also inquired from her about the incident. On next day i.e. on 4.4.2007, she alongwith her father and mother came to the Police Station Nirmand and lodged the FIR Ext. PW-1/A. Her date of birth was 17.9.1995. In her cross-examination, she deposed that she kept on sleeping w.e.f. 31.3.2007 to 3.4.2007. She also admitted categorically in her cross-examination that she did not sustain any injury when accused committed sexual intercourse with her.

13. PW-8 Kamla is the mother o the prosecutrix. According to her on 3.4.2007, she inquired from the prosecutrix as to what had happened to her and why she was not feeling well. She disclosed that she was having pain in her private part. She further disclosed to her that on 31.3.2007 when the prosecutrix was alone and she was in school and in the day time when she brought water from tank and came to bathroom the accused was already in bath room who gagged the mouth of the prosecutrix with cloth and caught hold of her from both arms and forcibly laid her down on the floor. Thereafter, after removing the string of the salwar, he committed sexual intercourse with her daughter. He also threatened her to do away with her life in case she disclosed the incident to her parents. On 3.4.2007, she disclosed the entire incident to her husband. Her husband also inquired about the incident from the prosecutrix in her presence and she narrated the incident to her husband also. Due to night hours, they could not lodge the FIR. On 4.4.2007, she alongwith the prosecutrix and her husband went to Nirmand and FIR was lodged and medical examination of the prosecutrix was got conducted in CHC Hospital Nirmand. In her cross-examination, she deposed that she alongwith her mother called mother of accused to their house but she threatened to give beatings to all her family members. Dharam Sain and his younger brother who was having *danda* in their hands came to attack them. The accused and his family members did not beat them. They had also disclosed this to the police at the time of recording FIR against the accused. The salwar of the prosecutrix was handed over to the police on the same day in the police station. The prosecutrix

was given another salwar for wearing after the salwar was taken into possession by the doctor. The prosecutrix was having injuries on the private part.

14. PW-9 Dr. Kapil Malhotra deposed that he was posted as Medical Officer MGMSC Hospital Khaneri. On 27.7.2007, on the request of the police, he has opined that penetration can lead to the partial rupture of hymen. Hymenal tags may be present even after full intercourse. He gave his opinion Ext. PW-9/A.

15. PW-10 LC Reema Devi deposed that after medical examination of the prosecutrix, the MO handed over one sealed cloth parcel stated to be containing vaginal slides, vaginal swab, one printed salwar, one envelope and sample of seal. He handed over the sealed parcel, envelope and sample of seal to MHC Mohar Singh.

16. PW-11 Const. Mohar Singh deposed that MHC Mohar Singh handed over to him the case property and he deposited the same at FSL Junga on the same day vide RC No. 24/2007.

17. Statements of PW-12 Ravinder Kumar and PW-13 Binu Ram are formal in nature.

18. PW-14 SI Harish Chand Thakur has investigated the case. He arrested the accused and collected the birth certificate and extract of Parivar register from Panchayat Secretary which are Ext. PW-1/B and PW-1/C. He also procured the extract of admission register from the Principal Govt. Girls Sr. Secondary School, Rampur Bushahr vide letter Ext. PW-4/A and the certificate issued by the Principal is Ext. PW-4/B. He also collected the birth certificate of accused vide letter Ext. PW-5/A and PW-5/B.

19. PW-15 SI Brij Lal has got medically examined the prosecutrix at CHC Nirmand. He went alongwith the prosecutrix and her father to the spot. He prepared the spot map Ext. PW-15/A. He recorded the statement of the witnesses. He obtained birth certificate of the prosecutrix Ext. PW-1/B.

20. PW-16 ASI Mohar Singh deposed that on 4.4.2007, complainant Sohan Lal had visited PS Nirmand alongwith his daughter and lodged FIR Ext. PW-6/A. He scribed application Ext. PW-2/A for conducting medical examination of the prosecutrix and sent her to PHC Nirmand under the supervision of Const. Reema. He sent the case property to FSL Junga through Const. Mohar Singh on 16.4.2007. In his cross-examination, he admitted that at the time of lodging the FIR, the mother was not accompanying the prosecutrix. At the time of lodging the FIR or thereafter, the prosecutrix or her parents did not present the salwar of the prosecutrix to the police in his presence.

21. According to the prosecution case, the incident has happened between 1-1:30 PM on 31.3.2007. The FIR was registered on 4.4.2007. According to PW-8 Kamla, the mother of the prosecutrix, she inquired from the prosecutrix on 3.4.2007 as to what had happened to her. The prosecutrix narrated her the entire incident. Thereafter, she disclosed this fact to her husband on 3.4.2007 at 7-8:00 PM. The FIR could not be registered since it was night time. The FIR was registered on 4.4.2007. Similarly, PW-6 Sohan Lal deposed that her wife PW-8 Kamla had told him how the incident has happened. According to PW-8 Kamla, she has also gone to the Police Station with the prosecutrix. However, PW-16 ASI Mohar Singh has categorically admitted that at the time of lodging the FIR, the mother was not accompanying the prosecutrix. According to the prosecutrix, she remained sleeping w.e.f. 31.3.2007 to 3.4.2007. It is not believable that the prosecutrix would remain sleeping w.e.f. 31.3.2007 to 3.4.2007. The Police Station was not at a very far off place. It is well settled by now that the delay in registration of the FIR cannot be fatal in every case. The prosecution can always explain the delay. In the

instant case, the delay has not been satisfactorily explained for lodging the FIR belatedly.

22. The prosecution version is also not corroborated by the medical evidence. The prosecutrix was examined by PW-2 Dr. Yashoda Anand on 4.4.2007. PW-2 Dr. Yashoda Anand, has given the opinion after examining the victim. According to her, there were no signs of recent sexual intercourse and final opinion was given after chemical examination of the samples. The FSL report is Ext. PW-14/B. No semen was found on the parcels. PW-2 Dr. Yashoda Anand gave the final opinion on 12.6.2007. It reads as under:

> "After seeing the forensic report of the samples sent for chemical examination, I am of the opinion that there are no signs of sexual intercourse."

23. The police has again sought for her opinion after the final opinion. She gave the opinion on 25.6.2007. According to her, the rupture of the hymen could occur due to sudden stretching like due to fall, sport injury etc. She has mentioned that hymen was partially ruptured and healed. It was not suggestive of pre-existing traumatic cause. The police again sought her another opinion and she gave the same on 18.7.2007. She had given the opinion that hymen was ruptured and healed. The pain could be due to some other cause. The exact duration of injury could not be given. The redness and tenderness could be due to uncleanness of the external genitalia or due to some other reason. According to her, it could not be clearly stated that there was penetration/partial penetration. In her cross-examination, PW-2 Dr. Yashoda Anand has admitted, as noticed hereinabove, that she has not noticed injuries on labia majora/labia minora. She has not noticed any tear on the edges of hymen. The prosecutrix had appeared as PW-7 and in her cross-examination also, she has admitted that she did not sustain any injury when the accused committed forcible intercourse with her.

24. The prosecution has also sought the opinion of PW-9 Dr. Kapil Malhotra. He has given the opinion vide Ext. PW-9/A. PW-9 Dr. Kapil Malhotra was never shown the MLC Ext. PW-2/C. His opinion is dated 27.7.2007. The incident has taken place on 31.3.2007. The prosecutrix was minor. In case, there was forcible intercourse with her, there was every possibility of swelling of labia majora/labia minora. According to PW-2 Dr. Yashoda Anand, as noticed by us hereinabove, has specifically opined that there was no recent sexual intercourse. Moreover, no semen was found on the clothes of the prosecutrix.

25. Their Lordships of the Hon'ble Supreme Court in ***Aman Kumar and another*** vs. ***State of Haryana***, (2004) 4 SCC 379 have held that it is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Their Lordships have further held that penetration is the sine qua non for an offence of rape and in order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. Their Lordships have further held that in examination of genital organs, state of hymen offers the most reliable clue. Their Lordships have held as under:

> "5. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is

no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would suffice.

7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (See Joseph Lines IC & K 893). It is well-known in the medical world that the examination of smegma loses all importance after twenty four hours of the performance of the sexual intercourse. (See Dr. S.P. Kholi, Civil Surgeon, Ferozepur v. High Court of Punjab and Haryana thr. Registrar (1979) 1 SCC 212). In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC."

26. Their Lordships of the Hon'ble Supreme Court in ***Tarkeshwar Sahu*** vs. ***State of Bihar (now Jharkhand),*** (2006) 8 SCC 560 have held no offence under Section 376 IPC can be made out unless there was penetration to some extent and in absence of penetration to any extent would not bring the

offence within the four corners of Section 375 of the Indian Penal Code. Their Lordships have held as under:

> "10. Under Section 375 IPC, six categories indicated above are the basic ingredients of the offence. In the facts and circumstances of this case, the prosecutrix was about 12 years of age, therefore, her consent was irrelevant. The appellant had forcibly taken her to his Gumti with the intention of committing sexual intercourse with her. The important ingredient of the offence under Section 375 punishable under Section 376 IPC is penetration which is altogether missing in the instant case. No offence under Section 376 IPC can be made out unless there was penetration to some extent. In absence of penetration to any extent would not bring the offence of the appellant within the four corners of Section 375 of the Indian Penal Code. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC. This Court had an occasion to deal with the basic ingredients of this offence in the case of State of U.P. v. Babul Nath. In this case, this Court dealt with the basic ingredients of the offence under Section 375 in the following words:- "8. It may here be noticed that Section 375 of the IPC defines rape and the Explanation to Section 375 reads as follows:
>
> "Explanation:Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."
>
> From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 of IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her."

27. Their Lordships of the Hon'ble Supreme Court in ***Yerumalla Latchaiah vs. State of A.P.*** (2006) 9 SCC 713 have held that when the prosecutrix aged 8 years at the time of alleged occurrence and according to evidence of the doctor who examined the prosecutrix immediately after the occurrence, there was no sign of rape, the evidence of prosecutrix belied by medical evidence. Their Lordships have held as under:

> 3. In the present case, age of the victim was only eight years at the time of alleged occurrence. Immediately after the occurrence, she was examined by Dr. K. Sucheritha (PW-7) who has stated in her evidence that no injury was found on any part of the body of the victim, much less on private part. Hymen was found intact and the doctor has specifically

stated that there was no sign of rape at all. In the medical report, it has been stated that vaginal smears collected and examined under the microscope but no sperm detected. The evidence of the prosecutrix is belied by the medical evidence. In our view, in the facts and circumstances of the present case, the High Court was not justified in upholding the conviction."

28. Their Lordships of the Hon'ble Supreme Court in ***Narender Kumar vs State (NCT of Delhi),*** (2012) 7 SCC 171 have held that it is for the prosecution to establish each ingredient of the offence beyond reasonable doubt on basis of cogent evidence and material on record and the prosecution cannot establish its case merely on basis of suspicion and moral belief, howsoever strong it may be or by taking support from weaknesses of defence case. Their Lordships have held as under:

> 29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: Tukaram & Anr. v. The State of Maharashtra,, AIR 1979 SC 185; and Uday v. State of Karnataka, AIR 2003 SC 1639).
>
> 30 . Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected."

29. Their Lordships of the Hon'ble Supreme Court in ***K. Venkateshwarlu vs. State of Andhra Pradesh*** (2012) 8 SCC 73 have held that a child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. His statement can be accepted only if court comes to conclusion that child understands questions put to him and he is capable of giving rational answers and that child is not tutored and his evidence has a ring of truth. Their Lordships have held as under:

> "5. The High Court has set aside order of acquittal. This court has repeatedly stated what should be the approach of the High Court while dealing with an appeal against acquittal. If the view taken by the trial court is a reasonably possible view, the High Court cannot set it aside and substitute it by its own view merely because that view is also possible on the facts of the case. The High Court has to bear in mind that presumption of innocence of an accused is strengthened by his acquittal and unless there are strong and compelling circumstances which rebut that presumption and conclusively establish the guilt of the accused, the order of acquittal cannot be set aside. Unless the order of acquittal is perverse, totally against the weight of evidence and rendered in complete breach of settled principles underlying criminal

jurisprudence, no interference is called for with it. Crime may be heinous, morally repulsive and extremely shocking, but moral considerations cannot be a substitute for legal evidence and the accused cannot be convicted on moral considerations. The present appeal needs to be examined in light of above principles.

9. Several child witnesses have been relied upon in this case. The evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers (see Section 118 of the Evidence Act). A child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if the court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the court. Careful evaluation of the evidence of a child witness in the background and context of other evidence on record is a must before the court decides to rely upon it.

11. Having perused the evidence of all the witnesses, we find it difficult to rely on them. We feel that the trial court had rightly discarded their evidence as unworthy of reliance and the High Court erred in taking it into consideration. This, in our opinion, is a case where neither the evidence of parents of victim PW-2 Aruna nor the evidence of PW- 2 Aruna, nor the evidence of child witnesses, who claim to have witnessed the incident, nor the medical evidence supports the prosecution case. Besides, all the pancha witnesses have turned hostile, a fact which we have noted with some anguish. A needle of suspicion does point out to the appellant because he is a police constable and in a small village where the incident took place, witnesses may be scared to depose against him because of his clout. There are certain circumstances which do raise suspicion about the appellant's involvement in the crime. The children were playing on the terrace of the appellant. The appellant was not arrested by police till 4.9.1998. The demeanour of PW-2 Aruna, the tears in her eyes, her walking out of the court after looking at the appellant, pricks the judicial conscience. But convictions cannot be based on suspicion, conjectures and surmises. We are unable to come to a conclusion that the trial court's judgment is perverse. For want of legal evidence we will have to set aside the appellant's conviction and sentence. But we make it clear that we are doing so only by giving him benefit of doubt."

30. Consequently, in view of the analysis and discussion made hereinabove, the prosecution has failed to prove its case conclusively that the accused had raped the prosecutrix. The circumstances noticed by us hereinabove creates reasonable doubt in the version of the prosecution. The lodging of the FIR belatedly has not been explained in view of the attendant circumstances, as stated hereinabove. The version of the prosecution is also not supported by the medical evidence.

31. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 23.12.2010, rendered by the learned Addl. Sessions Judge, Kinnaur at Rampur, Distt. Shimla, in Sessions trial No. 25-AP/7 of 2008/2010, is set aside. The accused is acquitted of the charges framed under Sections 376

and 506 IPC, by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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

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

Cr. Appeal No. 34/2011
Reserved on: 17.12.2014
Decided on: 18.12.2014

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3.5 kg of charas- according to prosecution witnesses, there were 5-7 shops on the roadside and about 15/20 residential houses in the village- it was admitted that no person from locality was associated nor any vehicle was stopped to associate its occupant as a witness while carrying out search- person carrying the ruqqa left to police station but never returned- held, that the police had not made any serious effort to associate independent witnesses- accused acquitted.

For the Appellant: Mr. Bimal Gupta, Advocate.
For the Respondent: Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against judgment rendered by learned Special Judge Kinnaur at Rampur Bushahr, District Shimla, HP in Case No. 25-AR/3 of 09/10 dated 6.12.2010, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1.00 Lac and in default to further undergo rigorous imprisonment for two years.

2. Prosecution case, in a nutshell, is that on 14.2.2009, Head Constable Govind Singh alongwith C. Pyare Lal No. 429 and C. Kam Raj No. 872 was present at Chil Mod near Khekhar Village at National Highway No. 22. At about 5.45 pm, they found one person standing near the parapet. On seeing the police party said person got scared and tried to run away. He was carrying a bag on his shoulder. On suspicion HC Govind Singh overpowered and apprehended him with the assistance of accompanying police officials. On suspicion of possession of some contraband in the bag, he was given option to be searched

either in the presence of a Magistrate or a Gazetted Officer but the accused opted to be searched by the police. Upon this, HC Govind Singh gave his personal search to the accused person and thereafter he conducted the search of the bag of accused and found one cushion of cloth in the bag, in which one polythene envelope having four polythene envelopes containing Charas was found. Charas weighed 3.500 kg. Thereafter two samples weighing 25 grams each were separated and put into separate parcels and the bulk was also put back into same polythene envelope and then put into the same bag which was put into a parcel. All three parcels were sealed with seal impression 'V'. NCB form in triplicate was filled in and after obtaining specimen of seal, the same was handed over to C. Jia Lal. The contraband article recovered from the possession of accused person was taken into possession vide seizure memo, which was witnessed by C. Jia Lal and C. Kam Raj. Rukka was scribed by HC Govind Singh, on the basis of which FIR No. 24 dated 14.2.2009 was registered in Police Station Kumarsain. The accused person was arrested. Samples and bulk were sent to Chemical Examiner FSL Junga who confirmed that the contents of the same were that of Charas. Investigation was completed and challan was put up after completing all the codal formalities.

3. Prosecution has examined as many as ten witnesses to prove its case against the accused. Statement of accused was recorded under Section 313 of the Criminal Procedure Code. He pleaded innocence. Accused was convicted and sentenced as noticed above. Hence, this appeal.

4. Mr. Bimal Gupta, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused.

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

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

7. PW-1 C. Kam Raj deposed that he accompanied Head Constable Govind Singh and C. Jia Lal on patrolling duty and when they reached near Khekhar, Chil Mod at about 5.45 pm, a person was found at National Highway on the parapet. He tried to run away. He was overpowered. HC Govind Singh sought option of the accused for his personal search after disclosing his right to be searched either before a Magistrate or a Gazetted Officer. Accused opted to be searched by the police vide Memorandum Ext. PW-1/A. HC Govind Singh gave his personal search to the accused vide memorandum Ext. PW-1/B. Search of the bag of the accused was carried out. Charas was recovered from the bag, which weighed 3.500 kg, out of which two samples of 25 gms each were drawn and put into a different packet duly sealed with seal 'V' and remaining charas including the polythene packet was duly sealed with seal 'V' and specimen impression of the seal was drawn and thereafter it was handed over to C. Jia Lal and the sample part alongwith the packet of remaining Charas was taken into possession vide Ext. PW-1/E. Specimen impression of the seal was drawn vide Ext. PW-1/D and handed over to him by HC Govind Singh to be carried to the Police Station. He admitted in his cross-examination that there were 5/7 shops on the roadside and there are about 15/20 residential houses in Khekhar village. He admitted that at normal speed it takes 45 minutes on foot to reach Chil Mod from Khekhar village through national highway. He admitted further that national highway remains busy with vehicular traffic. No person from nearby locality was associated nor any person from moving vehicles while effecting search of the accused. He came back from the spot alongwith rukka at 7.15 pm. He went back to the police station in bus. He did not return to the spot after reaching the police station.

8. PW-2 C. Gopal Singh deposed that on 15.2.2009, MHC Vinod Kumar handed over to him one sealed sample duly sealed with seal 'C' vide RC

No. 105/08-09 alongwith NCB form and the same was delivered on the same day and receipt was brought.

9. PW-3 C. Kamlesh Kumar is a formal witness.

10. PW-4 HC Vinod Kumar deposed that he was officiating SHO in addition to MHC police station. C. Kam Raj has brought Rukka at 8.30 pm. He registered FIR Ext. PW-4/A. Endorsement was made on Rukka vide mark 'A'. He handed over the file to C. Kam Raj. At about 9.45 pm HC Govind Singh produced one sealed sample containing bulk charas and two sealed samples duly sealed with seal 'V' alongwith NCB form and specimen impression of the seal and thereafter he resealed all the sealed packets with seal 'C' and filled up NCB form. Sealed exhibits alongwith specimen impression of the seal and reseal were deposited in the Malkhana and entry was incorporated in the Malkhana registered vide Ext. PW-4/E. Special report was also sent with C. Gopal Singh to be delivered in the office of SDPO Rampur. He handed over one sample alongwith specimen of seal impression vide RC No. 105/08-09 and NCB form to be delivered at SFSL on 16.2.2009.

11. PW-5 ASI Swaroop Ram is a formal witness.

12. PW-6 SI Neel Chand is also a formal witness.

13. PW-7 SI Purshottam Dutt is also a formal witness.

14. PW-8 C. Bharat Bhushan deposed that on 22.3.2010 MHC Vinod Kumar had handed over one large and one small parcel which were sealed with six seals each of impression 'V' and 'C', respectively. Alongwith NCB form docket and specimen of seal to him vide RC No. 115/09-10 dated 22.3.2010. He deposited the parcel alongwith accompanying documents and specimen of seal with FSL Junga on the same day.

15. PW-9 C. Parmodh Kumar testified that on 5.5.2010, he received two parcels sealed with seven seals and two seals respectively of FSL alongwith report Ex. PW-4/K. He handed over the same to MHC in PS Kumarsain on the same day.

16. PW-10 HC Govind Singh deposed the manner in which accused was apprehended and seizure and sampling process was completed. Rukka was sent through PW-1 C. Kam Raj to the police station. According to him, case property alongwith NCB form and specimen of seal was presented by him before officiating SHO HC Vinod Kumar, who resealed the case property and filled up remaining columns of the NCB form. In his cross-examination, he has admitted that distance of Chil Mod from the police post Sainj is about 1.5 kms. Distance from Sainj to Khekhar is 1 km and from Khekhar to Chil Mod is ½ km. They reached at the spot while patrolling on the way. It took them 1 hour and 45 minutes to reach the spot. There were 3-4 shops on the NH. Main village is below the road. He admitted that National Highway is a busy road, on which vehicles cross frequently. He also admitted that a foot path goes from Chil Mod to Luhri. At the time of conducting proceedings at the spot, he tried to stop vehicles to procure independent witnesses, however, no vehicle stopped there. No action was taken by him against the occupants of the vehicles, who did not stop and he did not send any person to procure independent witnesses He also admitted that C. Kam Raj had taken Rukka but he did not come back to the spot where he handed over the case file to him.

17. According to PW-1, there were 5-7 shops on the road side and 15-20 residential houses at Khekhar village. He also admitted that no person from nearby locality was associated nor any person from vehicles on the road was associated while carrying out search of the accused. He left the spot alongwith Rukka at 7.15 pm. He went to the police station, however, never came back from the police station to the spot. PW-10 Govind Singh has also admitted that there were 3-4 shops at National Highway at Khekhar and main village was below

road at some distance. He had tried to stop vehicles however, vehicles did not stop. He has not taken any action against the occupants of the vehicles nor has he sent any person to procure independent witnesses from the village.

18. It is not a case where recovery was effected from a secluded and isolated place. There were shops near the place from where accused was nabbed. Residential houses were also nearby and despite that police has not joined any independent witnesses. According to PW-1, Kam Raj, they have not associated occupants of the vehicles plying on the National Highway. It has come on record that there remains heavy vehicular traffic on the road. Version of PW-10 Govind Singh that they signaled the vehicles to stop but they did not stop, can not be believed. The police can always invoke provisions of Section 160 and 176 of the Criminal Procedure Code in case persons were not ready and willing to be associated during the course of investigation. It is true that the conviction can be made on the basis of statements made by the official witnesses, if the statements are true and inspire confidence, without associating independent witnesses. However, in the instant case, independent witnesses, though available at nearby place, were not associated by the police. Thus, the recovery of contraband from the accused is not proved in accordance with law. Prosecution has failed to prove its case against the accused beyond reasonable doubt.

19. In view of discussion and analysis made hereinabove, the appeal is allowed. Judgment of conviction passed by learned Special Judge, Kinnaur at Rampur on 6.12.2010 in Case No. 25-AR/3 of 09/10 is set aside. Accused is acquitted of the offence under Section 20 of Narcotic Drugs & Psychotropic Substances Act, 1985. He be released forthwith, if not required in any other case by the Police. Registry is directed to prepare release warrant of the accused and send the same to the Superintendent Jail concerned.

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

Tara Kaushal & ors. ..... Appellants.
Vs.
Bal Raj & ors. ..... Respondents

OSA No. 4003 of 2013.
Judgement reserved on: 24.11.2014.
Date of decision: 18.12.2014.

Code of Civil Procedure, 1908- Order 14 Rule 2- Court recorded finding only on issue No.1 and disposed of the remaining issues on the basis of this finding- held, that the matter ought to have been disposed of on all points and should not have been allowed to rest merely on consideration of a single point- Provisions of Order 20 requires the judgment to contain all the issues and findings or decisions thereon with reasons- the courts should not adopt a shortcut method of adjudicating upon a claim by resting its decision on one single point but should give a reasoned judgment of the dispute on all the issues. (Para-12 to 21)

Cases referred:

M/s Fomento Resorts and Hotels Ltd. vs. Gustavo Ranato da Cruz Pinto and others AIR 1985 SC 736

Om Prakash and others vs. State of Himachal Pradesh and others AIR 2001 HP 18

Lakshmi Ram Bhuyan vs. Hari Prasad Bhuyan and others (2003) 1 SCC 197

Income Tax Officer vs. M/s Murlidhar Bhagwan Dass AIR 1965 SC 342

Swaran Lata Ghosh vs. Harendra Kumar Banerjee and another AIR 1969 SC 1167

Prithvi Raj Jhingta & anr. vs. Gopal Singh & anr. AIR 2007 HP 11

For the appellants	:	Mr. K.D. Sood, Senior Advocate with Mr. Sandeep Pandey, Advocate.
For the respondents	:	Mr. Bhupender Gupta, Senior Advocate with Mr. Ajit Jaswal, Advocate, for respondents No. 1, 4 and 5. Respondents No. 2, 3, 6 to 11 already ex-parte.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The appellants are the plaintiffs and have filed the present original side appeal against the judgement and decree dated 27.9.2013 passed by the learned Single Judge of this court in Civil Suit No. 65 of 2000.

2. Plaintiffs- appellants filed the suit seeking a decree for the following reliefs:-

(i) That the plaintiffs and defendant Nos. 1 to 3 have 1/8th share each in the following properties:-

(a) Shop situated on Khasra No. 496/1 Khata Khatauni No. 44 min/144, measuring 0-00-52 hectares on which single storey shop is standing, according to the jamabandi for 1984-85 of mauza Sarkaghat Distt. Mandi. The shop is on area measuring 0-00-25 hectares;

(b) Double storeyed shops on Khasra No. 564 and 502 in khata khatauni No. 205/460 min in Abadi measuring 0-00-65 and 0-00-63 hectares, in all measuring 0-01-28 hectares according to jamabandi for 1984-85 of mauza Sarkaghat, Distt. Mandi;

(c) House standing on Khasra No. 497/1 which is three storeyed on area measuring 0-00-22 hectares in Khata Khatauni No. 474-426 according to the Jamabandi for the year 1984-85 of mauza Sarkaghat, Distt. Mandi.

(d) Shop-cum-house on Khasra No. 501/1 measuring 0-00-12 hectares, Khata Khatauni No. 174/426 according to Jamabandi for 1984-85 of mauza Sarkaghat, Distt. Mandi.

(e) Three storyed house on Khasra No. 503/1 measuring 0-00-16 hectares in Khata Khatauni No. 174/426 according to Jamabandi for 1984-85 of mauza Sarkaghat, Distt. Mandi.

(f) Shop standing on Khasra No. 506/1, measuring 0-00-10 hectares in Khata Khatauni No. 175/427 according to Jamabandi for the year 1984-85 of Muaza Sarkaghat Distt. Mandi.

(g) Three storeyed shop-cum-house on khasra No.570, khata khatauni No. 100/262 min measuring 0-00-90 hectares according to Misal Hakiat Bandobasat Jadid of Sarkaghat, Distt. Mandi.

(h) *Double storeyed shop-cum-residence on Khasra No. 563 Khata Khatauni No. 174/426 measuring 0-00-36 hectares according to Jamabandi for 1984-85 mauza Sarkaghat, Distt. Mandi.*

(i) *Two plots of land, compromised in Khasra No. 465 measuring 47-05 Sq. yards and 1191 measuring 22-08 Sq. yards in Mauja Una, Tehsil and District Una according to the jamabandi for the year 1976-77 and the joint Hindu Family M/s Ram Rakha Mall Kaushal and Sons, Sarkaghat and a decree for partition and separate possession of their 5/8th share in the said properties by metes and bounds, be passed in their favour.*

(ii) *That the plaintiffs be also granted a decree for rendition of accounts of the Joint Hindu Family business M/s Ram Rakha Mall Kaushal and sons and entitled to their 5/8th share in the said business.*

(iii) *That for partition and separate possession and for rendition of accounts local commissioner may be appointed to go into the rendition of accounts and divide their property by metes and bounds.*

3. According to the appellants, the pedigree table of the parties is as follows:-

```
                                Goru Mall
                                   I
_____________________________|_____________________
I                                   I
I                                   I
Telu Ram                        Ram Rakha Mall
I                                              I
I                                           I
Suriya Mall(D-6)                            |
                                            I
                                            I
Bal Raj     Ramesh     Subhash     Husan   Tara   Dinesh  Devi Ram Usha Rani
(D-1)       (D-2)      (D-3)       (P-1)   (P-2)  (P-3)   (P-4)    (P-5)
I
I
Satish    Sanjeev
(D-4)     (D-5)
```

4. Though the aforesaid pedigree table has been admitted in part, but according to the defendants-respondents, this pedigree table is incomplete and the same is as follows:-

```
                                Goru Mall
                                   I
_____________________________}_____________________________
I                                   I                           I
I                                   I                           I
Telu Ram                        Dhani Ram                   Ram Rakha Mal
I                                   I                           I
I                                   I                           I
Amritsaria Mall                 _____________________                I
@ Sariay Mall(D-6)          I                       I           I
        I                   I                       |
          Amrit Lal             Joginder Paul               I
_____________________________________________________________|
I          I        I        I        I      I      I              |
Bal Raj  Ramesh  Subhas  Husan  Tara  Dinesh  Bachni Devi Usha Rani
```

(D-1) (D-2) (D-3) (P-1) (P-2) (P-3) (P-4) (P-5)
I
|_____
Satish Sanjeev
(D-4) (D-5)

5. The plaintiffs pleaded that the common ancestor of the parties was one Shri Goru Mall, who had two sons Telu Ram and Ram Rakha Mall. This fact has been disputed by the defendants and submitted that there is third son also namely Dhani Ram and that the parties to the suit constitute a Joint Hindu Family and carried on the business of Kariana, cloth, iron and hardware etc. under the name and style of M/s Telu Ram Ram Rakha Mall at Sarkaghat, District Mandi. In 1970, two brothers Telu Ram and Ram Rakha Mall separated. Telu Ram started his business in the name and style of M/s Telu Ram Amritsaria Mall at Sarkaghat while Ram Rakha Mall Kaushal started his business in the name and style of M/s Ram Rakha Mall Kaushal and sons at Sarkaghat. Shri Ram Rakha Mall constituted a Joint Hindu Family of the plaintiffs namely Hushan Kaushal, Tara Kaushal, Dinesh Kaushal, Bachni Devi and Usha Rani and defendant Nos. 1 to 3 namely Bal Raj, Ramesh and Subhash, who continued the business of Karyana, cloth and later on added sale of cement etc. The Joint Hindu Family business was run as a partnership business between Ram Rakha Mall, Bal Raj, Husan and Tara Chand under deed of partnership Ext.DW1/A, which was executed on 2.9.1970. It is further pleaded that plaintiffs and defendant Nos. 1 to 3 and Shri Ram Rakha Mal had a joint mess and common residence at that relevant point of time and Shri Ram Rakha Mall was the head of the family. Ram Rakha Mall died on 12.8.1983. Since he was not keeping good health, he retired from the Hindu Undivided Family firm namely Ram Rakha Mall Kaushal and Sons and Shri Satish Kumar son of Bal Raj was inducted as partner in the ancestral business, but the Joint Hindu Family continued as such. There is no dispute about the death of Ram Rakha Mall. On the death of Ram Rakha Mall, his estate devolved upon the plaintiffs and defendant Nos. 1 to 3 in equal shares and the Joint Hindu Family business M/s Ram Rakha Mall Kaushal and sons continued as such. Defendant No.1 Bal Raj was eldest brother and head of the family, he became Karta of HUF in place of Shri Ram Rakha Mall. It has been further pleaded that Shri Telu Ram had separated himself from his brother Shri Ram Rakha Mal and had also started his separate business. He died in the year 1975 and his estate devolved upon Shri Suriya Mall @ Amritsaria Mall, defendant No. 6 who is in possession of the estate. The plaintiffs or defendant Nos. 1 to 5 have no common concern in the estate of Shri Telu Ram which has been inherited by Shri Amritsaria Mall. The plaintiffs pleaded that partition took place between Telu Ram and Ram Rakha Mall. The share of Ram Rakha Mall is jointly held by the plaintiffs and defendant Nos. 1 to 5 in the following manner:

1. *Shop situated in Khasra No. 496/1, Khata Khatauni No. 44 min.144, measuring 0-00-52 hectares on which single storey shop is standing, according to the jamabandi for 1984-85 of mauza Sarkaghat, District Mandi. The shop is on area measuring 0-00-25 hectares;*

2. *Double storeyed shops on Khasra No. 564 and 502 in Khata Khatauni No. 205/460 min in Abadi measuring 0-00-65 and 0-00-63 hectares in all measuring 0-01-28 hectares according to Jamabandi for 1984-85 of mauza Sarkaghat, District Mandi;*

3. *House standing on Khasra No. 497/1 which is three storeyed on area measuring 0-00-22 hectares in Khata Khatauni No. 474-426 according to the Jamabandi for the year 1984-85 of mauza Sarkaghat, Distt. Mandi.*

4. *Shop-cum-house on Khasra No. 501/1 measuring 0-00-12 hectares, Khata Khatauni No. 174/426 according to Jamabandi for 1984-85 of mauza Sarkaghat, Distt. Mandi.*

5. *Three storyed house on Khasra No. 503/1 measuring 0-00-16 hectares in Khata Khatauni No. 174/426 according to Jamabandi for 1984-85 of mauza Sarkaghat, Distt. Mandi.*

6. *Shop standing on Khasra No. 506/1, measuring 0-00-10 hectares in Khata Khatauni No. 175/427 according to Jamabandi for the year 1984-85 of Muaza Sarkaghat Distt. Mandi.*

7. *Three storeyed shop-cum-house on khasra No. 570, khata khatauni No. 100/262 min measuring 0-00-90 hectares according to Misal Hakiat Bandobasat Jadid of Sarkaghat, Distt. Mandi.*

8. *Double storeyed shop-cum-residence on Khasra No. 563 Khata Khatauni No. 174/426 measuring 0-00-36 hectares according to Jamabandi for 1984-85 mauza Sarkaghat, Distt. Mandi.*

9. *Land comprised in Khasra No. 1165, 34, 36, and 2339 measuring 47.05 sq. yards in mauza Kotla Khurd, Tehsil and District Una according to Jamabandi for the year 1976-77.*

6. The aforesaid properties were inherited by Shri Ram Rakha Mall and after his death, the plaintiffs and defendant Nos. 1 to 3 have 1/8th share each in the same. The plaintiffs are in possession of shops and residential houses situated over khasra No. 570. All other properties except two plots in Una, which are lying vacant, are in possession of defendant No. 1 and his sons, defendant Nos. 4 and 5. The properties are liable to be partitioned by metes and bounds and the plaintiff and defendants No. 1 to 3 are entitled to separate possession of the properties, as mentioned above.

7. On partition of the properties between Telu Ram and Ram Rakha Mall, Shri Ram Rakha Mall continued the business in the name and style of M/s Ram Rakha Mall Kaushal and Sons. The business was of kariana, cloth etc. and cement was later on added to it. The business was carried on in partnership, the terms of which were reduced into writing vide partnership deed Ext.D1 dated 2.9.1970, vide which Ram Rakha Mall had 40% share, Bal Raj 40%, Husan Chand and Tara Chand 10% each share. Defendant No. 1 Bal Raj was the Karta and managing the whole affairs. Shri Ram Rakha Mall because of his ill health, had retired from the partnership on 1.4.1983 and the business continued in the name and style of M/s Ram Rakha Mall Kaushal and Sons with Bal Raj having 40% share, Satish Kumar with 25% share, Husan Chand 25% and Tara Chand 10% share. This partnership business was Joint Hindu Family Business and continued till 15.3.1990 when Bal Raj defendant converted the business into another partnership business with three partners namely Bal Raj defendant No. 1 and his two sons Satish Kumar and Sanjeev Kumar. In this business, Bal Raj has 40% and Satish Kumar and Sanjeev Kumar 30% shares each. The business was being run in the name and style of the original firm i.e. M/s Ram Rakha Mal Kaushal and Sons at Sarkaghat with all stock, assets, trade and goodwill etc. The plaintiffs and defendants No. 1 to 3 have 1/8th share each in the said business. Therefore, the appellants prayed for decree of rendition of accounts and share in the properties and assets of the firm.

8. The defendants-respondents contested the suit. It has been pleaded that defendant No.1 and his two sons, defendant Nos. 4 and 5, have started separate business by forming a separate partnership. It was pleaded that the pedigree table is incorrect. Before 1950 there was a firm in the name and style of Telu Ram Dhani Ram but after 1950 Shri Dhani Ram separated himself from the family and started his own business. Thereafter the business was run in the name and style of Ram Rakha Mall. After 1970, there was partnership

between Telu Ram and Ram Rakha Mall and Telu Ram started business in the name of M/s Telu Ram Amritsarai Mall and Ram Rakha Mall Kaushal and Sons. Prior to 1962, the earlier firm also used to deal in medicines under the name of Shakti Medical Store and after partition in 1970, the said Shakti Medical Store also fell to the share of Ram Rakha Mall. Further, it was pleaded that after 1970 Shri Ram Rakha Mall was doing separate business and Telu Ram and Sons were doing separate business and there was no Joint Hindu Family business as pleaded. After 1970, the sons of Ram Rakha Mall were carrying on business separately under different partnerships. Partnership deed was entered into between Ram Rakha Mall, Bal Raj, Husan Chand Tara Chand on 2nd September, 1970 and a firm under the name and style of M/s Ram Rakha Mall Kaushal and Sons was constituted which was a partnership at will. The business of the firm was to deal in retail and wholesale business of karyana, cloth and such other items. By another deed of partnership dated 17.3.1970 Ext.D-5 Shri Husan Chand and Tara Chand constituted another firm in the name and style of Shakti Medical Store in which they had equal shares. Defendant No. 2 Ramesh Kumar had renounced the world and has not been seen/heard of after 1965 and was not associated in any of the businesses run by different firms. Defendant No. 3 Subhash Kaushal after completion his MA.LLB also did not take interest in any of the partnership businesses and therefore, he is also not partner of any of the firms. In the year 1980, there was again partition of the properties between Ram Rakha Mall and his sons in a family settlement. This settlement was not reduced into writing but the parties acted upon the partition by taking possession of the respective properties which fell to their shares. The respondents- defendants then proceed that there was no Joint Hindu Family as pleaded by the appellants- plaintiffs because:

(a) *Husan Lal (plaintiff No.1) purchased Jeep in the year 1972 and registration certificate was also in his own name and then sold the same in the year 1985 and the sale price was pocketed by him alone;*

(b) *In the year 1981 Dinesh Kumar (plaintiff No. 3) purchased Truck No. HPM-5335 and after plying the same for 3-4 years sold the same and pocketed the earnings and sale amount himself;*

(c) *Tara Chand (plaintiff No. 2) purchased van in the year 1989 bearing registration No. DNB-1283 and sold the same after about one year. The said purchase and sale was from his own account and had nothing to do with the alleged Joint Hindu Family;*

(d) *The income tax returns of Shakti Medical Store are submitted on behalf of two partners only namely Husan Chand and Tara Chand;*

(e) *The income tax return of M/s Ram Rakha Mall and Sons are submitted on behalf of four parties prior to financial year 1988-89 and thereafter on behalf of three partners due to change in the constitution of partnership;*

(f) *A partnership under the name and style of Tara Cloth House is doing separate business and the partners in the said concern are Dinesh Kumar (plaintiff No. 3), Smt. Neelam (wife of Tara Chand, plaintiff No.2) and Sh. Prem Krishan Thapar (father-in-law of Tara Chand plaintiff No. 2). The alleged Joint Hindu Family has nothing to do with this business of M/s Tara Cloth House;*

(g) *After family settlement in 1980 Bal Raj (defendant No.1) constructed three-storey pucca house over Khasra No. 497/1 and 503/1, which had fallen to his share and no person had any objection on the said construction;*

(h) Tara Chand and Dinesh Kaushal have raised third storey in 1984 over a two storey house constructed over khasra No. 570 which fell in their share in family settle in the year 1980;

(i) Out of a share in the partnership firm M/s Ram Rakha Mall Kaushal and Sons a shop was constructed over khasra No. 496/1 which fell in the share of Husan Chand;

(j) Over Khasra No. 570 there were two shops and prior to 1985 in one shop was Shakti Medical Store and the other shop was used as store by M/s Ram Rakha Mall Kaushal and Sons, but in the year 1985 Sh. Dinesh Kumar (plaintiff No. 3) got vacated the said store from M/s Ram Rakha Mall Kaushal and Sons as the said shop had fallen in his share. Thereafter, M/s Tara Cloth House was opened in the said shop wherein Dinesh is also one of the partners.

(k) Orchard situated at Galyog (Karsog) measuring about 26 bigha (owner of ½ share out of this 26 bighas is Amritsaria Mall) was given to Sh. Hussan Chand in the family settlement in the year 1980 but the amount for the development of the said orchard and construction of house in the said orchard was spent by M/s Ram Rakha Mall and Sons as Husan Chand had some share in the said partnership. But in the year 1990 out of total sale proceeds of about Rs.45,000/- it was the first income from the said orchard. Sh. Husan Chand had pocketed Rs. 35,000/- out of which Amritsaria Mall is entitled to ½ of the amount. From 1990 onward Sh. Husan Chand is looking after the said orchard himself, which goes to suggest that he is acting on the family settlement of the year 1980.

(l) Out of capital share of Tara Chand in the firm M/s Ram Rakha Mall Kaushal and Sons existing prior to 15th March, 1990, Sh. Tara Chand had asked to pay his share capital to the extent of Rs. 50,000/- to Sh. Dinesh Kumar along with whom his wife and his father-in-law were doing business under the name and style of M/s Tara Cloth House.

(m) Shri Tara Chand and Dinesh Kumar (plaintiffs Nos. 2 and 3 respectively) are negotiating at their own levels for grant of Bata Agency with which the alleged Joint Hindu Family had nothing to do.

(n) Sh. Husan Chand had also been carrying business of money lender and it was his own business which had nothing to do with the alleged Joint Family business.

(o) That Sh. Husan Chand used to spend most of his time in the development and maintenance of RIUR DEVI Temple as he is chairman of the management committee of the said temple and due to this he did not take any interest even in the partnership business.

9. The defendants admitted the death of Ram Rakha and denied that the plaintiffs and defendant Nos. 1 to 5 are in joint possession of the aforesaid properties on which the plaintiffs claimed their right by virtue of being members of a Joint Hindu Family. They submitted that in the partnership business of M/s Ram Rakha Mall and Sons, Bal Raj defendant No.1 and his sons defendant Nos. 4 and 5 were conducting the business after 1980, therefore, there was necessity of change in the partnership deed executed on 1.4.1983 and on 15.3.1990 fresh partnership deed between defendant No. 1 and his sons was executed. There are two more partnership concerns which are carrying on their

own business. M/s Shakti Medical Store is a partnership concern of Husan Chand and Tara Chand and Tara Cloth House is a partnership concern of Dinesh Kumar and his wife and father-in-law of Tara Chand. Both these businesses had been started by their own independent assets and goodwill.

10. On the pleadings of the parties, the following issues were framed by the learned single Judge:-

1. *Whether the sons of Goru Mall constituted a Joint Hindu Family and carried on joint family business, as alleged? .....OPP*

2. *Whether during partition in 1970 of the Joint Hindu Family constituting of sons of Goru Mall, Ram Rakha Mal got the properties mentioned at serial No. 1 to 9 in para 3 of the plaint? .....OPP*

3. *Whether the properties described at serial No. 1 to 9 are the properties of plaintiffs and defendants Nos.1 to 3? .....OPP*

4. *Whether after partition, in the year 1970, business of Ram Rakha Mal Kaushal and Sons was a Joint Hindu Family business, as alleged in para 1 of the plaint? .....OPP*

5. *Whether on retirement of Ram Rakha Mal from the aforementioned JHF business and on induction of Satish Kumar, business of M/s Ram Rakha Mal Kaushal and Sons continued to be joint, as alleged in para 4 of the plaint? .....OPP*

6. *Whether the properties mentioned in para 3 of the plaint are required to be partitioned. If so, what are the shares of the parties? .....OPP*

7. *Whether the plaintiffs are entitled for rendition of accounts. If so, with regard to what business/property and who is the accounting part? .....OPP*

8. *Whether the suit has not been properly valued for the purpose of court fee and jurisdiction. If so, what is the correct valuation? .....OPD 1,4&5.*

9. *Whether the suit is not within the period of limitation? ...OPD 1,4&5.*

10. *Whether the business carried on in the name and style of M/s Ram Rakha Mal Kaushal was a partnership business, as alleged and the said partnership stood dissolved on 1.4.1983, if so, its effect?.....OPD 1,4 & 5.*

11. *Relief.*

11. Thereafter following two additional issues were framed on 14.5.2007:-

10-A Whether there had been a family settlement in March, 1980 and in that settlement, the properties mentioned at Sr. No. 1 to 9 in para 3 of the plaint, had been divided amongst the joint owners? .....OPD 1, 4&5.

10-B. If issue No. 10-A is proved, whether the alleged family settlement had been acted upon and the parties have developed the properties that were allotted to them as per that settlement, if so, its effect? .....OPD 1,4&5.

12. The learned single Judge gave findings only on issue No. 1, while the remaining issues were dealt with in the following manner:-

"**Issue Nos. 2 to 5.**

30. In view of what I hold on issue No.1, these issues are also decided against the plaintiff.

Issue Nos. 6, 7 & 10

31. I find that evidence is tenuous as I have considered the evidence of all witnesses supra. Therefore, all these issues are also held against the plaintiff and in favour of the defendant.

Issue Nos. 8, 9,10 and 10-B

32. In view of the findings on above issues, these issues have become redundant.

Relief

33. I find no merit in this suit, which is accordingly dismissed. Decree sheet be drawn accordingly."

13. The appellants have assailed the decree on a number of grounds as taken in the memorandum of appeal, which we need not advert to, since the moot question required to be determined in this appeal is as to whether it was incumbent upon the learned single Judge to have recorded findings on all issues or could the suit have been dismissed by simply recording findings on one issue.

Order 14 Rule 2 CPC reads as follows:-

*"**14. 2. Court to pronounce judgment on all issues**.---(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.*

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

Order 20 Rule 4(2) and Order 20 Rule 5 reads as under:-

*"**4. (2) Judgment of other Courts**.----Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.*

***5. Court to state its decision on each issue**.---In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the findings upon any one or more of the issue is sufficient for the decision of the suit."*

14. A combined reading of aforesaid provisions would reveal that the mandate of the Code is that the judgement shall contain a concise statement of the case, points for determination, the decision thereon and the reasons for such decision. Further Order 20 Rule 5 CPC re-strengths the requirement contained in Order 20 Rule 4(2) CPC requiring that in suits, in which issues have been framed, the court shall state its finding or decision with the reasons therefore, upon each separate issue, unless the finding upon any one or more of the issue is sufficient for the decision of the suit. Therefore, despite mandate of deciding the issue separately, if the court comes to the conclusion that certain issues need to be decided together, there is no bar to do the same.

15. Undisputedly, in the present case, the issues were primarily both of law as well as facts and there was scope of an appeal from the decision of the learned single Judge. This being the position, it was desirable that the matter ought to have been disposed of on all points and should not have merely rested on consideration of a single point. In taking this view we are supported by the Hon'ble Supreme Court in **M/s Fomento Resorts and Hotels Ltd.** vs. **Gustavo Ranato da Cruz Pinto and others AIR 1985 SC 736** wherein it was held:-

> "27. In a matter of this nature where several contentions factual and legal are urged and when there is scope of an, appeal from the decision of the Court, it is desirable as was observed by the Privy Council long time ago to avoid delay and protraction of litigation that the court should, when dealing with any matter dispose of all the points and not merely rest its decision on one single point."

16. A Division Bench of this court while dealing with the provisions of Rule 5 of Order 20 in **Om Prakash and others** vs. **State of Himachal Pradesh and others AIR 2001 HP 18** held as follows:-

> "*12. In the present case, trial Court has framed all the issues and was supposed to give separate findings on each issue, as admittedly the findings upon any one or more of them are not sufficient for the decision of the suit. By simply enumerating the evidence and law and thereafter giving conclusion whereby the case of one party is accepted and the other party is rejected, is no judgment in the eyes of law. In other words, the judgment which does not contain the reasons or grounds on the basis of which the Judge has come to his conclusion/decision for passing a Judgment and decree on the points in issue or controversy, is vitiated. It is all the more necessary, when the judgment is by the Court of fact and is appealable, to avoid unnecessary delay and protracted litigation…"*

17. The provisions of Order 20 CPC came up for consideration before the Hon'ble Supreme Court in **Lakshmi Ram Bhuyan** vs. **Hari Prasad Bhuyan and others (2003) 1 SCC 197,** and it was held that the provisions of Order 20 requires a judgement to contain all the issues and findings or decisions thereon with reasons therefore. It would be apt to reproduce para-10 of the report, which reads as follows:-

> "10. Certain provisions of the Code of Civil Procedure, 1908 may be noticed. Order VII Rule 1 of the CPC requires the plaintiff to give sufficient particulars of the relief, which the plaintiff claims. Order XX requires a judgment to contain all the issues and findings or decision thereon with the reasons therefor. The judgment has to state the relief allowed to a party. The preparation of decree follows the judgment. The decree shall agree with the judgment. The decree shall contain, inter alia, particulars of the claim and shall specify clearly the relief granted or other determination of the suit. The decree shall also state the amount of costs incurred in the suit and by whom or out of what property and in what proportions such costs are to be paid. Rules 9 to 19 of Order XX are illustrative of contents of decrees in certain specified categories of suits. The very obligation cast by the Code that the decree shall agree with the judgment spells out an obligation on the part of the author of the judgment to clearly indicate the relief or reliefs to which a party, in his opinion, has been found entitled to enable decree being framed in such a manner that it agrees with the judgment and specifies clearly the relief granted or other determination of the suit. The operative part of the judgment should be so clear and precise that in the event of an objection being laid, it should not be difficult to find out by a bare reading of the judgment and decree whether the latter agrees with the former and is in conformity therewith. A self-contained decree drawn up in conformity

with the judgment would exclude objections and complexities arising at the stage of execution. "

18. A clear distinction has to be drawn between the findings and the reasons, which is apparent from the language of Order 20 Rule 5 CPC, which clearly provides that the court is required to state its findings and record reasons. Therefore, unquestionably the findings and reasons are totally two different aspects. Whereas, the findings would be the conclusions drawn, the reasons are as to why such a conclusion has been arrived at and in absence of reasons recorded by the court and jumping on to findings would be contrary to the express requirement of Order 20 Rule 5 CPC and would clearly vitiate the judgement.

19. The Hon'ble Supreme Court in **Income Tax Officer** vs. **M/s Murlidhar Bhagwan Dass AIR 1965 SC 342,** considered the above aspect and observed as under: -

"9. .....Under this Order, a "finding " is therefore, a decision on an issue framed in a suit. The second part of the rule shows that such a finding shall be one which by its own force or in combination with findings on other issues should lead to the decision of the suit itself. That is to say, the finding shall be one which is necessary for the disposal of the suit. The scope of the meaning of the expression "finding" is considered by a Division Bench of the Allahabad High Court in Pt. Hazari Lal v. Income-tax Officer, Kanpur, 1960 -39 ITR 265 at P. 272: (AIR 1960 All 97 at p. 99). There, the learned Judges pointed out:

> "The word "finding" interpreted in the sense indicated by us above, will only cover material questions which arise in a particular case for decision by the authority hearing the case or the appeal which, being necessary for passing the final order or giving the final decision in the appeal, had been the subject of controversy between the interested parties or on which the parties concerned have been given a hearing."

20. It has to be remembered that while deciding issues, the courts should not adopt a shortcut method of adjudicating upon a claim by resting its decision on one single point. The adjudication is essentially required to be made by way of reasoned judgement of the dispute upon a finding on the facts in controversy and application of law to the facts found which are essential attributes of a judicial trial. In a judicial trial the Judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the court or by law, he must record the ultimate mental process leading from the dispute to its solution. Here it would be apt to reproduce the following passage from the judgement passed by the Hon'ble Supreme Court in **Smt. Swaran Lata Ghosh** vs. **Harendra Kumar Banerjee and another AIR 1969 SC 1167:-**

"6. Trial of a civil dispute in Court is intended to achieve, according to law and the procedure of the Court, a judicial determination between the contesting parties of the matter in controversy. Opportunity to the parties interested in the dispute to present their respective cases on questions of law as well as fact, ascertainment of facts by means of evidence tendered by the parties, and adjudication by a reasoned judgment of the dispute upon a finding on the facts in controversy and application of the law to the facts found, are essential attributes of a judicial trial. In a judicial trial the Judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the Court or by law, he must record the ultimate mental process leading from the dispute to its solution. A judicial determination of a disputed claim where substantial questions of law or fact arise is satisfactorily reached, only if it be supported by the most cogent reasons

that suggest themselves to the Judge; a mere order deciding the matter in dispute not supported by reasons is no judgment at all. Recording of reasons in support of a decision of a disputed claim serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest : it is also intended to ensure adjudication of the matter according to law and the procedure established by law. A party to the dispute is ordinarily entitled to know the grounds on which the Court has decided against him, and more so, when the judgment is subject to appeal. The Appellate Court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just. It is unfortunate that the learned Trial Judge has recorded no reasons in support of his conclusion, and the High Court in appeal merely recorded that they thought that the plaintiff had sufficiently proved the case in the plaint."

21. The mode and manner in which issues have to be answered in terms of Rule 2 of Order 14 has been dealt with in detail by a Full Bench of this court in **Prithvi Raj Jhingta & anr.** vs. **Gopal Singh & anr. AIR 2007 HP 11** in the following manner:-

"2. Rule 2 of Order 14 C.P.C. as it presently stands reads as under:

2. Court to pronounce judgment on all issues. - (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of Sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

3. The present structure of Rule 2 was brought about by the Civil Procedure Code (Amendment) Act, 1976. Before its amendment by the aforesaid amending Act of 1976, Rule 2 read as under:

Order XIV, Rule 2 - Issues of law and of fact. - Where the issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

4. When one draws a comparison between the earlier Rule 2 and the amended Rule 2, the comparison immediately leads to a conclusion that whereas under the old Rule 2 it was mandatory for a Court to try the issues of law in the first instance and to postpone the settlement of issues of fact until after findings had been arrived at with respect to the issues of law, under the new, amended Rule 2, as has been spelt out and clearly stipulated in Sub-rule (1) thereof, the legislature has mandated that a Court shall pronounce judgment on all issues, both of law as well as facts, notwithstanding that a case may be disposed of only on a preliminary issue. Under the new Rule 2 the only exception is contained in Sub-rule (2) thereof which, in a manner of speaking relaxes the aforesaid legislative mandate to a limited extent by conferring a discretion upon the Court that if it is of the opinion that the case or any part thereof may be disposed of

on a issue of law only, it may try that issue first, in the process postponing the settlement of other issues until the issue of law has been determined. This discretion even though conferred by the aforesaid legislative amendment has however been circumscribed and limited, specifically and explicitly only to two situations and these are that the issue or issues of law only upon which the case or any part of the case may be disposed of must relate to either the jurisdiction of the Court or a bar to the suit created by any law for the time being in force. By a combined reading of Sub-rule (1) and Sub-rule (2) of Rule 2 what therefore emerges is that, except in situations covered by Sub-rule (2) a Court must dispose of a suit as a whole, try all issues of law and fact together and accordingly pronounce judgment on all such issues even though the case may be disposed of on a preliminary issue. More importantly, and for the purposes of our case, in the light of the specific reference on the formulated question of law, Rule 2 as it presently stands caters to and creates two sets of situations in a suit. One situation is where, at the stage of framing of issues the Court exercises its discretion conferred upon it under Sub-rule (2) and frames, in the first instance issues of law only and passes an order specifically and explicitly proposing to try issues of law only, in the process postponing the settlement of other issues until after it has decided the issue of law only. In this situation, at the stage of determining or deciding the issues of law only the Court may either dispose of the suit based on such determination of the issues of law only, of course these issues of law relating to the jurisdiction of the Court or a bar to the maintenance of the suit created by law for the time being in force, or upon determination of issues of law only the Court may hold that the suit is maintainable and/or that it has jurisdiction also to try the suit and thus, consequently to proceed to settle other issues for trial and determination. Such a situation is contemplated by Sub-rule (2) and there is no manner of doubt that in taking recourse to such a situation the Court has the mandate as well as the sanction from the legislature.

5. The second, other situation which may arise is that the Court does not exercise its discretion, for any reason whatsoever, valid or otherwise, and at the stage of framing of the issues frames all the issues, of law as well as fact and proceeds to decide all such issues together. This course of action is contemplated by an explicit mandate of the legislature in Sub-rule (1). The question which has fallen for our consideration in this reference is that if a suit falls under the second situation where the Court has not exercised its discretion under Sub-rule (2) and it has not only framed all the issues, of law as well as fact and has also tried all such issues together, is it open to the Court, after the conclusion of the trial on all the issues to take up issues of law only and by adopting this principle of severability to proceed to dispose of the suit on the issues of law only, without at the same time according its consideration to other issues.

6. While examining the repercussions of the unamended Rule 2 and the ramifications arising therefrom, the Law Commission of India had opined as under:

> *"This rule has led to one difficulty. Where a case can be disposed of on a preliminary point (issue) of law, often the Courts do not inquire into the merits, with the result that when, on an appeal against the finding on the preliminary issue the decision of the Court on that issue is reversed, the case has to be remanded to the Court of first instance for trial on the other issues. This causes delay. It is considered that this delay should be eliminated, by providing that a Court must give judgment on all issues, excepting, of course, where the Court finds that it has no jurisdiction or where the suit is barred by any law for the time being in force".*

7. The Statement of Objects and Reasons accompanying the amending Act of 1976 whereby Rule 2 was amended read thus:

> *"Clause 67 - Sub-clause (ii). - Rule 2 is being substituted to provide that although a suit can be disposed of on a preliminary issue, the Court shall ordinarily pronounce judgment on all issues; but where any issue relating to the jurisdiction of the Court or a bar created by any law for the time being in force, the Court may postpone settlement of the other issues until the preliminary issue with regard to the jurisdiction of the Court or such bar has been determined and the Court may deal with the suit in accordance with the determination of such preliminary issue".*

8. The legislative mandate is very clear and unambiguous. In the light of the past experience that the old Rule 2 whereby, in the fact situation of the trial Court deciding only preliminary issues and neither trying nor deciding other issues, whenever an appeal against the judgment was filed before the Appeal Court and the Appeal Court on finding that the decision of the trial Court on preliminary issues deserved to be reversed, the case per force had to be remanded to the trial Court for trial on other issues. This resulted in delay in the disposal of the cases. To eliminate this delay and to ensure the expeditious disposal of the suits, both at the stage of the trial as well as at the appeal stage, the legislature decided to provide for a mechanism whereby, subject to the exception created under Sub-rule (2), all issues, both of law and fact were required to be decided together and the suit had to be disposed of as a whole, of course based upon the findings of the trial Court on all the issues, both of law and fact.

9. Based upon the aforesaid reasons therefore, and in the light of legislative background of Rule 2 and the legislative intent as well as mandate based upon such background, as well as on its plain reading, we have no doubt in our minds that except in situations perceived or warranted under Sub-rule (2) where a Court in fact frames only issues of law in the first instance and postpones settlement of other issues, under Sub-rule (1), clearly and explicitly in situations where the Court has framed all issues together, both of law as well as facts and has also tried all these issues together, it is not open to the Court in such a situation to adopt the principle of severability and proceed to decide issues of law first, without taking up simultaneously other issues for decision. This course of action is not available to a Court because Sub-rule (1) does not permit the Court to adopt any such principle of severability and to dispose of a suit only on preliminary issues, or what can be termed as issues of law. Sub-rule (1) clearly mandates that in a situation contemplated under it, where all the issues have been framed together and have also been taken up for adjudication during the course of the trial, these must be decided together and the judgment in the suit as a whole must be pronounced by the Court covering all the issues framed in the suit."

22. While answering issue No. 1, the learned single Judge concluded that plaintiff had failed to prove that sons of Goru Mall constituted a Joint Hindu Family and carried on joint business and on basis of such findings dismissed the suit without answering the other issues. Now in case the other issues more particularly issue No. 3 is seen, it would be apparent that the same was in no manner connected with issue No.1 and was therefore, required to be answered separately irrespective of the findings recorded while answering issue No. 1. Even otherwise issues not only of fact but even of law, like valuation (issue No.8) and limitation (issue No.9) had been framed and therefore, also it was incumbent that separate findings qua each of the issue should have been recorded.

23. The main object of a judgement after all is to support by the most cogent reasons that suggest themselves, the final conclusion at which the Judge has conscientiously arrived. It is the mandate of Orders 14 and 20 of the Code that the court shall state its finding or decision and reasons thereof upon each separate issue and all the distinct issues have to be answered by findings supported by reasons, unless of course the finding upon one or more of the issue is sufficient for the decision of the suit. Despite this mandate of deciding the issues separately, if the court comes to the conclusion that certain issues need to be decided together, there is no bar to do the same. The impugned judgement does not in any manner confirm or comply with the provisions of either Order 14 or Order 20 CPC.

24. In view of the aforesaid discussion, we are of the considered view that the judgement passed by the learned single Judge does not comply with the mandate of law and the learned single Judge could not have dismissed the suit by deciding only issue No.1 and was required to decide all the issues.

Accordingly, the appeal is allowed and the judgement and decree passed by the learned single Judge are set-aside and the matter is remanded to the learned single Judge to decide the case afresh in accordance with law.

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

Jarmej Singh son of Shri Rasila Singh and others ....Appellants/Plaintiffs
Versus
Hazauro son of Shri Mangtu ....Respondent/Defendant

RSA No. 117 of 2003
Judgment Reserved on 12th December,2014
Date of Judgment 19th December, 2014

Specific Relief Act, 1963- Section 34- Plaintiffs claimed to be the co-owners in possession of the suit land and the defendant to be a stranger- defendant claimed that suit land was allotted to him by Government under H.P. Village Common Land and Utilization Scheme- copy of revenue record showed that suit land was recorded in ownership of Shamlat Deh Hasab Rasad Malguzari- the name of the defendant was recorded to be in possession of suit land- remarks column showed that ownership was transferred in the name of the Government and that the govt. had allotted the land in favour of the defendant- mutation was attested-Settlement collector reviewed and cancelled it - held, that certificate of allotment of land is a substantial piece of evidence- allotment made by Settlement Collector could not be challenged before the Civil Court but could only be challenged by filing an appeal.

(Para-11 and 12)

Cases referred:

Guru Amarjeet Singh vs. Rattan Chand and others AIR 1994 SC 227

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

Thakur Kishan Singh (dead) vs. Arvind Kumar 1994) 6 SCC 591

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

Gurdwara Sahib vs. Gram Panchayat Village Sirthala and another (2014)1 SCC 669

State of Haryana vs. Mukesh Kumar and others 2011(10) SCC 404
L.N. Aswathama and another vs. P.Prakash (2009) 13 SCC 229
Babu Ram vs. Ganpat Ram and others Latest HLJ 2014 HP 1261

For the Appellants: Mr. Rahul Mahajan, Advocate.
For the Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure by the appellants against the judgment and decree dated 5.8.2002 passed by learned Additional District Judge–I Kangra at Dharamshala in Civil Appeal No. 23-N/2000 titled Jarmej Singh vs. Hazauro whereby learned Additional District Judge-I Kangra at Dharamshala had affirmed the judgment and decree passed by learned trial Court i.e. Civil Judge Court No. II Nurpur District Kangra in Civil Suit No. 61 of 1995 titled Jarmet Singh and others vs. Hazauro.

2. Brief facts of the case as pleaded are that Jarmej Singh and other plaintiffs filed a suit for possession of land comprised in Khata No. 85, Khatauni No. 274 min Khasra No. 18, 25 plots 2 measuring 0-34-99 HM situated in Tikka mauja Thapkaur Tehsil Nurpur District Kangra. It is pleaded that plaintiffs are co-sharers along with other co-sharers and defendant is stranger to the suit land. It is further pleaded that defendant is also trespasser of suit land and defendant has no right title or interest over the suit land. It is also pleaded that neither the defendant is tenant over the suit land nor defendant was inducted as tenant over the suit land by the plaintiffs. It is pleaded that plaintiffs have asked the defendant to admit the claim of the plaintiffs but defendant refused to do so. Decree for possession in favour of plaintiffs and against defendant sought

3. Per contra written statement filed on behalf of defendant pleaded therein that suit is not maintainable in present form and suit is bad for non-joinder of necessary parties. It is also pleaded that plaintiffs are estopped by their act and conduct from filing the present suit and plaintiffs have no cause of action to file the present suit. It is further pleaded that plaintiffs have no locus standi to file the present suit and plaintiffs have also not come to Court with clean hands. It is denied that suit land is Shamlat deh and it is also denied that plaintiffs are co-owners over the suit land. Title of plaintiffs over the suit land is also denied. It is pleaded that other co-owners are necessary parties. It is pleaded that suit land has been allotted to the defendant by H.P. Government under the H.P. Village Common Land and Utilization Scheme 1975 and plaintiffs have no right title or interest over the suit land as same was allotted to the defendant. It is pleaded that mutation of suit land was illegally rejected by Settlement Collector. In alternative, defendant also pleaded right of adverse possession over the suit land. It is pleaded that plaintiffs have no cause of action and prayer for dismissal of suit is sought.

4. As per the pleadings of parties learned trial Court framed following issues on dated 9.9.1996:-

1. Whether the plaintiffs are entitled for the possession of the suit land? OPP
2. Whether the suit is not maintainable in the present form? OPD
3. Whether the suit is bad for non-joinder of necessary parties if so who is necessary party? OPD
4. Whether the plaintiffs are estopped by their act and conduct to file this suit? OPD

5. Whether the plaintiffs have no locus standi to file the present suit? OPD
6. Whether the plaintiffs have got no enforceable cause of action against the defendant? OPD
7. Whether the suit land had been allotted to the defendant by the H.P. Government under H.P. Village Common Land Vesting and Utilization Scheme 1975 if so its effect? OPD
8. Whether the defendant in the alternative has become owner of the suit land by way of adverse possession? OPD
9. Relief.

5. Parties examined following oral witnesses in supported of their case:-

Sr. No.	Name of witness
PW1	Dhian Singh Patwari
PW2	Angrez Singh
DW1	Hazauro Singh
DW2	Gian Singh

6. Parties produced following documentary evidence in support of their case:-

Sr. No.	Description
Ext.P1	List of owners of suit property
Ext.P2	Misal Hakiyat for the year 1983-84
Ext.P3	Jamabandi for the year 1978-79
Ext.P4	Jamabandi for the year 1978-79
Ext.D1	Jamabandi for the year 1990-91
Ext.D2	Jamabandi for the year 1983-84
Ext.D3	Jamabandi for the year 1972-73
Ext.D4	Jamabandi for the year 1978-79
Ext.D5	Copy of mutation No. 322
Ext.D6	Copy of allotment certificate of land in favour of defendant by Collector Nurpur District Kangra HP

7. Findings of learned trial Court on issues Nos. 1 to 6 were in negative and learned trial Court held that issue No. 7 became redundant. Learned trial Court decided issue No. 8 in favour of defendant and held that defendant has become owner of suit land by way of right of adverse possession. Learned trial Court dismissed the suit filed by the plaintiffs.

8. Feeling aggrieved against the judgment and decree passed by learned trial Court appellants filed first appeal before learned Ad ditional District Judge Kangra at Dharamshala which was registered as Civil Appeal No. 23-N of 2000 titled Jarmej Singh and others vs. Hazauro. Learned first Appellate Court held that respondent could not be said to have become owner of suit land by way of adverse possession. Learned first Appellate Court despite holding that defendant did not acquire right of adverse possession in para No. 14 of judgment

did not set aside findings of issue No. 8 and affirmed the impugned judgment and decree passed by learned trial Court dated 26.11.1999. Learned Additional District Judge-1 Kangra at Dharamshala H.P. dismissed appeal filed by appellants.

9. Thereafter feeling aggrieved by judgments and decrees passed by learned trial Court and affirmed by learned first Appellate Court appellants have filed present Regular Second Appeal No. 117 of 2003 titled Jarmej Singh and others vs. Hazauro. Hon'ble High Court admitted the present appeal on the following substantial question of law on dated 31.3.2003:

> Whether first appellate Court has wrongly read and inferred the oral and documentary evidence on record to come to the conclusion that the plaintiffs-appellants have no locus standi to file their suit in individual capacity as the land in dispute is recorded in the ownership of SHAMLAT DEH HASAB RASAD MALGUZARI?

10. Court heard learned Advocates appearing on behalf of the parties and also perused the entire record carefully.

Oral Evidence adduced by parties

10.1 PW1 Dhian Singh Patwari has stated that he has brought the summoned record. He has stated that he has also brought list of proprietors of suit land Ext.P1. He has stated that he is posted as Patwari since 13 years. He has denied suggestion that he has prepared list of proprietors of suit land contrary to record.

10.2 PW2 Angrej Singh has stated that plaintiffs are owners of suit land and further stated that there are 15 co-sharers of suit land. He has stated that he is also owner of other immovable property in village and he used to pay the land revenue. He has stated that defendant did not own any immovable property in the village. He has stated that possession of defendant is illegal. He has further stated that defendant did not accept the request of plaintiffs to vacate the suit land. He has denied suggestion that defendant is in settled possession since 1975. He has denied suggestion that defendant is owner in possession of suit land. He has denied suggestion that he has no title in suit property.

10.3 DW1 Hazauro has stated that suit land is 10 kanals and 11 marlas and he is in possession since 1975. He has stated that suit land was allotted to him as a landless person. He has stated that possession was also delivered to him. He has stated that plaintiff has no title in suit property. He has denied suggestion that he has no right title or interest in suit property i.e. Shamlat deh land.

10.4 DW2 Gian Chand has stated that parties are known to him and further stated that suit land is 10 kanals and 11 marlas. He has stated that suit land was allotted to defendant in the year 1975 by way of allotment order. He has stated that initially suit land was barren and grassy land. He has stated that plaintiff has no interest in suit property. He has denied suggestion that defendant is in illegal possession of suit property.

Findings upon Substantial Question of law framed by Hon'ble High Court:-

11. Court has also perused documentary evidence placed on record. As per document Ext.P2 suit land comprised in Khata No 85/59 Khatauni No. 274 is in ownership of Shamlat Deh Hasab Rasad Malguzari (All owners of village are proprietors of suit land as per payment of land revenue). In the possession column name of defendant has been recorded. Old Khasra number has been mentioned as 1 min and new Khasra number have been mentioned as 18 and 25. Area of Khasra No. 18 is mentioned as 0-25-97 Kuhli Awal (Irrigated land) and area of Khasra No. 25 has been shown as 0-09-02 barren land. As per

document Ext.P1 which is Fehrist Malkan (List of proprietors of village) 155 persons have been shown as owners of suit land in the capacity of Shamlat Deh Hasab Rasad Malguzari (All owners of village are proprietors of suit land as per payment of land revenue). As per jamabandi Ext.P3 for the year 1978-79 old khasra number of land has been shown as 1 and area of suit land has been shown as 137 kanals and nature of suit land has been shown as Gair Mumkin Khud (River) and in ownership column name of Shamlat Deh Hasab Rasad land revenue mentioned. As per jamabandi Ext.P4 for the year 1978-79 in the ownership column Shamlat Deh Hasab Rasad Malguzari mentioned and area shown as 137 Kanals. Nature mentioned as river. In jamabandi Ext.D3 jamabandi for the year 1972-73 old Khasra number of suit land mentioned as 1 and area mentioned as 137 Kanals. Nature mentioned as river. In the remarks column it has been specifically mentioned that on dated 4.11.1973 ownership of land was transferred from Gram Panchayat Deh to Shamlat Deh Hasab Rasad Malguzari (All owners of village are proprietors of suit land as per payment of land revenue). There is further recital in remarks column that vide mutation No. 316 ownership of land was transferred in the name of H.P. Government and mutation was sanctioned on dated 9.6.1978. There is further recital in remarks column that thereafter mutation was reviewed and ownership of suit land was again recorded in the name of Shamlat Deh Hasab Rasad Malguzari (All owners of village are proprietors of suit land as per payment of land revenue) and mutation of suit land in the name of H.P. Government was cancelled. There is further recital in remarks column that vide mutation No. 322 suit land measuring 10 Kanals and 12 marlas was allotted in favour of defendant and mutation was sanctioned on dated 27.3.1981. There is further recital in remarks column that thereafter mutation of suit land in favour of defendant was also reviewed by Settlement Collector and mutation in favour of defendant was cancelled.

12. It is proved on record that vide document Ext.D6 land measuring 10 Kanals 12 Marlas of land was allotted to defendant in Khasra No. 1/3 in mauja Thapkaur Tehsil Nurpur District Kanga. It is proved on record that old Khasra number of suit land was 1 and entire area of Khasra No. 1 was 137 Kanals. It is also proved on record that out of total land i.e. 137 Kanals land measuring 10 Kanals and 12 Marlas was allotted to the defendant and Khasra No. 1/3 was mentioned. It is also proved on record that Khasra No. 1/3 is a part of old Khasra No. 1 and suit land i.e. Khasra Nos. 18 and 25 are also part of old Khasra No.1 and thereafter min numbers were allotted to the suit land and old Khasra number was mentioned as 1 min and new Khasra Number has been shown as Khasra Nos. 18 and 25. Plaintiffs and defendant did not place on record Tatima (Field map) to show the location of land measuring 10 Kanals and 12 Marlas which was allotted to defendant by way of allotment measuring 10 Kanals 12 Marlas. It is well settled law that immovable property is located only through Khata Khatauni number, Khasra number and Tatima (Field map). It is well settled law that mutation did not confer or extinguish any title in suit property. It was held in case reported in ***AIR 1994 SC 227 titled Guru Amarjeet Singh vs. Rattan Chand and others*** that mutation does not confer or extinguish any title in immovable property. ***(Also see 1996(4) SLJ 2982 titled Mohammad Iqbal vs. Government of Indian and others)*** It is proved on record that 10 Kanals 12 Malras of land was allotted to the defendant from Khasra No. 1/3 situated in mauja Thapkaur Tehsil Nurpur District Kangra by the Collector Nurpur. Certificate of allotment of land to defendant who is landless person is substantive piece of evidence. There is no documentary evidence on record in order to prove that Collector has reviewed the allotment order in favour of defendant qua 10 Kanals 12 Marlas of land. Even as per Section 10 of H.P. Village Common Lands Vesting and Utilization Act 1974 order of allotment by the Collector could not be challenged before the Civil Court but could be challenged by way of appeal as mentioned in Section 9 of H.P. Village Common Lands Vesting and Utilization Act 1974.

13. Submission of learned Advocate appearing on behalf of appellants that learned trial Court had granted right of adverse possession to defendant in issue No. 8 over the suit property and learned first Appellate Court has held in positive manner in para 14 of judgment announced in Civil Appeal No. 23-N/2000 titled Jarmej Singh and others vs. Hazauro that defendant could not be said to have become owner of suit land by way of adverse possession due to non-impleadment of other co-owners and right of adverse possession could not be granted to the defendant in the suit property but despite above stated findings learned first Appellate Court affirmed entire judgment and decree of learned trial Court in toto contrary to its own findings is accepted for the reasons hereinafter mentioned. It is proved on record that right of adverse possession could not be granted in favour of defendant unless all co-owners of immovable property are not impleaded as co-party in civil suit. In present case it is proved on record as per document Ext.P1 that there are more than 150 owners of suit property because nature of suit land is shown as Shamlat Deh Hasab Rasad Malguzari (All owners of village are proprietors of suit land as per payment of land revenue) and it is well settled law that right of adverse possession could not be granted to the defendant unless all other co-owners of suit property are not impleaded as co-party in Shamlat Deh Hasab Rasad Malgujari land. It was held in case reported in ***1994)6 SCC 591 titled Thakur Kishan Singh (dead) vs. Arvind Kumar*** that long possession does not prove adverse possession and it was further held that even permissive possession could not be adverse. ***(See: (2007)6 SCC 59 titled P.T. Munichikkanna Reddy and others vs. Revamma and others (2014)1 SCC 669 titled Gurdwara Sahib vs. Gram Panchayat Village Sirthala and another).*** It was held in case reported in ***2011(10) SCC 404 State of Haryana vs. Mukesh Kumar and others*** that person claiming adverse possession has no equities in his favour. ***(See: (2009) 13 SCC 229 titled L.N. Aswathama and another vs. P.Prakash, Latest HLJ 2014 HP 1261 titled Babu Ram vs. Ganpat Ram and others.)*** Therefore it is held that learned first Appellate Court was under legal obligation to set aside the findings of adverse possession which were granted by learned trial Court in favour of the defendant. In para 14 of judgment learned first Appellate Court itself held that no right of adverse possession accrued in favour of defendant over the suit property. But despite holding by learned first Appellate Court that no right of adverse possession accrued in favour of the defendant over suit property learned first Appellate Court affirmed the entire judgment and decree passed by learned trial Court in toto wherein learned trial Court had granted right of adverse possession to defendant over suit land. It is held that judgment and decree of learned first Appellate Court are itself prima facie contradictory in nature keeping in view the findings in para Nos. 14 and 15 of judgment. It is well settled law that contradictory findings of same Court should not be allowed to sustain as per law. Even it is proved on record that present suit has been filed by plaintiffs in the individual capacity qua suit property owned by other co-sharers of village. Plaintiffs have themselves pleaded in para No. 1 of plaint that present suit is filed for benefit of all co-sharers. Plaintiffs did not seek the leave of Court to file the present suit in representative capacity as required under Order 1 Rule 8 of Code of Civil Procedure 1908. Suit property is in ownership of Shamlat Deh Hasab Rasad Malguzari (All owners of village are proprietors of suit land as per payment of land revenue). In view of above stated facts it is held that plaintiffs were under legal obligation to obtain leave of Court under Order 1 Rule 8 of CPC for institution of suit. Suit property is owned by public at large who are residents of village and who use to pay the land revenue. Court has carefully perused the entire order sheets of learned trial Court and it is proved on record that plaintiffs did not seek leave of Court as required under Order 1 Rule 8 of Code of Civil Procedure 1908. As per Order 1 Rule 8 of CPC whenever any civil suit is filed for the benefit of other co-owners then prior permission of Court is essential to file the suit in representative capacity. Hence it is held that no relief could be granted in favour of plaintiffs in view of provision of Order 1 Rule 8 of CPC. Even it is proved on record that present suit has been filed by

plaintiffs in personal capacity but personal names of plaintiffs did not record in ownership column of suit property. On the contrary in the ownership column it is recorded that suit land is owned by all proprietors of village who use to pay land revenue i.e. Shamlat Deh Hasab Rasad Malgujari. Jamabandis entries have been prepared by public official in discharge of their official duties and are relevant facts under Section 35 of Indian Evidence Act 1872. In view of above stated facts substantial question of law framed by Hon'ble High Court is decided accordingly.

14. In view of above findings appeal is partly allowed. Findings of learned trial Court qua issue No. 8 relating to findings of title of adverse possession in favour of defendant over suit land and affirmation of findings of learned first Appellate Court qua issue No. 8 relating to right of adverse possession in favour of defendant are set aside and it is held that defendant did not acquire any right of adverse possession over suit property. Issue No. 8 framed by learned trial Court is decided against defendant. Other findings of learned trial Court upon other issues No. 1 to 6 are affirmed. Issue No. 7 is decided in favour of defendant. It is held that land measuring 10 Kanals 12 Marlas situated in village Thapkaur Mauja Thapkaur Tehsil Nurpur District Kangra (HP) comprised in Khasra No. 1/3 allotted to defendant as per H.P. Village Common Lands Vesting and Utilization Scheme 1975. Certificate of allotment Ext.D6 placed on record will form part and parcel of decree sheet. Judgment and decree passed by learned trial Court and judgment and decree passed by learned first Appellate Court are modified to this extent only. Parties are left to bear their own costs. Decree sheet be prepared as mentioned under Section 100 of CPC forthwith. File of learned trial Court and learned first Appellate Court along with certified copy of this judgment and decree passed under Section 100 CPC 1908 be transmitted forthwith. Pending applications if any also disposed of. Appeal stands disposed of.

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

Jarmej Singh S/o Rasila Singh and others. ....Appellants/Plaintiffs

Versus

Raghubir Singh S/o Mangtu ....Respondent/Defendant

RSA No. 118 of 2003
Judgment Reserved on 12th December,2014
Date of Judgment 19th December, 2014

Specific Relief Act, 1963- Section 34- Plaintiffs claimed to be the co-owners in possession of the suit land and the defendant to be a stranger- defendant claimed that suit land was allotted to him by Government under H.P. Village Common Land and Utilization Scheme- copy of revenue record showed that suit land was recorded in ownership of Shamlat Deh Hasab Rasad Malguzari- the name of the defendant was recorded to be in possession of suit land- remarks column showed that ownership was transferred in the name of the Government and that the govt. had allotted the land in favour of the defendant- mutation was attested-Settlement collector reviewed and cancelled it - held, that certificate of allotment of land is a substantial piece of evidence- allotment made by Settlement Collector could not be challenged before the Civil Court but could only be challenged by filing an appeal.

(Para-11 and 12)

Cases referred:
Guru Amarjeet Singh vs. Rattan Chand and others AIR 1994 SC 227

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

For the Appellant: Mr. Rahul Mahajan, Advocate.
For the Respondents: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure by the appellants against the judgment and decree dated 5.8.2002 passed by learned Additional District Judge–I Kangra at Dharamshala in Civil Appeal No. 24-N/2000 titled Jarmej Singh vs. Raghubir Singh whereby learned Additional District Judge Kangra at Dharamshala had affirmed the judgment and decree passed by learned trial Court i.e. Civil Judge Court No. II Nurpur District Kangra in Civil Suit No. 67 of 1995 titled Jarmej Singh and others vs. Raghubir Singh.

2. Brief facts of the case as pleaded are that Jarmej Singh and others plaintiffs filed suit for possession of suit land comprised in Khata No. 85 Khatauni No. 271 min Khasra No. 19, 20 and 27 measuring 0-31-42 situated in Tikka mauja Thapkaur Tehsil Nurpur District Kangra H.P. It is pleaded that suit land is Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue) and plaintiffs are co-sharers along with other co-sharers. It is pleaded that present suit has been filed for the benefit of other co-sharers also. It is pleaded that defendant was not inducted as tenant over the suit land at any point of time and defendant has also not any immovable property in the village. It is pleaded that defendant is trespasser over the suit land and plaintiffs have asked the defendant to vacate the suit land but defendant did not vacate the suit land despite request. Prayer for decree of possession as mentioned in relief clause of plaint is sought.

3. Per contra written statement filed on behalf of defendant pleaded therein that suit is not maintainable in present form and suit is bad for non-joinder of necessary parties and further pleaded that plaintiffs are estopped by their act and conduct from filing the present suit. It is also pleaded that plaintiffs have no locus standi to file the present suit and plaintiffs have also no cause of action against the defendant and plaintiffs have not come to Court with clean hands. It is denied that plaintiffs have any title over the suit property. It is pleaded that suit land was allotted to defendant under the H.P. Village Common Land and Utilization Scheme and allotment certificate has been issued by the Collector in favour of the defendant. It is pleaded that possession of suit land was also delivered to the defendant and in alternative defendant has become owner of suit land by way of right of adverse possession. It is pleaded that plaintiffs have no cause of action to file the suit. Prayer for dismissal of suit sought.

4. As per the pleadings of parties learned trial Court framed following issues on dated 12.6.1996:-

1. Whether the plaintiffs are entitled to recover possession over the suit land? OPP
2. Whether the suit is not maintainable? OPD
3. Whether the suit is bad for non-joinder of necessary parties? OPD
4. Whether the plaintiffs are estopped by their act and conduct to file the present suit? OPD

5. Whether the plaintiffs have no locus standi to file the present suit? OPD
6. Whether the plaintiffs have got no cause of action to file the present suit? OPD
7. Whether the plaintiffs have not come to the Court with clean hands if so its effect?OPD
8. Whether the suit land has been allotted by the H.P. Government to the defendant as alleged if so its effect? OPD
9. Relief.

5. Findings of learned trial Court on issues Nos. 1 to 6 were in negative and against the plaintiffs and learned trial Court decided issue Nos. 7 and 8 in favour of the defendant and dismissed the suit filed by plaintiffs.

6. Feeling aggrieved against the judgment and decree passed by learned trial Court appellants have filed appeal before learned Additional District Judge Kangra at Dharamshala and vide Civil Appeal No. 24-N of 2000 titled Jarmej Singh and others vs. Raghubir Singh learned first Appellate Court held that suit has not been filed in representative capacity in view of the fact that suit land is Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue) and thereafter learned first Appellate Court affirmed the judgment and decree passed by learned trial Court.

7. Thereafter feeling aggrieved against the judgments and decrees passed by learned trial Court and affirmed by learned first Appellate Court appellants filed present Regular Second Appeal No. 118 of 2003 titled Jarmej Singh and others vs. Raghubir Singh. Hon'ble High Court admitted the appeal on dated 31.3.2003 on the following substantial question of law:-

> Whether first appellate Court has wrongly read and inferred the oral and documentary evidence on record to come to the conclusion that the plaintiffs-appellants have no locus standi to file their suit in individual capacity as the land in dispute is recorded in the ownership of SHAMLAT DEH HASAB RASAD MALGUZARI?

8. Parties examined following oral witnesses in supported of their case:-

Sr. No.	Name of witness
PW1	Jarmej Singh
PW2	Dhian Singh
DW1	Raghubir Singh
DW2	Puran Chand

8.1. Parties produced following documentary evidence in support of their case:-

Sr. No.	Description
Ext.P1	List of co-sharers.
Ext.P2	Misal Hakiyat for the year 1983-84
Ext.P3	Jamabandi for the year 1990-91
Ext.P4	Jamabandi for the year 1978-79
Ext.P5	Jamabandi for the year 1978-79

Ext.D1	Jamabandi for the year 1972-73
Ext.D2	Certificate of allotment given by Collector
Ext.DA	Copy of Mutation No. 323.

9. Court heard learned Advocates appearing on behalf of the parties and also perused the entire record carefully.

Evidence adduced by parties

9.1 PW1 Jarmej Singh has stated that suit land is Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue). He has stated that plaintiffs have also other immovable land which is owned by plaintiffs and plaintiffs used to pay land revenue. He has stated that defendant has encroached upon the suit land in the year 1983. He has stated that defendant has no share in the suit property and defendant did not pay any land revenue in village. He has stated that State did not become owner of suit property at any point of time. He has stated that no allotment of land was granted in favour of defendant by the Collector. He has further stated that plaintiffs requested the defendant to vacate the suit land but defendant did not vacate the suit property. He has stated that defendant has no interest in suit property. He has stated that there are more than 150 persons who are owners of suit property. He has stated that initially suit land was owned by Panchayat. He has stated that he does not know that thereafter ownership of suit land vested in H.P. Government. He has denied suggestion that suit land was allotted in favour of defendant in the year 1980. He had admitted that defendant is in settled possession of suit land since the time of settlement.

9.2 PW2 Dhian Singh Patwari has stated that he has brought the summoned record. He has stated that nature of suit land is Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue). He has stated that list of proprietors of suit land is Ext.P1 which is correct as per revenue record.

9.3 DW1 Raghubir Singh has stated that suit land is in his settled possession and he is owner of suit property since 1975. He has stated that suit land was allotted by H.P. Government in the year 1975. He has stated that possession was given by Halqua Patwari and Field Kanungo to the defendant. He has stated that he is owner of suit property and further stated that plaintiffs have no right title or interest in suit property. He has denied suggestion that he is encroacher over the suit property. He has denied suggestion that he has no right title or interest in suit property.

9.4 DW2 Puran Chand has stated that parties are known to him and he has seen the suit property. He has stated that defendant is in possession of suit property for the last more than 25 years. He has stated that suit land was allotted to defendant by H.P. Government. He has stated that possession was delivered to the defendant by Halqua Patwari and Field Kanungo. He has stated that plaintiffs have no title in suit property. He has denied suggestion that defendant is trespasser of suit land.

Findings upon Substantial Question of law framed by Hon'ble High Court:-

10. As per document Ext.P1 fehrist Malkan (List of owners), more than 150 persons have been shown as owners of suit property. As per document Ext.P2 Misal Hakiyat Bandobast (Settlement) prepared for the year 1983-84 in the ownership column of suit property name of Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue) has been shown. In possession column name of defendant is recorded and old khasra number is recorded as 1 min and new Khasra Nos. recorded as

19, 20 and 27 and nature of land has been shown as Kuhli Awal (Irrigated land) and barren land. Entries of jamabandi for the year 1990-91 Ext.P3 are the same as recorded in jamabandi for the year 1983-84. As per jamabandi Ext.P4 for the year 1978-79 suit land has been recorded in the ownership of Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue) and Khasra number has been shown as 1 and area has been shown as 137 Kanals and nature of suit land has been shown as Gair Mumkin Khud (River). In the remarks column it has been shown that land measuring 10 Kanals 10 marlas situated in Khasra No. 1/4 has been allotted to Raghubir Singh and mutation was sanctioned on dated 10.7.1980. As per further remarks column mutation in favour of Raghubir Singh was reviewed and cancelled. As per jamabandi Ext.P5 placed on record for the year 1978-79 in the ownership column suit land has been shown as Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue) and area of suit land is shown as 137 Kanals and nature of suit land has been shown as Gair Mumkin Khud (River) and khasra of suit land has been shown as 1. In the remarks column it has been mentioned that land measuring 10 Kanals 10 marlas was allotted in favour of defendant Raghubir Singh and mutation was sanctioned on dated 10.7.1980. There is further recital in remarks column that mutation stood reviewed on dated 21.9.1984. As per jamabandi for the year 1972-73 suit land has been shown in ownership of Gram Panchayat Deh and Khasra number has been mentioned as 1 and total area of suit land has been mentioned as 137 Kanals and nature of suit land is shown as Gair Mumkin Khud (River). In the remarks column it has been mentioned that ownership of Gram Panchayat deleted and ownership of Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue) was recorded on dated 4.11.1973. There is further recital in remarks column that vide mutation No. 316 suit land vested in H.P. Government and mutation was sanctioned. There is further recital that mutation in the name of H.P. Government was reviewed and cancelled. There is further recital in remarks column of the jamabandi for the year 1972-73 that 10 Kanals 10 marlas of suit land comprised in Khasra No. 1/4 was allotted in favour of Raghubir Singh and mutation was sanctioned on dated 10.7.1980. There is further recital in remarks column that mutation in favour of defendant was reviewed on dated 21.9.1984 and as per document Ext.D2 land comprised in Khasra No. 1/4 measuring 10 Kanals 10 Marlas was allotted in favour of defendant Raghubir Singh by Collector under H.P. Village Common Lands Vesting and Utilization Schemes 1975.

11. In present case it is proved on record that suit land was comprised in Khasra No. 1 measuring 137Kanals and it is also proved on record that land measuring 10 Kanals 10 Marlas was allotted in favour of defendant comprised in Khasra No. 1/4 situated in Tika Thapkaur Mauza Thapkaur Tehsil Nurpur District Kangra (H.P.) under H.P. Village Common Lands Vesting and Utilization Scheme 1975. There is no documentary evidence on record in order to prove that certificate of allotment of land in favour of defendant was cancelled by Collector. It is well settled law that title passed in favour of defendant after issuance of allotment certificate by the Collector qua 10 Kanals 10 marlas of land situated in Khasra No. 1/4 situated in Tika Thapkaur mauza Thapkaur Tehsil Nurpur District Kangra. As per Section 10 of H.P. Village Common Land Vesting and Utilization Act 1974 order passed by Collector could not be challenged before the Civil Court and same could be challenged only under Section 9 before the State Government or before the Officer authorized by the State Government by notification within 60 days from the passing of order. There is no evidence on record that certificate of allotment granted by the Collector in favour of defendant has been set aside by any competent authority of law in appeal as mentioned in Section 9 of H.P. Village Common Lands Vesting and Utilisation Act 1974. It is held that simple review of mutation in favour of defendant did not extinguish the title of defendant granted to the

defendant by way of allotment under H.P. Village Common Lands Vesting and Utilization Act 1974 because it is well settled law that mutation did not confer or extinguish any title. It was held in case reported in ***AIR 1994 SC 227 titled Guru Amarjeet Singh vs. Rattan Chand and others*** that mutation does not confer or extinguish any title. ***(Also see 1996(4) SLJ 2982 titled Mohammad Iqbal vs. Government of India and others)*** It is proved on record that suit land is in ownership of general public who are residents of village Tikka Thapkaur as per land revenue paid by them and all villagers have proprietary rights on suit property as per share of land revenue paid by them. In present case plaintiffs have not filed the suit in representative capacity. It is proved on record that plaintiffs have filed the suit regarding the suit property owned by general public residing in village. It is well settled law that suit relating to immovable property which is owned by general public residing in the village could be filed in representative capacity only with leave of Court under Order 1 Rule 8 of Code of Civil Procedure 1908. Plaintiff did not seek the leave of Court in present case. In present case suit property is not shown to have been exclusively owned by plaintiffs but by documentary evidence placed on record it is proved that suit property is owned by general public who is residing in the village and share of general public is as per payment of land revenue. Exclusive names of plaintiffs did not figure in the ownership column of suit property. On the contrary there is recital in record of rights prepared under H.P. Land Revenue Act that suit property is owned by general public residing in the village as per payment of land revenue. The plaintiffs themselves pleaded in the plaint that they have filed the present suit for the benefit of other co-owners also. As per Order 1 Rule 8 of CPC whenever any civil suit is filed for the benefit of other co-owners also then prior permission of Court is essential to file the suit in representative capacity. In present case plaintiff did not seek any permission to file any suit in representative capacity for the benefit of other co-owners. Hence it is held that no relief could be granted in favour of plaintiffs in view of provision of Order 1 Rule 8 of CPC. Even it is proved on record that present suit has been filed by plaintiffs in personal capacity but personal names of plaintiffs did not record in ownership column of suit property. On the contrary in the ownership column it is recorded that suit land is owned by all proprietors of village who use to pay land revenue i.e. Shamlat Deh Hasab Rasad Malguzari.

12. In present case there is recital in plaint that present suit has been filed for the benefit of other co-owners also. As per record of right placed on record prepared by public servant in discharge of official duty suit land is owned by Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue). There is no evidence on record that suit land has been partitioned in accordance with law. Individual name of plaintiff is also not recorded in ownership column of suit land prepared under H.P. Land Revenue Act and share of plaintiff is also not defined till date. In view of certificate given by Collector Nurpur qua allotment of land in favour of defendant qua 10 Kanals 10 Marlas of land comprised in Khasra No. 1/4 situated in Tika Thapkaur Tehsil Nurpur District Kangra it is not expedient in the ends of justice to grant relief to plaintiffs as sought in relief clause of plaint. Allotment certificate given by Collector Ext.D2 will form part and parcel of decree sheet. Substantial question of law framed by Hon'ble High Court is answered in negative against the appellants.

13. In view of above findings RSA No. 118 of 2003 filed by appellants is dismissed. Judgments and decrees passed by learned Courts below are affirmed. Parties are left to bear their own costs. Decree sheet as mentioned under Section 100 of CPC be prepared forthwith. File of learned trial Court and first Appellate Court along with certified copy of judgment and decree be transmitted forthwith. Pending applications if any also disposed of. Appeal stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.

Joginder Singh @ Pamma ..... Appellant.
Versus
Vikram @ Vicky and others ....Respondents

FAO (MVA) No.108 of 2007
Judgment reserved on 5.12.2014
Date of decision: 19 .12.2014.

Motor Vehicle Act, 1988- Section 149- Tribunal had held that driver did not have a valid driving licence - Driver had a valid driving licence to drive light motor vehicle- he was driving a Canter at the time of accident- unladen weight of Canter is less than 4000 kg and gross weight of the same is 10005 kg- held, that canter falls within the definition of "Light Motor Vehicle" as given in Sections 2 (21) and 2 (28) of the Motor Vehicles Act —licence was valid and the Tribunal had fallen in error in holding that driver did not possess a valid driving licence.

(Para-15 to 19)

Cases referred:

Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd. AIR 1999 SC 3181

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

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

For the appellant: Mr. C.N. Singh, Advocate.

For the respondents: Nemo for respondents No. 1 and 2.
Mr. Rajinder Dogra, Advocate, for respondent No.3.
Mr. B.M. Chauhan, Advocate, for respondent No.4.
Mr. Ashwani K. Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this appeal, the appellant/ owner-cum-driver of Canter No. PB-10-Z-8353, has thrown challenge to the judgment and award dated 21.07.2003, made by the Motor Accident Claims Tribunal Solan, for short "the Tribunal", in MAC Petition No. 83-S/2 of 2002, titled *Shri Vikram alias Vicky versus Shri Joginder Singh alias Pamma and others*, whereby compensation to the tune of Rs.2,12,000/- along with interest @ 9 % per annum, came to be awarded in favour of the claimant. Respondent No.1- owner-cum driver and insurer/New India Assurance Company-respondent No. 4 have been saddled with the liability jointly and severally to the extent of 60% with right of recovery from respondent No.1-appellant herein, hereinafter referred to as "the impugned award.", for short, on the grounds taken in the memo of appeal.

2. It is necessary to give a brief resume of the relevant facts, the womb of which has given birth to the instant appeal.

3. Claimant Vikram *alias* Vicky, being the victim of a vehicular accident, had filed claim petition before the Motor Accidents Claims Tribunal, Solan for the grant of compensation to the tune of Rs.6,50,000/- , as per the break-ups given in the claim petition. It is averred in the claim petition that he was working as cleaner in truck (Canter) No. HR-69-0113, owned by respondent No. 2, which was being driven by respondent No. 3 Naresh Kumar and insured with respondent No. 5-United India Insurance Company, was travelling in the said vehicle as such, on 23.6.2002 from Gamberpul to Delhi, in which vegetables and tomato boxes were loaded. When the said vehicle reached near Bastara crossing on G.T. Road at Madhuban, another vehicle bearing registration No. PB-10Z-8353, which was ahead of them, being driven by Joginder Singh, appellant herein, in a high speed, without giving signal, applied emergency brakes and in that process, the said Canter hit vehicle bearing registration No. HR-69-0113 and claimant sustained injuries resulting in amputation of his left arm and rendered him permanent disabled. He was taken to Arpana Hospital, Madhuban and remained under treatment there till 2.7.2000.

4. Respondents, except respondent No. 2 Mr. Munna Khan, who did not put in appearance before the Tribunal and was proceeded against ex parte, resisted and contested the claim petition by filing separate replies.

5. The Tribunal, on the pleadings of the parties framed the following issues:

(i) *Whether petitioner has sustained the injuries on account of rash and negligent driving by driver as alleged, if so, its effect? ……. OPP*

(ii) Whether the petitioner is entitled for compensation, if so, how much and from whom? …..OPP

(iii) Whether respondent No. 1 was not having valid and effective DL, if so, its effect? …..OPR-4.

(iv) Whether vehicle No. PB-10-Z-8353 was being driven in contravention of terms and conditions of policy? ….OPR-4.

(v) Whether there is misjoinder of respondents No. 3 and 5 as alleged? ….OPR-5.

(vi) Whether respondent No. 3 was not having valid and effective DL as alleged? …..OPR-5.

(vii) Relief.

6. Parties led evidence and also produced documents.

7. The Tribunal, after hearing the learned counsel for the parties and scanning the evidence on record, held that both the drivers of the offending vehicles had failed to take due care and caution and had driven the vehicle rashly and negligently and caused the accident in which claimant sustained injuries and rendered him permanent disabled.

8. Only Joginder Singh driver-cum- owner of offending vehicle bearing registration No.PB-10Z-8353 has questioned the impugned award. The owner, driver and the insurer of vehicle No.HR-69-0113, have not questioned the impugned award on any ground thus, it has attained finality so far as it relates to them.

9. Before I deal with Issues No. 2 and 3, I deem it proper to deal with Issues No. 4 to 6.

10. Respondent No. 4, i.e., New India Assurance Company had to discharge the onus on this issue, has failed to do so. Thus, the findings returned on issue No. 4 are upheld.

11. The onus to discharge issues No. 5 and 6 was on respondent No. 5- United India Insurance Company, has also failed to discharge the same. Thus, the findings returned on these issues are upheld.

12. The Tribunal, while determining Issues No. 2 and 3 held that the claimant is entitled to compensation to the tune of Rs.2,12,000/- and saddled respondent No. 1, i.e., appellant herein and respondent No.4-New India Assurance Company liable to the extent of 60% and owner, driver of offending vehicle bearing registration No.HR-69-0113 and respondent No.5-United India Insurance Company, to the extent of 40%.

13. The only question to be determined is whether the Tribunal has rightly held the insurer-New India Assurance Company entitled to right of recovery? 14. The Tribunal, while determining Issue No. 3 held that owner–cum-driver, i.e., appellant herein was not having a valid and effective driving licence. Admittedly, he was having license to drive light motor vehicle. Copy of driving licence stands exhibited as Ext. RA on the record, which is valid and driver was competent to drive light motor vehicle.

15. Canter's unladen weight is less than 4000kg and gross weight is 10005kg, thus, falls within the definition of "Light Motor Vehicle" as given in Sections 2 (21) and 2 (28) of the Motor Vehicles Act, for short "the Act".

16. This issue was raised before the Supreme Court in case titled ***Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd.*** reported in ***AIR 1999 SC 3181***. It is apt to reproduce paras 10, 11 and 14 of the said judgment herein:

> *"10. Definition of "light motor vehicle" as given in clause (21) of Section 2 of the Act can apply only to a "light goods vehicle" or a "light transport vehicle". A "light motor vehicle" otherwise has to be covered by the definition of "motor vehicle" or "vehicle" as given in clause (28) of Section 2 of the Act. A light motor vehicle cannot always mean a light goods carriage. Light motor vehicle can be non-transport vehicle as well.*
>
> *11. To reiterate, since a vehicle cannot be used as transport vehicle on a public road unless there is a permit issued by the Regional Transport Authority for that purpose, and since in the instant case there is neither a pleading to that effect by any party nor is there any permit on record, the vehicle in question, would remain a light motor vehicle. The respondent also does not say that any permit was granted to the appellant for plying the vehicle as a transport vehicle under Section 66 of the Act. Moreover, on the date of accident, the vehicle was not carrying any goods, and thought it could be said to have been designed to be used as a transport vehicle or goods carrier, it cannot be so held on account of the statutory prohibition contained in Section 66 of the Act.*
>
> *12-13 ....*
>
> *14. Now the vehicle in the present case weighed 5,920 kilograms and the driver had the driving licence to drive a light motor vehicle. It is not that, therefore, that insurance policy covered a transport vehicle which*

meant a goods carriage. The whole case of the insurer has been built on a wrong premise. It is itself the case of the insurer that in the case of a light motor vehicle which is a non-transport vehicle, there was no statutory requirement to have specific authorisation on the licence of the driver under Form 6 under the Rules. It had, therefore, to be held that Jadhav was holding effective valid licence on the date of accident to drive light motor vehicle bearing Registration No. KA-28-567."

17. This Court in **FAO No. 54 of 2012** titled ***Mahesh Kumar and another*** vs**. *Smt. Piaro Devi and others*** decided on 25th July, 2014, held that such type of vehicle is LMV. It is apt to reproduce paras 10,11,14,16,18 and 19 of the said judgment herein:

"10.I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:

"2. .....

(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.

xxx xxx xxx

23. "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.

xxx xxx xxx

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.

xxx xxx xxx

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

11. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

12-13. ....

14. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for

driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

15.My this view is supported by Section 10 of the MV Act, which reads as under:

*"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

15- ....

16. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, which was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stand deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

17. ....

*18. The purpose of mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:*

"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for

necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. .....

21. .....

22. .....

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

19. The Apex Court in another case titled as ***National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,*** *reported in* ***2008 AIR SCW 906,*** *has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:*

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. .....

10. .....

11. .....

12. .....

13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

18. Applying the ratio, the vehicle in question falls within the definition of "Light Motor Vehicle" while keeping in view the "unladen weight", "gross weight" and type of vehicle, given in the Registration Certificate and other documents.

19. Same principles of law have been laid down in FAOs No. 385 of 2007 & 388 of 2007 decided on 14.11.2014, FAOs No. 33 & 55 of 2010, decided on 17.10.2014 and FAO No. 293 of 2006 decided on 4.4.2014.

20. Having said so, the Tribunal has fallen in error in holding that driver was not having a valid and effective driving licence. Accordingly, findings returned on issue No. 3 are set aside and it is held that the driver was having a valid and effective driving lilcence.

21. It was for the insurer to plead and prove that the owner has committed any willful breach which he failed to do so. The owner has not committed any willful breach. The insurer is to be saddled with the liability.

22. The Apex Court in a case titled **National Insurance Co. Ltd.** *versus* **Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** has also laid down principles, how the insurer can avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by

the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

23. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran

Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

24. Thus, the Tribunal has fallen in error in saddling the owner with the liability and granting right of recovery to the insurer. Accordingly, findings to the extent impugned in this appeal, are set aside.

25. As a corollary, the appeal is allowed and the impugned award is modified by providing that the insurer-New India Assurance Company is saddled with the liability to the extent of 60% without right of recovery.

26. The appeal stands accordingly, disposed of alongwith pending applications, if any. Send down the records forthwith.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No. 347 of 2007
a/w FAO No. 407 of 2007
Reserved on: 05.12.2014
Decided on: 19.12.2014

FAO No. 347 of 2007

Kesari Devi ...Appellant.

Versus

Anil Kumar Mastana & others ...Respondents.

.....

FAO No. 407 of 2007

Rajesh Kumar ...Appellant.

Versus

Kesari Devi & others ...Respondents.

Motor Vehicle Act, 1988- Section 149- Owner claimed that he had engaged one 'R' as driver and 'A' on his own had started vehicle and had caused accident- A did not have a valid driving licence at the time of accident- held, that if 'R' was engaged as driver, it was not explained as to how 'A' could have opened the door of the vehicle and could have started the same- no police report was filed before the Tribunal- held, that in these circumstances, Tribunal had rightly held the owner to be liable.

(Para-16 to 18)

FAO No. 347 of 2007

For the appellant: Mr. Suneet Goel, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. Vinod Thakur, Advocate, for respondent No. 2.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.

.....

FAO No. 407 of 2007

For the appellant: Mr. Vinod Thakur, Advocate.
For the respondents: Mr. Suneet Goel, Advocate, for respondent No. 1.
Nemo for respondent No. 2.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Both these appeals are outcome of award, dated 14th June, 2007, made by the Motor Accident Claims Tribunal, Hamirpur, H.P. (hereinafter referred to as "the Tribunal) in MAC Petition No. 81 of 2006, titled as Kesari Devi versus Anil Kumar @ Mastana and others, whereby compensation to the tune of Rs. 1,50,000/- with interest @ 9% per annum from the date of petition till its realization came to be awarded in favour of the claimant-injured and the owner-insured and driver-Anil Kumar came to be saddled with liability jointly and severally (hereinafter referred to as "the impugned award"). Therefore, I deem it proper to dispose of both these appeals by a common judgment.

2. By the medium of **FAO No. 347 of 2007,** the claimant-injured has questioned the impugned award on the ground of adequacy of compensation.

3. The owner-insured, by the medium of **FAO No. 407 of 2007,** has called in question the impugned award on the ground that the Tribunal has fallen in error in saddling him with liability.

4. In order to determine the issue, it would be profitable to give a brief resume of the facts of the case.

Brief facts:

5. The claimant-injured, namely Smt. Kesari Devi, filed a claim petition before the Tribunal for grant of compensation on the ground that on 29th June, 2006, at about 12.45 p.m., she was waiting at Bus Stand Hamirpur for boarding a bus, was hit by a bus, bearing registration No. HP-22-7103, which was being driven by Shri Anil Kumar @ Mastana-respondent No. 1 in the claim petition, rashly and negligently, sustained grievous injuries because her right hand was crushed, FIR No. 236 of 2006 was registered at Police Station Hamirpur, was referred to Regional Hospital, Hamirpur, remained under treatment for two months. Further pleaded that she has suffered 75% permanent disability and the disability certificate, Ext. PW-1/A, was issued by the concerned Doctor.

6. The claimant-injured has claimed compensation to the tune of Rs. 15,50,000/- as compensation including 50,000/- as interim compensation.

7. The insurer, owner-insured and the driver of the offending vehicle resisted the claim petition on the grounds taken in the respective memo of objections.

8. On the pleadings of the parties, following issues came to be framed by the Tribunal:

> *"1. Whether the petitioner had sustained injuries in a motor vehicle accident owing to rash and negligent driving on the part of respondent No. 1 while driving bus No. HP-22-7103?*
> *OPP*
>
> *2. In case issue No. 1 is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom?*
> *OPP*
>
> *3. Whether respondent No. 1 was not holding a valid and effective driving licence at the time of the accident and if so, its effect? OPR-3*

4. Whether offending bus was being plied without a valid Route Permit and Registration & Fitness Certificates and if so, its effect? OPR-3

5. Relief."

9. The claimant-injured has examined Shri Sanjay Pathania, Record Keeper, Regional Hospital, Hamirpur as PW-1, Dr. Dinesh Thakur as PW-2, HC Prakash Chand as PW-3 and has herself stepped into the witness box as PW-4. The driver-Anil Kumer has himself stepped into the witness box as RW-1. The owner-insured as examined Shri Ramesh Chand as RW-3 and has himself stepped into the witness box as RW-2. The insurer has not led any evidence in support of its case.

Issue No. 1:

10. The Tribunal, after scanning the evidence, held that the claimant-injured has proved that the accident was outcome of rash and negligent driving of Shri Anil Kumar while driving the bus, bearing registration No. HP-22-7103. Accordingly, issue No. 1 came to be decided in favour of the claimant-injured. The claimant-injured, the owner-insured and the insurer have not questioned the findings returned by the Tribunal on issue No. 1, are accordingly upheld.

11. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 and 4.

Issues No. 3 and 4:

12. The insurer had to prove both these issues, has not led any evidence. The owner-insured and the alleged driver, namely Shri Ramesh Chand, have admitted that Shri Anil Kumar-respondent No. 1 in the claim petition had driven the vehicle at the relevant point of time, caused the accident and he was not holding driving licence.

13. It is also positive case of the owner-insured that he had not engaged Shri Anil Kumar as a driver, but has engaged one Shri Ramesh Chand, who was in possession of the vehicle alongwith the keys and Shri Anil Kumar had unauthorizedly driven the vehicle. Shri Anil Kumar has neither pleaded nor proved that he was having the driving licence, rather he has denied that he had driven the vehicle at the time of accident. Thus, the Tribunal has rightly recorded the findings on issue No. 3 to the effect that driver-Anil Kumar was not having valid and effective driving licence. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

14. The insurer has failed to lead evidence to prove that the offending vehicle was being driven without valid documents, i.e. route permit, registration and fitness certificates and rightly came to be decided against the insurer. Having said so, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 2:

15. The Tribunal has discharged the insurer from liability and directed the owner-insured and driver-Anil Kumar to satisfy the award.

16. The owner-insured has questioned the said finding on the ground that he had engaged Shri Ramesh Chand as driver and Shri Anil Kumar, on his own, has started the vehicle and caused the accident, without his permission or without the consent of Shri Ramesh Chand. Further, it is pleaded that they have also lodged a police report.

17. The Tribunal has discussed the said issue in paras 14 and 15 of the impugned award, is well reasoned and needs no interference. I deem it proper to record herein that if Shri Ramesh Chand was the driver; was in possession of the keys and were with him at the relevant point of time, then how

Shri Anil Kumar opened the window/door of the vehicle and entered into the same, is an important factor which goes against the owner-insured and the driver. Thus, adverse inference is to be drawn.

18. The owner-insured and Shri Ramesh Chand, while appearing in the witness box as RW-2 and RW-3, have stated that they have lodged a police report. There is no proof on the file to the effect or to show as to what was the outcome of the police report and the investigation conducted. Even the owner-insured has not examined any witness from the police department in order to substantiate his plea.

19. Having said so, the Tribunal has rightly recorded the findings and has rightly saddled the owner-insured and driver-Anil Kumar with liability.

20. The claimant-injured has also questioned the findings returned on issue No. 2 so far it relates to quantum of compensation. I have gone through the claim petition. The claimant-injured has not given the break-ups how she has claimed compensation to the tune of Rs.15,00,000/-. She has also not placed on record the medical reports or bills to substantiate her claim. Even, there is no evidence on the file to prove her income and how it has affected her earning capacity.

21. It appears that the Tribunal, after making guess work, has rightly awarded Rs.50,000/- under the head "pain and sufferings" and Rs.1,00,000/- under the head "permanent disability".

22. May be the amount is meager, but keeping in view the fact that the owner-insured also belongs to rural area and appears to be poor read with the fact that the driver-Anil Kumar has passed away during the pendency of the appeal, I am of the considered view that the amount awarded is just and appropriate.

23. Having said so, the findings returned by the Tribunal on issue No. 2 are upheld.

24. Having glance of the above discussions, the impugned award needs to be upheld, is accordingly upheld and both the appeals are dismissed.

25. The driver-Anil Kumar has passed away during the pendency of the appeal. The insurer has deposited Rs.25,000/- as interim compensation. Thus, I direct the owner-insured to deposit Rs. 1,25,000/- with interest @ 9% per annum from the date of the petition, i.e. 9th October, 2006, till its deposition, before the Registry within twelve weeks. On deposition of the amount, the same be released in favour of the claimant-injured after proper identification.

26. Send down the records after placing copy of the judgment on each of the files.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company ...Appellant.
Versus
Anil Kumar & others ...Respondents.

FAO No. 155 of 2007
Decided on: 19.12.2014

Motor Vehicle Act, 1988- Section 149- Passengers carrying capacity of the vehicle was '4+1' which means that risk of 4 passengers and one

driver was covered- deceased was travelling in the vehicle at the time of accident- insurer had not proved the terms and conditions of the policy- it cannot be said to be an 'Act Policy'- held, that the insurer was rightly held liable. (Para-12 and 13)

For the appellant: Mr. Lalit K. Sharma, Advocate.
For the respondents: Mr. K.S. Banyal, Advocate, for respondents No. 1 to 4.
Mr. Bheem Raj, Advocate, vice Mr. Lalit Sehgal, Advocate, for respondents No. 5 to 10.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the award, dated 24th May, 2006, made by the Motor Accident Claims Tribunal (II), Shimla, H.P. (for short "the Tribunal") in M.A.C. No. 120-R/2 of 2004/01, titled as Anil Kumar & others versus Smt. Sumitra Devi & others, whereby compensation to the tune of Rs. 4,90,000/- with interest @ 7.5% per annum from the date of institution of the claim petition till its realization came to be awarded in favour of the claimants and the appellant-insurer came to be saddled with liability (for short "the impugned award"), on the grounds taken in the memo of appeal.

2. The claimants and the driver-cum-owner/insured have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Learned counsel for the appellant-insurer contested the impugned award on the ground that the insurance policy was 'Act Policy' and the appellant-insurer was not to be saddled with liability.

4. In order to determine the issue involved, I deem it proper to give a brief resume of the facts of the case:

Brief facts:

5. The claimants had claimed compensation to the tune of Rs. 20,00,000/-, as per the break-ups given in the claim petition, on the ground that they became the victims of a motor vehicular accident, which was caused by the driver, namely Shri Jawahar Lal Negi, while driving the Gypsy, bearing registration No. HP-10-0004, rashly and negligently on 31st March, 2001, at Seri-Nalah near Summerkot in Tehsil Rohru.

6. The respondents resisted the claim petition on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the Tribunal on 15th March, 2002:

> *"1. Whether the driver Jawahar Lal Negi was driving the Gypsy bearing No. HP-10-0004 at Serinalah, near Summerkot in rash and negligent manner, resulting in death of Sh. Yoginder Prasad on 31.3.2001, as alleged? OPP*
>
> *2. If issue No. 1 is proved, whether the petitioners are entitled for compensation, if so from whom? OPP*
>
> *3. Whether the vehicle in question was being driven in violation of conditions and provisions of the Insurance policy, as alleged? OPR-7*

4. Whether the vehicle in question at the time of accident was carrying unauthorised passengers in violation of law, route permit and insurance policy, as alleged? OPR-7

5. Whether the vehicle was being driven by an unauthorized person who did not have valid and effective driving licence, as alleged? OPR-7

6. Relief."

8. The claimants have led evidence in support of their case. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation to the tune of Rs. 4,90,000/- with interest @ 7.5% per annum from the date of institution of the claim petition till its realization in favour of the claimants and saddled the appellant-insurer with liability.

Issues No. 1 and 5:

9. Learned counsel for the appellant-insurer has not questioned the findings returned by the Tribunal on issues No. 1 and 5. However, I have gone through the evidence and am of the considered view that the claimants have proved that the driver of the offending vehicle had driven the vehicle rashly and negligently and caused the accident. The appellant-insurer has failed to prove that the driver of the offending vehicle was not having valid and effective driving licence. Thus, the findings recorded by the Tribunal on issues No. 1 and 5 are upheld.

10. Issues No. 2 to 4 are inter-dependent. Therefore, I deem it proper to club these issues.

Issues No. 2 to 4:

11. It was for the appellant-insurer to plead and prove that the owner has committed any willful breach, has failed to do so. Thus, the findings returned by the Tribunal on issues No. 2 and 3 need no interference and are, accordingly, upheld.

12. Learned counsel for the appellant-insurer argued that the findings returned by the Tribunal on issue No. 4 are not correct. The argument, though attractive, is devoid of any force for the simple reason that the perusal of the insurance policy, Ext. R-1, does disclose that the offending vehicle was insured with the appellant-insurer at the time of accident, in terms of which the 'passengers carrying capacity' of the offending vehicle was '4+1', meaning thereby, risk of four passengers and one driver was covered. Thus, the risk of the deceased was covered in terms of the insurance policy, Ext. R-1.

13. It was for the insurer to prove the terms and conditions contained in the insurance policy, has not led any evidence, thus, cannot be said to be an 'Act Policy'. The Tribunal has rightly returned the findings in para 15 of the impugned award, need no interference.

14. Having said so, I am of the considered view that the Tribunal has not fallen in error in saddling the appellant-insurer with liability.

15. Viewed thus, the appeal deserves to be dismissed. Accordingly, the appeal is dismissed and the impugned award is upheld.

16. 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.

17. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd. .....Appellant.
Versus
Smt. Leela Devi and others ...Respondents

FAO (MVA) No. 109 of 2007.
Date of decision: 19th December, 2014.

Motor Vehicle Act, 1988- Section 166- Deceased was returning to his home in a Tractor- he requested the driver to stop the tractor- driver stopped the tractor on which the deceased got down the tractor- Driver started the tractor but could not control it- tractor rolled down- deceased was crushed and succumbed to the injury- insurer had failed to prove that driver did not have a valid driving licence – insurer had not pleaded and proved that owner had committed willful breach of the terms and conditions of the policy- held that deceased was not in the tractor and was present on the road side, and the insurance company was rightly held liable to pay compensation. (Para-10 to 15)

For the appellant: Mr. G.D. Sharma, Advocate.
For the respondents: Mr.Dinesh Kumar, Advocate, for respondents No. 1 to 3.
Mr. Vinod Gupta, Advocate, for respondents No. 4 and 5.
Nemo for respondents No. 6 to 11.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Insurer-appellant has questioned the judgment and award dated 21.12.2005, made by the Motor Accident Claims Tribunal-II, Solan, for short "the Tribunal" in MAC Petition No. 4-S/2 of 2004, titled *Smt.Leela Devi and others versus Group Finance Unit and others,* whereby compensation to the tune of Rs.4,20,167/- came to be awarded in favour of the claimants and against the insurer-appellant herein, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. Claimants had invoked the jurisdiction of the Motor Accident Claims Tribunal for the grant of compensation to the tune of Rs.10 lacs, as per break-ups given in the claim petition.

3. Precisely, the case of the claimants was that on 21.5.1998, deceased Ram Swaroop was coming back to his home in the offending vehicle, i.e., tractor bearing registration No. 12191. He requested the driver of the tractor, namely, Surjeet Singh, to stop the tractor enabling him to answer the call of nature. He stopped the vehicle and the deceased, after alighting while covering a little distance on foot, on the side of the road, the driver of the tractor suddenly started driving the tractor rashly and negligently, could not control the tractor and it rolled down. Consequently, deceased was crushed and succumbed to the injuries. The details of the accident have been given in para 20 of the claim petition.

4. Respondents resisted and contested the claim petition by filing separate replies.

5. On the pleadings of the parties, following issues came to be framed by the Tribunal:

"(i) *Whether on 21.5.1998 at 1 AM at village Lohara, the driver of the Tractor No.12191 was driving the Tractor rashly and negligently and as such caused the death of deceased Ram Swaroop? OPP.*

(ii) If issue No. 1 is proved, to what amount of compensation, the petitioners are entitled to and from whom? OPP.

(iii) Whether the driver of the tractor No. 12191 did not have effective and valid driving licence at the time of accident? OPR-7.

(iv) Whether the petition is not maintainable? OPR

(v) Whether the tractor was over-loaded and was being driven in breach of standard insurance policy? OPR-7.

(vi) Whether the deceased was the owner of the tractor, if so to what effect? OPR-7.

(vii) Relief.

6. The claimants examined six witnesses, namely, Smt. Leela Devi, (PW-1), Krishan Kumar (PW-2), Lachhi Ram (PW-3), Mohan Lal (PW-4), Dr. Niraj Mittal (PW-5) and Tulsi Ram (PW6).

7. Respondent No. 7 examined only one witness, namely, Nokh Ram, as RW-7.

8. The Tribunal, after scanning the evidence, held that the claimants have proved that the driver of the offending tractor has driven the offending vehicle rashly and negligently and returned the findings in favour of the claimants. These findings are not in dispute; accordingly the findings returned are upheld.

9. Before I deal with Issue No.2, I deem it proper to deal with Issues No. 3 to 6.

10. The insurer had to prove issue No. 3, has failed to lead any evidence and even the learned counsel for the appellant has not questioned the findings returned on this issue. However, I have gone through the record. Insurer has failed to prove that the driver of the offending tractor was not having any valid and effective driving license. Thus, the findings returned on this issue are upheld.

11. **Issue No. 4**. It was for the insurer to prove that the claim petition was not maintainable. However, claimants are victims of a vehicular accident and claim petition, in terms of Section 166 of the Motor Vehicles Act was maintainable. Thus, the findings returned on this issue are accordingly upheld.

12. **Issue No.5.** Respondent No. 7 has not led any evidence that the tractor was over-loaded. There is not even a whisper to this effect. Accordingly, findings returned by the Tribunal on issue No. 5, merit to be upheld. It is also worthwhile to mention here that the learned counsel for the appellant has not questioned the findings returned on issue No. 5, accordingly, the same are upheld.

13. **Issue No. 6.** Admittedly, deceased was travelling in the offending tractor. He came down and in the meantime, driver of the offending tractor lost control over the tractor. The tractor rolled down and in the process, deceased was crushed. Respondents have not led any evidence to prove this issue. Accordingly, findings returned on this issue are upheld.

14. Now adverting to issue No. 2. The adequacy of compensation is not in dispute for the simple reason that neither the claimants nor owner, driver and insurer have questioned the adequacy of compensation. I have gone through the impugned award. It is just and appropriate and cannot be said to be inadequate or meager in any way. The only question is, who is to be saddled with the liability.

15. It was for the insurer to plead and prove that the owner has committed willful breach and driver was not having a valid and effective driving licence. The insurer has not led any evidence and has failed to prove any breach and even has not placed on record the copy of insurance policy though, it is admitted that the vehicle was insured. The deceased was not in the tractor at the relevant point of time. He was on the road side when he became victim of the said accident, thus was a third party. The claimants being the victims of the accident, have lost source of dependency. The Tribunal has discussed the entire evidence and the insurer came to be rightly saddled with the liability.

16. Accordingly, the appeal merits to be dismissed and is accordingly dismissed. Registry is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payee's cheque account, after proper identification.

17. The appeal stands disposed of, as indicated hereinabove, alongwith pending applications. Send down the record, forthwith, after placing a copy of this judgment.

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

Sagar Chaudhary .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 403 of 2011
Reserved on: December 18, 2014.
Decided on: December 19, 2014.

N.D.P.S. Act, 1985- Section 50- Accused was found in possession of 7 kg of charas concealed under the clothes- an option was given to him whether he wanted to be searched by police on the spot, magistrate or gazetted officer prior to the search- held, that accused has to be given an option to be searched before gazetted officer or magistrate- option given to the accused to be searched before the Magistrate, gazetted officer or the police is against the letter and spirit of Section 50 of the ND & PS Act- the entire trial is vitiated due to non-compliance of the provisions of Section 50- accused acquitted. (Para-16)

Cases referred:
Man Bahadur vrs. State of Himachal Pradesh, (2008) 16 SCC 398

Ashok Kumar Sharma vrs. State of Rajasthan, (2013) 26 SCC 67

For the appellant: Mr. B.C.Verma, Advocate.
For the respondent: Mr. P.M.Negi, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 11.7.2011, rendered by the learned Special Judge, Kullu, H.P. in Sessions Trial No. 31 of 2010, whereby the appellant-accused (hereinafter referred to as accused) who was charged with and tried for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act), has been convicted and sentenced to undergo rigorous imprisonment for ten years and to pay fine of rupees one lac and in default of payment of fine he was ordered to suffer further imprisonment for six months.

2. The case of the prosecution, in a nut shell, is that on 29.3.2010, the police party headed by PW-9 Insp. Prem Singh comprising of HC Narender, PW-7 Const. Rakesh Lal and PW-6 S.I. Rajinder Kumar were on patrol duty for detection of crime relating to forests and narcotics. The police party was present at *Hathithan* near Bhuntar at about 5:15 AM. They noticed the accused coming from Manikaran side. The accused on seeing the police tried to escape. He was nabbed. The name and particulars of the accused were ascertained. The Investigating Officer had suspicion about possessing of some contraband by the accused. He expressed his intention to conduct search of the accused. The accused was apprised about his right to be searched either before the police on the spot, or Magistrate or Gazetted Officer. The accused consented to be searched by the police vide memo Ext. PW-6/A. Thereafter, the I.O. gave his personal search vide memo Ext. PW-6/B. Nothing incriminating was found. The I.O conducted the search of the accused and the accused was found bearing vest underneath shirt and was found possessing black coloured substance in the shape of rectangle and in the form of chapatis. After removing the cello tape, it was found to be charas. It weighed 7 kgs. The I.O. sealed the contraband with 10 seals of impression 'B'. NCB-1 form in triplicate was filled in. The impression of seal 'B' was drawn on Ext. PW-6/D. The seal was handed over to S.I. Rajinder Kumar. The case property was taken into possession vide memo Ext. PW-6/C. *Rukka* Ext. PW-9/A was prepared and sent to the Police Station Kullu through Const. Rakesh Lal. SHO registered the FIR vide Ext. PW-9/D. The I.O. prepared the site plan Ext. PW-9/B. The I.O. also prepared special report Ext PW-1/A. It was sent to Dy. S.P., Police Station SV and ACB, Kullu. The case property alongwith the impression of seal 'B', NCB forms, copies of FIR and seizure memo were sent to FSL, Junga vide RC Ext. PW-3/A through PW-4 Const. Paras Ram. He deposited the case property alongwith requisite documents at FSL, Junga. Report of the FSL is Ext. PW-8/A. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 9 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C. The accused has denied having committed any offence. According to him, nothing was recovered from him and he was falsely implicated. The learned trial Court convicted the accused, as noticed hereinabove.

4. Mr. B.C.Verma, Advocate, appearing on behalf of the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. P.M.Negi, Dy. AG, has supported the judgment of the learned trial Court dated 11.7.2011.

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

6. PW-1, SI Kanshi Ram has proved the copy of special report vide Ext. PW-1/A.

7. PW-2 Const. Surender Kumar, is a formal witness.

8. PW-3 HC Hans Raj, deposed that on 29.3.2010, he was working as MHC, Police Station SV and ACB, Kullu. Inspector Prem Singh deposited one sealed parcel which was sealed with ten seals of seal 'B' alongwith NCB form in triplicate and specimen seal impression of seal 'B' with him. He entered all these articles in the relevant register at Sr. No. 23. On 30.3.2011 he handed over the case property to HHC Paras Ram with a direction to deposit the same at FSL, Junga. The case property was given to HHC Paras Ram vide RC No. 35/2010 vide Ext. PW-3/A. In his cross-examination he admitted that in respect of the entries at Sr. No. 23, in register No. 19, there was a cutting. Voluntarily deposed that the cuttings were initialed by him.

9. PW-4 Const. Paras Ram deposed that on 30.3.2010, parcel Ext. P-1 was given to him by MHC Hans Raj (PW-3) alongwith NCB form in triplicate, sample seal and other relevant documents. He deposited the case property at FSL Junga vide receipt Ext. PW-3/B.

10. PW-5 DSP Amar Nath is a formal witness.

11. PW-6 SI Rajinder Kumar testified that on 29.3.2010, he along with the police party started from Kullu in an official vehicle at about 3:30 AM. At about 4:15 AM, the police party reached at a place just ahead to Jia bridge. The place was secluded. The police had put a barrier/Naka. At about 5:15 AM, the police party noticed a person coming from the Manikaran side. On seeing the police party, the said person tried to flee away. His activities raised a suspicion. He alongwith HC Narender Kumar nabbed that person. The I.O. Inspector Prem Singh inquired about the name and address of the said person. The accused was apprised of his right to be searched either before the police or some Gazetted Officer or some competent Magistrate. The accused opted to be searched by the police present on the spot. The I.O. has also given his personal search. The I.O. searched the accused after frisking and found something concealed under the clothes of the accused. The I.O. found that the accused has kept something concealed under the *dupatta* type vest cloth. The clothes were removed. It was found containing charas. The charas weighed 7 kgs. The recovered charas was put alongwith the clothes and cello tape in cloth parcel, which was sealed with ten seals of impression 'B'. The case property was taken into possession vide seizure memo Ext. PW-6/C. NCB forms in triplicate were also filled in and handed over to him by the I.O. In his cross-examination, he admitted that they have checked 3-4 vehicles before arrival of the accused. The accused noticed them from a distance of about 15 feet. The accused could only run for about 4-5 paces when they nabbed him. The distance between Bhunter bridge and Jia bridge is approximately five hundred meters. He also admitted that there are number of hotels and *dhabas* situated in and around Jia bridge. He also admitted that in and around Jia bridge, there is *abadi (*habitation*)*. Voluntarily stated that the place where the police had put *Naka* was secluded one.

12. PW-7 Const. Rakesh Lal also deposed the manner in which the accused was apprehended, the search and sampling process was completed on the spot. He also admitted in his cross-examination that from Bhunter bridge up to Jia bridge, there were hotels, restaurants and shops on both sides of the road. Voluntarily deposed that the place where the police party had laid barrier/naka was secluded one. The place where the police had laid barrier/naka was one kilometer from Jia bridge towards Manikaran side.

13. PW-8 Dr. Kapil Sharma, has proved the FSL report Ext. PW-8/A.

14. PW-9 Insp. Prem Singh deposed the manner in which the accused was apprehended at 5:15 AM. He apprised the accused about the suspicion and also apprised that the police wants to search him and it was his right to give his search to the police present on the spot or to any Magistrate or to any Gazetted

Officer. The accused consented to be personally searched by the police officer. The option/consent memo was prepared vide Ext. PW-6/A. The search and sampling process was completed on the spot. The Rukka was prepared vide memo Ext. PW-9/A. It was sent to the Police Station SV and ACB Kullu through Const. Rakesh Lal. He prepared the spot map Ext. PW-9/B. He also prepared the special report Ext. PW-1/A. In his cross-examination, he also admitted that there was habitation near Bhunter bridge. There were hotels and other houses on both sides of the road. The place where the barrier/naka was put up was just behind the village *Hathithan*. He also admitted that the road on which they had laid the *Naka* remains busy and vehicular traffic plies on the same. According to him, only two vehicles passed through the spot.

15. The case of the prosecution, precisely, is that the accused was apprehended on 29.3.2010. Charas was recovered from the person of the accused. It weighed 7 kgs. According to PW-6 Rajinder Kumar, the option was given to the accused regarding his search either before the police, some Gazetted Officer or some competent Magistrate. PW-7 Const. Rakesh Lal also deposed that the I.O. had apprised the accused about his legal right to opt regarding his search and accused has consented to be searched by the Police Officer. PW-9 Insp. Prem Singh also deposed that he apprised the accused about the suspicion and also apprised that the police wanted to search him and it was his right to give his search to the police present on the spot or to any Magistrate or to any Gazetted Officer.

16. The requirement of Section 50 of the Act is that if the contraband is recovered from the person, the accused has to be given an option either to be searched before the nearest Gazetted Officer or the nearest Magistrate. However, as per Ext. PW-6/A consent memo, the option which was given to the accused was to be searched before the Magistrate or Gazetted Officer or the I.O. The consent memo Ext. PW-6/A is against the letter and spirit of Section 50 of the ND & PS Act. The option was to be restricted only to the Gazetted Officer or the Magistrate and not to the Police Officer concerned. Thus, the entire trial is vitiated for non-compliance with mandatory provisions of Section 50 of the Act. Moreover, we have also seen in the present case that the accused was apprehended on 29.3.2010 and the area where the accused was apprehended, there were number of restaurants, hotels, shops and houses and despite that no independent witness was associated during the investigation.

17. Their lordships of the Hon'ble Supreme Court in the case of ***Man Bahadur vrs. State of Himachal Pradesh,*** reported in ***(2008) 16 SCC 398,*** have held that when the I.O. only giving option to appellant to be searched by the I.O. himself or in presence of Magistrate or Gazetted Officer, Section 50 was not substantially complied with. Their lordships have held as under:

> "(5) In this case it is accepted at the Bar that the search memo or any other document do not show that the appellant was made aware of his right to be searched before a gazetted officer or a Magistrate.
>
> (6) From the deposition of P.W.10-I.O.P.P. Pandoh, it appears that he had merely given an option to the appellant to be searched either by himself or in presence of a Magistrate or a gazetted Officer.
>
> (7) No evidence has been adduced to show that the appellant was communicated of his right either to be searched in presence of a Magistrate or a gazetted officer on the one hand and by an empowered officer on the other.
>
> (8) In the instant case, there has been even no substantial compliance of Section 50 of the N.D.P.S. Act.
>
> (9) For the reasons aforementioned, the impugned judgment of conviction and sentence cannot be upheld. It is set aside accordingly. The appeal is allowed."

18. Their lordships of the Hon'ble Supreme Court in the case of ***Ashok Kumar Sharma vrs. State of Rajasthan,*** reported in ***(2013) 26 SCC***

67, have held that the empowered officer is legally obliged to inform suspect/accused of his right under Section 50 to be searched before a Gazetted Officer or a Magistrate and it is only if suspect/accused does not choose to exercise his said right, can empowered officer conduct search of person of suspect/accused himself. Their lordships have further held that Section 50 of the Act is mandatory and non-compliance with said mandatory procedure vitiates entire proceedings initiated against the accused and entitles him to acquittal.

19. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 11.7.2011, rendered by the Special Judge, Kullu, H.P., in Sessions Trial No. 31 of 2010, is set aside. Accused is acquitted of the charges framed against him. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.

FAO No. 173 of 2007 a/w
FAOs No. 174 & 175 of 2007
Decided on: 19.12.2014

FAO No. 173 of 2007

United India Insurance Company Ltd. ...Appellant.
Versus
Smt. Salima Devi & others ...Respondents.

.....

FAO No. 174 of 2007

United India Insurance Company Ltd. ...Appellant.
Versus
Smt. Urmila Devi & others ...Respondents.

.....

FAO No. 175 of 2007

United India Insurance Company Ltd. ...Appellant.
Versus
Smt. Ram Rakhi & others ...Respondents.

Motor Vehicle Act, 1988- Section 166- High Court had decided one of appeal bearing number FAO No. 278 of 2007, titled as United India Insurance Company Ltd. versus Shri Tulsi Ram and others, on 31.10.2014 in which the insurer was saddled with liability- the insurer had not questioned the same and the order had attained the finality- held that the insurer was liable to pay the compensation in view of the earlier judgment. (Para-7)

For the appellant: Mr. Ashwani K. Sharma, Advocate.

For the respondents: Mr. Jagdish Thakur, Advocate, for respondents No. 1 to 5 in FAO No. 173 of 2007, for respondents No. 1 to 4 in FAO No. 174 of 2007 and for respondents No. 1 to 6 in FAO No. 175 of 2007.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

These appeals are outcome of a motor vehicular accident, which was caused by the driver, namely Shri Khushi Ram Sharma, while driving bus, bearing registration No. HP-22-5785, on 25th November, 2005, near Village Amb (Pathiar) in District Kangra, rashly and negligently. Thus, I deem it proper to dispose of all these appeals by this common judgment.

2. **FAO No. 173 of 2007** is directed against the award, dated 17th February, 2007, made by the Motor Accident Claims Tribunal, Hamirpur (for short "the Tribunal") in MAC No. 09 of 2006, titled as Salima Devi & others versus Anju Thakur & others, whereby compensation to the tune of Rs. 5,76,000/- with interest @ 9% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and the appellant-insurer came to be saddled with liability (for short "the impugned award-I"), on the grounds taken in the memo of appeal.

3. By the medium of **FAO No. 174 of 2007,** the appellant-insurer has questioned the award, dated 17th February, 2007, made by the Tribunal in MAC No. 11 of 2006, titled as Urmila Devi & others versus Anju Thakur & others, whereby compensation to the tune of Rs. 3,16,800/- with interest @ 9% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and the appellant-insurer came to be saddled with liability (for short "the impugned award-II"), on the grounds taken in the memo of appeal.

4. **FAO No. 175 of 2007** is directed against the award, dated 17th February, 2007, made by the Tribunal in MAC No. 04 of 2006, titled as Smt. Ram Rakhi & others versus Anju Thakur & others, whereby compensation to the tune of Rs.3,03,700/- with interest @ 9% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and the appellant-insurer came to be saddled with liability (for short "the impugned award-III"), on the grounds taken in the memo of appeal.

5. The claimants, the driver and the owner-insured have not questioned the impugned awards on any count, thus, have attained finality so far it relate to them.

6. The appellant-insurer has questioned the impugned awards on the grounds that the Tribunal has wrongly saddled the appellant-insurer with liability.

7. Learned counsel for the respondents stated at the Bar that this Court has already determined one appeal, which is also outcome of the same accident, being **FAO No. 278 of 2007,** titled as **United India Insurance Company Ltd. versus Shri Tulsi Ram and others,** decided on 31.10.2014, in terms of which the insurer has been saddled with liability, the insurer has not questioned the same, thus, has attained finality.

8. I have gone through the judgment (supra) and the findings returned, have not been questioned by the insurer. Thus, the findings returned by the Tribunal in all these awards are to be upheld in view of the judgment (supra).

9. Perused the entire record. The Tribunal has rightly recorded the findings on all issues in view of the judgment (supra), need no interference.

10. At this stage, learned counsel for the appellant(s)-insurer stated at the Bar that the compensation awarded in all the cases is excessive.

11. I have examined the averments made in all the claim petitions and am of the considered view that the Tribunal has rightly assessed the compensation, which is just and proper, cannot be said to be excessive in any way.

12. Having said so, the argument of the learned counsel for the appellant(s) is not tenable.

13. Viewed thus, all the appeals deserve dismissal, are accordingly dismissed and the impugned awards are upheld. The judgment (supra) shall form part of this judgment also.

14. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the respective impugned awards after proper identification.

15. Send down the record after placing copy of the judgment on Tribunal's file and on each of the appeals.

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

Maulana Mumtaz Ahmed Quasmi .....Appellant.

Versus

Himachal Pradesh Wakf Board .....Respondent.

RFA No. 484 of 2011-C.
Reserved on: August 25, 2014.
Decided on: September 10, 2014.

Code of Civil Procedure, 1908- Section 11- Plaintiff filed a civil suit for permanent prohibitory injunction and recovery of use and occupation charges- an application under Order 7 Rule 11 of CPC was moved by the defendant- application was allowed by the Tribunal constituted under the Wakf Act- an appeal was preferred by plaintiff which was allowed and it was held that recovery of possession use and occupation charges is a dispute relating to the Wakf and Tribunal had jurisdiction- held, that in view of adjudication of the application filed by the defendant – question whether the Wakf Tribunal had jurisdiction or not cannot be raised subsequently in the suit. (Para-7 and 8)

Wakf Act, 1995- Section 7- Defendant was removed by Himachal Pradesh Wakf Board from the post of Imam of the mosque - he was caught red handed taking bribe from the Muslim community for sending them to Haz- he was in possession of the residential accommodation free of cost- he was using two storeyed building attached to the mosque as guest house- he was asked to vacate the premises but he refused to do so- held, that defendant had not assailed his termination order as Imam of the mosque- status of the defendant after termination was of a mere tress passer- he had no vested right to reside in the accommodation after his removal as Imam- therefore, defendant was liable to vacate the premises and to pay use and occupation charges. (Para-14)

For the appellant: Mr. Dushyant Dadwal, Advocate.
For the respondent: Mr. B.S.Attri, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular first appeal is instituted against the judgment dated 27.8.2011 of the learned District Judge (Wakf Tribunal), Shimla, H.P., rendered in Civil Suit No. 7-S/1 of 2008.

2. Key facts, necessary for the adjudication of this first appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff for the convenience sake) has filed suit for possession, permanent injunction and recovery of use and occupation charges against the appellant-defendant (hereinafter referred to as the defendant for the convenience sake). The defendant had been working as Honorary Imam of mosque at Boileauganj, as per

letter dated 31.7.2003, issued by the Chief Executive Officer, of the then Punjab Wakf Board. In the year 2005, the H.P. Wakf Board had been constituted. All rights, title and interests of wakf property situated in H.P. stood vested in the plaintiff. On 29.1.2006, vide resolution No. 4/2006, the H.P. Wakf Board had removed the defendant from the post of Honorary Imam. On representation, the defendant was reinstated. However, in December, 2006, T.V. Channel IBN-7, in its coverage, had caught the defendant red handed taking bribe from the members of the muslim community for sending them to Haz. The defendant was the Chairman of the Haz Committee. The plaintiff on 14.2.2007 had removed the defendant from the service of Honorary Imam. The defendant was in possession of residential accommodation free of cost. There was two storeyed building attached to the mosque, which was used as guest house by the defendant. The defendant had also started running a school of Muhammadan studies in the mosque without the permission from the plaintiff. He was asked to vacate the premises. He has refused to do so. The mosque and the accommodation attached thereto was situated in prime locality of Boileauganj and in any case could fetch rent of Rs. 600/- per day.

3. The defendant resisted the suit. According to him, the Muslim Wakf committee had appointed him as Imam of the mosque. The accommodation under the occupation of the defendant stood permanently allotted to him. He has denied having been removed as Imam by the H.P. Wakf Board. The defendant has also denied the charges of bribe. He has not been provided reasonable opportunity before removing him on 14.2.2007. He has started school of Muhammadan studies in the mosque under Shariat. He was not liable to pay use and occupation charges at the rate of Rs. 600/- per day.

4. The suit of the plaintiff was decreed. The learned District Judge, Shimla (Wakf Tribunal) held the plaintiff entitled to the possession of residential accommodation of Imam under the occupation of defendant in mosque at Boileauganj. The plaintiff was also held entitled to possession of guest house of the mosque alongwith goods lying therein. A permanent injunction was issued against the defendant restraining him from running school of Muhammadan studies in the mosque at Boileauganj and the accommodation attached thereto. The plaintiff was also held entitled to use and occupation charges at the rate of Rs. 600/- per day from the date of institution with interest at the rate of 9% per annum till payment and vacation. Hence, the present regular first appeal.

5. Mr. Dushyant Dadwal, Advocate, appearing for the defendant has vehemently argued that the Wakf Tribunal has no jurisdiction to adjudicate upon the matter. He has also argued that the learned District Judge (Wakf Tribunal), Shimla has not correctly appreciated the evidence led by the parties. On the other hand, Mr. B.S.Attri, Advocate, has supported the judgment dated 27.8.2011, rendered by the District Judge Shimla (Wakf Tribunal).

6. I have heard the learned Advocates for both the sides at length.

7. The defendant, during the course of the pendency of the suit, has moved an application on 20.8.2007 under Order VII Rule 11 read with Section 151 CPC. According to him, the Act was not applicable to the suit land of the plaintiff. The application was resisted by the plaintiff. The learned Tribunal vide order dated 15.1.2008, allowed the application preferred by the defendant. The suit of the plaintiff was ordered to be returned for institution before the Court of competent jurisdiction. The plaintiff filed an appeal against the order dated 15.1.2008 by way of FAO No. 156 of 2008, in this Court. FAO No. 156 of 2008 was allowed by this Court, vide judgment dated 22.5.2008. The operative portion of the judgment reads as under:

> " The petition is to prevent the misuse and also recovery of the wakf property. Admittedly property in question is a wakf property and, therefore, the administration of the same has to be a dispute under the

Act. The Board is enjoined with a duty to protect and preserve the wakf property and also take action against the erring officials. The Tribunal having all powers of Civil Court can determine all rival contentions. Any interpretation to the contrary would render the provisions of the Act, empowering the Board to protect and preserve the property to be superfluous and redundant. The Act specifically oust the jurisdiction of the Civil Court in respect of any dispute, question or other matter relating to wakf or wakf property. Thus, no other interpretation can be given to the expression 'any dispute' under 'the Act'. The dispute for protection and preservation of the property is certainly a dispute falling under the Act.

In my view, the order passed by the Tribunal is unsustainable in law. The recovery of possession and use and occupation charges is definitely a dispute relating to the wakf under the Act. Simply because an Imam inducted into the wakf property, ceases to be one, it cannot be said that it is a dispute pertaining to the said property would be a dispute against a third person having nothing to do with the wakf. (Subhan Shah through Lrs. Ramjan Khan and others v. M.P. Wakf Board and others (AIR 1997 Madhya Pradesh 8)."

8. Thus, it is evident that this Court has categorically held that the District Judge (Wakf Tribunal) had the jurisdiction to go into the matter. The judgment dated 22.5.2008 has attained finality. Thus, the question whether the learned District Judge (Wakf Tribunal) had the jurisdiction in the matter or not is no more *res integra* in view of the judgment dated 22.5.2008.

9. According to PW-1, Kutab Deen, the defendant was appointed as Honorary Imam by the Punjab Wakf Board vide letter dated 31.7.2003. The services of the defendant stood terminated by the plaintiff on 29.1.2006. He was requested to vacate the accommodation vide letter dated 14.2.2007. The accommodation could yield income of Rs. 600/- per day. The defendant was caught red handed accepting the bribe. The Board has appointed Mohd. Mussa Nadvi, as Imam of the mosque. The newly appointed Imam could not be given the accommodation since the defendant has not vacated the same.

10. PW-2, Murad Khan deposed that the defendant was in occupation of the residential accommodation. He was caught red handed while accepting the bribe from Haz pilgrims.

11. The defendant has appeared as DW-1. According to him, the accommodation in question was allotted to him permanently by the Wakf Committee. He was not removed from the services of Imam. He was running a School of Muhammadan studies under the Shariat.

12. DW-2, Sayeed Hasan Falahi was an employee of the Punjab Wakf Board. He tendered in evidence document Ext. DW-2/A. The Punjab Wakf Board had approved the appointment of the defendant as Honorary Imam on 31.7.2003.

13. DW-3, Shafiq Ahmad was also an official of Punjab Wakf Board. He had prepared the document Ext. DW-2/A. DW-4, Krishan Chand deposed that the mosque at Boileauganj had been provided power connection and billing was being done in the name of the defendant. According to DW-5, Mohammad Ali, he had been visiting the mosque but was not charged any amount by the defendant.

14. What emerges from the facts enumerated hereinabove, is that the defendant was terminated as honorary Imam on 29.1.2006, vide resolution No. 4 / 2006. He was directed to vacate the accommodation on 14.2.2007. The defendant has attained the age of 62 years. It is the duty cast upon the Board to protect its property. The defendant, till date, has not assailed his termination as Imam of the mosque. The status of the defendant after order dated 14.2.2007,

was of a mere trespasser. He was in un-authorised occupation of the mosque. He has no vested right to reside in the accommodation after his removal as Imam. He had also been using the portion of the premises of the mosque as school of Mohammadan studies without the permission of the plaintiff. He had also been using the portion of the mosque as guest house and charging money from the occupants. The accommodation where the defendant was running guest house is two storeyed. It cannot be believed that the defendant was not charging any amount from the occupants of the guest house. The property is situated in Boileauganj area. It is a commercial area. The Court below has rightly come to the conclusion that the plaintiff was entitled for use and occupation charges at the rate of Rs. 600/- per day. The learned District Judge (Wakf Tribunal) has correctly appreciated the evidence. The defendant was removed as Imam of the mosque.

15. The Court below has correctly appreciated the oral as well as documentary evidence on record. Accordingly, there is no merit in the appeal, the same is dismissed. No costs.

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

Vinod Kumar Khadia .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 66 of 2011.
Reserved on: October 08, 2014.
Decided on: October 13, 2014.

Indian Penal Code, 1860- Section 302- Accused gave beating with the help of a wooden piece and inflicted injuries upon 'K'- children raised hue and cries on which PW-1 and PW-2 arrived at the spot – 'K' was beaten by the accused in their presence - PW-13, vice-president of Panchayat was called- 'K' was lying unconscious on the floor – she was taken to hospital where an application was moved for ascertaining whether she was fit to make the statement or not- Medical Officer certified that she was not fit to make statement and referred her to PGI, Chandigarh- 'K' succumbed to injury at PGI, Chandigarh- PW-1 did not state in the Court that he had seen the accused giving beating to the deceased- accused was not arrested immediately- PW-13 also admitted that he had never summoned the accused in the Panchayat as no complaint was received against him- PW-1 and PW-2 had entered in the room simultaneously – therefore, PW-2 could not be called to be an eye-witness to the beating- children who had witnessed the incident were not examined- there were 40-50 houses in the village- no person was examined to corroborate the testimony of eye-witness- there are major contradictions in the testimonies of eye-witnesses- hence, in these circumstances, prosecution case is not proved beyond reasonable doubt.

(Para-19 to 25)

For the appellant: Nemo.
For the respondent: Mr. M.A. Khan, Addl. AG with Mr. J. K.Verma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 16.2.2011 and consequent order dated 17.2.2011, rendered by the learned Addl. Sessions Judge, Solan, H.P. in Sessions Trial No. 5-S/7 of 2010, whereby the appellant-

accused (hereinafter referred to as the accused) who was charged with and tried for offence under Section 302 IPC, was convicted and sentenced to undergo rigorous imprisonment for life and to pay fine of Rs. 20,000/- and in default of payment of fine, the accused was ordered to suffer further imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 23.11.2009, at about 10:30 PM, accused gave beatings with the help of a wooden piece, Ext. P-1 and inflicted injuries with knife Ext. P-2, to Smt. Kiran Bala. The children raised hue and cry. The noises were heard by PW-1, Sushil Kumar. The elder son of the accused called PW-2, Naresh Kumar. PW-2, Naresh Kumar reached the spot and Kiran Bala was given beatings by the accused in their presence with the help of Ext. P-1. Thereafter, PW-13 Prabhu Dayal, Vice President of Panchayat, was called on telephone. The deceased was lying unconscious on the floor. The statement of PW-1 Sushil Kumar was recorded under Section 154 Cr.P.C. vide memo Ext. PW-1/A. FIR Ext. PW-10/B was registered on the basis of the statement Ext. PW-1/A. PW-6 ASI Yadav Singh moved an application Ext. PW-6/B to the doctor who opined vide his opinion Ext. PW-6/D that the victim was not fit to make the statement. The deceased died at PGI, Chandigarh on 27.11.2009. The blood stained wooden block, knife, pieces of bangles and blood lying on the floor was taken into possession. The site was photographed. The sketch of wooden block and knife were drawn. These were sealed in a cloth parcel with seal 'T'. Ext. P-1 wooden block and knife Ext. P-2, were sent to FSL, Junga through PW-9 alongwith pant of the accused and report of FSL is Ext. PW-14/J. The police prepared the spot map. The post mortem of dead body was conducted by PW-15, Dr. S.P. Mandal on 30.11.2009. The police completed the investigation and the challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 15 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. According to him, he was falsely implicated in the case and claimed to be innocent. He also deposed that his wife fell from the lintel and he was not present at his house at the time of the incident. The learned Trial Court convicted and sentenced the accused, as stated hereinabove. Hence, the present appeal.

4. The Advocate on behalf of the accused was not present on two dates and Mr. M.A. Khan, learned Addl. Advocate General appeared for the State. Mr. M.A.Khan, learned Addl. Advocate General, has supported the judgment of the learned Addl. Sessions Judge, Solan, H.P. dated 16.2.2011.

5. We have gone through the impugned judgment dated 16.2.2011 and records of the case carefully.

6. PW-1 Sushil Kumar, deposed that the houses of Naresh Kumar Attri and Leela Dutt are adjoining to his house. He knew accused Vinod Kumar. He remained the tenant of Leela Dutt for about one or two months. The accused was residing in a rented accommodation alongwith his wife and three minor children. On 23.11.2009 at about 10:30 PM, he heard noise from the house of Leela Dutt. The elder son of accused was knocking at the door of his neighbor Naresh Kumar Attri and was shouting that his mother had been killed by his father. Thereafter, he alongwith Naresh Kumar Attri went to the room of the accused where deceased Kiran Bala wife of the accused was lying on the floor in a pool of blood. She was unconscious and the accused was standing there. They enquired from the accused as to why he killed his wife. The accused told them that he had received telephonic calls from his native place that his entire family shall be eliminated. He further disclosed that he thought before his family is killed by someone else he killed his wife and thereafter he was to kill his children and himself lateron. Rest of the family members were saved due to the shouting of elder son of the accused. The accused disclosed that he killed

his wife with the help of wooden piece and knife. The wooden piece and knife were lying on the spot. They telephonically called Prabhu Dayal, Up-Pradhan of Gram Panchayat, who informed the police for further proceedings. The police came to the spot. His statement under section 154 Cr.P.C. was recorded. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that when he reached in the room of the accused, the accused was beating the deceased with the wooden piece. He admitted that the deceased was saved by them from the clutches of the accused. In his cross-examination by the learned Advocate for the accused, he deposed that his house was at a distance of approximately 10 feet from the house of Leela Dutt. He was watching T.V. in the ground floor. He was residing with his mother and wife in his house and they were present in the house on that night. There were other houses situated at a distance of approximately 25 feet from his house and the house of Naresh Kumar Attri. He has never seen the accused quarreling with his wife. The elder son of the accused was about 3-4 years old. His statement was recorded by the police in the hospital.

7. PW-2 Naresh Kumar Attri deposed that on 23.11.2009 at about 10:45 PM, he was present in his house. The elder son of accused Vinod Kumar knocked his door. He opened it and the boy asked him to save his mother. He told him that the accused was beating his wife. He visited the room of the accused who was tenant of Leela Dutt. After hearing the noise, PW-1 Sushil Kumar, also came and they both visited the room of the accused. When they went inside the room of the accused, he was beating his wife with the help of wooden piece and was also having knife in his hand. The deceased was lying unconscious on the floor. The accused had thrown her by pulling her from legs on the floor. Thereafter they saw the face of the wife of the accused which was badly injured. The accused on their inquiry told them that he will finish his wife. He called up-Pradhan Prabhu Dayal from his telephone. He came to the spot and called the police. The police reached the spot and inspected the spot. He identified wooden piece Ext. P-1 and knife Ext. P-2. In his cross-examination, he admitted that there are 40-50 houses in their village and the population is approximately 100-150. He also admitted that the child of accused was 3-4 feet in height and might be 9-10 years old. He was residing with his wife and son in his house. His son is 24 years old. 25-30 people had assembled on the spot. He told the police that the boy of the accused had come to him. He had stated to the police that the boy of accused had come to him and he knocked his door and thereafter he told him to save his mother from his father. Confronted with statement of this witness mark PW-2/A, wherein it is not so recorded.

8. PW-3 Leela Dutt, has deposed that the accused was his tenant since October, 2009.

9. PW-4 Gopal Singh, Patwari has prepared the *spot map* Ext. PW-4/A, *tatima* Ext. PW-4/B and issued copy of *jamabandi* Ext. PW-4/C.

10. PW-5 Madan Lal, deposed that he was working as Manager in All India Sewa Samiti Chandigarh. They were informed by Satish Kumar from PGI Chandigarh and thereupon they visited PGI, Chandigarh. The dead body of deceased Kiran Bala was unclaimed, so the body was cremated by the Samiti.

11. PW-6 ASI Yadav Singh, deposed that on 23.11.2009, at 10:55 PM, Sh. Prabhu Dayal, Vice President telephonically informed at Police Post that a tenant of Leela Dutt had beaten his wife. He made the report in the Daily Diary Register at Sr. No. 10, which is Ext. PW-6/A. He alongwith other police officials rushed to the spot. The deceased was badly injured and was unconscious at that time. Accused Vinod Kumar was also present there. He immediately informed SHO PS Kasauli and immediately shifted the deceased to PHC Dharampur. He moved application Ext. PW-6/B to the doctor. The doctor opined vide Ext. PW-6/C that the victim was not fit to give statement. He

procured MLC mark 'A'. He recorded statement of Sushil Kumar Ext. PW-1/A. The deceased died at PGI, Chandigarh. He admitted in his cross-examination that the accused was not formally arrested since the deceased was very serious and they were concerned about the condition of the deceased at that relevant time. The '*rukka*' was sent to SHO at about 2:30 PM.

12. PW-7 Dr. Naresh Attri, deposed that he examined the accused. His blood stained pant was sealed by him with the seal impression 'X'. He issued MLC Ext. PW-7/B.

13. Statements of PW-8 MC Hardev Singh, PW-9 Const. Shyam Lal and PW-10 HC Chet Ram are formal in nature.

14. PW-11 HC Rakesh Kumar, deposed that on 24.11.2009, SHO Ramesh Thakur, deposited with him a parcel duly sealed with seal 'T' stated to be containing a wooden piece, knife and blood lifted from the spot. He entered these items at Sr. No. 237 of the *Malkhana* register. On 25.11.2009, SHO again deposited with him parcel duly sealed with seal 'X' stated to be containing pant of the accused Vinod Kumar. He entered the same at Sr. No. 238 of the *Malkhana* register. These parcels were sent to FSL Junga for examination.

15. PW-12 Dr. Parvinder Singh, deposed that he examined Kiran who was brought to him by police vide request Ext. PW-6/B. He issued MLC Ext. PW-12/A. He noticed following injuries on the person of deceased:

> "1. There was an open wound about 5 cm x 1 cm on chin straight clean and clear margins from left side towards centre, fresh blood was oozing from the wound.
>
> 2. There was lacerated, open wound 1 cm - 3 cm on forehead, above the left eye brow with 1 cm in breadth. Fresh blood was present. I have drawn the shape of injury in the MLC.
>
> 3. There was swelling over left eyelid. It was of bluish discleration.
>
> 4. Bleeding was present from mouth and teeth. Patient was unconscious, pulse rate 100 p.m. respiratory rate 22 per minute and pupils were slowly reacting."

The probable duration of all the injuries was less than 12 hours at the time of examination. The injury No. 1 was caused with the sharp weapon whereas injuries No. 2, 3 & 4 were caused with a blunt weapon. He issued final opinion in this regard on MLC Ext. PW-12/A vide Ext. PW-12/B. According to him, injury No. 1 in MLC Ext. PW-12/A could be caused by knife Ext. P-2 shown to him in the Court. The injuries No. 2, 3 & 4 shown in Ext. PW-12/A could be caused with the wooden block Ext P-1. He admitted that in PW-12/A, there were some cuttings in the column of date and arrival of patient in the hospital.

16. PW-13 Prabhu Dayal, deposed that on 23.11.2009, he was at his residence at about 10:45 PM. PW-1 Sushil Kumar telephonically informed him that a quarrel had taken place between the husband and wife who were tenants of Leela Dutt. Thereupon, he telephonically informed at Police Chowki Garkhal. He visited the house of Leela Dutt. Accused Vinod Kumar was found present in his room. His wife was lying on the floor. She was unconscious and had sustained injuries on her head which were bleeding. In the meantime, accused Vinod Kumar fled away from the spot. After some time, the police also reached at the spot. The room was locked on 24.11.2009. In his presence, the police seized the wooden block, knife, piece of bangles and blood from the room of the accused. In his cross-examination, he deposed that after receipt of the telephonic call, he went to the spot. He noticed Sushil Kumar and Naresh Kumar already present on the spot. The children of the accused were weeping in the room. His house is at the distance of approximately 50 meters. The

house of Sushil Kumar and Naresh Kumar are adjoining to the room of the accused. However, there were so many houses in the village at some distance of the house of Leela Dutt. He had never summoned accused in Panchayat, since no written complaint was received against him. The accused ran away from the spot after sometime when he reached at the spot. They did not apprehend the accused since they were more worried about the condition of the wife of the accused.

17. PW-14 Inspector Ramesh Thakur, deposed that on 24.11.2009, ASI Yadav Singh, Incharge PP Garkhal sent the statement of Sushil Kumar Ext. PW-1/A alongwith *'rukka'* Ext. PW-6/D, through HC Raghubir Singh. Thereafter, he recorded FIR Ext. PW-10/B. He visited the spot in the presence of Vice President Prabhu Dayal. He clicked the photographs. He took into possession wooden block and knife. The accused was arrested. He was got medically examined. He got prepared the spot map Ext. PW-4/A, *tatima* Ext. PW-4/B and *jamabandi* Ext. PW-4/C. In his cross-examination, he admitted that it is not mentioned in the FIR whether it was recorded at 1:45 AM or PM. He met the children on the spot. He inquired from the children but they could not understand since they were small and had some language problem. According to him, the son of the accused was approximately 5-6 years old. They were not cited as witnesses since they could not understand his queries. The accused was arrested on 24.11.2009 at 4:00 PM.

18. PW-15 Dr. S.P. Mandal, has conducted the post mortem examination on the body of the deceased. According to him, the deceased died due to shock and head injury. The injuries were ante mortem caused with blunt weapon. The probable duration between injury and death was around 4 days and between death and post mortem was 76 hours. The copy of the post mortem repot is Ext. PW-15/B. He admitted in his cross-examination that there was no fracture in the scalp.

19. The statement of PW-1 Sushil Kumar was recorded under Section 154 Cr.P.C. vide memo Ext. PW-1/A. It is specifically stated in Ext. PW-1/A that on 23.11.2009 at 10:45 PM he was in his room. He heard cries from the house of Leela Dutt. He alongwith his neighbor Naresh Kumar Attri went to the spot. The tenant of Leela Dutt, Vinod Kumar was beating his wife with wooden block. He and Naresh Kumar saved the deceased from the clutches of Vinod Kumar with great difficulty. According to him, it appeared that the accused has given knife blow on the body of the deceased. Vinod Kumar ran away from the spot proclaiming that he would kill his wife. If they had not reached the spot, the accused would have killed his wife. He informed the Up-Pradhan Prabhu Dayal about the incident. However, when Sushil Kumar appeared before the Court as PW-1, he deposed that he was watching T.V at 10:30 PM on 23.11.2009. He heard noises from the house of Leela Dutt. The children were crying. The elder son of accused was knocking at the door of his neighbor Naresh Kumar Attri and was shouting that his mother had been killed by his father. Thereafter, he and Naresh Kumar Attri went to the room of the accused where deceased was lying on the floor in a pool of blood. She was unconscious. They inquired from the accused why he killed his wife. The accused told them that he received telephonic calls from his native place that his entire family shall be eliminated. He further disclosed that before his family is killed by someone else he killed his wife and thereafter he was to kill his children and himself lateron. In his cross-examination, he admitted that he has never seen the accused quarreling with his wife. His house was at a distance of 10 feet from the house of Leela Dutt. There were many houses in the locality. PW-2 Naresh Kumar Attri, has given a different version. According to him, when they went inside the room of the accused, he was beating his wife Kiran Bala with the help of wooden block and was also carrying one sharp edged weapon in his hand. The deceased was lying unconscious on the floor. The accused, on their

enquiry, told them that he would finish his wife. He called Prabhu Dayal from his telephone, who came to the spot.

20. PW-1 Sushil Kumar, though in his statement under Section 154 Cr.P.C. has stated that when he and Naresh Kumar PW-2 went to the room, the accused was beating his wife. They saved her from the clutches of the accused. However, when PW-1 Sushil Kumar appeared in the Court, as noticed by us hereinabove, he deposed that when he and Naresh Kumar went to the room of the accused, the deceased was lying on the floor. He has not deposed that he had seen the accused giving beatings to the deceased. PW-2 Naresh Kumar Attri, has deposed that they had seen accused giving beatings to his wife with the help of wooden block and was carrying sharp edged weapon in his hand. PW-6 ASI Yadav Singh, reached the spot after receiving information at 10:55 PM on 23.11.2009. He has not arrested the accused on 23.11.2009. The accused was arrested on 24.11.2009 at 4:00 PM. The explanation given for not arresting the accused on 23.11.2009 is that they were more worried about the condition of the deceased. PW-13 Prabhu Dayal, has admitted in his cross-examination that he has never summoned the accused in the Panchayat since no written complaint was ever recorded against him. The deceased, as per the opinion of PW-15 Dr. S.P.Mandal, died due to shock and head injuries.

21. PW-1 Sushil Kumar has not seen the accused beating his wife though he had gone to the room where the accused was residing with PW-2 Naresh Kumar Attri. PW-2 Naresh Kumar Attri in view of the statement of PW-1 Sushil Kumar cannot be termed as eye-witness to the incident, more particularly, when both PW-1 and PW-2 have entered the room simultaneously. According to PW-2 Naresh Kumar Attri, the elder son of the accused knocked his door. Thereafter he visited the room of the accused with PW-1 Sushil Kumar. He was confronted with Ext. PW-2/A wherein it is not so recorded. The prosecution has not examined the elder son of the accused. According to PW-1 Sushil Kumar, the age of the elder son of the accused could be 3-4 years. According to PW-2 Naresh Kumar Attri, the age of the boy could be between 9-10 years. According to PW-14 Inspector Ramesh Thakur, the age of the elder son of the accused was about 5-6 years. The child has not been examined. The explanation given by PW-14 Inspector Ramesh Thakur, as to why he has not cited the child as witness is that the child could not understand the queries and there was some language problem. The child was material witness, since according to the case of the prosecution; he went to the house of PW-2 Naresh Kumar Attri. The prosecution has not attributed a specific motive why the accused would have killed his wife. The only evidence to this effect is statement of PW-1 Sushil Kumar that the accused has told them that he has received telephonic calls from his native place that his entire family would be eliminated and he further disclosed that before his family is killed by someone else, he killed his wife and thereafter he was to kill his children and himself lateron. This version of PW-1 Sushil Kumar, cannot be believed. The person would not kill his wife and thereafter children and try to commit suicide only because somebody had advanced threats to his family. He would try to protect his family instead of killing his family members.

22. PW-1 Sushil Kumar and PW-2 Naresh Kumar Attri were residing with their family members. The family members ought to have accompanied them when they visited the house of the accused, more particularly, when according to them the accused was giving beatings to the deceased. The family members would have definitely visited the house of the deceased. There are about 40-50 houses in the village. The house of the accused was situated in the middle of the village. The population was approximately 100-150. If the children were crying in the house and one boy had gone to the house of PW-2 Naresh Kumar Attri, it would have drawn the attention of the other villagers. None other than PW-1 Sushil Kumar and PW-2 Naresh Kumar Attri has visited the spot, though PW-13 Prabhu Dayal also reached after some time. According

to PW-1 Sushil Kumar, he heard the noise emanating from the house of Leela Dutt at 10:30 PM on 23.11.2009, however, in his statement recorded under Section 154 Cr.P.C, it is stated that it was at 10:45 PM that he heard the noise coming from the house of Leela Dutt. According to Naresh Kumar Attri PW-2, he was present in the house at 10:45 PM when the elder son of the accused Vinod Kumar knocked the door.

23. The defence of the accused before the trial Court was that he was not present in his house on the date of the incident i.e. on 23.11.2009. PW-6 ASI Yadav Singh, has deposed that the accused was arrested on 24.11.2009. PW-14 Inspector Ramesh Thakur, has also admitted that the accused was arrested on 24.11.2009. The accused could have been arrested on 23.11.2009 itself. The explanation given by PW-6 ASI Yadav Singh and PW-14 Inspector Ramesh Thakur, is that the accused was not arrested for the simple reason that they were looking after the deceased. The deceased had already been taken to the hospital and if the accused was present on the spot, he ought to have been arrested on 23.11.2009 itself. The fact that he has not been arrested on 23.11.2009 but on 24.11.2009, probablizes the defence of the accused that he was not present on the spot at the relevant time.

24. There are major contradictions in the statements PW-1 Sushil Kumar, PW-2 Naresh Kumar vis-à-vis the manner they have entered the house and seen the incident on 23.11.2009. The prosecution has not attributed any specific motive towards the accused. The eldest son of the accused was a material witness, who has not been examined. The explanation given by PW-14 Inspector Ramesh Thakur, for not examining him is not believable. Thus, the prosecution has failed to prove its case against the accused beyond reasonable doubt.

25. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 16.2.2011 and consequent order dated 17.2.2011, rendered by the learned Addl. Sessions Judge, Solan, in Sessions trial No. 5-S/7 of 2010, is set aside. The accused is acquitted of the charge framed under Section 302 IPC, by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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

Jamila Khan .....Petitioner.

Versus

State of H.P. & others. .....Respondents.

CWP No. 6807 of 2014.
Decided on: 20.11.2014.

Constitution of India, 1950- Article 226- Husband of the petitioner was employed as Mali in a Private College- College informed the petitioner that she is entitled to leave encashment amount of Rs. 19,811/- and sum of Rs. 6,12,909/- towards gratuity- however, no amount was paid – State contended that husband of the petitioner was not Government servant- his case was not covered under the CCS (Pension) Rules, 1972- State only released financial assistance towards the part of salary component- held, that respondent No. 2 is establishment as

per Section 1(3)(b) of the Payment of Gratuity Act, 1972- Government should make efforts to see that teachers and non-teaching staff of Government Aided Colleges/Schools are treated at par with teachers and non-teaching staff of Government Colleges/Schools- College directed to release the gratuity and state directed to pay the amount towards the leave encashment. (Para-3 to 18)

Cases referred:

State of Punjab versus Labour Court, Jullundur and ors., (1980) 1 SCC 4
Principal, S.D.Kanya Vidhyala, Jammu versus Authority under the Payment of Gratuity Act and another, 1983 Lab.I.C. 1263,
The Management of S.I.E.T. Women's College, Madras vrs. Mahamed Ibrahim and ors. (1992) 1 LLJ 91
Principal, Bharatiya Mahavidyalaya, Badnera Road and another vrs. Shri Ramkrishna, 1994 Lab. I.C. 404
Ram Gopal Vyas versus Shri Mahesh Sikshan Sansthan and others, 1996(73) FLR 1162
Venkateshwara Rao V vrs. SMVM Polytechnic, Tanuku & others, 1998-I LLJ 181
Laxmi D. vrs. A.P. Agricultural University and another, 2002-I- LLJ 69
Habibia Girls Primary School, (rep. by its Manager), Ambur Vrs. Noorinisha (Ms.) and others, 2004-II- LLJ 398
Agarwal Shiksha Samiti and Another vrs. Moti Chand Jain and Others 2009-II-LLJ 616 (Raj),

For the petitioner:	Ms. Anita Parmar, Advocate.
For the respondents:	Mr. M.A.Khan, Addl. AG with Mr. P.M.Negi, Dy. AG and Mr. J.S.Guleria, Asstt. AG for respondent No. 1.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J. (oral)

The reply filed by respondent No. 1 is taken on record.

2. The petitioner's husband was employed as Mali in respondent No. 2- Private College on 15.7.1976. He was placed in regular pay scale on 11.5.1990. He died on 3.1.2011. Respondent No. 2 informed the petitioner that she is entitled to leave encashment amount of Rs. 19,811/- and a sum of Rs. 6,12,909/- towards gratuity. The fact of the matter is that the petitioner has neither been paid leave encashment nor gratuity. The respondent No. 2 College was established in the year 1976. It is affiliated to H.P. University. It is receiving 95% grant-in-aid from the respondent-State.

3. The Legislative Assembly of Himachal Pradesh has enacted the Act to provide for the security of services to the employees of the aided Colleges in the State of Himachal Pradesh known as The Himachal Pradesh Aided Colleges (Security of Services of Employees) Act, 1994 (in short "the Act"). Section 2(a) of the Act defines the "aided College" or "College" to mean College affiliated to and admitted to the privileges of a University and receiving financial assistance not less than fifty per centum of the salary component for both teaching and non-teaching staff from the State Government. Section 3 of the Act lays down the minimum qualifications for recruitment of various classes of the employees of a College. The method of recruitment is provided under Section 4 of the Act. Section 6 provides that the scales of pay and other allowances and privileges of the employees of a College shall be such as may, from time to time, as specified by the State Government. Section 13 lays down the procedure for payment of salaries. Section 21 empowers the State Government to frame rules by way of notification. The State Government has also notified on 16.3.2008, The Himachal Pradesh Non-Government College

Grant-in-aid Rules, 2008. The object of the grant, as per Rule 3, is to financially assist non-Government Colleges teaching in Arts, Commerce and Science subjects at under Graduate levels, till they become self-reliant. According to Rule 4, grant-in-aid is admissible for meeting, a part of the salary expenses, in respect of approved staff (teaching & non-teaching). However, grant-in-aid to a College should not exceed 50% of the revenue gap (total expenditure on salary of approved teaching and non-teaching staff minus the total income from all sources). The actual amount of grant-in-aid is dependent upon the availability of resources and budgetary allocation with the Government for this purpose. Rule 5 lays down the eligibility criteria. Rule 7 provides for equitable distribution in case of insufficiency of funds. Rule 13 lays down that where the Government is of the opinion that it is necessary or expedient to do so, it may relax any of the provisions of these rules. By way of amendment notified on 6.10.2009, after first proviso, the following proviso was inserted in Rule 4:

> "Provided further that colleges which were getting Grant-in-aid under the Himachal Pradesh Non-Government Affiliated Colleges Grant-in-aid Rules, 1994 shall be provided Grant-in-aid only for those teaching and non-teaching staff for whom Grant-in-aid was being provided prior to notification of Himachal Pradesh Grant-in-aid to non-Government Colleges Rules, 2008 and the amount of annual Grant-in-aid to these colleges shall be restricted up to the amount of annual Grant-in-aid provided against each of these teaching and non-teaching staff in these colleges prior to 31.3.2008. On accrual of any incremental and other benefits after 31.3.2008, no additional Grant-in-aid shall be provided to these colleges. Further, the Grant-in-aid shall be reduced as and when the staff gets retired.
>
> Provided further that the Grant-in-aid shall be provided w.e.f. 1.4.2008".

4. The respondent No. 2 though is duly served, however, there is no representation on its behalf. The stand of the respondent-State as per the reply is that the petitioner's husband was not a government servant. His case was not covered under the CCS (Pension) Rules, 1972. The employees of 95% aided institutions would not fall within the category of the Government. It is also averred in the reply that the role of the State is confined to release financial assistance in the form of GIA only towards part of salary component as provided in the GIA Rules. It is also averred that the gratuity and leave encashment applicable to the petitioner and other employees of non-Government affiliated colleges whether aided or non-aided is to be released as per the Ist Ordinance of 1973 Appendix-"A" Chapter XXXVIII para 38.5B(d).

5. Appendix "A" of Ist Ordinance, 1973 talks of teachers and not the non-teaching staff. The petitioner's husband has served respondent No. 2-College for almost 35 years as Mali. The petitioner has been informed of the entitlement towards leave encashment and gratuity. However, the fact of the matter is that till date, neither gratuity nor leave encashment has been released in favour of the husband of the petitioner. The Himachal Pradesh Aided Colleges (Security of Services of Employees) Act, 1994, only lays down as per Section 6 that the scales of pay and other allowances and privileges of the employees of a College shall be such as may from time to time, be specified by the State Government. It is not clear from the language employed in Section 6 of the Act that whether the gratuity was intended to be included herein or not.

6. Respondent No. 2-College is an establishment as per Section 1(3)(b) of the Payment of Gratuity Act, 1972. The petitioner's husband would fall within the ambit of Section 2(e) of the Act. The non-teaching employees of the establishment are entitled to gratuity as per Section 4 of the Act. The Gratuity is to be determined as per Section 7 of the Act.

7. Their lordships of the Hon'ble Supreme Court in the case of ***State of Punjab versus Labour Court, Jullundur and ors.,*** reported in ***(1980) 1 SCC 4,*** have held that there is no warrant for limiting the expression "law..... in relation to shops and establishments" to a law which relates to both shops and establishments. The expression is comprehensive in its scope and can mean a law in relation to shops as well as, separately, a law in relation to establishments or a law in relation to shops and commercial establishments and a law in relation to non-commercial establishments. Their lordships have held as under:

> "3. In this appeal, the learned Additional Solicitor- General contends on behalf of the appellant that the Payment of Gratuity Act, 1972 cannot be invoked by the respondents because the Project does not fall within the scope of Section 1(3) of that Act. Section 1(3) provides that the Act will apply to :
>
> "(a) every factory, mine, oilfield, plantation, port and railway company;
>
> (b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;
>
> (c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf."
>
> According to the parties, it is clause (b) alone which needs to be considered for deciding whether the Act applies to the Project. The Labour Court has held that the Project is an establishment within the meaning of the Payment of Wages Act, section 2(ii) (g) of which defines an "industrial establishment" to mean an "establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on." It is urged for the appellant that the Payment of Wages Act is not an enactment contemplated by section 1(3)(b) of the Payment of Gratuity Act. The Payment of Wages Act, it is pointed out, is a central enactment and section 1(3)(b), it is said, refers to a law enacted by the State Legislature. We are unable to accept the contention. Section 1(3) (b) speaks of "any law for the time being in force in relation to shops and establishments in a State." There can be no dispute that the Payment of Wages Act is in force in the State of Punjab. Then, it is submitted, the Payment of Wages Act is not a law in relation to "shops and establishments". As to that, the Payment of Wages Act is a statute which, while it may not relate to shops, relates to a class of establishments, that is to say, industrial establishments. But, it is contended, the law referred to under section 1(3) (b) must be a law which relates to both shops and establishments, such as the Punjab Shops & Commercial Establishments Act, 1958. It is difficult to accept that contention because there is no warrant for so limiting the meaning of the expression "law" in section 1(3) (b). The expression is comprehensive in its scope, and can mean a law in relation to shops as well as, separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in relation to noncommercial establishments. Had section 1(3)(b) intended to refer to a single enactment, surely the appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments, both commercial and

non-commercial. The Punjab Shops & Commercial Establishments Act does not relate to all kinds of establishments. Besides shops, it relates to commercial establishments alone. Had the intention of Parliament been, when enacting section 1(3)(b), to refer to a law relating to commercial establishments, it would not have left the expression "establishments" unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable to discern any reason for giving the limited meaning to section 1(3) (b) urged before us on behalf of the appellant. Section 1(3) (b) applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include an industrial establishment within the meaning of section 2(ii) (g) of the Payment of Wages Act. Accordingly, we are of opinion that the Payment of Gratuity Act applies to an establishment in which any work relating to construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on. The Hydel Upper Bari Doab Construction Project is such an establishment, and the Payment of Gratuity Act applies to it."

8. The Jammu and Kashimir High Court in the case of ***Principal, S.D.Kanya Vidhyala, Jammu versus Authority under the Payment of Gratuity Act and another,*** reported in ***1983 Lab.I.C. 1263,*** held that the employees of private educational institution are entitled to the receipt of gratuity under the Payment of Gratuity Act, 1972 when the conditions for the applicability as enumerated in the Gratuity Act are satisfied. It has been held as under:

"[11] In view of this settled position of law, it is obvious that the definition of the 'private educational institution' as contained in Private Educational Institutions (Regulations and Control) Act, 1967, cannot be imported into SRO-740 or to the J & K Shops and Establishments Act. That being the position, it is obvious that by virtue of SRO-740 of 1978 all Private Educational Institutions in the State have been declared as establishments under J & K Shops and Establishments Act, 1966 and in view of the provisions of S. 1 (3) (b) of the Gratuity Act, 1972, the employees of 'Private Educational Institutions' are entitled to the receipt of gratuity under the said Act, when the conditions for the applicability as enumerated in the Act are satisfied."

9. In the case of ***The Management of S.I.E.T. Women's College, Madras vrs. Mahamed Ibrahim and ors.*** reported in ***(1992) 1 LLJ 91,*** the Division Bench of the Madras High Court has held that the Women's College was also an 'establishment' as defined in Section 2 (C) of the Tamil Nadu Payment of subsistence Allowance Act and educational institution was an Industry within the meaning of Industrial Disputes Act. Thus, the College was an establishment falling within the purview of Section 1(3)(b) of the Payment of Gratuity Act, 1972. It has been held as under:

"5. The Employees 'Provident Funds and Miscellaneous Provisions Act, 1958 is applicable to the petitioner as all educational institutions have been notified as 'establishments' within the meaning of the said Act by the Central Government under Section 1(3)(b) of that Act, (Vide Notification S.O. 986 dated February 19, 1982). Hence, the petitioner is an 'establishment' within the meaning of a law for the time being in force in relation to establishments in the State. One of the contentions urged by learned counsel for the petitioner is that the law referred to in Section 1(3)(b) of the Act should be a law already in force in the concerned State and not any law which comes into force subsequently. We do not agree

with this contention. The question has to be decided only when it arises before the Court. If at the time when the question arises before the Court for consideration, there is a law in force in relation to shops or establishments in a State, then the Act will apply to all shops and establishments within the meaning of such law. There is no necessity for the relevant law to have been in forced already when the Act was passed in 1972. However, that argument will not apply to the Employee' Provident Funds and Miscellaneous Provision Act, 1952, as that came into force long prior to the passing of the Payment of Gratuity Act. Even assuming that the contention of learned counsel is acceptable, it cannot escape the applicability of the Act as the petitioner is an establishment within the meaning of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

6. The petitioner is also an 'establishment' as defined by Section 2(c) of other Tamil Nadu Payment of Subsistence Allowance Act (43 of 1981). That Section reads as follows :- "establishment" means any place where any industry, trade, business, undertaking, manufacture, occupation or service is carried on, and with respect to which the executive power of the State extends, but does not include ---

(i) any office or department of the Central or the State Government; or

(ii) a railway administration; or

(iii) any mine or oil field; or

(iv) any major port; or

(v) any public sector undertaking of the Central Government.

Explanation :- For the purpose of this clause "any public sector undertaking of the Central Government" means an establishment owned, controlled or managed by -

(1) the Central Government or a department of the Central Government.

(2) a Government company as defined in Section 617 of the Companies Act, 1956 (Central Act I of 1956) and owned or controlled by the Central Government;

(3) A Corporation established by or under a Central Act, which is owned, controlled or managed by the Central Government."

"Industry" is defined in Section 2(e) of that Act as "an industry as defined in Section 2(j) of the Industrial Disputes Act, 1947 (Central Act XIV of 1947)". An educational institution is an 'industry' within the meaning of the Industrial Dispute Act, as elucidated by the Supreme Court in Bangalore Water Supply & Sewerage Board Etc. v. A. Rajappa and Other Etc. (1978-I-LLJ-349). Section 2(j) of the Industrial Disputes Act defines an 'industry' as "any business, trade undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen." The amendment of the definition sought to be introduced by the Industrial Disputes (Amendment) Act, 1982 (46 of 1982) excluding educational institutions from the purview thereof, has not yet come into force.

7. A Division Bench of the Allahabad High Court has in U. P. Co-operative Union and others v. Prabhu Dayal Srivastava and others 1988 (57) F.L.R. 70 held that the world "establishment" as used under Section 1(3)(b) and Section 1(3)(c) of the Act connotes an organised body of men and women employed where the relationship of employer and employee comes into existence. The Division Bench has taken the view that the Act being a progressive, Social and beneficial legislation, the construction that promotes the purpose of legislation should be preferred to a literal construction. Relying upon the meaning of the word 'establishment' as

found in the dictionaries. The Bench held that the Act would apply to an apex-co-operative society registered under the U.P. Co-operative Societies Act, 1965.

8. The result of the above discussion leads to the conclusion that the petitioner is an 'establishment 'falling within the purview of Section 1(3)(b) of the Act and the contention to the contrary urged by learned counsel for the petitioner should be rejected."

10. In the case of ***Principal, Bharatiya Mahavidyalaya, Badnera Road and another vrs. Shri Ramkrishna,*** reported in ***1994 Lab. I.C. 404,*** the learned Single Judge of the Bombay High Court has held that the educational institution is covered under the Payment of Gratuity Act, 1972. It has been held as under:

"[7] In order to appreciate the controversy, it will be better to go to the various provisions of law. Section 1 of Payment of Gratuity Act, 1972 runs as under:

"1. (1) This Act may be called the Payment of Gratuity Act, 1972.

(2) It extends to the whole of India:

Provided that in so far as it relates to planations or ports, it shall not extend to the State of Jammu and Kashmir.

(3) It shall apply to---

(a) .....

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employee, or were employed, on any day of the preceding twelve months;

(c) .....

(3-A) .....

(4) ....."

The word establishment is not defined in the Payment of Gratuity Act. In short, the Payment of Gratuity Act would apply to all the establishments which are 'establishments' as per any law in the State concerning the shops and establishments. There is no dispute and indeed there cannot be any that the Bombay Shops and Establishments Act, 1948 would be one of such laws which is in force in the State of Maharashtra and which pertains to the subject of shops and establishments. In order that an establishment is covered under section 1(3)(b) of the Gratuity Act, that establishment will have to be "within the meaning of" the Bombay Shops and Establishments Act or any other law which covers the subject of shops and establishments.

[8] Section 5 of the Gratuity Act provides that the appropriate Government may by notification and subject to such conditions as may be specified in the notification exempt any establishment from the operation of the Gratuity Act. It will be better to quote section 5(1) of the Payment of Gratuity Act, 1972 which is as under:---

"Section 5(1). The Appropriate Government may, by notification, and subject to such conditions as may be specified in the notification, exempt any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act if, in the opinion of the appropriate Government, the employees in such establishment, factory, mine oilfield, plantation,

port, railway company or shop are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act."

There is no dispute about the fact that the appropriate Government in the present case would be the State Government, i.e. the Government of Maharashtra. The State of Maharashtra, therefore, is empowered to specifically exempt any establishment provided it does so according to the modality provided by section 5(1) of the Gratuity Act. It is also an admitted position that the State of Maharashtra has not exempted any education institutions, muchless any institution or establishment like that of the petitioners from the operation of the Gratuity Act."

11. The learned Single Judge in the case of ***Ram Gopal Vyas versus Shri Mahesh Sikshan Sansthan and others,*** reported in ***1996(73) FLR 1162,*** have held that the provisions of Payment of Gratuity Act, 1972 would be applicable to the aided schools. It has been held as under:

"[4] I have carefully considered the arguments advanced by both the learned counsel and also perused the orders passed by the Controlling Authority as well as by the appellate authority. Mr. Vyas learned counsel for the petitioner was very much right in submitting that the Controlling Authority in its judgment running into 24 typed pages has considered all the aspects of the case and rightly come to the conclusion that the State Government has exempted the respondent No. 1 Institution and, therefore, the Controlling Authority was very much right in treating that the respondent No. 1 was an establishment. Thus, therefore, provisions of Payment of Gratuity Act, 1972 would be applicable in this case and the original petitioner was entitled for the gratuity from the respondent No. 1 It must be stated that while allowing the appeal the appellate authority has passed a cryptic order, except reproducing the provisions he has not given any other finding except stating that:

"An educational institution may be an industry under the Industrial Disputes Act, 1947 in view of the law laid down by the Supreme Court of India in the Case of Bangalore Water Supply and Sewage Board v. Rajagpa or it may be an establishment but unless it is a Commercial establishment under the Rajasthan Shops & Commercial Establishments, Act 1958,it will not come within the ambit of the Payment of Gratuity Act, 1972."

[5] The View taken by the appellate authority is wholly unsustainable. In my opinion the appellate authority was wrong in coming to the conclusion that the respondent No. 1 Institution may be an establishment, but unless it is held to be commercial establishment under the Raj. Shops and Commercial Establishments Act, 1958 it will not come within the ambit of Pay-ment of Gratuity Act. 1972."

12. The Division Bench of Andhra Pradesh High Court in the case of ***Venkateshwara Rao V vrs. SMVM Polytechnic, Tanuku & others,*** reported in ***1998-I LLJ 181,*** held that the polytechnic was an institution in which the activity of imparting knowledge or training was systematically carried on and was an "establishment" for the purpose of the Gratuity. It has been held as under:

"[7] Now, apart from the petitioner/polytechnic being an establishment by virtue of Section 1(3)(a) of the Gratuity Act being a factory etc., and an establishment etc., under several laws supra, there is also a positive material to bring it within the meaning of 'establishment' under Section 1(3)(b) of the Act.

Section 1(3) of Employees Provident Funds and Misc. Provisions Act., 1952 reads:

"1. 3: Subject to the provisions contained in Section 16, it applies--

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf.

It is almost in pan materia with Section 1(3) of the Gratuity Act. The Central Government has issued a notification No. SO.986 dt.19-2-1982 under Section 1 (3)(b) of the Act supra as follows:-

"In exercise of the powers conferred by Clause (b) of Sub-section (3) of Section 1 of the Employees' Provident Funds and Misc. Provisions Act, 1952, the Central Government hereby specifies the following classes of establishments in each of which twenty or more persons are employed, as establishments to which the said Act shall apply, namely--

(i) any University

(ii)any College, whether or not affiliated to a University

(iii) Any school, whether or not recognised or aided by the Central or a State Government

(iv) any scientific institution

(v) any institution in which research in respect of any matter is carried on

(vi) Any other institution in which the activity of imparting knowledge or training is systematically carried on."

The petitioner/polytechnic cannot but to accept that it is an institution in which the activity of imparting knowledge or training is systematically carried on to come within Clause (vi) of the notification. In other words, it comes within the applicability provision of Section 1(3)(a) of the Employees Provident Fund and Misc. Provisions Act to make the Act, 1952 applicable upon itself. Therefore, such an act in the State of A.P., making the petitioner/polytechnic an 'establishment' under the said provision inforce should necessarily come within the meaning of "establishment" for the purpose of Section 1(3)(b) of the Gratuity Act to operate such a law to the Polytechnic. Thus, both legally and logically the petitioner polytechnic is governed by the provisions of the Payment of Gratuity Act entitling the fifth respondent/appellant to get the Gratuity as claimed and as correctly conceded by the fourth respondent. The approach of the matter beyond such a legal reinforcement approved by the Supreme Court also and rightly followed by the Division Bench of the High Court of Madras by the learned single Judge cannot persuade us to hold to the contrary and sustain the impugned order in the appeal and we propose to set aside the same."

13. In the instant case also, more than 10 employees are engaged by respondent No. 2 College for imparting knowledge.

14. In the case of ***Laxmi D. vrs. A.P. Agricultural University and another,*** reported in ***2002-I- LLJ 69,*** the Division Bench of the A.P. High Court held that 'establishment' in Section 1(3)(b) of the Act was comprehensive to include 'establishment' within the meaning of any law, not only law relating to shops and establishments, for the time being in force in a State. It has been held as under:

"[5] The learned single Judge while answering the first question relied upon the decision of a learned single Judge of this Court in Chairman, G.B.S.M.V.M.P. Technic, Tanuku v. Government of Andhra Pradesh and

Ors., 1989(2) LLJ 95. It now appears that the subject-matter, as raised before us, earlier came up for consideration before a Division Bench of this Court in V. Venkateswara Rao v. S.M.V.M. Polytechnic, , wherein the Division Bench following the decision of the Apex Court in State of Punjab v. Labour Court, , reversed the view that the University is not an educational institution. The Apex Court in State of Punjab v. Labour Court (supra) while rejecting the contention that Section 1 (3) (b) must be a law, which relates to both shops and establishments stated:

".....Section 1(3) (b) speaks of 'any law for the time being in force in relation to shops and establishments in a State". It is difficult to accept such a contention because there is no warrant for so limiting the meaning of the expression 'law' in Section 1 (3) (b). The expression is comprehensive in its scope, and can mean a law in relation to shops and commercial establishments and a law in relation to shops as well as separately, a law in relation to establishments or a law in relation to non-commercial establishments... Had Section 1(3) (b) intended to refer to a single enactment, surely the appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments both commercial and noncommercial.....Had the intention of Parliament been, when enacting Section 1(3)(b), to refer to a law relating to commercial establishments, it would not have left the expression "establishment" unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable to discern any reason for giving the limited meaning to Section 1(3) (b) urged before us on behalf of the appellant. Section 1(3)(b) applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State.....

[6] Although the aforesaid decision was rendered in the light of Section 2(g) of the Payment of Wages Act, defining 'industrial establishment' in a State being the law in force, we are of the opinion, that the above decision would cover the instant case also. The Act refers to an establishment. It, therefore, embraces in its fold all types of establishments, including industrial establishments. Furthermore, as noticed hereinbefore, the Act applies to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments. The Central Government also issued notification dated 19-2-1982 extending its applicability to a University, College - whether affiliated or not to a University held that the Act is applicable. The Apex Court in A. Sundarambal v Government of Goa, Daman and Diu, held that though school is an industry, the teachers employed therein are not workmen."

15. In the case of ***Habibia Girls Primary School, (rep. by its Manager), Ambur Vrs. Noorinisha (Ms.) and others,*** reported in ***2004-II- LLJ 398,*** the learned Single Judge has held that the 'school' whether aided or otherwise, would come under the ambit of 'establishment' under the Payment of Gratuity Act, 1972. It has been held as follows:

"[4] It is, of course, true that the original authority had decided the matter ex parte, as the petitioner had not appeared. Even before the appellate authority, no concrete materials had been adduced, in support of such an assertion and the appellate authority came to the conclusion that the school was being run from the year 1972. This being a factual conclusion, there is no scope for interfering with the conclusion arrived at by the appellate authority.

[15] Following the aforesaid decisions, I have no hesitation in observing that the provisions contained in Section 1(3) of the Payment of Gratuity Act are also applicable to unaided educational institutions. Once such a

conclusion is arrived at, there is hardly any scope for interfering with the order passed by the appellate authority."

16. The Division Bench of the Rajasthan High Court in the case of ***Shri Agarwal Shiksha Samiti and Another vrs. Moti Chand Jain and Others*** reported in ***2009-II-LLJ 616 (Raj)***, has held that non-governmental educational institutions were bound to pay gratuity to its employees. It has been held as under:

> "[2] All these appeals arise from a common order of learned Single judge whereby, the appellant Samiti was directed to make payment of gratuity to the respondents along with interest. The order does not call for interference in view of the ratio indicated in Children Garden Play School Education Society v. Raj Nan Government Educational Institutions Tribunal and Ors.,2008 3 WLC(Raj) 147 wherein, the Division Bench of this Court held that non-government educational institutions are bouna to pay gratuity to the employees worked with them since gratuity is a benefit arising from past service and meant for relief and assistance after retirement or cessation of employment."

17. The employees of respondent No. 2-College are also doing yeomen's service in educational field. The conditions for the service of teaching and non-teaching staff must be humane and the endeavour should be made by the State Government that the teachers and non-teaching staff of Government Aided Colleges/Schools are treated at par with teachers and non-teaching staff of Government Colleges/Schools. The teachers in private Aided Colleges are appointed as per the Ordinance framed by the University and they are also supposed to fulfill the minimum educational qualification criteria, as laid down under the UGC norms. The petitioner's husband was also entitled to leave encashment. The expression salary in the grant-in-aid clause would also cover leave encashment.

18. Accordingly, the Writ Petition is allowed. Respondent No. 2-College is directed to release the gratuity to the petitioner, strictly as per the provisions of the Payment of Gratuity Act, 1972 within ten weeks from today. The respondent No. 1 is also directed to pay a sum of Rs. 19,811/- to the petitioner towards leave encashment, if necessary by relaxing the Rules under Rule 13 of the Himachal Pradesh Non-Government College Grant-in-aid Rules, 2008 within six weeks. It is made clear that the amount paid towards the leave encashment can be adjusted by the respondent No. 1-State while releasing grant-in-aid to respondent No. 2-College. The respondent-State is also directed to consider making comprehensive rules/ guidelines for the retiral benefits of the Government aided Colleges/Institutions.

****

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

Child Development Project Officer & others ...Appellants.

Versus

Smt. Tripta Devi ...Respondent.

LPA No. 11 of 2007
Decided on: 10.12.2014

Constitution of India, 1950- Article 226- Petitioner was appointed as Anganwari Worker- her services were terminated on 14.12.2001- she filed a Writ Petition which was allowed and the order of the termination was quashed – written notices were to be served upon the petitioner in terms of the guidelines- respondent had not served notice, therefore,

termination order was rightly quashed - however, the petitioner had not pleaded that she was not gainfully engaged when she was kept out of services, therefore, she is not entitled to back wages- order modified and it is directed that petitioner is not entitled to back-wages but is only entitled for other consequential benefits. (Para-2 to 7)

For the appellants: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. M.A. Khan, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.

For the respondents: Ms. Monika Shukla, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This Letters Patent Appeal is directed against the judgment and order, dated 18th April, 2007, passed by the Writ Court in CWP No. 255 of 2002, titled as Tripta Devi versus Child Development Project Officer & another, whereby the writ petition filed by the writ petitioner-respondent herein came to be allowed (hereinafter referred to as "the impugned judgment").

2. The writ petitioner-respondent herein was engaged as Anganwari Worker. Her services were terminated vide order, dated 14th December, 2001, was subject matter of the writ petition filed by the writ petitioner-respondent herein, was allowed and the order of termination was quashed.

3. In terms of the guidelines (Annexure R-4), three written notices were to be issued, which were not served upon the writ petitioner-respondent herein and the Writ Court, after noticing the said fact, quashed the termination order.

4. Mr. J.K. Verma, learned Deputy Advocate General, frankly conceded that three written notices were not issued, but the notice issued contains the details.

5. Having said so, we are of the considered view that the Writ court has passed a well reasoned judgment, needs no interference.

6. The writ petitioner-respondent herein was not in position and has not performed her duties. It is not, however, pleaded that she was not gainfully engaged during the said period.

7. In the given circumstances, we deem it proper to modify the impugned judgment by providing that the writ petitioner-respondent herein is not entitled to back-wages/honorarium from the date of termination till today, but is to be counted for all service benefits.

8. Accordingly, the impugned judgment is modified and the appeal is disposed of alongwith all pending applications.

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

Kunj Lal & ors. .....Appellants.

Versus

Kekh Ram & ors. .....Respondents.

RSA No. 399 of 2001.
Reserved on: 03.12.2014.
Decided on: 11.12.2014.

Specific Relief Act, 1963- Section 34- 'T' had gifted the land in favour of 'J'- subsequently, she filed a suit for recovery of gift- 'J' agreed to pay maintenance @ Rs. 50/- per month to 'T' and arrears of maintenance @ Rs. 200/- per month before 11.5.1965- 'T' could recover the possession on breach of undertaking given by 'J'- 'J' exchanged the land with 'B' and 'D'- 'B' transferred the portion of the suit land in favour of defendants No. 14 and 15- 'J' transferred the portion of the land in favour of defendants No. 8 to 13- 'T' filed an Execution Petition without impleading the transferee - warrant of possession was issued on 6.7.1971 – plaintiffs, successors of the transferee, sought declaration that they are owners in possession of the suit land- held, that copy of the report filed by Field Kanungo and copy of Raznamcha do not show as to who was evicted from the suit land- these documents further do not show that 'T' was put in possession of the suit land- exchange made by predecessor-in-interest of the plaintiffs was valid and they could not be deprived of the land given to them.

(Para- 25)

For the appellant(s): Mr. Sanjeev Kuthiala, Advocate.

For the respondents: Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Ajeet Singh Jaswal, Advocate, for respondents No. 1 & 2.
Mr. Sunil Mohan Goel, Advocate, for respondents No. 13 to 16, 18 & 19.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Kullu, H.P. dated 9.8.2001, passed in Civil Appeal No. 80 of 2000.

2. Key facts, necessary for the adjudication of this regular second appeal are that the appellants-plaintiffs (hereinafter referred to as the plaintiffs, for the convenience sake), have instituted a suit for declaration with consequential relief of injunction and in the alternative suit for possession against the respondents-defendants (hereinafter referred to as the defendants) or their predecessor in interest. According to the plaintiffs, their predecessor-in-interest, namely Sh. Bhagat Ram was owner-in-possession of land comprised in Kh. Nos. 701 and 702 as per jamabandi for the year 1960-61 and 1/3rd share of land comprised in Khata Khatauni No. 207/310, Kh. No. 39, specifically described in jamabandi for the year 1966-67 and predecessor-in-interest of the defendants No. 3(a) to 3(f) of Jeet Ram, as per the array of parties given in original suit. Since the deceased defendant Jeet Ram was owner-in-possession of Kh. No. 260 and 695 and of ½ share of land comprised in Kh. No. 661, as per jamabandi for the year 1960-61, Sh. Bhagat Ram predecessor-in-interest of the plaintiffs exchanged 4/5th share of his land comprised in Kh. No. 701 and land comprised in Kh. No. 702 with the ½ share of land comprised in Kh. No. 661 and Kh. No. 695 belonging to Jeet Ram vide mutations No. 539 dated 29.9.1965 and mutation No. 548 dated 12.8.1966. Sh. Jeet Ram has also exchanged his land comprised in Kh. No. 260 with the 11/14 share of land comprised in Kh. No. 18 belonging to defendant No. 13 Dola Ram vide mutation No. 837 dated 26.9.1965 and Dola Ram in turn exchanged the land comprised in Kh. No. 260 with 1/3rd share of land comprised in Kh. No. 39 belonging to Bhagat Ram vide mutation No. 538 dated 26.9.1965. Defendant No. 13 Dola Ram subsequently transferred Kh. No. 39 in favour of defendant No. 14 Ram Dayal and defendant No. 15, Thakar Dass. Jeet Ram further transferred Kh. Nos. 701 and 702 in favour of defendants No. 8 to 13, namely, Nawang Chhering, Dorje Angroop, Tashi Angroop, Tashi Tandup, Padma Dorje and Dole Ram. Bhagat Ram raised an orchard on the suit land. They came to know for the first time in the year 1997 that Thakri Devi widow of Parmanand was owner-in-possession of ½ share

of Kh. Nos. 260, 695 and 661 along with some other Khasra numbers and that she had gifted this land in favour of Sh. Jeet Ram. However, she subsequently filed a suit bearing No. 250 of 1964 against defendant Jeet Ram. The matter was compromised on 11.5.1965. The compromise decree was drawn. According to the compromise-decree, Jeet Ram would pay a monthly maintenance amount of Rs. 50/- to her along with the arrears of Rs. 200/- and in case of default Thakri Devi was empowered to get the possession of the gifted land back by way of execution. Thereafter, Thakri Devi hatched a conspiracy with Jeet Ram by concealing the material facts that the suit land had already been transferred by way of exchange in favour of Bhagat Ram. Smt. Thakri Devi filed an execution petition in the Court without impleading the predecessor-in-interest of the plaintiffs as a party. The warrant of possession was issued vide order dated 6.7.1971. Rapat No. 183 dated 7.12.1971 was prepared by Halqua Patwari. Mutation No. 782 was attested. After the death of Smt. Thakri Devi, defendants No. 1 & 2 Sh. Khimatu and Shamsher Singh procured mutation No. 977 in respect of the suit land in their favour. The plaintiffs, have thus claimed decree of declaration, to the effect that they were owners-in-possession of the suit land and defendants No. 1 & 2 be restrained from interfering in their possession over the suit land comprised in Kh. Nos. 701 and 702 and 1/3 share in Kh. No. 39.

3. The suit was contested by defendants No. 1 & 2, namely Sh. Khimatu and Shamsher Singh, defendants No. 8 to 13 and defendants No. 14 & 15. A joint written statement was filed by defendants No. 1 & 2. It is admitted that defendant No. 3, namely, Jeet Ram had exchanged the suit land with the land of Bhagat Ram, predecessor-in-interest of the plaintiffs. It is asserted that defendant No. 3 had no right to exchange the khasra numbers in dispute with Bhagat Ram and defendant No. 13 Dola Ram in view of the compromise dated 11.5.1965 in suit bearing No. 250/1964. Smt. Thakri Devi has executed the *'Will'* dated 4.10.1978 in favour of defendant No. 1 Khimatu and Fateh Chand, the father of defendant No. 2. According to them, the possession of the suit land was delivered to Thakri Devi in execution petition by way of warrant of possession.

4. Jeet Ram, in his written statement, has admitted that he had exchanged the suit land with Bhagat Ram and defendant No. 13 Dola Ram. However, he has pleaded that he was owner of Kh. No. 260 only to the extent of ½ share and he has given only this share in exchange to Dola Ram who in lieu thereof had given to him 11/14 share of Kh. No. 18. He has admitted about the compromise decree. He has denied that he had hatched conspiracy with Smt. Thakri Devi.

5. Defendants No. 8 to 13 have filed the joint written statement. They have denied for want of knowledge the facts relating to the exchange of land and passing of compromise decree and thereafter execution petition. According to them, defendant No. 8 Nawang Cherring and Nawang Thele, predecessor-in-interest of defendants No. 9 to 12 had purchased 4/5 share of Kh. No. 701 and land measuring 1-3-0 bighas comprised in Kh. No. 702 from Hira Lal son of Sh. Lal Chand. They have purchased the land bonafide.

6. The replication was filed by the plaintiffs. The learned Sub Judge Ist Class, Manali, framed the issues and additional issue was framed on 19.5.2000. The learned Sub Judge Ist Class, Manali, decreed the suit on 29.5.2000 by declaring the plaintiffs to be owners-in-possession of suit land and defendants No. 1 & 2 were perpetually restrained from interfering in any manner over the suit land. The LRs of defendant No. 1 and defendant No. 2 Shamsher Singh filed an appeal before the learned District Judge, Kullu. The learned District Judge, Kullu, allowed the appeal and set aside the impugned judgment and decree vide judgment dated 9.8.2001. Hence, this regular second appeal.

7. This regular second appeal was admitted on the following substantial questions of law on 28.8.2001:

> "1. Whether oral and documentary evidence on record especially the statements of PW-1 Kunj Lal plaintiff, PW-2 Cherring Dorje, Exhibits, P-9 to P-15 mutations, Exhibits P-16 jamabandi for the year 1960-61, Ext. D-1 compromise decree, Ext. D-2 compliance report, Ex. D-7 and Ex. D-8 mutations, Ex. D-15 Rapat Rojnamcha, Ex. PA-1 mutation, DW-2 statement of Bhoop Ram, Chowkidar have not been considered in their proper perspective by the learned first appellate court?
>
> 2. Whether the principles of Section 41 and Section 52 of the Transfer of Property Act can be applied to a bonafide transaction, which was made during the period when there was no pendency of any suit and after due and diligent investigation regarding the title of the person making the transfer?
>
> 3. Whether Section 119 of the Transfer of Property Act would be applicable where one of the party to the transaction is subsequently deprived of property transferred and there is non receipt of properties stipulated to be received and the said property is entitled to the option for return of the property from the other party, legal representative or the transferee is also entitled to damages for the deprivation of that property?
>
> 4. Whether in a gift where the dispositive words are clear and an absolute estate is given and mutation entered thereto regarding acceptance and delivery of possession, and where allegedly the purpose of the gift is allegedly for maintenance of the donor, it does not follow that a complete estate is given and there is a rider in said transfer of gift?"

8. Mr. Sanjeev Kuthiala, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that the first Appellate Court has not correctly appreciated the documentary evidence placed on record. He has supported the judgment and decree passed by the trial Court. On the other hand, Mr. Bhupinder Gupta, Sr. Advocate, has supported the judgment and decree passed by the learned District Judge, Kullu dated 9.8.2001.

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

10. The dispute, in a nut shell, is that the predecessor-in-interest of the plaintiffs Sh. Bhagat Ram, exchanged 4/5 share of his land comprised in Kh. No. 701 and 702 with ½ share of land comprised in Kh. Nos. 661 and 695 belonging to Jeet Ram. The mutations No. 539 and 548 dated 29.9.1965 and 12.8.1966, respectively, were also attested. Sh. Jeet Ram has also exchanged his land comprised in Kh. No. 260 with the 11/14 share of land comprised in Kh. No. 18 belonging to defendant No. 13 Dola Ram vide mutation No. 837 dated 26.9.1965 and Dola Ram in turn exchanged the land comprised in Kh. No. 260 with 1/3rd share of land comprised in Kh. No. 39 belonging to Bhagat Ram vide mutation No. 538 dated 26.9.1965. Defendant No. 8 Nawang Chhering and Nawang Thele, predecessor-in-interest of defendants No. 9 to 12 had purchased 4/5 share of Kh. No. 701 and land measuring 1-3-0 bighas comprised in Kh. No. 702 from Hira Lal son of Sh. Lal Chand. Smt. Thakri Devi has gifted Kh. Nos. 260, 695 and 661 to Sh. Jeet Ram. She filed Civil Suit bearing No. 250/64 against Jeet Ram. It was compromised on 11.5.1965. Thereafter, she filed execution petition and mutation was attested on 7.12.1971.

11. PW-1 Kunj Lal deposed that Sh. Jeet Ram was owner of Kh. Nos. 260, 695 and 661. His father owned Kh. Nos. 701 and 702. Kh. No. 260 was also owned by Sh. Jeet Ram. He has exchanged this Kh. No. with Sh. Dole Ram.

Sh. Dole Ram has exchanged this Kh. No. with Kh. No. 39. Jeet Ram was given Kh. No. 695 for exchange of Kh. No. 702 and Kh. No. 661was exchanged with Kh. No. 701. Sh. Jeet Ram was owner of Kh. Nos. 260, 695 and 661. With the exchange thereafter, they have become owners of the land. An orchard was raised on Kh. No. 695. The defendants have started interfering in their possession since 1997. They came to know about the gift executed by Thakri Devi in favour of Jeet Ram. They have never left the possession. A false report was prepared by the revenue department. The mutation was wrongly attested in favour of Thakri Devi. In his cross-examination, he deposed that his father died in the year 1982. The exchange was made in the year 1965. Jeet Ram was owner of ½ share of Kh. No. 661 and absolute owner of Kh. Nos. 695 & 260.

12. PW-2 Cherring Dorje deposed that he knew the parties. He had seen the disputed land. Bhagat Ram has raised an orchard 30-35 years back. In his cross-examination, he could not narrate the khasra number. He was not aware that defendants No. 8 to 13 have purchased land from Hira Lal.

13. DW-1 Shamsher Singh deposed that the disputed land was owned by Thakri Devi. The land was gifted to Jeetu. Thakri Devi has instituted suit in the year 1964. The suit was compromised. Sh. Jeetu has to pay a sum of Rs. 200/- per month to Thakri Devi and in case of breach, Thakri Devi has right to get the possession of the land back. Thakri Devi was in possession of the suit land. She has executed the '*Will*' in the year 1978 in favour of Sh. Fateh Chand and Khimatu, vide mark A. It was scribed by Chuhru Ram. Sh. Mukand Lal and Dholu Ram were the marginal witnesses. Sh. Chuhru Ram has read the contents of the '*Will*' in front of the marginal witnesses. She has put her signatures in front of the witnesses. Thereafter, the marginal witnesses have put their signatures. The possession was taken over through Kanungo and Patwari. The legal heirs of Jeet Ram were in possession of the suit land. In his cross-examination, he deposed that Bhagat Ram knew that Thakri Devi was in possession of the suit property at the time of exchange.

14. DW-2 Bhoop Ram deposed that he was Chowkidar. He has seen the suit land. The land was in possession of Thakri Devi. After her death the land came to the possession of Fateh Chand and Khimatu. Thereafter, it came to the possession of Shamsher Singh. The Patwari and Kanungo had come on the spot to give possession to Thakri Devi.

15. PW-3 Sh. Chuhru Ram deposed that he was working as Petition Writer since 1968. Ext. DW-3/A was scribed by him at the instance of Thakri Devi. It was scribed on 4.10.1978. Smt. Thakri Devi has put her signatures in the presence of marginal witnesses Mukand Lal Upadhyay, Advocate and Dola Ram. Thereafter, the marginal witnesses have also signed the '*Will*'. The contents of '*Will*' were read over to Thakri Devi. She after admitting the contents to be true put her thumb impression on the same. She was in her senses. She knew her profit and loss.

16. DW-4 Mukand Lal deposed that '*Will*' Ext. DW-3/A was scribed by Chuhru Ram at the instance of Thakri Devi. The contents of the '*Will*' were read over to Thakri Devi. She after admitting the contents of the '*Will*' to be true, put her thumb impression in his presence and Dola Ram. Thereafter, he and Dola Ram signed the '*Will*'. She was in her senses.

17. DW-5 Dola Ram deposed that he has taken Kh. No. 39 in the year 1968 from Bhagat Ram by way of exchange and in lieu thereof Kh. No. 54 was taken from Rattan Dass in the year 1970. He has raised parapets on the same. He has spent Rs. 5,00,000/-. He has admitted in his cross-examination that he exchanged Kh. No. 260 and Bhagat Ram has given him Kh. No. 39 in lieu thereof in the year 1965.

18. DW-6 Tashi Angroop deposed that Kh. Nos. 701 & 702 were purchased by their predecessor-in-interest from Sh. Hira Lal. They have

improved the property. He was not aware that on Kh. Nos. 260, 695 and 661, defendants No. 1 & 2 have raised an orchard.

19. DW-7 Phunchok deposed that he knew Dola Ram. He was in possession of Kh. No. 54 since 1970. He has raised an apple orchard over the same.

20. DW-8 Thakur Dass deposed that their father has given Kh. No. 54 to Dola Ram in exchange and in lieu thereof Kh. Nos. 17, 18, 19 and 39 were given to his father.

21. DW-9 Heera Singh deposed that Jeet Ram was his father. His father had exchanged the land with Bhagat Ram. His father has given ½ share of Kh. Nos. 260, 661 and 695 to Bhagat Ram and Bhagat Ram had given in exchange Kh. Nos. 701 & 702. Thakri Devi has executed gift in favour of his father. Thakri Devi has also filed a Civil Suit. Bhagat Ram, father of the plaintiffs' was not aware of this Civil Suit. The possession was also handed over at the time of the exchange. Thakri Devi has filed execution petition. The possession was given to Thakri Devi. He admitted in his cross-examination that after exchange, the plaintiffs were in possession of Kh. Nos. 260, 695 and 661. He also admitted that Jeet Ram was owner of Kh. No. 260.

22. Smt. Thakri Devi has made a gift in favour of Jeet Ram. She filed suit for revocation of the gift. Decree-sheet is Ext. D-1 dated 11.5.1965. According to the decree-sheet, Jeet Ram has undertaken to regularly pay maintenance amount of Rs. 50/- per month to Smt. Thakri Devi and also to pay arrears of maintenance @ Rs. 200/- before 11.5.1965. Thakri Devi could take back the possession in breach of the undertaking given by Sh. Jeet Ram. Sh. Bhagat Ram has exchanged 4/5th share of his land comprised in Kh. No. 701 and whole share in Kh. No. 702 with Jeet Ram who in lieu thereof gave ½ share of land comprised in Kh. No. 661 and land compromised in Kh. No. 695 to Sh. Bhagat Ram. The mutation No. 539 was attested on 26.9.1965 and mutation No. 548 on 12.8.1966. Sh. Jeet Ram has further exchanged his land comprised in Kh. No. 260 with the 11/14 share of land comprised in Kh. No. 18 belonging to defendant No. 13 Dola Ram vide mutation No. 837 dated 26.9.1965 and Dola Ram in turn exchanged above mentioned Kh. No. 260 with 1/3rd share of land comprised in Kh. No. 39 belonging to Bhagat Ram vide mutation No. 538 dated 26.9.1965. According to these mutations, Sh. Bhagat Ram was put in possession of the suit land. Civil Suit No. 250 of 1964 was compromised on 11.5.1965. Smt. Thakri Devi, as per Ext. D-3 copy of order dated 16.3.1970 has admitted that Jeet Ram has made payment to her in accordance with the terms of decree upto 11.11.1966. Thus, it can safely be presumed that the decree remained in abeyance till 11.11.1966. The mutations were attested on 29.9.1965, 12.8.1966 and 26.9.1965 before 11.11.1966.

23. It is not disputed that Bhagat Ram has given Kh. Nos. 701, 702 and 39 to Sh. Jeet Ram. There is no contemporaneous material placed on record by the contesting defendants that Bhagat Ram knew about the Civil Suit instituted by Thakri Devi for revocation of the gift and compromise decree dated 11.5.1965. Neither from Ext. D-2, copy of report made by field Kanungo nor from D-15, copy of Rojnamcha, it is clear who was evicted from the suit land in pursuance of the warrant of possession. No tangible material has been placed on record that Thakri Devi was infact physically put into possession of the suit property. PW-1 Kunj Lal has categorically deposed that they were in possession of Kh. No. 260, 695 and 661 and have raised orchard on Kh. No. 695. PW-2 Cheering Dorje has also deposed that Bhagat Ram has raided an orchard on one portion of the land. Sh. Bhagat Ram was owner-in-possession of the suit land. Thereafter, the plaintiffs came in possession of the suit land. DW-1 Shamsher Singh has admitted in his cross-examination that he did not know whether anybody has dispossessed Bhagat Ram from the land which he got in exchange. DW-2 Bhoop Ram has categorically admitted in his examination-in-chief that

Jeet Ram was never in possession of the suit land. DW-9 Heera Singh has also admitted in his cross-examination that after the exchange, possession of the suit land was delivered and the plaintiffs came in possession of the same. Even according to Ext. P-1 to P-8 jamabandis, plaintiffs were shown in possession of the suit land. Thus, the learned first appellate Court has come to a wrong conclusion that at the time of exchange of the suit land the title of Bhagat Ram was under clog.

24. Smt. Thakri Devi has made gift in favour of Jeet Ram. The compromise decree was passed on 11.5.1965. Thereafter, the land was exchanged and mutations were attested. Thakri Devi, as noticed hereinabove, has admitted that Jeet Ram has paid her maintenance up to 11.11.1966. Sh. Jeet Ram has not adhered to the terms and conditions of the decree only after 11.11.1966. It is also not proved that Thakri Devi was ever put in physical possession of the suit property rather it has come on record that plaintiffs were in possession of the suit land. They could alone be evicted from the suit land. It cannot be said that plaintiffs were bound by the compromise decree dated 11.5.1965. Bhagat Ram, predecessor-in-interest of the plaintiffs has exchanged his own land with the land of Sh. Jeet Ram. Plaintiffs cannot be deprived of the land which their father has exchanged with Sh. Jeet Ram. The exchange has been admitted by the defendants. The learned first appellate Court has not even considered the alternative prayer of the plaintiffs for recovery of the land given in exchange by their father to defendant No. 3 Sh. Jeet Ram only on the ground that there was complexity of the matter. There was hardly any complexity of the matter and plaintiffs could not be forced to initiate fresh proceedings. The first appellate Court has not correctly appreciated the oral as well as documentary evidence placed on record, more particularly, the revenue entries and mutations. The exchange of land made by the predecessor-in-interest of the plaintiffs with defendant No. 3 Jeet Ram was bonafide. They could not be deprived of their land given in exchange to Sh. Jeet Ram as per the settled law. The substantial questions of law are answered accordingly.

25. Consequently, the regular second appeal is allowed. The judgment and decree passed by the learned first Appellate Court dated 9.8.2001 is set aside. Judgment and decree of the learned Sub Judge Ist Class, Manali, dated 29.5.2000, is affirmed. In view of the above, pending application(s), if any, including CMP No. 11889 of 2014 shall stand disposed of.

****

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

Manohar Lal. ...Petitioner.
Versus
Joginder Singh and another. ...Respondents.

Civil Revision No.2/2014
Reserved on : 26.11.2014
Decided on: 15.12.2014

H.P. Urban Rent Control Act, 1987- Sections 2(e) and 12- tenant claimed that he had taken permission of the landlord to carry out commercial activities which was granted at the enhanced rent- parties had not taken the permission of the Rent Controller in writing for converting residential building into non-residential building- held that, landlord and tenant cannot convert a residential building into non-residential building by their mutual consent and landlord would be entitled to seek ejectment of the tenant. (Para- 24 to 31)

Code of Civil Procedure, 1908- Order 41 Rule 27- There must be satisfactory reasons for non-production of the evidence in trial court- any

party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court. (Para-33)

Cases referred:

Kamal Arora vs. Amar Singh and others, 1986 (Supp) SCC 481
Vinod Kumar Arora vs. Surjit Kaur, (1987) 3 SCC 711
Tara Chand Chandani vs. Shri Shashi Bhushan Gupta, 1980 (2) Rent L.R. 212
Shri Hari Mittal vs. Shri B.M. Sikka, 1986 (1) Punjab Law Reporter 1
Varinder Kumar vs. Janak Raj, 1987 (3) Rent Law Reporter 193
Surjit Singh Arora vs. Harbans Singh 1989 (1) Rent Control Reporter
Krishan Lal Nanda vs. Madan Lal, 1992 (2) Rent Control Reporter 104
Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148

For the Petitioner: Mr. B.C. Negi, Advocate.
For the Respondents: Mr. Satyen Vaidya, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This revision petition is directed against the order dated 20.7.2013 rendered in CMP No. 193-S/6 of 2013 and order dated 20.7.2013 rendered in Rent Appeal no. 19-S/14 of 2012 rendered by the Appellate Authority.

2. "Key facts" necessary for the adjudication of this petition are that respondents-landlords (hereinafter referred to as the "landlords" for convenience sake) filed eviction petition against the petitioner-tenant (hereinafter referred to as the "tenant" for convenience sake) under section 14 of the H.P. Urban Rent Control Act, 1987. According to the landlords, tenant has ceased to occupy the premises continuously for a period of 12 months immediately prior to filing of eviction petition. The premises were lying locked continuously. Tenant has acquired sufficient accommodation for his requirement at B-19, Sector-1, near State Bank of India, New Shimla, which was within the urban area. The residential premises were two rooms, one kitchen and one bath room. The rent was fixed @ Rs. 300/- per month.

3. The petition was contested by the tenant. It was denied that tenant has ceased to occupy premises immediately prior to filing of eviction petition. He was inducted as tenant in premises in the year 1962. He was inducted by previous landlords, i.e. Jagat Ram and Suresh Chand. He was unmarried when he was inducted as tenant. He got married in the year 1967. He requested the landlord for one additional room, which was used as godown by landlords. In the year 1994, tenant requested the landlords to grant permission to start commercial activities from premises and the same was agreed at the enhanced rent and upon payment of lump sum amount of ` 10,000/-. He has purchased B type plot in New Shimla in the year 1990. He has shifted to new premises in the year 2001. The premises were used by the tenant for business purpose. Tenant was suffering from skin problem. He was also suffering from heart ailment.

4. Landlords filed rejoinder. Learned Rent Controller framed the issues on 3.9.2009. He allowed the petition on 1.3.2012. Tenant preferred an appeal against the order dated 1.3.2012 before the Appellate Authority. Tenant also moved an application under order 41 rule 27 of the Code of Civil Procedure. The Appeal was dismissed on 20.7.2013 and the application under order 41 rule

27 of the Code of Civil Procedure vide CMP No. 193-S/6 of 2013 was also dismissed on 20.7.2013. Hence, the present petition.

5. Mr. B.C. Negi has vehemently argued that since the character of the building has been converted into non-residential building, landlords could not seek ejectment of the tenant on the ground of bona fide requirement. He has also contended that his client has always remained in the occupation of the premises.

6. Mr. Satyen Vaidya has supported the orders passed by the Appellate Authority.

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

8. PW-1 Joginder Singh has testified that he has purchased building in the year 2007. It is three storeyed building. He has proved rough sketch plan Ex.PW-1/A. Neither tenant nor his family members were residing in the premises. The premises remained closed for more than 12 months. Tenant has acquired accommodation in New Shimla.

9. PW-2 Inder Mohan has deposed that no one was residing in the premises. The premises were closed for the last 5-6 years. He has not seen either Manohar Lal or his family members residing in the premises for the last 4-5 years.

10. PW-3 Nek Ram has proved Ex.PW-3/A. According to Ex.PW-3/A, from February, 2008 to June, 2009, total 192 units were consumed. No units have been consumed in the months of February, 2008, March, 2008, May, 2008, June, 2008, July, 2008, September, 2008, October, 2008, January, 2009, February, 2009 and only 4 and 10 units have been consumed during March, 2009 and April, 2009, respectively.

11. PW-4 Raj Pal has deposed that Manohar has been recorded as tenant in the disputed premises. The premises were found locked.

12. RW-1 Kamla Devi has proved that Ex.RW-1/A. She has admitted that there were no details of incoming calls.

13. RW-2 Aman Chadda has deposed that the tenant was agent of Bajaj Alliance. He has proved Ex.PW-2/A.

14. RW-3 Lekh Raj has proved Ex.RW-3/A.

15. Tenant Manohar Lal has appeared as RW-4. According to him, the disputed premises comprised of two rooms, one kitchen and one bath room. It was taken on rent in the year 1962 from Jagat Ram Sood and Suresh Chand. He requested the landlords to give him one more room. Landlords agreed for the same. He retired from the Government service in the year 1994. He requested the landlords to convert residential premises into office-cum-residence. He started business of small saving agency, UTI agency and IDBI agency. The rent was enhanced to Rs. 1,200/-. In addition, he has also paid Rs. 10,000/- to the landlords. He has got a telephone installed in the premises. He has constructed the residential house in New Shimla. He has serious skin disease. He was doing business from the disputed premises between 10.30 A.M. to 3.30 P.M.

16. RW-5 Vinay Kumar has deposed that the tenant was his patient. He was suffering from skin disease.

17. RW-6 Sandeep Kumar has deposed that the tenancy was created in the year 1962. Tenant was residing in premises comprised of two rooms, kitchen and bathroom. Tenant used to pay Rs. 300/- in the year 1962 initially. The rent was enhanced to Rs. 1200/- annually and a sum of Rs. 10,000/-

additional was also paid when the request of tenant was accepted for converting premises for commercial purpose.

18. RW-7 Subhash Chand has deposed that tenant has retired from T&CP Department in the year 1995. Manohar Lal started business in the year 1995. He used the premises for office-cum-residence.

19. Mr. B.C. Negi has drawn the attention of the Court to section 2 (e) of the H.P. Urban Control Act, 1987. It reads as under:

> **2. (e) "non-residential building" means a building being used-**
>
> **(i) mainly for the purpose of business or trade; or**
>
> **(ii) partly for the purpose of business or trade and partly for the purpose of residence, subject to the condition that the person who carried on business or trade in the building resides therein :**
>
> **Provided that if a building is let out for residential and non-residential purposes, separately to more than one person, the portion thereof let out for the purpose of residence shall not be treated as non-residential building.**

20. Section 12 of the H.P. Urban Control Act reads as under:

> **"12. Conversion of a residential building into a non-residential building**
>
> **No person shall convert a residential building into a non-residential building except with the permission in writing of the Controller.**
>
> **13. Landlords` duty to keep the building or rented land in good repairs**
>
> **(1) Every landlord shall be bound to keep the building or rented land in good and tenantable repairs.**
>
> **(2) if the landlord neglects or fails to make, within a reasonable time after receiving a notice in writing, any repairs which he is bound to make under sub-section (1), the tenant may make the same himself and deduct the expenses of such repairs from the rent or otherwise recover them from the landlord :**
>
> **Provided that the amount so deducted or recoverable in any year shall not exceed one-twelfth of the rent payable by the tenant for the year."**

21. Tenant cannot take assistance from section 2 (e) (ii). It is evident from the plain language of section 2 (e) (ii) that non- residential building would mean "building used partly for the purpose of business or trade and partly for the purpose of residence, subject to the condition that the person who carried on business or trade in the building resides therein". Tenant has purchased the plot in the year 1994. He has raised the construction. He has shifted in the year 2001 to the new premises. The parties have not taken permission of the Rent Controller in writing for converting a residential building into non-residential building. Tenant while appearing as RW-4 has deposed that he had requested the landlords to give him one additional room. According to RW-4 he has sought permission of the landlords in the year 1994 to covert the residential premises into office-cum-residence. He has enhanced rent from Rs. 300/- to Rs. 1200/-. The language employed in section 12 is imperative and mandatory. It is reiterated that the parties were required to get the permission in writing from the Rent Controller before converting the residential premises to non-residential premises under section 12 of the H.P. Urban Rent Control Act, 1987.

22. PW-1 Joginder Singh has testified that neither the tenant nor his family members were residing in the premises and they have shifted to new accommodation in New Shimla. Similarly, PW-2 Inder Mohan has deposed that he has seen the premises closed for the last 5-6 years. He has not seen Manohar Lal or his family members residing in the premises for the last 4-5 years. It is also established from the statements of PW-3 Nek Ram and PW-4 Raj Pal that the premises were not being used by the tenant.

23. The copy of sale deed is mark P-1. It is evident from clause-B of mark P-1 that in demised premises Manohar Lal was residing. It is not mentioned in mark P-1 that Manohar Lal was carrying on his business as well. Tenant has not produced vendor. Landlords have conclusively proved that the tenant has ceased to occupy the premises and he has acquired alternative accommodation sufficient for his requirements in New Shimla.

24. Since the premises have never been converted from residential to non-residential, landlords have absolute right to evict the tenant from the premises. There is no merit in the contention of Mr. B.C.Negi, Advocate that for violating Section 12, there is only provision of penalty under Section 30 and the eviction proceedings could not be initiated. Section 30 does not debar the landlord to file independent petition seeking eviction of the tenant under Section 14 of the H.P. Urban Rent Control Act, 1987 from the residential premises. Section 12 & 30 operate independently. A person violating Section 12 can be punished with fine, which may extend to Rs. 1000/-. The underlying purpose of enacting Sections 12 and 30 is to highlight the scarcity of residential premises and not converting the same to non-residential premises. In this case, no permission has been taken under Section 12 of the H.P. Urban Rent Control Act, 1987. The suit premises have never lost the character of residential premises.

25. Their Lordships of the Hon'ble Supreme Court in ***Kamal Arora*** vs. ***Amar Singh and others***, 1986 (Supp) SCC 481 have held that the landlord and the tenant by their mutual consent cannot convert a residential building into a non-residential building because that would be violative of the provisions of section 11. Their Lordships have held as under:

> "3. Undoubtedly, the landlord let out the premises knowingly that it is being taken for running a school and admittedly the building is used for running a school. Therefore, prima facie the leased premises would fall within the definition of a non-residential building. The High Court after examining the provision of the Capital of Punjab (Development and Regulation) Act, 1951 read with Section 11 of the Rent Act held that statute prohibits conversion of residential building into non-residential by act inter vivos. It was said that the landlord and the tenant by their mutual consent cannot convert a residential building into a non-residential building because that would be violative of the provision of Section 11. And it is admitted that building is situated in a sector falling within the residential zone. In this fact situation, coupled with the fact that the landlord has retired from service and genuinely needs the premises for his residence as found by all courts, we are not inclined to interfere with the judgment and order of the High Court. Mr. Goel, however, wanted us to examine the question : whether where the parties have by mutual consent changed the user, the landlord cannot be permitted to back out from his consent? He wanted to invoke the situation where parties are pari delicto court should not render assistance to any one of them. In our opinion this is not a case to examine this contention. Let it be decided in an appropriate case."

26. ***Kamal Arora*** vs. ***Amar Singh and others***, 1986 (Supp) SCC 481 has been relied upon by their Lordships of the Hon'ble Supreme Court in ***Vinod Kumar Arora*** vs. ***Surjit Kaur***, (1987) 3 SCC 711. Their Lordships have held as under:

"11 However, when the appellant entered the witness box, he gave up the case set out in the written statement and propounded a different case that the hall had been taken on lease only for non-residential purposes. The perceptible manner in which the appellant had shifted his defence has escaped the notice and consideration of the Statutory Authorities. Both the Authorities have failed to bear in mind that the pleadings of the parties form the foundation of their case and it is not open to them to give up the case set out in the pleadings and propound a new and different case. Another failing noticed in the judgments of the Rent Controller and the Appellate Authority is that they have been oblivious to the fact that the respondent had leased out the hall to the appellant only for a period of 11 months. Such being the case, even if the respondent had come to know soon after the lease was created that the appellant was using the hall to run a clinic, she may have thought it prudent to let the appellant have his way so that she can recover possession of the hall after 11 months without hitch whereas if she began quarrelling with the appellant for his running a clinic, she would have to be locked up in litigation with him for a considerable length of time and can obtain possession of the hall only after succeeding in the litigation. Yet another factor which vitiates the findings of the Rent Controller and the Appellate Authority is that both of them have overlooked Sec. 11 of the Act, and the sustainability of any lease transaction entered in contravention of Sec. 11. The legislature, with a view to ensure adequate housing accommodation for the people, has interdicted by means of Section 11 the conversion of residential buildings into non-residential ones without the written consent of the Rent Controller. Admittedly, in this case the parties had not obtained the consent in writing of the Rent Controller for converting the hall in a residential building into a clinic. Such being the case, the appellant cannot get over the embargo placed by section 11 by pleading that the respondent was well aware of his running a clinic in the hall and that she had not raised objection at any time to the running of the clinic. Learned counsel for the appellant referred us to the decision in Dr. Gopal Dass Verma v. Dr. S. K. Bharadwaj (1962) 2 SCR 678 : (AIR 1963 SC 337) and argued that the ratio laid down therein would be fully attracted to the facts of this case. It is true that in the said decision, it was held that when a leased premises was used by the lessee incidentally for professional purposes and that too with the consent of the landlord, then the case would go out of the purview of Section 13(3)(e) of the Delhi and Ajmer Rent Control Act, 1954 and consequently the landlord would not be entitled to see eviction of the tenant on the ground he required the premises for his own residential requirements. We find the facts in that case to be markedly different and it was the speciality of the facts which was largely instrumental in, persuading this Court to render its decision in the aforesaid manner. Moreover, the Court had not considered the question whether the conversion. of a residential premises into a non-residential one without the permission of the Rent Controller was permissible under the Delhi and Ajmer Rent Control Act and if it was not permitted, how far the contravention would affect the rights of the parties. In our opinion, the more relevant decision to be noticed would be Kamal Arora v. Amar Singh, 1986 (Suppl) SCC 481 where this Court declined to interfere with an order of eviction passed in favour of the landlord as the Court was of the view that even if the landlord and the tenant had converted a residential building into a nonresidential one by mutual consent, it would still be violative of Section 11 of the East Punjab Rent Restriction Act

and, therefore, the landlord cannot be barred from seeking recovery of possession of the leased building for his residential needs. We are therefore of the view that the findings of the Rent Controller and the Appellate Authority about the appellant having taken the hall on lease only for running a clinic and that he had not changed the user of the premises have been rendered without reference to the pleadings and without examining the legality of the appellant's contentions in the light of Section 11 of the Act. We do not therefore think the High Court has committed any error in law in ignoring the findings rendered by the Statutory Authorities about the purpose for which the hall had been taken on lease.

27. Learned Single Judge of Punjab and Haryana High Court in ***Tara Chand Chandani*** vs. ***Shri Shashi Bhushan Gupta,*** 1980 (2) Rent L.R. 212 has held that when the premises were let out to a Chartered Accountant for residential purposes and the Chartered Accountant was running office in the building, the premises would remain residential building. Learned Single Judge has held as under:

"[8] There is another aspect of the matter as well. Section 11 of the Act, as reproduced earlier, says that no person shall convert a residential building into a non-residential building except with the permission in writing of the Controller In the present case admittedly the rented premises are a part or a portion of a residential building known as `Lakshmi Vishnu Bhawan. The portion other than the rented one is being used by the landlord for his own residence. Under these circumstances, could the landlord convert a part of the residential building into a non-residential one without the permission in writing of the Rent Controller? Since there is a bar provided under the Act itself and under Section 19 of the Act penalty for the breach of the same has been provided it is quite clear that a residential building as such could not be converted into a non-residential building by letting it out to a Chartered Accountant for running his office therein. Anything done in contravention of the provisions of the Act cannot bind the landlord or the tenant. In this view of the matter also it cannot be held that the premises have become non-residential building because it is being used solely for the purpose of running the office by the tenant as Chartered Accountant. This also indicates that the Legislature used the expression 'profession as distinguished from the expression 'business' or 'trade' under the Act."

28. The Full Bench of Punjab and Haryana Court in ***Shri Hari Mittal*** vs. ***Shri B.M. Sikka***, 1986 (1) Punjab Law Reporter 1 has held that section 11 of East Punjab Urban Rent Restriction Act, 1949 was intended to subserve a public policy of seeing that the residential accommodation does not fall short of community's requirement. The Full Bench has further held that the residential building let out for non-residential purpose by the landlord without obtaining the written permission of the Rent Controller would continue to be residential building and the landlord would be entitled to seek ejectment of the tenant on the ground of his bona fide personal requirement. The Full bench has held as under:

"18. In our opinion, the kind of purpose that clause (k) of S. 14(1) of the Delhi Rent Act served, the same purpose appears to have been intended by the Punjab appears to have been intended by the Punjab Legislature in the present case to be served by the provision of S. 11 of the Act, so far as the use of the residential building for non-residential purpose is concerned. This injunction was intended to subserve a public policy of seeing that the residential accommodation does not fall short of the community's requirement,

as the shortage of residential accommodation would tend to result in unhygienic conditions of the residential areas by accommodating more members than it could legitimately be intended or the extra population resorting to unhygienic use of the open spaces and pavements and creating social tension and health hazards to the community. In view of the above, the provisions of section 11 of the Act are mandatory in character.

30. The reference made by the learned single judge is answered in the affirmative and it is held that a residential building let out for non-residential purpose by the landlord without obtaining the written permission of the Rent Controller in terms of S. 11 of the Act would continue to be a residential building and the landlord would be entitled to seek ejectment of the tenant on the ground of his bona fide personal requirement."

29. Learned Single Judge of Punjab Haryana High Court in ***Varinder Kumar*** vs. ***Janak Raj***, 1987 (3) Rent Law Reporter 193 has held that residential building let out for non-residential purposes without the permission of Rent Controller under section 11 of the Rent Act, the premises would continue to be residential and character of the building would not be changed. Learned Single Judge has held as under:

"[3] The only contention raised by the learned counsel for the petitioner before me is that the premises in dispute is a house bearing Municipal No. 366 situated at Buria Gate, Jagadhri. It consists of one room and a courtyard. In spite of the fact that it is proved on the record that it was let out to the respondent for a non-residential purpose, the premises continues to be a residential house and the petitioner has a right to seek eviction of the respondent on the ground that he requires the premises bonafide his own use and occupation. He placed reliance on Hari Mittal v. B.M. Sikka, 1986 90 PunLR 1, to urge that without the permission of the Rent Controller a residential building cannot be converted into non-residential one."

30. Learned Single Judge of Punjab and Haryana High Court in ***Surjit Singh Arora*** vs. ***Harbans Singh*** 1989 (1) Rent Control Reporter while replying upon ***Shri Hari Mittal*** vs. ***Shri B.M. Sikka***, 1986 (1) Punjab Law Reporter 1 has held that the landlord cannot convert a residential building into non-residential without permission of Rent Controller as required under section 11. Learned Single Judge has held as under:

"[6] Section 11 of the Act is intended to prevent residential accommodation being converted into a non-residential one without the permission of the Rent Controller. The landlord cannot convert a residential building into a non-residential one without permission of the Rent Controller and Section 11 of the Act is mandatory. This Court in the Full Bench judgment reported as Shri Hari Mittal v. Shri B. M. Sikka, 1986 90 PunLR 1 held as under:

In our opinion, the kind of purpose that Clause (k) of S. 14 (1) of the Delhi Rent Act served, the same purpose appears to have been intended by the Punjab Legislature in the present case to be served by the provision of Section 11 of the Act, so far as the use of the residential building for non-residential purpose is concerned. This injunction was intended to subserve a public policy of seeing that the residential accommodation does not fall short of the community's requirement, as the shortage of residential accommodation would tend to result in unhygienic condition of the residential areas by accommodating more members than it could

legitimately be intended or the extra population resorting to unhygienic use of the open spaces and pavements and creating social tension and health hazards to the community in view of the above, the provisions of Section 11 of the Act are mandatory in character.

It was then argued that if Section 11 of the Act was intended to subserve a public policy of the kind, then it would prohibit even a landlord for converting a self occupied residential building, but this Court in two Division Bench decisions referred to by the Division Bench in Bansal's case that is, Chattar Sain's case and Faqir Chand's case has taken the view that Section 11 is not attracted to a residential building which is in the self-occupation of the landlord, hence the landlord could convert it into a self occupied non-residential building without the permission of the Controller in terms of Section 11 of the Act.

The learned Counsel drew my attention to a case reported as Dr. Jagit Mehta v. Dev Brat Sharma, 1987 HRR 680, to substantiate the plea that the demised premises being a non-residential building cannot be got vacated by the Respondent by invoking the provisions of Section 13-A of the Act. This judgment is not applicable to the facts of the present case. The premises in dispute in that case were located in Jullundur and the provisions of the Regulation Act were not applicable to the town of Jullundur Moreover, the learned Judge, on the evidence produced on the record came to the conclusion that the location and nature of the building was such that it could only be used as shop and for no other purpose."

31. Learned Single Judge of Punjab and Haryana High Court in ***Krishan Lal Nanda*** vs. ***Madan Lal***, 1992 (2) Rent Control Reporter 104 has held that though the tenant has converted the residential building into non-residential with consent of landlord, it being violative of section 11, would not deprive the landlord seeking ejectment of tenant on ground of his bona fide need. Learned Single Judge has held as under:

"[7] Tara Chand RW-3 and Jagan Nath RW-4 have admitted in their cross-examination that the main building of which the demised premises was a part, was being used by the landlord as his residence; that the houses in neighbourhood of the said property were also being used for residential purposes; that Vakilpura mohalla was a residential locality and portions of various houses in that mohalla are being used as shops. Both the lower authorities on the basis of appreciation of evidence on record have concurrently found that tenant failed to prove that the premises in question was constructed as an independent shop. It was in fact a portion of the main residential building. In Dr. Subhash Chander's case (supra), it has been held that mere fact that a room of the main building was being used by the tenant as a shop, did not convert the building into a non-residential building and that merely because it was given for business purpose was not sufficient to hold that it had become commercial premises. More over, in Vinod Kumar Arora v. Smt. Surjit Kaur , A. I. R. 1987 S. C. 2179. it has been held that even if the tenant had converted the residential building into a non-residential one, by mutual consent, it being violative of Section 11 of the Act, the landlord could not be deprived of seeking the ejectment of the tenant on the ground of his bonafide residential need.

32. Tenant had also moved an application under section 41 rule 27 of the Code of civil Procedure whereby he intended to place on record copy of order

dated 2.8.2012 and letter dated 31.3.2013. Learned first appellate court has rightly rejected the application under section 41 rule 27 of the Code of Civil Procedure. Tenant has placed on record unattested Photostat copy of the document. It has also come on record that the landlords have purchased built up area and the same did not fall within the definition of section 118 of the H.P. Tenancy and Land Reforms Act, 1972. Eviction petition was instituted by the landlords in the year 2009 and the application was thus filed belatedly to delay the proceedings. Moreover, the parties cannot be permitted to fill in lacuna in their case by filing an application under order 41 rule 27 of the Code of Civil Procedure. The principles for allowing the additional evidence must be fulfilled while allowing the application under order 41 rule 27 of the Code of Civil Procedure.

33. Their Lordships of the Hon'ble Supreme Court in ***Union of India*** vs. ***Ibrahim Uddin and another***, (2012) 8 SCC 148 have held that party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court. There must be satisfactory reasons for non-production of the evidence in trial court for seeking production thereof in appellate court. Their Lordships have held as under:

> **"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).**
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> **37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).**
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> **38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].**

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.

44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an

essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336).

45. In The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:

> **"We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence."**
>
> **(Emphasis added)**

A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad and Ors., AIR 2008 SC 1108.

46. A Constitution Bench of this Court in K. Venkataramiah (Supra), while dealing with the same issue held:

> **"It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."**
>
> **(Emphasis added)**

In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.

47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.

48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either

of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

Stage of Consideration:

49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053)."

34. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed. The tenant shall handover the premises in question to the landlords within a period of three months from today, failing which it shall be open to the landlords to initiate appropriate proceedings for the eviction of the tenant. Pending application(s), if any, also stands disposed of. No costs.

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

RFA No.130 of 2006 a/w RSA Nos. 131, 132, 133, 134, 135, 136 and 137 of 2006.
Reserved on : 10.12.2014
Decided on : 16.12.2014

RFA No. 130 of 2006

Prakash Kaur & Others ....Appellants.

Versus

L.A.C & others ....Respondents.

RFA No. 131 of 2006

Ram Dass & another ....Appellants

Versus

L.A.C & Others ....Respondents.

RFA No. 132 of 2006
Hari Ram & Others ....Appellants
Versus
L.A.C & Others ....Respondents.
RFA No. 133 of 2006
Mehar Chand & Others ....Appellants
Versus
L.A.C & Others ....Respondents.
RFA No. 134 of 2006
Hari Ram & Others ....Appellants
Versus
L.A.C & Others ....Respondents.
RFA No. 135 of 2006
Jeewan Singh ....Appellant
Versus
L.A.C & Others ....Respondents.
RFA No. 136 of 2006
Savitri Devi & Others ....Appellants
Versus
L.A.C & Others ....Respondents.
RFA No. 137 of 2006
Ram Pal & others ....Appellants
Versus
L.A.C & Others ....Respondents.

Land Acquisition Act, 1894- Section 18 - Appellants claimed that an award announced by District Judge should have been taken into consideration while assessing the compensation payable to them- held, that award pronounced by the District Judge could have been taken into consideration only when the lands are proximate to each other – oral testimonies of the claimants in absence of Khaka Dasti prepared by revenue officials cannot lead to an inference that the lands were proximate to each other-District Judge was justified in rejecting the previous award. (Para-3)

Case referred:
Krapa Rangiah versus Special Deputy Collector, Land Acquisition 1982 (2) SCC 374

For the Appellant(s): Mr. H.K Bhardwaj & Mr. Dheeraj K Vashisht, Advocate.
For the respondents: Mr. Vivek Singh Attri, Deputy Advocate General for respondent-State.
Mr. Rahul Mahajan, Advocate for Respondent-General Manager, Northern Railways in all appeals except RFA No. 137 of 2006.
Mr. Jagan Nath, Advocate vice Mr. Anand Sharma, Advocate for respondent-General Manager, Northern Railways in RFA No. 137 of 2006.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

All these appeals are directed against the impugned award rendered by the learned District Juna, Una in Land Reference Petition Nos. 1,2,3,4,5,6,7 and 8 of 2002, wherein the award of the learned District Judge,

Una is subjected to a frontal attack by the learned counsel for the appellants herein, on the score of his having assessed deficient, unjust and unreasonable compensation in favour of the appellants herein qua their lands subjected to acquisition for respondent No.3-General Manager Northern Railways.

2. The learned counsel appearing for the appellants herein has concerted to espouse before this Court that the learned District Judge in rendering findings, on the issues, qua which the parties were at contest, has committed an impropriety inasmuch as he has omitted to take into consideration the factum of applicability of award rendered in a Reference Petition comprised in Ex. P-4 to the instant appeal even though, the lands of the land owners therein, as were subjected to acquisition, while being located in Village Ajnauli, as are the lands of the appellants herein located, as such, the determination of compensation by the learned District Judge in his award comprised in Ex. P-4 ought to have been the determinant parameters for the learned District Judge, Una in his impugned award to on its strength assessing compensation qua the lands of the appellants herein. He hence, concerts that the learned District Judge, Una while assessing compensation qua the lands of the appellants herein has discarded the probative worth of Ex. P-4 and proceeded to assess a deficient, unreasonable and unjust compensation qua the lands of the appellants herein. The above contention as addressed before this Court by the learned counsel appearing for the appellants herein would garner immense weight and strength in the face of cogent evidence having come to be adduced before the learned District Judge, Una qua the fact of the advantages inherent in the lands of the land owners subjected to acquisition and qua which a determination was rendered by the learned District Judge, Una in Ex. P-4 and which advantages are extracted hereinafter being also inherent in the lands of the appellants herein while both being proximately located to each other.

> *" 27. From the perusal of the evidence as has been re-produced hereinabove the following factors emerges as proved:-*
>
> *(i) That the aforesaid land of the petitioners which has been acquired happened to be situated on the boundary of Municipal Committee Una by the side of District Hospital, Una and a shopping complex named as Bhikha Market..*
>
> *(ii) The acquired land abutted the main road leading from Una to Hamirpur.*
>
> *(iii) The acquired land happened to be situated in the vicinity of village Ajnauli.*
>
> *(iv) The petitioners were growing crop in the acquire land and one of the petitioner siri Ram had built a shop on the land bearing Khasra No. 1184.*

3. The apt and apposite evidence of probative worth to constitute or to lay foundation for an inference that the advantages borne by the lands of the land owners qua whose lands an award is comprised in Ex. P-4 are also borne by the lands of the appellants herein was comprised in potent and cogent evidence portraying the factum of proximity of lands of the lands owners qua whom an award was rendered in Ex. P-4 with the lands of the appellants herein. Even though the oral testimonies of the petitioners in support thereof exist or occur on record, however, the self serving depositions of the petitioners are deficient as well as inapt for rendering a conclusion that hence cogent and potent evidence has come on record qua accomplishment and fulfillment of the relevant admissible parameter of the lands comprised in Ex. P-4 being situated in close proximity to the lands of the appellants so as to prod this Court to adjudge, on the strength of compensation determined in Ex. P-4, compensation qua the lands of the appellants herein at par thereon. Rather the deposition of PW-1 unfolds the factum of lands being away from the main highway. Besides the deposition of PW-2 while unfolding the factum of the vastness of expanse of village Ajnauli where the lands of the appellants is located, in as much as its

extending up to 7 Kms., does also give leeway to an inference that given the expanseness or the width of the tract of the village wherein the lands of the land holders qua whom an award was rendered as comprised in Ex. P-4 are located and wherein too the lands of the appellants herein are located, that, hence the lands of the land holders comprised in the verdict existing in Ex. P-4 and lands of the appellants herein are improximately located. Consequently, as such, the determination of compensation by the learned District Judge in his award comprised in Ex. P-4 qua the lands located in Village Ajnauli as the lands of the appellants are located cannot for lack of cogent evidence portraying proximity interse lands of the petitioners in the award comprised in Ex. P-4 with the lands of the appellants herein form anvil for determining on score thereof compensation in favour of the lands of the appellants herein, too located in Village Ajnauli especially with theirs being improximately located to each other. Even otherwise the best evidence, for marshalling an inference that the determination of compensation by the learned District Judge in his award comprised in Ex. P-4 ought to be the anvil or anchor for determining on score thereof compensation for the lands of the appellants herein, was constituted by adduction of 'Khaka Dasti' at the instance of the Revenue Officials of the Mohal Concerned portraying the factum of proximity in location of the lands inter se the petitioners in award comprised in Ex. P-4 and the lands of the appellants herein. Omission of its adduction into evidence fosters rather a concomitant deduction that the lands of the land holders comprised in award existing in Ex. P-4 cannot be reinforcingly concluded to be forming or constituting a viable, just and apposite parameter for on its score determining compensation qua the lands of the appellants herein though located also in village Ajnauli. Consequently, the reasoning and the concomitant conclusions arrived at by the learned District Judge that the award of the learned District Judge Una comprised in Ex. P-4 is unreliable or does not constitute a relevant parameter for on its score adjudging or determining compensation for the lands of the appellants herein is un-interfereable.

4. The learned counsel appearing for the appellants herein vociferously canvasses before this Court that the learned District Judge in his impugned award has untenably discarded the probative worth of Ex. PW-4/A, sale deed entered into a willing seller and willing buyer, hence bereft of an element of its constituting a rigged transaction, as such, when it was reliable and relevant piece of evidence, it rather ought to have been borne in mind by the learned District Judge for on its score determining compensation for the lands of the appellants herein as were subjected to acquisition dehors the fact that the sale deed adduced into evidence by the petitioners comprised in Ex. PW-4/A is qua a small tract of land and then may be the market value as unfolded in it may not in its entirety constitute the market value for the vast expanse or tract of lands of the appellants herein as subjected to acquisition unless obviously some legal permissible deductions from it were meted out. Nonetheless, the further fact that even when the apposite evidence for unraveling the factum of the land comprised in Ex. PW-4/A being located in close proximity to the lands of the appellants herein, is amiss, the apt conclusion which is to be formed is that the market value unfolded in the sale instance comprised in Ex. PW-4/A, cannot hence constitute a reckonable parameter for on its strength determining compensation for the lands of the appellants herein. Moreso, when the said factum of proximity inter se the land comprised in Ex. PW-4/A and the lands of the appellants herein as subjected to acquisition remained un-pronounced even in the testimonies of the vendor and vendee therein. Concomitantly then it has been tenably concluded by the learned District Judge Una in his impugned award that the market value of the sale instance comprised in Ex. PW-4/A was both unreliable as well as un- reckonable for on its strength determining compensation for the lands of the appellants as were subjected to acquisition.

5. Be that as it may, when this Court while allowing an application preferred by the counsel for the appellants in RFA No. 131 of 2006 under Order

41 Rule 27 had then permitted him to adduce into evidence a judgment rendered by the learned Additional District Judge, Fast Track Court, Una who then come to tender the same into evidence and exhibited the same as Ex. AX. It hence becomes imperative for this Court to adjudicate and determine whether the compensation awarded by the learned Additional District Judge, Fast Track Court, Una in his judgment comprised in Ex. AX qua the lands of the lands owners therein constitutes, though rendered subsequently, to the rendition of the impugned award a relevant just and acceptable parameter for prodding this Court to on its strength determine compensation qua the lands of the appellants herein. A perusal of award comprised in Ex. AX unfolds the fact that the lands of the land owners therein as the lands of the appellants herein are located in Village Ajnauli. However, the mere factum of location of the lands of the land owners therein and of the appellants herein, in a common village Ajnauli, would not per se constitute Ex. AX, to be an apt parameter for on its strength determining compensation for the lands of the appellants herein, unless of course, evidence of potent worth and of immense probative value unveiling the factum of interse proximity of lands comprised in Ex. AX and the lands of the appellants herein came to be unfolded as well as unearthed. The said evidence is manifestly brought to the fore by the factum of revelation in Annexure AX of the lands comprised in Khasra No. 1074/2, 583/2, 707/2, 741/3, 705/2, 706/2, 1075/2, 661/2, 698/2, respectively, having come to be therein subjected to acquisition. Now given also the imminent fact of the lands of the appellants herein bearing Khasra No. 583/1, 698/1 705/1, 706/1, 707/1, 741/1, 741/2, 1075/1 and 661/1, hence, only having a dissimilarity of min number vis-à-vis the lands detailed in Ex. AX, as such, obviously when the core khasra Numbers borne by each aforesaid are congruous or analogous to each other does then boost an inference that given the commonality of the core Khasra Nos. of the lands of the land holders in Ex. AX and of the lands of certain land holders/appellants herein that hence, the lands of the land holders in Ex. AX and the lands of the appellants herein are proximately located. Consequently, when there is an accomplishment and satiation of the relevant parameter of proximity inter-se the land of the land holders in Ex. AX with the lands of the appellants herein, as such, given the substantiation of proximate location of lands interse the land holders in Ex. AX with the lands of the appellants herein, the determination of compensation as rendered in favour of the land holders in Ex. AX also ought to prod this Court to qua the lands of the appellants herein award rates of compensation at par with the rates assessed qua the land of the land holders in Ex. AX. Even though, the lands of the land holders in Ex. AX were subjected to acquisition, subsequent to acquisition of the lands of the appellants herein and an award by the learned District Judge was also rendered subsequent to the rendition of the impugned award, yet especially in the face of rendition of an authoritative pronouncement of the Hon'ble Apex Court comprised in a judgment reported in 1982 (2) SCC 374 titled as ***Krapa Rangiah*** versus ***Special Deputy Collector, Land Acquisition***, the relevant portion whereof is extracted hereinafter, wherein it has been held that where higher rates of compensation are awarded by the Courts of law in subsequent claims, for adjoining lands then the higher rates of compensation as adjudged or assessed qua such lands adjoining the lands previously acquired be also adjudged as compensation for such previously acquired lands.

> *"……The area being comparable, the situation also being the same and all the plots having been acquired under the selfsame notification for Housing Scheme it seems to us proper that the same rate of compensation should be awarded to the claimant herein as was awarded by the High Court in Appeal No. 50 of 1970. We accordingly enhance the compensation granted to the claimants by Rs. 2 per Sq. Yd. with consequential increase in solatium and interest……" (p.p 375-376)*

6. Consequently, it is held that even though the land holders herein/appellants were unable to establish before the learned District Judge Una, who was seized of the Reference Petition, the factum of their lands being carrying a potentiality equivalent or at par with the lands of the land holders qua whom a verdict as comprised in Annexure AX was rendered while theirs being located in proximity to the lands of the land holders therein, yet, when in Ex. AX the land owners therein have been able to adduce cogent evidence qua the fact of their lands carrying/bearing immense potentiality in as much as theirs being located on Una Hamirpur road as well as being 500 meters away from Municipal Limits of Una. As such, when for the reasons aforesaid, it has been held that the lands of the appellants herein are located in close proximity to the lands of the land holders in Ex. AX, it would be inexpedient, unjust and unfair to deprive to the appellants herein compensation at par with the one afforded to the land holders in Ex. AX merely for the reason that the appellants herein had failed or omitted to then before the learned District Judge adduce cogent evidence portraying the factum of the location of the lands in proximity to Una Hamirpur road as also being located 500 meters away from Municipal limits of Una town which evidence now as has surged forth by way of adduction into evidence Ex. AX ought to be revered to facilitate assessment of fair, just and reasonable compensation, even though Ex. AX is subsequently pronounced. Consequently, Rate of compensation awarded qua the lands of the land holders in Ex. AX is assessed to be the rate of compensation for the lands of the appellants herein alongwith all statutory benefits.

7. For reiteration, the appeals are allowed and all the appellants herein are held entitled to the enhanced compensation at the rate of Rs. 1,58,400/- per kanal of land. The appellants are awarded interest @ 12% per annum on the enhanced amount of compensation under Section 23(1-A) from the date of publication of notification under Section 4 up to the date of pronouncement of award by LAC i.e. w.e.f 26.3.1998 to 18.9.2000. Further, the appellants are entitled to solatium at the rate of 30% on the enhanced amount of compensation on account of compulsory acquisition of lands on the enhanced amount of compensation. Apart from above, the appellants are entitled to interest at the rate of 9% per annum for one year from the date of pronouncement of award by LAC i.e. 18.9.2000 and thereafter at the rate of 15 % per annum till the amount of compensation is deposited in the Court.

The judgment disposes of all the appeals.

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

Sant Ram .....Appellant.
Versus
Land Acquisition Collector & anr. .....Respondents.

RFA No. 06 of 2005.
Reserved on: 09.12.2014.
Decided on: 16.12.2014.

Land Acquisition Act, 1894- Section 18- Land of the petitioner was acquired for the construction of the road- Petitioner claimed that his Gharat was damaged in the year 1985 along with water channel and remaining wall was damaged in the year 1993- he claimed that he was earning Rs. 5,000/- and had incurred total loss of Rs. 1 lac due to damage to Gharat- held, that there was no satisfactory evidence to show that Gharat and its three walls were damaged in the year 1985- Land Acquisition Collector had awarded amount of Rs. 2,157/- amount was enhanced to Rs. 25,000/- for the damage to one wall. (Para-11)

For the appellant(s): Mr. G.D.Verma, Sr. Advocate, with Mr. B.C.Verma, Advocate.
For the respondents: Mr. J.S.Guleria, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular first appeal is directed against the award passed by the learned District Judge, Shimla, dated 18.08.2004, in Land Ref. No. 3-S/4 of 2000.

2. Key facts, necessary for the adjudication of this regular first appeal are that the Government of Himachal Pradesh had issued notification under Section 4 of the Land Acquisition Act on 11.3.1998. It was published in the H.P. Rajpatra on 28.3.1998. It was also published in two newspapers i.e. Jansatta and Dainik Tribune on 7.5.1998. The notification was issued under Section 6 & 7 on 7.4.1999. These were published in H.P. Rajpatra on 22.4.1999 and two newspapers i.e. Punjab Kesari and The Tribune on 12.5.1999 and 13.5.1999, respectively. It was also brought to the notice of the general public through the Tehsildar, Kotkhai on 5.5.1999. Notice under Section 9 of the Act was issued to the interest holder(s) on 10.5.1999. They were directed to appear before the Land Acquisition Collector on 27.5.1999. The Land Acquisition Officer made the award on 5.6.1999.

3. The present appeal has been filed for enhancement of the amount.

4. Mr. G.D.Verma, Sr. Advocate, appearing for the appellant has vehemently argued that the learned District Judge has not assessed the market price of the land and *'Gharat'* in accordance with law. On the other hand, Mr. J.S.Guleria, learned Asstt. Advocate General, vehemently argued that the road was constructed in the year 1993 and only one wall of the *'Gharat'* was damaged.

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

6. The notification, as noticed hereinabove, was issued under Section 4 of the Act on 11.3.1998. It was published in H.P. Rajpatra on 28.3.1998. All the codal formalities were completed and award was made by the Land Acquisition Collector on 7.6.1999. According to the appellant, the market value of the agriculture land was not less than one lac rupees per bigha at the time of issuance of the notification dated 11.3.1998. PW-1 Sh. Anant Ram Negi has deposed that the market value of the land was Rs. 25,000/- per bishwa. However, the appellant has not produced any record to prove that any sale transaction has actually taken place at *Chak Jungle Kambli,* where the land was acquired. The respondents have place on record sale transaction Ext. R-1 whereby 1-15 bighas of land situated in Village Shawala has been sold for a consideration of Rs. 23,000/-. The learned District Judge, on the basis of the land acquired at Village Shawala has assessed the market rate at Rs. 22,280.40 per bigha.

7. Mr. G.D.Verma, learned Sr. Advocate, has vehemently argued that the three walls of the *'Gharat'* of the appellant were damaged in the year 1985 alongwith the water channel and remaining wall was damaged in the year 1993. According to him, the appellant was earning Rs. 5,000/- and has incurred a loss of Rs. 1,00,000/-.

8. PW-1 Anant Ram, has deposed that the *'Gharat'* (Water Mill) was functional for the last 40 years. However, when the road was constructed in the year 1984 from Prem Nagar to Chander Nagar and Chander Nagar to

Halaila, the three walls of the '*Gharat'* (Water Mill) and water channel were damaged. The '*Gharat'* became non-functional in the year 1985. According to him, the value of the '*Gharat'* was more than Rs. 1,00,000/-. The income from the '*Gharat'* has come to an end. He has admitted in his cross-examination that he could not produce any cogent evidence about the income from the '*Gharat'*. He has also not led any evidence to prove the value of the land.

9. PW-2 Ramesh Chand has supported PW-1. He has deposed that the '*Gharat'* was in existence. He used to visit the same. However, the '*Gharat'* was damaged when the road was constructed in the year 1985 alongwith the water channel.

10. PW-3 Prem Parkash, Patwari has proved Ext. P-3. However, in his cross-examination, he has admitted that he has never remained Patwari of this Patwar Circle and he has never seen the '*Gharat'* of the appellant.

11. The road was constructed on 17.7.1993 on this particular portion of the land. The appellant has not led any cogent evidence except the self serving statement of PW-1 Anant Ram that the '*Gharat'* was in existence and three walls were damaged in the year 1985 at the time of construction of the road. Infact, the '*Gharat'* was already damaged and one wall was damaged during the construction of the road in the year 1993. The Land Acquisition Collector awarded a sum of Rs. 2157/- and the same has been upheld by the learned District Judge vide award dated 18.8.2004. In case the '*Gharat'* of the appellant was damaged in the year 1985, he should have definitely taken action against the respondents. Though the appellant has failed to plead any tangible evidence, as noticed hereinabove, that the '*Gharat'* was damaged in the year 1985, but the fact of the matter is that one wall was damaged in the year 1993. The award made by the learned District Judge whereby he has enhanced the amount for acquisition of the land to Rs. 22,280.40 per bigha is upheld. The appeal is partly allowed. The appellant is held entitled to a sum of Rs. 25,000/- for the damage caused to one wall of '*Gharat' (Water Mill)* situated on Kh. No. 10 in the year 1993, with all statutory benefits under the Land Acquisition Act, to be paid within ten weeks from today.

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

CWP No. 5173 of 2014 alongwith CWP Nos. 5452, 5453, 5454, 5455, 5456 and 5457 of 2014.
Judgement reserved on: 26.11.2014.
Date of decision: December 18th, 2014.

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1. **CWP No. 5173 of 2014.**
Anand Chauhan ..... Petitioner.
Vs.
The Commissioner of Income Tax,
Himachal Pradesh ..... Respondent.

2. **CWP No. 5452 of 2014.**
Aprajita Kumari ..... Petitioner.
Vs.
The Commissioner of Income Tax,
Himachal Pradesh ..... Respondent.

3. **CWP No. 5453 of 2014.**
M/s Virbhadra Singh ..... Petitioner.
Vs.
The Commissioner of Income Tax,
Himachal Pradesh ..... Respondent.

4. **CWP No. 5454 of 2014.**

Chunni Lal Chauhan ..... Petitioner.

Vs.

The Commissioner of Income Tax,
Himachal Pradesh & anr. ..... Respondents.

5. **CWP No. 5455 of 2014.**

Pratibha Singh w/o Sh.Virbhadra Singh ..... Petitioner.

Vs.

The Commissioner of Income Tax,
Himachal Pradesh ..... Respondent.

6. **CWP No. 5456 of 2014.**

Vikramaditya Singh ..... Petitioner.

Vs.

The Commissioner of Income Tax,
Himachal Pradesh ..... Respondent.

7. **CWP No. 5457 of 2014.**

Virbhadra Singh ..... Petitioner.

Vs.

The Commissioner of Income Tax,
Himachal Pradesh ..... Respondent.

Constitution of India, 1950- Article 226- Income Tax Department had issued show cause notice to the petitioners- petitioners filed reply to the notice - an order was passed by the Department transferring the case to DCIT, Central Circle, Chandigarh- record showed that order was passed on the facts, which were not disclosed in the show cause notice- department was in possession of facts mentioned in the order of transfer- held, that petitioners were entitled to know the facts which were to be used against them- non disclosure of the facts amounts to violation of principle of natural justice. (Para-15 to 43)

Cases referred:

S. L. Kapoor vs. Jagmohan, AIR 1981 SC 136

Collector of Central Excise vs. H.M.M. Limited 1995 Supp (3) Supreme Court cases 322

Raj Bahadur Narain Singh Sugar M. Ltd. vs. Union of India and others (1997) 6 SCC 81

Kaur & Singh vs. Collector of Central Excise, New Delhi 1997 (94) E.L.T. 289 (S.C.)

M. A. Jackson v. Collector of Customs, reported in (1998) 1 SCC 198

K. Vijayalakshmi v. Union of India, (1998) 4SCC 37: (AIR 1998 SC 2961)

Tarlochan Dev Sharma vs. State of Punjab and others (2001) 6 SCC 260

Commissioner of Central Excise Bangalore vs. Brindavan Beverages (P) Ltd. & ors. (2007) 5 SCC 388

M/s Ajantha Industries and others v. Central Board of Direct Taxes, New Delhi and others AIR 1976 SC 437

Budhia Swain and others versus Gopinath Deb and others (1999) 4 SCC 396

Grindlays Bank Ltd. versus Income-tax Officer, Calcutta and others AIR 1980 SC 656

Kapoor Chand Shrimal versus Commissioner of Income Tax, Andhra Pradesh, Hyderabad (1981) 4 SCC 317

Commissioner of Income Tax versus Bharat Kumar Modi 2000 (246 ITR) 693

For the petitioner(s) : Mr. N.K.Sood, Senior Advocate with M/s Yashwardhan Chauhan, C.S.Verma, Neeraj

Sharma, Hemant Sharma & Pranay Pratap Singh, Advocates, (in all the petitions)

For the respondent(s) : Mr. Vinay Kuthiala, Senior Advocate with Ms. Vandana Kuthiala, Advocate, (in all the petitions).

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common question of law and fact arise for consideration, therefore, all these cases are taken up together for disposal.

2. All the petitioners are income tax assessees and are aggrieved by the action of the respondents whereby their cases have been transferred to DCIT, Central Circle, Chandigarh.

3. Undisputed facts are that the petitioners prior to transfer of their cases were issued show-cause notices which were duly replied to by the petitioners and thereafter the respondents have passed the order transferring the cases to DCIT, Central Circle, Chandigarh (for short the 'impugned order').

4. The petitioners have contended that before their cases could have been ordered to be transferred, they were entitled to fair and proper hearing and principles of natural justice were required to be complied with and the adjudicating authority was under an obligation to furnish the relevant material, which formed the basis of issuance of show-cause notices. This material, according to them, was never disclosed either in the show-cause notices or at the time of hearing and the same was disclosed only in the impugned order. Had the same been disclosed, the petitioners could have offered an appropriate explanation. The non-disclosure of the same has caused serious prejudice to them. The impugned order has been questioned on various other grounds as taken in the writ petitions.

5. The respondents filed their reply (s), wherein it was alleged that writ petitions are not maintainable since no legal right of the petitioners has been infringed and the respondents have acted only in exercise of their statutory duties in order to protect the interest of the department and for carrying out proper investigation of the case as well as assessment and collection of taxes. The order dated 14.7.2014 has been passed in order to ensure coordinated investigation and assessment of a number of assessees including 11 other persons who had been assessed at Delhi, whose financial dealings are interlinked with the petitioners. The cases of 11 other persons who have been assessed at Delhi and have financial dealings with the petitioners are also in the process of transfer from Delhi to Chandigarh for coordinated investigation and assessment. There is yet another preliminary objection with regard to a public interest litigation pending at Delhi High Court.

6. In so far as the merits of the cases are concerned, it is contended that there is no fundamental right of an assessee to be assessed in a particular area or locality and that section 127 of Income Tax Act, 1961 (for short, the Act) is a machinery provision and it should be construed to effectuate a charging section so as to allow the authorities concerned to do so in the manner therefore the statute was enacted. It is further averred that the petitioners cannot take any exception to the case being transferred from one jurisdiction to other for coordinated investigation. It is then contended that relevant material was provided in the show cause notice and it was not necessary to provide materials gathered during the course of investigation and enquiries as it is not relevant at the stage of transfer of jurisdiction contemplated under section 127 of the Act.

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

7. Shri Naresh Sood, learned Senior Advocate assisted by S/Sh.Yashwardhan Chauhan, C.S.Verma, Neeraj Sharma, Hemant Sharma and Pranay Pratap Singh, Advocates, for the petitioners has vehemently argued that assuming that the show-cause notices are valid, even then the petitioners were not provided the necessary material during the course of investigation and inquiry and the respondents while passing the impugned order have relied upon extraneous material simply in order to justify the transfer of cases. This contention is without prejudice to the other contentions that the show-cause notices itself are not valid since the only reason given for transfer of the cases was that the same is being proposed for the effective and coordinated investigation of the assessment case which is vague and too general and the assessees could not have been expected to make an effective and purposeful representation against the proposed transfer while replying to the show-cause notices.

8. On the other hand, Shri Vinay Kuthiala, learned Senior Advocate assisted by Ms. Vandana Kuthiala, Advocate, for the respondents has vehemently argued that respondents have acted within the four corners of law and no exception of the same can be taken by the relevant.

9. We proceed to examine the first contention raised by the petitioners to the effect that even if the show cause notices are held to be valid even then the petitioners were not provided necessary material during the course of investigation and inquiry and the respondents have relied upon extraneous material in order to justify the transfer of the cases.

10. The relevant portion of the show cause notices in case of each of the petitioners reads thus:-

In CWP No. 5173 of 2014:

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/O. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/O Holy Lodge, Jhaku, Shimla (AESPK2933C), Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R) and Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

The assessee has made huge cash deposits of more than Rs.6 crores in his bank accounts which have been used for purchase of insurance polices in the name of the Sh. Virbhadra Singh and his family members. The evidence on record suggests that money have been sourced in his bank accounts from undisclosed sources."

In CWP No. 5452 of 2014:

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/o. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/O Holy Lodge, Jhaku, Shimla (AESPK2933C), Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/O. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash

Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R) and Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

> **The assessee has invested Rs.34 lacs in the purchase of shares of M/s . Tarini Infrastructures Ltd. but no such investment appears to be declared by the assessee in her return of income. Investment in purchase of LIC Policies to the tune of Rs.10 Lakh for the F.Y. 2009-10 were found to be made from the alleged agricultural income, shown in the revised income tax returns of Sh. Virbhadra Singh, HUF which was routed through the bank account of Sh. Anand Chauhan. However, the investment made is not found to be reflected in the assessee's return of income."**

<u>In CWP No. 5453 of 2014:</u>

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/o. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/O Holy Lodge, Jhaku, Shimla (AESPK2933C), Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R), Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

> **1. Agricultural income of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N) was shown as follows in the original returns filed at the below given details:**

A.Y.	Returned income/agricultural income		Date of filing
	Income	Agri.	
2009-10	Rs.16,38,438/-	Rs.7,35,000/-	24.07.2009
2010-11	Rs.44,67,584/-	Rs.15,00,000/-	29.07.2010
2011-12	Rs.15,13,712/-	Rs.25,00,000/-	11.07.2011

> **The agricultural income has dramatically increased as follows in the revised returns filed at the following details:**

A.Y.	Income as per revised return		Date of filing
	Income	Agri.	
2009-10	Rs.16,38,938/-	Rs.2,21,35,000/-	02.03.2012
2010-11	Rs.44,67,584/-	Rs.2,80,92,500/-	02.03.2012
2011-12	Rs.15,13,710/-	Rs.1,55,00,000/-	02.03.2012

The revised agricultural income is an apparent attempt to justify the investments made in the purchase of insurance policies in the name of Sh. Virbhadra Singh and his family. The insurance policies were noticed by the department while investigating large cash deposits in the bank accounts of Sh. Anand Chauhan. The investments in the insurance policies in the name of family members of Sh. Virbhadra Singh were made from the accounts of Sh. Anand Chauhan and the purported source of cash deposits in the bank account of Sh. Anand Chauhan is highly suspect."

<u>In CWP No. 5454 of 2014:</u>

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/o. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/o Holy Lodge, Jhaku, Shimla (AESPK2933C), Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R) and Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

The assessee has allegedly purchased apples of Sh. Virbhadra Singh, HUF from Sh. Anand Chauhan (agent of Sh. Virbhadra Singh, HUF) in cash. No further evidence of sale of apples by him or arranging cash sale receipts to Sh. Anand Chauhan from other agents of apple buyers has been furnished."

<u>In CWP No. 5455 of 2014:</u>

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/o. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/o Holy Lodge, Jhaku, Shimla (AESPK2933C), Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R) and Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

The assessee has received unsecured loans of Rs.1.50 crores from Sh. Vakamulla Chandershekhar in FY 2011-12. Further on the basis of news item appearing in various national dailies shows that the assessee has invested Rs.34 lacs in the purchase of shares of M/s Tarini Infrastructures Ltd. but no such investment appears to be declared by the assessee in her return of income. Investment in purchase of LIC Polices to the tune of Rs.2.60 Crore for the F.Y. 2008-09, 2009-10 & 2010-11 were found to be made from the alleged agricultural income, shown in the revised income tax returns of Sh. Virbhadra Singh, HUF which was routed through the bank account of Sh. Anand Chauhan. However, the investment made is not found to be reflected in the assessee's return of income."

In CWP No. 5456 of 2014:

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/o. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/o Holy Lodge, Jhaku, Shimla (AESPK2933C), Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R) and Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

> **The assessee has received unsecured loans of Rs.2 crores from Sh. Vakamulla Chandershekhar in FY 2011-12. Further on the basis of news item appearing in various national dailies shows that the assessee has invested Rs.30 lacs in the purchase of shares of M/s. Tarini Infrastructures Ltd. but no such investment appears to be declared by the assessee in his return of income. Investment in purchase of LIC Policies to the tune of Rs.1.64 Crore in the F.Y. 2009-10 & 2010-11 were found to be made from the alleged agricultural income, shown in the revised income tax returns of Sh. Virbhadra Singh, HUF which was routed through the bank account of Sh. Anand Chauhan. However, the investment made is not found to be reflected in the assessee's return of income."**

In CWP No. 5457 of 2014:

"On the basis of enquires carried out, and also material gathered during the course of assessment proceedings, in the cases of Sh. Virbhadra Singh (HUF), R/o. Holy Lodge, Jhaku, Shimla (AACHV0223N), Sh. Virbhadra Singh, R/o. Holy Lodge, Jhaku, Shimla (ALRPS6513N), Smt. Pratibha Singh w/o Sh. Virbhadra Singh and R/o Holy Lodge, Jhaku, Shimla (AESPK2933C),Sh. Vikramaditya Singh (CAXPS8819J), Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L), Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R) and Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L), reveal the following:-

> **"The assessee has received unsecured loans of Rs.2.4cr from Sh. Vakamulla Chandershekhar in FY 2011-12. However there is no such information available in the return filed by the assessee for the relevant Assessment year. Further, investments in purchase of LIC Policies to the tune of Rs.2.25 Crore during the F.Y. 2008-09 & 2009-10 in the assessee's name were found to be made from the alleged agricultural income, shown in the revised income tax returns of Sh. Virbhadra Singh, HUF which was routed through the bank account of Sh. Anand Chauhan. However, the investment made is not found to be reflected in the assessee's return of income."**

11. It was not in dispute that a detailed reply to the said notices was filed by each of the petitioners and they were also afforded an opportunity of hearing. But, the grievance made by the petitioners is that the reasons now spelt out in the impugned order are not the same to which they had been put to

notice. Para-1 of the impugned order in all the cases sets out in verbatim the contents of the show-cause notices (supra), but thereafter the contents of Para-2 (Para-3 in CWP No.5453 of 2014, CWP No.5455 of 2014 and CWP No.5456 of 2014) in the impugned orders read as under:-

> **"2. The information and facts also show that above named persons mentioned in para-1 above have close relations/ nexus and business dealings amongst themselves and other persons namely Sh. Vakamulla Chandershekhar and M/s Tarini Infrastructure Limited. The details of the transactions entered with the above entities are as under:-**
>
> **i. Interest free unsecured loan of Rs.5.9 crores was advanced by Sh. Vakamulla Chandershekhar to Sh. Virbhadra Singh (Rs.2.4 Crore), Smt. Pratibha Singh (Rs.1.5 Crore) and Sh. Vikramaditya Singh Rs.2 Crore). But no information is available in the income tax returns of these persons. The source of loans given by Sh. Vakamulla Chandershekhar to Sh. Virbhadra Singh and family members is highly suspect. Information available so far shows that Sh. Vakamulla Chandershekhar has failed to show any disclosed source of income that could have been used by him to advance the above mentioned loans.**
>
> **ii. Investment of Rs.34 lacs, Rs.30 lacs and Rs.34 lacs were made in the shares of M/s. Tarini Infrastructure Limited (Director Sh. Vakamulla Chandershekhar) by Smt. Pratibha Singh, Sh. Vikarmaditya Singh and Ms. Aprajita Kumari respectively. The family of Sh. Virbhadra Singh have earned profit on the sale of the shares of M/s. Tarini Infrastructure Limited, which is yet to be offered for tax. Sources of acquisition of these shares are not found in the respective returns, nor the profit earned on sale of these shares are being shown in the return of income."**

12. The petitioners have contended that the aforesaid allegations for the very first time have appeared only in the impugned orders and these allegations had never been brought to the notice of the petitioners either in the show-cause notices or at the time of hearing so as to afford them a proper and effective opportunity to reply to these allegations.

13. Here it may be noticed that on 30.6.2014 i.e. after about five days of issuance of show cause notice, the respondent addressed a letter to the Chief Commissioner of Income Tax, H.P. Region Shimla, on the subject of centralization of cases, which reads:-

> **"To**
>
> **The Chief Commissioner of Income Tax,**
> **H.P. Region, Shimla.**
>
> **Sir,**
>
> **Sub:- Centralization of cases- regarding-**
>
> **Kindly refer to your letter No. CCIT/SML/Tech/2014-15/Sr.PS 02 dated 12.6.2014 enclosing therein letter of member investigation CBDT, regarding centralization of cases related to Sh. Virbhadra Singh and connected cases, in view of the above a meeting was held with the DGIT (Inv.) Chandigarh, DIT (Inv.) at Chandigarh alongwith your goodself in which it was decided that the cases related to Sh. Virbhadra Singh are to be centralized with**

DCIT/ACIT (Central) Circle Chandigarh under the charge of CIT (Central) Gurgaon. The details of the cases which are to be centralized are as under:

Sr.No.	Name & Address	Presently Assessed with the AO	CCIT Charge	CIT Charge
1.	Sh.Virbhadra Singh (HUF), R/o.Holy Lodge, Jhaku, Shimla (AACHV0223N)	DCIT, Shimla Circle	Shimla	Shimla
2.	Sh. Virbhadra Singh, R/o.Holy Lodge, Jhaku, Shimla (ALRPS6513N)	DCIT, Shimla Circle	Shimla	Shimla
3.	Smt. Pratibha Singh w/o. Sh. Virbhadra Singh and R/o. Holy Lodge, Jhaku, Shimla (AESPK2933C)	DCIT, Shimla Circle	Shimla	Shimla
4.	Sh. Vikramaditya Singh s/o Sh. Virbhadra Singh, r/o Holy Lodge, Jhaku, Shimla (CAXPS8819J)	ITO, Ward-1, Shimla	Shimla	Shimla
5.	Ms. Aprajita Kumari D/o. Sh. Virbhadra Singh (AOUPK6157L,)	ITO, Ward-1 Shimla	Shimla	Shimla
6.	Sh. Anand Chauhan, R/o. Kailash Niwas, Inder Nagar, Dhali, Shimla (ADFPC3964R)	ITO, Ward-1, Shimla.	Shimla	Shimla
7.	Sh. Chunni Lal Chauhan, Prop. Universal Apple Associates, Parwanoo (AAHPC7645L)	DCIT,Parwanoo Circle	Shimla	Shimla.

Hence show cause notices u/s 127 of the I.T. Act, 1961 have been issued to the above persons on 25.6.2014 for furnishing their

objections if any. For this purpose the cases are fixed for 4.7.2014. A letter dated 30.6.2014 has also been issued to the CIT (Central) Gurgaon to accord his concurrence and also to specify the names and designation of the officer of Central circle at Chandigarh with whom the above cases are to be centralized.

During the above meeting held with the DGIT (Inv.) it was informed by him that investigation wing Chandigarh has also conducted investigation in the various cases related to Sh. Virbhadra Singh including Sh. Vakamulla Chander Shekher. The result/outcome of investigations carried out by the Investigation Wing will help the undersigned to strengthen the order to be passed u/s 127 of the I.T. Act, 1961. Hence, you are requested to please take up the mater with the DGIT (Inv.) Chandigarh to share result/ outcome of the investigation with this office so that the same may be utilized in passing the order u/s 127 of the I.T. Act, 1961.

You are also requested to take up the matter with the DGIT (Inv.) Chandigarh in respect of the centralization of other cases related to Sh. Virbhadra Singh and which are not assessed under the jurisdiction of the undersigned."

It would be noticed from the underlined portion of the letter that the respondent was well aware of the investigation being carried out in various cases relating to the petitioners, particularly, petitioner in CWP No.5453 of 2014 and 5457 of 2014 and one Vakamulla Chander Shekhar, but despite this the respondents did not make a mention of the same in the show-cause notices issued to the petitioners.

14. Though, prima facie, it appeared that the reasons in the impugned order were totally different from what was spelt out in the show-cause notices. But, then to test the veracity of the contentions of petitioners that the reasons now assigned in the show-cause notices have never been confronted to the petitioners, this Court vide order dated 18.11.2014 summoned the original records of the cases. After going through the same meticulously, we find that there is no material available on record which may show even remotely that the reasons now spelt out in the impugned order were ever brought to the notice of the petitioners so as to afford them an adequate and effective opportunity to respond to the same.

15. It is trite that every person before an authority exercising the adjudicatory power has right to know the case he is required to meet. The fundamental principle remains that nothing should be used against the person, which has not been brought to his notice. If the relevant material is not disclosed to a party, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing.

16. For reasons best known to the respondent, it has treated all the petitioners/assessees as one person/assessee. We observe so because all the petitioners were admittedly issued individual show-cause notices where separate and distinct allegations against each one of them had been set out. But, now when the impugned order is seen, it is absolutely clear that after setting out the allegations as mentioned in Para-1 of the show-cause notice, an omnibus reason common to all the petitioners has been recorded for the transfer of the cases, which indisputably did not find mention in the show-cause notices.

17. The show-cause notices issued to the petitioners in CWP No.5173 of 2014, CWP No.5452 of 2014 and CWP No.5453 of 2014 did not even make a reference of Shri Vakamulla Chandershekhar. Similarly, the petitioners in CWP No.5455 of 2014 and CWP No. 5456 of 2014 were though put to notice that they had received unsecured loans of Rs. 1.50 crores and Rs. 2 crores respectively from said Shri Vakamulla Chandershekhar which were invested in M/s Tarini

Infrastructure Ltd., but then nowhere it was brought to the notice that such information was not available in the income tax returns of these persons (Vakamulla Chandershekhar etc.). Similarly, there was no allegation in the show-cause notices issued to the petitioners in CWP Nos.5452, 5455, 5456 and 5257 of 2014 that by investing in M/s Tarini Infrastructure Ltd., these persons had earned profit on the sale of shares of M/s Tarini Infrastructure Ltd., which was yet to be offered for tax.

18. The aforesaid reasons and allegations contained in the show-cause notices vis-à-vis the impugned order are only illustrative and not exhaustive and have been taken note of in order to satisfy ourselves that the reasons now reflected in the impugned order have never been made known to the petitioners individually in the show-cause notices issued to them. Therefore, it is apparent that the impugned order is founded on grounds at variance from the one in the show-cause notices and consequently the same being based on extraneous consideration is bad in law.

19. In this background, the question which would require our consideration, therefore, is as to whether at the time of issuance of show-cause notices and passing of impugned order, the requirements of natural justice have been complied with because non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It is here then that the action of the respondent is required to be tested on the touchstone of justice, equity, fair play and in case its decision is not based on justice, equity and fair play and has been taken after taking into consideration other material, then even though on the face of it, the decision may look to the legitimate, but as a matter of fact the reasons are not based on values but on extraneous consideration that decision cannot be allowed to stand.

20. In this connection, the decision in **S. L. Kapoor vs. Jagmohan, AIR 1981 SC 136** is relevant for our purpose. In paragraph 16 of the judgment, their Lordships have held as follows:-

> ***".....In our view, the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based if it is furnished in a casual way or for some other purpose. We do not suggest the opportunity need be a 'double opportunity' that is one opportunity on the factual allegations and another on the proposed penalty. Both may be rolled into one. But the person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken against him. If that is made known the requirements are met. ..."*** *(Emphasis added)*
>
> ***.....In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs. We do not agree with the contrary view taken by***

the Delhi High Court in the judgment under appeal."
(Emphasis supplied)

21. In Wade & Forsyth -- 'Administrative law', the learned Authors have said thus :-

> ***"A proper hearing must always include a 'fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view'. Lord Denning has added :***
>
> ***'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.' ...."*** *(Emphasis supplied)*

22. In De Smith, Woolf and Jowell's --Judicial Review of Administrative Action, under the caption 'Duty of adequate disclosure', it is said thus :-

> ***"If prejudicial allegations are to be made against a person, he must normally, as we have seen, be given particulars of them before the hearing so that he can prepare his answers. In order to protect his interests he must also be enabled to controvert, correct or comment on other evidence or information that may be relevant to the decision; indeed, at least in some circumstances [here will be a duty on the decision maker to disclose information favourable to the applicant, as well as information prejudicial to his case. If material is available before the hearing, the right course will usually be to give him advance notification; .....***
>
> ***If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing. ,, ..."***

23. In our considered opinion, once show cause notice has been sought to be issued, then it was incumbent upon the respondent to have set out in detail and with precision the various acts of commission and omission to the notice of the petitioner so as to afford him an effective opportunity to meet the case of the department. In taking this view, we are fortified by the following observations of Hon'ble Supreme Court in **Collector of Central Excise vs. H.M.M. Limited 1995 Supp (3) Supreme Court cases 322:-**

> ***"..... If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso....."***

24. The party to whom the show cause notice has been issued must be made aware of the exact allegations, he is required to meet. This was so held by Hon'ble Supreme Court in **Raj Bahadur Narain Singh Sugar M. Ltd.** vs. **Union of India and others (1997) 6 SCC 81** wherein after placing reliance

upon **Collector of Central Excise** vs. **H.M.M** case (supra), it was held as follows:-

> ***"9.....The party to whom a show-cause notice under Rule 10 is issued must be made aware that the allegation against him is of collusion or wilful misstatement or suppression of fact. This is a requirement of natural justice. It is also the law, laid down by this court in CCE v. H.M.M. Ltd. It has been said there with reference to Section 11-A of the central Excises and Salt Act, 1944, which replaced Rule 10, that if the authorities propose to invoke the proviso to Section 11-A(1, the show-cause notice must put the assessee to notice which of the various commissions and omissions stated in the proviso is committed to extend the period from six months to five years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the authorities. The defaults enumerated in the proviso were more than one and if the authorities placed reliance on the proviso, it had to be specifically stated in the show-cause notice which was the allegation against the assessee falling within the four comers of the said proviso."***

25. The requirement of making a person aware of the exact allegations he is required to meet is a requirement of natural justice as held by the Hon'ble Supreme Court in **Kaur & Singh** vs. **Collector of Central Excise, New Delhi 1997 (94) E.L.T. 289 (S.C.)** where the Hon'ble Supreme Court after placing reliance upon **Collector of Central Excise** vs. **H.M.M** and **Raj Bahadur Narain Singh Sugar M. Ltd.** vs. **Union of India and others** cases held that:-

> ***"3. This court has held that the party to whom a show cause notice of this kind is issued must be made aware of the allegation against it. This is a requirement of natural justice. Unless the assessee is put to such notice, he has no opportunity to meet the case against him. This is all the more so when a larger period of limitation can be invoked on a variety of grounds. Which ground is alleged against the assessee must be made known to him, and there is no scope for assuming that the ground is implicit in the issuance of the show cause notice. [See: Collector of Central Excise vs. H.M.M. Limited, 1995 (76) E.L.T. 497 and Raj Bahadur Narain Singh Sugar M. Ltd. vs. Union of India and others, 1996 (88) E.L.T.24]."***

26. In the decision **M. A. Jackson v. Collector of Customs, reported in (1998) 1 SCC 198** which relates to a case under the Customs Act, the Department proceeded under Section 28(1) of the Customs Act alleging short levy of duty. The Department computed the duty on the basis of certain documents, for which no notice was given to the appellant. The question was whether the Department was justified in relying on the documents, copies of which were not furnished to the appellant. It was held thus:-

> ***"In our view, once it is admitted that the price mentioned in the magazine was not mentioned in the show-cause notice issued to the petitioner, any reliance on the said price mentioned in the magazine by the Customs authorities must be held to be illegal. Further, it is clear that though this point was taken in the grounds of the appeal before the appellate authorities a copy of the magazine was never made available to the petitioner, ..."*** *(Emphasis added)*

For the above reason, the Orders of the Authorities were set aside by the Honourable Supreme Court.

27. Similarly in **K. Vijayalakshmi v. Union of India,** **(1998) 4SCC 37: (AIR 1998 SC 2961)**, it was held thus:-

> ***"We are of the view that without going into the factual aspect of the case, the order of the Tribunal as well as the order of the General Manager confirmed by the appellate authority are liable to be set aside on the sole ground that the document based on which the conclusion came to be reached having not been supplied to the appellant, the decision cannot be sustained. The respondent ought to have given to the appellant a copy of the opinion of the Forensic Department based on which the impugned order came to be passed."*** *(Emphasis supplied)*

28. In **Tarlochan Dev Sharma** vs. **State of Punjab and others (2001) 6 SCC 260,** the impugned order was founded on grounds at variance from the one in show cause notice, consequently the same was held to be bad in law. The Hon'ble Supreme Court observed as under:-

> ***".....There is nothing in the show cause notice or the ultimate order to hold how the act of appellant had 'obstructed the working of Municipal Council' or was 'against the interest of council.' We are, therefore, clearly of the opinion that not only the principles of natural justice were violated by the factum of the impugned order having been founded on grounds at variance from the one in the show cause notice, of which appellant was not even made aware of let alone provided an opportunity to offer his explanation, the allegations made against the appellant did not even prima facie make out a case of abuse of powers of President....."***

29. It cannot be disputed that the show cause notice is the foundation on which the department has to build up its case, therefore, if the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/ or unintelligible or do not disclose the real material upon which a proposed action is contemplated to be drawn, then it is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice. **(Ref: Commissioner of Central Excise Bangalore** vs. **Brindavan Beverages (P) Ltd. & ors. (2007) 5 SCC 388.**

30. In view of the aforesaid exposition of law it can therefore safely be concluded that the fundamental principle of law is that adjudication has to be within the four corners of the allegations set out in the show cause notice. Any finding given beyond the terms of show cause notice will be hit by violation of principles of natural justice.

31. It is in terms of Section 127 of the Act that the respondent has ordered the transfer of the cases of the petitioners. This provision was subject-matter of consideration before the Hon'ble Supreme Court in **M/s Ajantha Industries and others** v. **Central Board of Direct Taxes, New Delhi and others AIR 1976 SC 437** and relevant observations are as follows:-

> ***"5.....The successor section under the Income-tax Act, 1961 is Section 127 and the same may be set out:***
>
> ***"Transfer of cases from one Income-tax Officer to another:-***
>
> > ***(1) The Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one Income-tax Officer subordinate to him to another also subordinate to him, and the Board may similarly transfer any case from one Income-tax Officer to another.***

Provided that nothing in this sub-section shall be deemed to require any such opportunity to be given where the transfer is from one Income-tax Officer to another whose offices are situated in the same city, locality or place.

(2) The transfer of a case under sub-s. (1) may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Income-tax Officer from whom the case is transferred.

Explanation:- In this section and in Sections 121 and 125, the word 'case' in relation to any person whose name is specified in any order or direction issued thereunder, means all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all proceedings under this Act which may be commences after the date of such order or direction in respect of any year."

The section was amended by Section 27 of Finance (No. 2) Act, 1967, and Section 127 since then stands as under:-

(1) "The Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from any Income-tax Officer or Officers subordinate to him to any other Income-tax Officer or Income-tax Officers also subordinate to him and the Board may similarly transfer any case from any Income-tax Officer or Income-tax Officers to any other Income-tax Officer or Income-tax Officers.

Provided that nothing in this sub-section shall be deemed to require any such opportunity to be given where the transfer is from any Income-tax Officer or Income-tax Officer or Income-tax Officers to any other Income-tax Officer and the offices of all such Income-tax Officers are situated in the same city, locality or place:

Provided further that where any case has been transferred from any Income-tax Officer or Income-tax Officers to two or more Income-tax Officers, the Income-tax Officers to whom the case is so transferred shall have concurrent jurisdiction over the case and shall perform such functions in relation to the said case as the Board or the Commissioner (or any Inspecting Assistant Commissioner authorised by the Commissioner in this behalf) may, by general or special order in writing, specify for the distribution and allocation of the work to be performed.

(2) The transfer of a case under sub-section (1) may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Income-tax Officer or Income-tax Officers from whom the case is transferred.

Explanation:- In this section and in Sections 121, 123, 124 and 125, the word 'case' in relation to any person whose name is specified in any order or direction issued thereunder, means all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before

such date, and includes also all proceedings under this Act which may be commenced after the date of such order or direction in respect of any year."

10. The reason for recording of reasons in the order and making these reasons known to the assessee is to enable an opportunity to the assessee to approach the High Court under its writ jurisdiction under Article 226 of the Constitution or even this Court under Article 136 of the Constitution in an appropriate case for challenging the order, inter alia, either on the ground that it is mala fide or arbitrary or that it is based on irrelevant and extraneous considerations. Whether such a writ or special leave application ultimately fails is not relevant for a decision of the question.

11. We are clearly of opinion that the requirement of recording reasons under Section 127 (1), is a mandatory direction under the law and non-communication thereof is not saved by showing that the reasons exist in the file although not communicated to the assessee.

15. When law requires reasons to be recorded in a particular order affecting prejudicially the interests of any person, who can challenge the order in court, it ceases to be a mere administrative order and the vice of violation of the principles of natural justice on account of omission to communicate the reasons is not expiated."

32. A perusal of the aforesaid observations makes it clear that the requirement for recording of reasons in the order and making these reasons known to the assessee is to enable an opportunity to the assessee to approach the High Court under its writ jurisdiction under article 226 of the Constitution so as to enable him to challenge the order, inter alia, either on the ground that it is mala fide or arbitrary or that it is based on irrelevant and extraneous considerations as would be clear from the perusal of para-10 thereof.

33. Furnishing of specific and intelligible reasons for the proposed transfer of the case is only a concomitant of the concept of reasonable opportunity enshrined in section 127 (1) and (2). Unless the assessee knows the precise reasons for the transfer, he would be handicapped in putting forth his objections effectively and in case the transfer of case is based on extraneous considerations then issuance of show cause notice becomes meaningless and is reduced to an idle formality.

34. The law is, therefore, fairly well settled that if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing, so that he can prepare his defence. The fair procedure and principle of natural justice are inbuilt into the rules. It is also well settled that show cause proceeding is meant to give a person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice. Therefore, at that stage the person proceeded against must be told the charges against him so that he can give an effective and proper reply to the same. Reply to show cause notice is not an empty formality because after all justice must not only be done but it must manifestly appear to be done which principle is equally applicable to quasi-judicial proceedings.

35. It is also equally settled that statutory authority must exercise its jurisdiction within the four corners of the law. Therefore, in case the respondent wanted to rely upon any material which subsequently came to its notice, then fairness demanded that petitioner ought to have been put to notice before acting upon the same especially when it not only forms the foundation but even the basis of the transfer of cases. The giving of notice containing reasons for the proposed action is after all a basic postulate for compliance of the principles of

natural justice. It is axiomatic that unless a party is informed of the reasons for the proposed action, it would be impossible for the noticee to put-forth its point of view with regard to reasons for the proposed action of show-cause notice. It must be adequate so as to enable a party to effectively object/respond to the same.

36. In view of aforesaid discussion, we have no hesitation in holding that the show cause notices issued to the petitioners were only an empty formality as the basis and foundation of the transfer of the cases is not the one for which the petitioners infact had been asked to show-cause. The impugned order has been passed after taking into consideration the extraneous material which had never been brought to the notice of the petitioners prior to passing of the impugned order. Therefore, the action of the respondents is violative of principles of natural justice and fair play and therefore not sustainable in the eyes of law.

In view of the aforesaid findings, the other contentions as raised by the respective parties need not to be gone into.

37. However, it only needs to be clarified that there is a difference between lack of jurisdiction and irregular exercise of authority/jurisdiction. Proceedings will be a nullity when the authority assuming it has no power to have seisin over the case. An irregularity in procedure need not result in annulment unless the statute specifically stipulates to the contrary.

38. In **Budhia Swain and others versus Gopinath Deb and others (1999) 4 SCC 396**, the Hon'ble Supreme Court highlighted that distinction exists and was well recognized between lack of jurisdiction and mere error of jurisdiction in the following terms:-

> **"9. A distinction has to be drawn between lack of jurisdiction and a mere error in exercise of jurisdiction. The former strikes at the very root of the exercise and want of jurisdiction may vitiate the proceedings rendering them and the orders passed therein a nullity. A mere error in exercise of jurisdiction does not vitiate the legality and validity of the proceedings and the order passed thereon unless set aside in the manner known to law by laying a challenge subject to the law of limitation. In Hira Lal Patni v. Kali Nath AIR 1962 SC 199 it was held:**
>
> > **"The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it."**

39. In **Grindlays Bank Ltd. versus Income-tax Officer, Calcutta and others AIR 1980 SC 656**, the Hon'ble Supreme Court quashed the assessment order but then issued directions to make fresh assessment in the circumstances of the case. It was held as under:-

> **"7. The next point is whether the High Court possessed any power to make the order directing a fresh assessment. The principle relief sought in the writ petition was the quashing of the notice under Section 142(1) of the Income-tax Act and inasmuch as the assessment order dated March 31, 1977 was made during the pendency of the proceedings consequent upon a purported non-**

compliance with that notice, it became necessary to obtain the quashing of the assessment order also. The character of an assessment proceeding, of which the impugned notice and the assessment order formed part, being quasi-judicial the "certiorari" jurisdiction of the High Court under Article 226 was attracted. Ordinarily, where the High Court exercises such jurisdiction it merely quashes the offending order and the consequential legal effect is that but for the offending order the remaining part of the proceeding stands automatically revived before the inferior court or tribunal with the need for fresh consideration and disposal by a fresh order. Ordinarily, the High Court does not substitute its own order for the order quashed by it. It is, of course, a different case where the adjudication by the High Court establishes a complete want of jurisdiction in the inferior court or tribunal to entertain or to take the proceeding at all. In that event on the quashing of the proceeding by the High Court there is no revival at all. But although in the former kind of case the High Court, after quashing the offender order, does not substitute its own order it has power nonetheless to pass such further orders as the justice of the case requires. When passing such orders the High Court draws on its inherent power to make all such orders as are necessary for doing complete justice between the parties. The interest of justice require that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court, by the mere circumstance that it has initiated a proceeding in the court, must be neutralized. The simple fact of the institution of litigation by itself should not be permitted to confer an advantage on the party responsible for it. The present case goes further...."

40. Similarly, in **Kapoor Chand Shrimal versus Commissioner of Income Tax, Andhra Pradesh, Hyderabad (1981) 4 SCC 317**, it was held that the duty of the appellate authority does not end with making a declaration that the assessments are illegal. It has also to issue further directions which include remanding the matter afresh unless forbidden from doing so by the statute. It was held as under:-

"17....It is, however, difficult to agree with the submission made on behalf of the assessee that the duty of the Tribunal ends with making a declaration that the assessments are illegal and it has no duty to issue any further direction. It is well known that an appellate authority has the jurisdiction as well as the duty to correct all errors in the proceedings under appeal and to issue, if necessary, appropriate directions to the authority against whose decision the appeal is preferred to dispose of the whole or any part of the matter afresh unless forbidden from doing so by the statute....."

41. A Division Bench of Bombay High Court in **Commissioner of Income Tax versus Bharat Kumar Modi 2000 (246 ITR) 693,** after taking note of the aforesaid well settled principles of law held that an order is not a nullity or in exercise of void *ab-initio* jurisdiction, when the Assessing Officer does not confront the assessee with the material in his possession. The said error is in irregularity which could be corrected by remitting the matter. Therefore, power of annulment and power to set aside and remit the case, have to be exercised keeping in mind the distinction between lack of jurisdiction and irregularity in exercise of authority/jurisdiction, while the former cannot be rectified, the latter can always be rectified.

42. In the present case, it cannot be disputed that respondent had the jurisdiction to decide the case, but omitted to confront the assessees with the material in his possession and proceeded to pass impugned order which was

founded on grounds at variance from the one in the show-cause notices which however, does not affect the *ab-initio,* jurisdiction enjoyed by the respondent in respect of the proceedings.

43. Therefore, bearing in mind the aforesaid exposition of law, the impugned order passed by the respondent though is not sustainable, however, it will be open for the respondent to commence the proceedings afresh which needless to say shall be strictly in accordance with the law. It also needs to be clarified that since we have not made any observation on the relative merits of the case(s), therefore, in the event of fresh show-cause notice(s) being issued, it shall be open to the petitioner(s) to raise all questions of fact and law including those raised before this Court.

44. In view of the aforesaid discussion, the impugned order(s) dated 14.07.2014 is quashed and set aside and the petitions are disposed of as aforesaid, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of. The Registry is directed to place a copy of this judgment on the files of connected matters.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Badri Nath ..... Appellant
Vs.
H.P. State Forest Corporation Ltd. ..... Respondent

RFA No. 153 of 2012.
Date of decision: 18.12.2014.

Limitation Act, 1965- Article 112 - Plaintiff filed a civil suit for the recovery on the ground of loss suffered by him due to breach of contract- suit was instituted on 10.12.2004, whereas, agreement was entered between the parties on 28.6.1997- plaintiff claimed that his case was covered under Article 112 of Limitation Act and the suit was within limitation- held that, Article 112 covers the suit filed by State Government or the Central Government- any authority/corporation which falls within definition of state under Article 12 will not become entitled to be treated as Central Government or State Government within the meaning of Article 12- suit was to be filed within the period of three years and the suit having not been filed within period of three years is barred by limitation. (Para- 3 to 12)

Case referred:
Nav Rattanmal and others vs. State of Rajasthan AIR 1961 SC 1704

For the appellants : Mr. Sunil Mohan Goel, Advocate.
For the respondent: Mr. Bhupinder Pathania, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This appeal is directed against the judgement and decree passed by the learned District Judge, Kangra at Dharamshala whereby the suit filed by the plaintiff- respondent has been decreed, while the counter-claim filed by the appellant- defendant has been dismissed.

2 The facts in brief may be noticed. The respondent herein filed a suit for recovery of Rs.6,17,599/- on account of loss suffered by the plaintiff due to breach of contract. The suit admittedly was instituted on 10.12.2004 and the agreement in question had been entered into on 28.6.1997 and the cause of action, if any, accrued to the plaintiff on 8.12.1997. A specific issue regarding limitation was framed to the following effect:-

"Whether suit is within time? OPP"

The learned trial court answered the issue in the following manner:-

> *"21. Submission of ld. Advocate appearing on behalf of plaintiff that suit is within time is also accepted for the reasons hereinafter mentioned. It is proved on record that written agreement Ex. PW 1/D was executed interse parties on dated 28.6.1997. It is also proved on record that HPFC is owned by Himachal Pradesh State Government. Court is of the view that any suit filed by State Forest Corporation owned by H.P. State Government is covered under Art.112 of the limitation Act. As per Art. 112 of the Limitation Act any suit (except a suit before the Supreme Court in the exercise of its original jurisdiction) by or on behalf of the Central government or any State Government including the Government of the State of Jammu & Kashmir, can be filed within thirty years when the period of limitation would begin to run. Present suit was filed on dated 10.12.2004. Hence it is held that present suit is governed under Art. 112 of the limitation Act 1963 because HPFC is owned by H.P. Government and any suit filed by Corporation owned by Government is governed by Art. 112 of Limitation Act 1963. Hence it is held that present suit is within time. Issue No. 10 is decided in favour of plaintiff."*

The suit was decreed. However, the counter claim preferred by the defendant-appellant was ordered to be dismissed.

Hence, this appeal.

3 The question which arises for consideration is as to whether the suit and the counter claim can be held to be within time.

Article 112 of Limitation Act, 1963 which has been relied upon by the learned trial court to decree the suit of the plaintiff- respondent reads as follows:

	Description of appeal	***Period of limitation.***	***Time from which period begins to run.***
112	Any suit (except a suit before the Supreme Court in the exercise of its original jurisdiction) by or on behalf of the Central Government, or any State Government including the Government of the State of Jammu and Kashmir.	Thirty years	When the period of limitation would begin to run under this Act against a like suit by a private person.

4 Therefore, the moot question required to be answered is as to whether recourse to Article 112 of the Limitation Act can be taken by the plaintiff- corporation to claim that the suit is within limitation. It cannot be

disputed that a particular period of limitation for filing a suit by a Central government or State government or as the case may be has been provided for under Article 112. The State Government has been provided for in the statute of Limitation for a purpose and object. Prior to Article 112 of 1963 Act, the paramateria provision was Article 149. While noticing the purpose and object of Article 149 of the Limitation Act, the Hon'ble Supreme Court in **Nav Rattanmal and others** vs. **State of Rajasthan AIR 1961 SC 1704** held as follows:-

> *"10. First and foremost there is this feature that the Limitation Act, though a statute of repose and intended for quieting titles, and in that sense looks at the problem from the point of view of the defendant with a view to provide for him a security against stale claims, addresses itself at the same time also to the position of the plaintiff. Thus, for instance where the plaintiff is under a legal disability to institute a suit by reason of his being a minor or being insane or an idiot, it makes provisions for the extension of the period taking into account that disability. Similarly, public interest in a claim being protected is taken into account by S. 10 of the Act by providing that there shall be no period of limitation in the case of express trusts. It is not necessary to go into the details of these provisions but it is sufficient to state that the approach here is from the point of view of protecting the enforceability of claims which, if the ordinary rules applied, would become barred by limitation. It is in great part on this principle that it is said that subject to statutory provision, while the maxim vigilantibus et non dormientibus jura Subveniunt is a rule for the subject, the maxim nullum tempus occurit regi is in general applicable to the Crown. The reason assigned was, the quote Coke, that the State ought not to suffer for the negligence of its officers or for their fraudulent collusion with the adverse party. It is with this background that the question of the special provision contained in Art. 149 of the Act has to be viewed. First we have the fact that in the case of the Government if a claim becomes barred by limitation, the loss falls on the public, i.e., on the community in general and to the benefit of the private individual who derives advantage by the lapse of time. This itself would appear to indicate a sufficient ground for differentiating between the claims of an individual and the claims of the community at large. Next, it may be mentioned that in the case of governmental machinery, it is a known fact that it does not move as quickly as in the case of individuals. Apart from the delay occurring in the proper officers ascertaining that a cause of action has accrued-Government being an impersonal body, before a claim is launched there has to be inter-departmental correspondence, consultations, sanctions obtained according to the rules. These necessarily take time and it is because of these features which are sometimes characterised as re-tape that there is delay in the functioning of Government officers....."*

5 The words "Central Government" or "State Government" have not been defined in Limitation Act, 1963. The "Government" has been defined in section 3(23) of the General Clauses Act, 1897 in the following words:-

> *"23. "Government" or "the Government" shall include both the Central Government and any State Government."*

6 The word "State" has been defined under Article 12 of the Constitution of India to mean:-

> "**12. *Definition.*-** In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

An analysis of the aforesaid definition of word "State" would show that the same is an inclusive definition which includes the Government, Parliament of India and the Government and Legislature of each States and all local or other authorities within the territory of India or under the control of the Government of India. The definition of word "State" as contained in Part-II of Constitution of India is for the purpose of Part-III and Part-IV of the Constitution of India. Article 12 itself indicates that the words "the State" is a word of wider definition and it encompasses in it other authorities, which may be controlled by Government of India.

7 No doubt, the plaintiff- corporation may be an authority within the meaning of Article 12 of the Constitution of India, but the question is as to whether the words "Central Government" and "State Government" used in Article 112 of the Limitation Act, 1963 should be read as the word "State".

8 When the Limitation Act, 1963 was enacted, the Parliament was well aware of the concept of Central Government, State Government and concept of "State". The Limitation Act, 1963 itself indicates that the word "Local Authority" is not included within the meaning of Central Government or State Government, which is apparent from the fact that a separate limitation period has been provided for Local Authority in the limitation Act under Article 111, which reads as follows:-

	Description of appeal	***Period of limitation.***	***Time from which period begins to run.***
111.	By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.	Thirty years	The date of the dispossession or discontinuance.

9. Therefore, had the Legislature intended to include local authority within the meaning of State Government or Central Government under Article 112 of the Limitation Act, there was no occasion to provide for a separate limitation period for local authority. It is thus clear that the local authority and other authorities which may fall within the definition of "State" under Article 12 of the Constitution of India were never intended to be included in the words "Central Government" or "State Government". Thus any authority/ corporation, which may be State within the meaning of Article 12 does not *ipso facto* become entitled to be treated as Central Government or State Government within the meaning of Article 112 of the Limitation Act. Accordingly, the plaintiff-appellant is not entitled to the extended period of limitation as provided for under Article 112 of the Limitation Act.

10 Indisputably the agreement in this case was entered into between the parties on 28.6.1997. The appellant- defendant had completed the rope way work and floating the timber in ravi river. On 18.12.1997, there was obstruction in the river and consequently a large quantity of timber was washed away. The total timber received by the corporation at road side depot was 1433.662 M^3 and there was short fall of 187.572 M^3 of timber. Therefore, the entitlement of the plaintiff- respondent to recover the amount towards balance timber arose on 18.12.1997 itself and the suit for recovery of money in terms of Article 113 of the Act is within three years.

11 The plaintiff has examined PW 1 B.S. Datwalia, who had been serving the department and had retired in 1989 as Divisional Manager, Forest Corporation. In the years 1994 to 1998, he had been posted as Divisional Manager, H.P. Forest Corporation, Dharamshala and he proved on record the bid given by the defendant and thereafter the agreement Ex. PW 1/D entered into between plaintiff and the defendant. The details of timber handed over to the defendant Ex. PW 1/E was also duly proved on record. The witness thereafter has only stated that some of the timber has been washed away and report to this effect had been lodged at P.P. Holi. PW 2 on the other hand has only stated about filing of the present suit under his signature.

12 The plaintiff has led no evidence whatsoever to show and prove that the suit has been filed within three years of the alleged cause of action. A perusal of the statement shows that cause of action as per plaintiff arose on 8.12.1997 when some of the timber was washed away, recovery whereof in fact had been sought by the plaintiff. In case the limitation is computed from such period, then same admittedly expired on 7.12.2000, while the present suit came to be instituted only on 10.12.2004 and the same is apparently barred by limitation. Once the suit by the plaintiff- respondent is held to be not maintainable, then the counter claim preferred by the defendant for withholding his amount for the very transaction and based on same cause of action has also been filed beyond the prescribed period of three years of cause of action and is thus required to be dismissed on the ground of limitation.

13 Having held so, the other questions need not be gone into since neither the suit nor the counter-claim is maintainable having been filed beyond the period of limitation.

14 Accordingly, the appeal is partly allowed. Resultantly, the suit filed by the plaintiff- respondent and the counter claim preferred by defendant-appellant are both dismissed as being time barred, 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.

Hem Raj .....Petitioner.
Vs.
State of H.P. & Ors. .....Respondents.

CWP No.7353 of 2014.
Reserved on: 11.12. 2014.
Decided on:18.12.2014.

Constitution of India, 1950- Article 226- License qua unit No. 23 was issued by respondent in favour of petitioner – Petitioner deposited an amount of Rs. 7,50,879/- for renewal of the license on the expiry of original license-however, license was not renewed- a conscious decision was taken by the respondent to merge this unit with other units- unit No. 23 lost its identity- petitioner was advised to obtain license for Unit No. 25- petitioner insisted upon renewal of license for unit No. 23- held, that mere deposit of license fees, does not confer any right upon the petitioner to obtain the renewal of license of unit No. 23 when it had ceased to exist- Financial Commissioner had power to merge liquor units - petition dismissed. (Para-3 to 7)

Case referred:
M/s Rishi Pal and Co. Vs. State of H.P. and others, 1998(5) SCC 333

For the Petitioner: Mr. Jagat Paul, Advocate.
For the respondents: Mr. Ramesh Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through the instant writ petition, the petitioner herein seeks quashing of notice comprised in Annexure P-7 as well as the impugned orders comprised in Annexures P-9 and P-10, besides a direction is sought for from this Court against the respondents inasmuch, as, the latter being directed to order for the petitioner being holder of Unit No. 23.

2. As divulged by Annexure P-1 a license qua Unit No. 23 was issued by the respondents in favour of the petitioner. Under Unit No. 23, L-2 Shalaghat, L-14 Shalaghat, L-14 Palania, L-14 Madhuva fall. The petitioner under Annexure P-4 deposited a sum of Rs.7,50,879/- for obtaining renewal of license qua Shallaghat Unit No.23 as initially issued in his favour as divulged by Annexure P-1. He continues to aver that even a no objection certificate as divulged by Annexure P-6 was issued in his favour by the competent authority. However, under Annexure P-7 the respondents were constrained to communicate/convey to the petitioner for the reasons comprised in it that they were precluded or deterred to renew the license as comprised in Annexure P-1, initially issued in favour of the petitioner qua Unit No.23.

3. The entire factual matrix apposite for rendition of an adjudication on the writ petition is embedded and encapsulated in impugned Annexures P-9 and P-10. An incisive reading with discernment of the aforesaid Annexures articulates that in both the impugned Annexures aforesaid the authority concerned as was seized of a lis inter-se similar/analogous contestants as are the contestants herein, had on an in-depth scrutiny of the facts, material as well as the apposite law applicable thereon concluded that the ventilation of the grievance therein by the petitioner herein had no force. True it is that under Annexure P-1 license qua Unit No. 23 inasmuch as qua Shalaghat was issued in favour of the petitioner herein for the year 2013-14. The petitioner under Annexure P-4 deposited before the authority concerned the necessary fee for renewal of license qua Unit No.23 in his favour, however, under notice comprised in Annexure P-7 a communication was conveyed to the petitioner that owing to non-renewal of Unit No.20 Kunihar, Unit No.25 Darlamor, Unit No. 27 Bhararighat and Unit No.44 Dumehar of Arki Tehsil, a conscious decision was taken by the respondents in the interest of buoying revenue that the units aforesaid be clubbed with Units No.22 Arki, Unit No. 23 Shalaghat and Unit No. 24 Darlaghat. Since the liquor license issued in favour of the petitioner under Annexure P-1 was qua Unit No. 23 inasmuch, as, qua Shalaghat hence when the unit aforesaid on reconstitution/regrouping respectively of Units No. 20, 25, 27, 44 with it a newly constituted Unit No. 45 of which hitherto Unit No. 23 qua which a liquor license was initially issued in favour of the petitioner herein is a part, came into existence, as such the respondents were constrained not to renew the liquor license in favour of the petitioner qua Unit No. 23, it having lost its identity or it having become extinct on its amalgamation with units aforesaid whereby a rechristened unit No. 45 was constituted. Even the respondents had advised the petitioner to file an application before 12.00 noon on 26.03.2014 before the authority concerned, for obtaining license on completion of codal formalities for the newly constituted Unit No. 45. Nonetheless, the petitioner herein has chosen to anchor his claim for renewal of license qua Unit No. 23 which now has paled into extinction on regrouping/reconstitution of Units. His espousal before this Court for renewal of license qua Unit No. 23 is anchored upon the factum of Annexure P-4 with a disclosure in it of his having deposited the necessary fees before the authority concerned, hence, it is urged by the counsel for the petitioner that the receipt of the necessary license fees by the

authority concerned as portrayed by annexure P-4 invests an inherent, indefeasible right in him ensuing from the applicability of the principle of promissory estoppel or in other words acceptance of license fees by the authority concerned from the petitioner disclosed by Annexure P-4 estops/interdicts the respondents against non renewal of license of Unit No. 23 in his favour qua which a license initially was issued in his favour comprised in Annexure P-1. He also proceeds to submit that the regrouping and reconstitution as well as realignment of Units No. 20, 25, 27, 44 with Unit No. 22, 23 and 24 and theirs hence being ascribed a new Unit No. 45 is an act of the respondents ridden with arbitrariness merely to oust the petitioner herein to obtain renewal of hitherto Unit No. 23 even when he had deposited the necessary fees for its renewal before the authority concerned.

4. Both the submissions aforesaid are bereft of legal tenacity or sinew. The mere factum of the petitioner having deposited license fee before the authority concerned as divulged by Annexure P-4 does not perse bestow or invest in him a right to obtain renewal of hitherto Unit No. 23 especially when Unit No. 23 has faded into extinction on its alongwith units No. 20, 25, 27 and 44 having come to be realigned, reconstituted and regrouped, unless it was demonstrated that the re-alignment of units aforesaid alongwith Unit No.23 qua which a liquor license was initially issued in favour of the petitioner under Annexure P-1 smacks of malafidies or is ultra vires the rules. Besides it was entailed upon the counsel for the petitioner to substantiate that such regrouping has been constituted or such regrouping/realigning is generated by exercise of extra constitutional power by the respondents or is prodded by whimsicality or caprice arising from no authority or power vesting in the authority concerned to create a new group by amalgamation or regrouping. In the aforesaid scenario the non-renewal of license qua Unit No. 23 in favour of the petitioner would be ridden with the vice of arbitrariness and concomitant illegality. However, an incisive perusal of the record demonstrates that the authority concerned is vested by empowerment contained in Rule 13 and 34 of the Himachal Pradesh Liquor License Rules, 1986 read with Conditions No. 1.2, 1.3 and 3.18 of the Excise Allotment/Renewal Announcements for the year 2014-15 to carry out regrouping/realignment of liquor Units/Vends and concomitantly to amalgamate Units. In fact an un-circumscribed/unfettered power is vested in the Financial Commissioner to carry out regrouping of liquor units. The plenitude of powers vested in the Financial Commissioner to carry out realignment of liquor units and on such regrouping reconstitute and assign them a new unit number has been upheld in a decision reported in M/s Rishi Pal and Co. vs. State of H.P. and others, 1998(5) SCC 333. Besides vires thereof has been upheld in a decision rendered by this Court in Civil Writ Petition No. 473 of 2008 decided on 25.09.2008. In face thereof the act of the respondents to render extinct Unit No. 23 qua which a liquor license was initially issued in favour of the petitioner under Annexure P-1 by its tenable act of on its regrouping/realignment with other Units bearing No. 20, 25, 27 and 44 ascribe to it a new unit No. 45 cannot obviously bestow any right in the petitioner herein to on merger of Unit No. 23 with other Units aforesaid claim a vested or entrenched right merely on the anvil of his having deposited the revenue fees qua one of the Units forming a part of newly constituted Unit No. 45 for the latter renewal in his favour. Moreso, when the license initially issued under Annexure P-1 qua one of the Units forming part of newly constituted unit No. 45 has faded into extinction. In other words, when Unit No. 23 no longer exists or has faded into oblivion, no vested/ subsisted rights endure in the petitioner to claim renewal of license qua a part of reconstituted unit number in his favour. He though does have a right to participate in the process for allotment or issuance of license qua newly constituted Unit No. 45 and in case he was interdicted or forbidden to participate in the process for allotment /issuance of license qua newly constituted Unit No. 45 on its coming into being on regrouping/realignment of units aforesaid then he could tenably agitate before

this Court that such interdiction imposed upon him by executive fiat acquires the taint of bias and is liable to be interfered with by this Court in the exercise of writ jurisdiction for facilitating the cherished constitutional tenet of equality. However, when as apparent on an incisive rummaging of the record that the petitioner was advised by the respondents to file an application before the authority concerned, before 12.00 noon on 26.3.2014 for his being considered for issuance of license or his being allotted on completion of codal formalities newly constituted Unit No. 45, yet his having omitted to participate renders him ill-equipped to agitate that in the process undertaken by the respondents to allot newly constituted Unit No. 45 he has been denied an opportunity compatible with other bidders seeking allotment/issuance of license qua it, besides estops him from contending that the process initiated by the respondents for allotment of the newly constituted Unit No. 45 by omitting elicitation of his participation is ridden with arbitrariness.

5. The discussion aforesaid unfolds the factum that the authority concerned in taking to obliterate Unit No. 23 by resorting to a tenable or legally ordained act of regrouping/realignment had not committed any illegality nor had indulged in any act smacking of arbitrariness. Besides when the rule of promissory estoppel as sought to be invoked by the petitioner on the strength of his having deposited license fee for the since obliterated Unit No. 23 by a tenable act of regrouping by the respondents, hence, stands effacement, obviously it cannot surge forth to the rescue of the petitioner for his claiming renewal of liquor license qua Unit No. 23.

6. For reiteration, In the face of Unit No. 23 standing obliteration it would be an abuse of the equitable principle of promissory estoppels to stretch it to a scenario as in the instant case when with the unit qua which it is canvassed to be purportedly generated has faded into oblivion by a tenable act of the respondents. In other words, it would be a travesty of the rules permitting exercise of un-circumscribed powers embedded in the authority concerned to create/constitute new units by regrouping of hitherto units in case merely on the strength of deposit of license fees by the petitioner herein for renewal of an extinct liquor vend/unit, the equitable principle of promissory estoppel is permitted to sprout. The latter rule is a rule of equity and is unavailable to be drawn, when rules as in the instant case governing the issuance of liquor license to the aspirants exist. Even otherwise, the act of the respondents in rendering extinct Unit No. 23 by resorting to by its tenable act of regrouping create a new unit no. 45 is buoyed or fostered by a profiteering motive of the Government. Annexures P-9 and P-10 portray that since no application for renewal of license in respect of four units namely Kunihar, Darlamore, Bhararighat and Dumehar having a license fee of Rs.4.23 crores were received, as such, for want of receipt of application for renewal of units aforesaid which application if received would have reared a revenue of Rs.4.23 crores to the State exchequer the legally authorized step of the respondent to regroup of the units aforesaid with Unit No. 23 and thereby create/constitute newly ascribed unit No. 45 is to be presumed to be a legally warranted step prodded by statistical data. The petitioner has omitted to display any material portraying that no statistical data loses of revenue to the respondents existed before they proceeded to obliterate units aforesaid and on regrouping/realigning thereof theirs having constituted a new Unit No. 45 in which the participation of the petitioner herein too was elicited. For lack of adduction on record of the aforesaid material an invincible conclusion which ensues is that the respondents in resorting to the act of regrouping/realigning of Units and on such regrouping, ascribing a new unit number had carried out a stretched and thoughtful exercise. Preponderantly then, when the said exercise is not imaginative or conjectural rather is obviously to buoy revenue or obviate loss to the exchequer in the sum of Rs. 4.23 Crores, it cannot be construed to be smacking of any malafides or arbitrariness.

7. Preeminently the ascription of Unit No. 45 to Unit No. 23, on its regrouping with units at Kunihar, Darlamore, Bhararighat and Dumehar too, cannot be said to have been arbitrarily done inasmuch as Unit No. 23 qua which initially a liquor license was issued in favour of the petitioner under Annexure P-1, having been arbitrarily singled out for amalgamation with other units, on regrouping whereof, a newly constituted unit No. 45 came into existence, especially in the face of revelation by the impugned annexures that not only newly constituted unit No. 45 came into existence on regrouping rather with their being a revelation on an incisive discernment of the record of Darlaghat & Arki units, too having been subjected to regrouping or realigning hence theirs having also then acquired a fresh identity rather dispel the contention of the learned counsel for the petitioner that his unit No. 23 was arbitrary handpicked or singled out by the respondents to an act of regrouping alongwith other units.

8. The upshot of above discussion is that the authorities below while rendering the impugned Annexures had incisively applied their mind to the entire material on record. It appears that they neither excluded germane material from consideration nor took inapposite material into consideration. Consequently, the findings as recorded by both the Authorities below in their impugned Annexures are well merited, they do not suffer from any perversity or absurdity of mis-appreciation or non-appreciation of material placed on record. Accordingly, we find no merit in the petition, which is accordingly dismissed, so also the pending application, if any. No costs.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C. J.

Anuj Sirkek ...Appellant.
Vs.
Neelma Devi and Ors. ...Respondents.

FAO No.57 of 2014
Decided on: December 19, 2014.

Motor Vehicle Act, 1988- Section 149- Tribunal held that driver/insured was not having a driving licence- record showed that insured/driver possessed a learner's licence- RW-1 deposed that he was travelling in the scooter as an instructor and was sitting behind the insured in the scooter- held, that driver was having a valid driving licence and was competent to drive the vehicle - he was accompanied by an instructor, and it cannot be said that driver was not competent to drive the vehicle. (Para-11 to 18)

Cases referred:
National Insurance Co. Ltd. vs. Swaran Singh and others, AIR 2004 SC 1531

For the appellant : Mr.R.K. Bawa, Senior Advocate, with Mr.Jeevesh Sharma, Advocate.
For the respondents: Mr.Ramesh Sharma, Advocate, for respondents No.1 to 7.
Mr.B.M. Chuahan, Advocate, for respondent No.8.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral):

Challenge in this appeal is to the award, dated 21st October, 2013, passed by Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr,

District Shimla, H.P. (for short, the Tribunal), in MAC Petition No.0100061 of 2011, titled Neelma Devi and others vs. Anuj Sirkek and another, whereby compensation to the tune of Rs.8,25,600/-, with costs quantified at Rs.3,000/- and interest at the rate of 6% per annum from the date of filing of the petition till its realization, was awarded in favour of the claimants No.1 to 6, (respondents No.1 to 6 herein), and the insured/driver/appellant came to be saddled with the liability, (for short, the impugned award).

2. The claimants and the insurer have not questioned the impugned award. Therefore, the only question needs to be determined in this appeal is – Whether the Tribunal was right in discharging the insurer and saddling the appellant/owner/driver with the liability?

3. In order to determine the controversy in hand, it is necessary to have a glance of the facts of the case, the womb of which has given birth to the present appeal.

4. Claimants, seven in number, invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, (for short, the Act), for grant of compensation to the tune of Rs.20.00 lacs, as per the break-ups given in the Claim Petition, on the ground that on 7th May, 2011, at about 9.30 a.m., the driver, namely, Anuj Sirkek (appellant herein), had driven the offending vehicle i.e. Pick Up, bearing registration number HP-63B-0553, rashly and negligently and hit the deceased Budhi Singh at Nogli, District Rampur, H.P., who sustained injuries resulting, lateron, into his death.

5. The Claim Petition was resisted by the insured/driver and the insurer on various grounds, by filing replies.

6. On the pleadings of the parties, the following issues came to be framed:

4. Whether late Sh.Budhi Singh had died on account of injuries sustained by him due to the rash and negligent driving of vehicle No.HP-63B-0553, being driven by respondent No.1, as alleged? OPP

5. If issue No.1 is proved, to what amount of compensation the petitioners are entitled to and from whom? OPP

6. Whether at the relevant time, respondent No.1 was not possessed of a valid and effective driving licence? OPR-2

7. Whether at the relevant time, the offending vehicle was being plied without fitness certificate? OPR-2

8. Relief.

7. Claimants, in order to prove their claim, have examined one Sagar Dass as PW-2 and one of the claimants i.e. Smt.Neelma Devi also stepped into the witness box as PW-1. The driver has examined one Dinesh Chauhan as RW-1, while the insurer examined Sangat Ram Negi as RW-2.

8. The Tribunal, after scanning the pleadings and the evidence led by the parties, decided issue No.1 in favour of the claimants, against the driver/owner/insured. Theses findings of the Tribunal are not in dispute, therefore, the same are upheld.

9. Onus to prove issue No.4 was upon the insurer, in which it has failed to discharge. Moreover, the findings on this issue are also not in dispute and, therefore, the same are liable to be upheld and are upheld accordingly.

10. Now, coming to issues No.2 and 3, the Tribunal, after making assessment, held the claimants entitled to compensation to the tune of Rs.8,25,600/-, with costs and interest, as detailed above. Neither the claimants

nor the insurer has questioned the adequacy of compensation. Thus, it is held that the amount of compensation awarded by the Tribunal is just and appropriate.

11. During the course of hearing, the learned counsel for the appellant/owner/driver strenuously argued that the Tribunal has fallen in error in saddling the appellant with the liability. The learned counsel laid emphasis on the statement of RW-1 Dinesh Chauhan, who has stated that, at the relevant point of time, he was sitting beside the appellant and was having a valid and effective driving licence.

12. I have gone through the entire record of the case. The Tribunal has saddled the appellant/insured with the liability on the ground that the appellant/driver/insured was not having a valid driving licence for the reason that he, at the relevant point of time, was having a learner's licence and was not accompanied by any instructor having valid and effective driving licence to drive the offending vehicle in terms of the insurance policy. Copy of the learner's licence has been proved on record as Ext.RW-1/B. It is not the case, either of the claimants or of the insurer, that the appellant/driver/insured was not having a learner's licence.

13. Dinesh Chauhan RW-1 has deposed before the Tribunal that on the fateful day, he was accompanying the appellant/driver/owner as instructor and was sitting beside him in the offending vehicle.

14. The insurer has not led any evidence to disprove the said fact and has not been able to shatter the evidence of RW-1 Dinesh Chauhan during the cross examination.

15. Having glance of the above discussion, the question which emerges is – Whether a driver, having a learner's licence and accompanied by a person having valid and effective driving licence to drive the vehicle in question, can be said to be competent to drive the vehicle and whether it can be termed as breach of the insurance policy, read with the mandate of the Act.

16. To answer the above contentious issue, a reference may be made to the decision of the Apex Court in **National Insurance Co. Ltd. vs. Swaran Singh and others, AIR 2004 SC 1531.** It is apt to reproduce paragraphs No.88, 89 & 105 (i), (iii), (iv), (vi) and (viii), hereunder:

> "88. Motor Vehicles Act, 1988 provides for grant of learner's licence. [See Section 4(3), Section 7(2), Section 10(3) and Section 14]. A learner's licence is, thus, also a licence within the meaning of the provisions of the said Act. It cannot, therefore, be said that a vehicle when being driven by a learner subject to the conditions mentioned in the licence, he would not be a person who is not duly licensed resulting in conferring a right on the insurer to avoid the claim of the third party. It cannot be said that a person holding a learner's licence is not entitled to drive the vehicle. Even if there exists a condition in the contract of insurance that the vehicle cannot be driven by a person holding a learner's licence, the same would run counter to the provision of Section 149(2) of the said Act.
>
> 89. The provisions contained in the said Act provide also for grant of driving licence which is otherwise a learner's licence. Sections 3(2) and 6 of the Act provide for the restriction in the matter of grant of driving licence, Section 7 deals with such restrictions on granting of learner's licence. Sections 8 and 9 provide for the manner and conditions for grant of driving licence. Section 15 provides for renewal of driving licence. Learner's licences are granted under the rules farmed by the Central Government or the

State Governments in exercise of their rule making power. Conditions are attached to the learner's licences granted in terms of the statute. A person holding learner's licence would, thus, also come within the purview of "duly licensed" as such a licence is also granted in terms of the provisions of the Act and the rules farmed thereunder. It is now a well-settled principle of law that rules validly framed become part of the statute. Such rules are, therefore, required to be read as a part of main enactment. It is also well-settled principle of law that for the interpretation of statute an attempt must be made to give effect to all provisions under the rule. No provision should be considered as surplusage.

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105. The summary of our findings to the various issues as raised in these petitions are as follows :

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

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(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability toward insured, the insurer has to prove that the insurer was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the conditions of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish `breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

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(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defence available to the insured under section 149(2) of the Act.

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(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

17. Coming to the facts of the instant case, admittedly, the driver of the offending vehicle was having a learner's licence at the relevant point of time. A driver who is having a learner's licence can be said to be competent to drive a vehicle, provided such a person is accompanied by an instructor holding a valid and effective driving licence to drive the vehicle in question.

18. In the present case, the driver/insured, in order to satisfy the mandate of the Act, has examined Dinesh Chauhan as RW-1, who has stated that he was sitting with the driver of the offending vehicle, i.e. the appellant, at the relevant point of time. Therefore, by no stretch of imagination, it can be said that the appellant/insured/driver was not competent to drive the vehicle in question.

19. It was for the insurer to plead and prove that the insured has committed any willful breach, has failed to do so.

20. Viewed thus, the Tribunal has fallen in error in coming to the conclusion that the insured has committed the breach.

21. In view of the above discussion, the appeal is allowed, the impugned award is modified by providing that the owner/driver has not committed any willful breach and the insurer has to satisfy the impugned award. Accordingly, the insurer is directed to deposit the entire award amount within a period of 8 weeks from today in the Registry of this Court and on deposit, the Registry is directed to release the same in favour of the claimants strictly in terms of the impugned award. Thereafter, the amount deposited by the appellant/driver, if any, be released in his favour through payee's account cheque.

22. The appeal stands disposed of accordingly, alongwith pending CMPs, if any.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Himachal Pradesh State Electricity Board. .....Petitioner

Versus

Sh. Madan Lal Gulati ... ...Respondent

Arb. Case No. 50 of 2007

Reserved on 17th November, 2014

Decided on: 19th December, 2014

Arbitration and Conciliation Act, 1996- Section 34- Construction of underground work comprising of Head Race Tunnel and Desilting Chambers was awarded to the respondent-Contractor by the Executive Engineer- date of completion was fixed as 31.8.1991- Contractor failed to complete the work well within the time- Contract was rescinded on 23.03.1992 with the condition to get it completed by the Electricity Board at the cost of the Contractor- Work was completed in June, 1996 – A notice was served on 16.10.1998 for the appointment of the Arbitrator for adjudication of the dispute- the Arbitrator was appointed on 9.9.1999- Arbitrator announced the award on 7.9.2007- held, that delay in execution of the work granted a right to the Board to rescind the contract- Board was competent to get the work executed at the cost of the contractor - rescission of the contract and execution of the remaining work by Board at the risk and cost of the contractor did not fall within

the definition of the dispute and could not have been referred to Arbitrator- cost of the remaining work should have been adjusted against the security deposit bill. (Para-14 to 18)

Arbitration and Conciliation Act, 1996- Section 34- Contract was rescinded by the Electricity Board on failure of the contractor to complete the contract within time on 23.3.1992- contractor claimed that he was not responsible for non-completion of the work within time and the non-completion was due to the acts of the board- held, that the dispute could have been raised within 30 days before the Arbitrator- contractor had not sought the appointment of the Arbitrator and had filed a counter-claim on 28.6.2008 when the appointment of the Arbitrator was sought by Electricity Board- the counter-claim preferred by contractor was barred by limitation. (Para-19 to 23)

Cases referred:

Voltas Limited versus Rolta India Limited (2014) 4 SCC 516

State of Goa versus Praveen Enterprises (2012) 12 SCC 581

For the petitioner:	Mr. J.S. Bhogal, Senior Advocate with Mr. Suneet Goel, Advocate.
For the respondent:	Mr. Y.P.S. Dhaulta, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

Petitioner is a Board constituted under the Electricity (Supply) Act 1948. The petitioner-Board had taken in hand the construction work of Thirot Hydel Project. The construction of underground work comprising of Head Race Tunnel and Desilting Chambers was awarded to the respondent-Contractor for a sum of Rs.1.15 crores by the Executive Engineer, Thirot, Division No. 1 vide letter dated 21.11.1989. An agreement was entered upon between the petitioner and the respondent-Contractor. The agreed date for completion of the work was 31.08.1991. The respondent-Contractor, however, as agreed upon. The contract, therefore, was rescinded on 23.03.1992 with the stipulation to get the same completed by the petitioner-Board at the risk and cost of the respondent. The work could only be completed in the month of June, 1996.

2. The respondent-Contractor served the petitioner-Board with a legal notice dated 16.10.1998 calling upon thereby to appoint an Arbitrator for adjudication of the dispute having arisen in relation to the agreement. The Arbitrator came to be appointed on 09.09.1999.

3. The petitioner-Board preferred the claims against the respondent-Contractor well within the period of limitation in the month of June, 1999 i.e. well within three years of the date of completion of work i.e. June, 1996. The respondent, however, filed reply to the claims of the petitioner-Board and also the counter-claims on 26.08.2002 allegedly beyond the period of limitation. The Arbitrator announced the award on 07.09.2007 and thereby while awarding a sum of Rs.12,00,000/- along with interest @ 15% in favour of the petitioner-Board at the same time awarded a sum of Rs.21,63,850/- along with interest @ 15% in favour of the respondent-Contractor.

4. The petitioner-Board aggrieved by the award has questioned the legality and validity thereof on the grounds inter-alia that the same being non-speaking award having no reasons, as required under Section 31 of the Arbitration and Conciliation Act, 1996 recorded by the Arbitrator is against the public policy of India. Also that, the counter-claims being time barred have been erroneously entertained and the aspect of limitation has not been considered. The amount under the counter-claims has been awarded without

there being any evidence available on record and rather the Arbitrator travelled beyond the terms of the agreement, while making the award in favour of the respondent-Contractor. On the other hand, claim to the tune of Rs.39,12,870/- of the petitioner-Board has not been considered in the light of the evidence available on record and only a paltry amount i.e. Rs.12,00,000/- has been awarded out of the same.

5. The respondent-Contractor in preliminary submissions has urged that no ground in terms of Section 34(2) of the Act is made out for setting aside the impugned award and also that the objection not filed by the authorized person, the same is not maintainable. The petition is also claimed to be time barred. On merits, while supporting the award, it has been submitted that he preferred the counter-claims well within the period of limitation. It is specifically pointed out that the petitioner-Board raised objections qua the counter-claims time barred only after 17 hearings having taken place in the matter before the learned Arbitrator. It is also denied that he failed to complete the work within the stipulated period. It is rather the petitioner-Board stated to have erroneously rescinded the contract.

6. In rejoinder, the petitioner-Board has denied the contents of the preliminary submissions being wrong. On merits, while reiterating the contents of the petition denied the contentions to the contrary in the reply being wrong.

7. On the pleadings of the parties, following issues were framed on 28.07.2008:

i) Whether the award dated 7.9.2007 is against the Public Policy of India ? If so, its effect? OPO

ii) Relief.

8. The parties though initially opted for producing evidence by way of affidavits, however, on 29.09.2008 intended to argue the matter on the basis of record of the Arbitrator, as find recorded in the order passed on that day.

9. It is seen that a Co-ordinate Bench of this Court dismissed the petition and also the counter-claims vide judgment dated 6th May, 2009. The matter on being taken to a Division Bench by way of Arbitration Appeal No. 7/09 was remanded to learned Single Judge for fresh disposal after taking on record reply to the petition on behalf of respondent-Contractor, as it was not filed earlier, though rejoinder thereto was on record. Now, reply stands taken on record as discussed supra.

10. Mr. J.S. Bhogal, learned Senior Advocate has mainly emphasized on the point of limitation and has canvassed that counter-claims, the respondent-Contractor preferred being hopelessly time barred have erroneously been entertained and the amount so claimed by the respondent-Contractor by way of counter-claim awarded wrongly. On merits also, it has been urged that award without there being any reason, is non-speaking hence perverse and not legally sustainable. According to Mr. Bhogal, claims to the tune of Rs.39,12,870/- having been preferred by the petitioner-Board well within the period of limitation should have been awarded as a whole. The Arbitrator without recording any cogent and plausible reason has erroneously reduced the same and awarded only a sum of Rs.12,00,000/- against the claim of the petitioner-Board.

11. On the other hand, Mr. Y.P.S. Dhaulta, learned counsel representing the respondent-Contractor has urged that the impugned award to the extent of allowing counter-claims is absolutely legal and valid, hence calls for no interference by this Court under Section 34 of the Act. The claims preferred by the petitioner-Board allegedly being time barred should have not been entertained nor any amount awarded. The award to the extent of allowing

the claims preferred by the petitioner-Board partly has been sought to be quashed.

12. It is seen from the record that the Arbitrator on the basis of the claims and counter-claims preferred by the parties on both sides before him has framed the following issues:

1. Issue No.1-Whether the claim filed by the claimant is within time limit.
2. Issue No.2-Whether the counter claim filed by the Respondent is within time limit.
3. Issue No.3-Whether there has been a breach of contract by the Respondent.
4. Issue No.4-Whether the Claim of the Claimant is justified.
5. Issue No.5-Whether the counter claim of the Respondent is justified.

13. Issue Nos. 1 and 3 have been answered in favour of the petitioner-Board. Issue No. 4 has also been answered in favour of the Board, however, partly as only Rs.12,00,000/- has been awarded against the claim of the Board to the tune of Rs.39,12,870/-. Issue No. 2 has been answered in favour of the respondent-Contractor. Issue No. 5 has also been answered in favour of the respondent-Contractor, however, partly because against the claim of Rs.1,99,41,497/-, he claimed by way of counter-claims, only a sum of Rs.21,63,850/- has been awarded to him.

14. Now the question arise that the claim/counter-claim constitutes disputes within the meaning of Clause 25 of the contract agreement, which reads as follows:

"Clause 25-SETTLEMENT OF DISPUTES BY ARBITRATION"

> "Except where otherwise provided in the contract, all questions and disputes relating to the meaning and interpretation of the terms of contract, specifications, design, drawings and instructions herein before mentioned and as the quality of workmanship or material used in the work or as to any other question, claim, right matter, or thing 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 of abandonment thereof of the contract, shall be referred to a Sole Arbitrator who will be appointed by HPSEB.
>
> It will be no objection to any such appointment that the Arbitrator, so appointed, is Govt./Board servant, that he had to deal with matters to which the contract relates to and that in the course of his duties as Govt./Board servant, he had expressed views on all or any of the matters in dispute or difference. In case the Arbitrator to whom dispute/difference so referred is unable to function as such for any reason whatsoever or his Award being set aside by the Court for any other reasons, another Arbitrator shall be appointed in the same manner as indicated above. Such person shall be appointed to proceed with the references from the stage at which it had been left by his predecessor or to conduct the proceedings afresh as he may deem fir or as the case may be.

It is also a terms of the contract that the party invoking Arbitration shall specify the dispute(s) to be referred to the arbitration under this Clause together with the amount(s) claimed in respect to each dispute. If work under the contract has not been completed when a dispute on any matter whatsoever is referred to arbitration, the contractor shall not be entitled to suspend such work to which the dispute relates and payment to the contractor shall be continued to be made in terms of the contract.

It is also a terms of the contract that if the contractor(s) does not prefer any claim, in writing within 90 (ninety) days of the date on which the dispute first arises or date of limitation of the preparation of the bill, thereof, whichever is earlier, the claim(s) of the contractor will be deemed to have been waived and absolutely barred and the HPSEB shall be discharged and released of all the liabilities under the contract in respect of such claim(s). Likewise all dispute(s) referred to above shall be preferred as provided above within 90 (90) days of the final bill otherwise all claim(s) shall stand extinguished. Provided, in the event of rejection of contractor's claim(s), the contractor within 80 days after receiving limitation in writing of such decision shall give notice in writing to the Chief Engineer, requesting him that the matter be referred to the arbitration.

In all cases referred for arbitration, the Arbitrator/Umpire shall assign reasons under all circumstances on which his decision is based. The Arbitrator/Umpire from time to time, with the consent of the parties enlarge time for making/publishing the Award. The decision of the Arbitration/Umpire as the case may be, shall be conclusive, final and binding on the parties.

Subject to the provisions of the contract on the contrary as aforesaid, the provisions of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force, shall apply to all arbitration proceedings under this Clause. All disputes regarding the contract shall be subject to the jurisdiction of Shimla Courts alone irrespective of place, execution and performance of contract and delivery & payment whatsoever etc. etc."

15. The present is a case where on account of non completion of work within the stipulated period, the petitioner-Board has rescinded the contract on 23.03.1992 and resorted to the course of action provided under Clause 3 of the contract agreement and arranged to execute the remaining work at the risk and cost of the respondent-Contractor. Clause 3 of the agreement, reads as follows:

"Clause 3-DETERMINATION OF CONTRACT"

Chief Engineer, may without prejudice to Board's right in respect of any delay or inferior workmanship or otherwise or to any claim for damage in respect of any right or remedies under this contract or otherwise and irrespective of the fact whether the date of completion has or has not elapsed by notice in writing, absolutely determine the contract in any of the following cases:

1(i). If the contractor, having been given by the Engineer-in-Charge a notice in writing to rectify, reconstruct or replace any defective work or that the work/or part of work is being performed in an inefficient manner or otherwise improper or unworkman like manner, fails to

comply with the requirement of such notice within a period of seven days thereafter or if the contractor shall delay or suspend the execution of the work or part of the work so that either in the judgment of the Chief Engineer(which shall be final and binding) the contractor will be unable to secure completion of the work by the date for completion or the contract has already failed to complete the work by that date.

2(ii). If the contractor being company shall pass a resolution or the court shall make an order that the company shall be wound up or if a receiver or a manner on behalf of creditor shall be appointed or if circumstances shall arise which entitle the court or creditor to appoint a receiver or a manager or which entitle the court to make a winding up order.

3(iii). If the contractor commits breach of any of the terms and conditions of this contract.

4(iv). If the contractor commits any acts mentioned if Clause-21 hereof.

When the contractor has made himself liable for action under any of the cases aforesaid, the Chief Engineer, on behalf of the Board shall have powers:

a) To determine or rescind the contract as aforesaid (of which termination or rescission notice in writing to the contractor under the hand of the Chief Engineer, shall be conclusive evidence). Upon such determination or rescission, the security deposit of the contractor shall be liable to be forfeited and shall be absolutely at the disposal of HPSEB.

b) To execute the work departmentally and debit the cost (cost as certified by the Engineer-in-Charge shall be final and conclusive against the contractor) of such execution to the contractor and credit him with the value of the work done in all respects in the same manner and at the same rates as if it had been carried out by the contractor under the terms of his contract. The certificate of the Engineer-in-charge as to the value of the work done shall be final and conclusive against the contractor, provided always that action under the sub-clause shall only be taken after giving notice in writing to the contractor, provided also that if the expense incurred by the department are less than the amount payable to the contractor at contracted rates, the difference should not be paid to the contractor and if the expenses incurred by the department are more than the amount payable to the contractor at contracted rates, the difference shall be paid by the contractor.

c) After giving notice to the contractor to measure up the work executed by him and to take such part thereof as shall be unexecuted out of his hands and to give it to another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to original contractor, if the whole work had been executed by him(of the amount of which excess the certificate in writing of the Engineer-in-charge shall be final and conclusive) shall be borne and

paid by the original contractor and may be deducted from any money due to him by the Board under this contract or any other amount whatsoever or from his security deposit or the proceeds of Sales thereof or sufficient part thereof as the case may be.

d) To take any part of the work out of contractor's hands which in the opinion of Engineer-in-charge is not being carried out by the contractor with required diligence and efficiency and to execute it departmentally or through other agency at the risk and cost of the contractor.

In the event of any one or more of the above courses being adopted by the Engineer-in-charge, the contractor shall have no claim to compensation for any less sustained by him by reason of his having purchased or procured any materials or entered upon into any engagements or made any advances on account or with a view to the execution of the work or the performance of contract. And in case, action is taken under any of the provisions aforesaid, the contractor shall not been entitled to recover or be paid any sum for any work thereto or actually performed under this contract unless and until the Engineer-in-charge has certified in writing the performance of such work and the value payable in respect thereof and he shall be only be entitled to be paid the value so certified."

16. It is seen that the delay in execution of the work or completion of the work within the stipulated period extends a right in favour of the Board to rescind the contract under intimation in writing to the Contractor. The Board was also competent to execute the remaining work at the cost of the contractor by crediting him with the value of the work so executed in such a manner and at the rate, as if such work has been executed by the Contractor himself under the terms of the contract. Such course of action can only be resorted to after giving notice in writing to the Contractor.

17. Clause 3 of the agreement is self-speaking and provides for the determination of the contract on account of breach of any terms and conditions including qua completion of the work within the stipulated period. This Clause further provides for procedure to be followed to execute the remaining work at the cost of the Contractor to his notice and knowledge and the costs of the work so executed as it is the liability of the Contractor to bear the costs of the work so executed as per the bill(s) to be prepared by the Engineer Incharge.

18. Therefore, rescission of the contract and execution of the remaining work by the petitioner-Board at the risk and costs of the Contractor being not a dispute within the meaning of Clause 25, the petitioner-Board should have neither sought the appointment of an Arbitrator nor Arbitrator so appointed had any jurisdiction to entertain or adjudicate the same. As a matter of fact, Clause 3 of the contract agreement is non arbitral. The amount of Rs.39,12,870/- has been determined by the Board under Clause 3 of the contract, as discussed supra. There was no need for the Board to have invoked arbitration Clause i.e. Clause No. 25 of the contract agreement. The Arbitrator had also no jurisdiction to arbitrate and adjudicate the same. The claim petition itself was misconceived and the costs of the remaining work, the Board executed should have been adjusted against the security deposits made by the Contractor or against his outstanding bill(s), if any, or by resorting to any other and further remedy available to it to recover the same. As a matter of fact, the petitioner-Board has already resorted to such remedy by filing Civil Suit No. 77 of 2009 in this Court, after the judgment dated 6th May, 2009 in this petition initially, as stated by Mr. Suneet Goel, Advocate, learned counsel for the petitioner-Board. Any how, in my considered view, the Arbitrator has exceeded the jurisdiction

and erred in entertaining as well as adjudicating the claims preferred by the petitioner-Board.

19. If coming to the counter-claims, the respondent-Contractor preferred though, the same could have been entertained and adjudicated by the Arbitrator under Clause 25 of the contract agreement, however, if preferred within 90 days from the date of dispute having arisen. Admittedly, the contract was rescinded on 23.03.1992 by the petitioner-Board on the ground of non-completion of work within the stipulated period. The respondent-Contractor, however, claims that he is not responsible for non-completion of the work within the stipulated period and rather it is the petitioner-Board responsible for the same and to the contrary the contract has been rescinded in an arbitrary manner. The Contractor should have raised all such questions in accordance with the agreed terms and conditions i.e. by issuance of notice for appointment of Arbitrator and preferring his claims well within the period of limitation. He, however, never served the Board with any notice for appointment of Arbitrator nor ever preferred his claims, if any. It is rather the petitioner-Board sought the appointment of Arbitrator in June, 1999 after the completion of the left out work in the month of June, 1996. The determination of the contract agreement on account of breach of contract and the payment of the cost of the left out work is a matter not covered under Clause 25 of the contract agreement. It is rather entitlement of the petitioner-Board to recover the costs of such work, of course, subject to compliance of the procedure prescribed under Clause 3 supra. The limitation for filing a suit for recovery of money is three years. The petitioner-Board, therefore, could have recovered the amount, if any, left out after adjustment of the security deposits or against the pending bill(s), if any, of the Contractor by way of resorting to the remedy available to it in accordance with law. The respondent-Contractor did not approach the competent authority for appointment of the Arbitrator nor ever lodged his claims within 90 days as prescribed under Clause 25 of the contract agreement. He, rather preferred counter-claims on 28.06.2002 viz. even much after the appointment of Arbitrator and his having entered upon the reference, because first hearing before the Arbitrator did take place on 22.10.2001.

20. Surprisingly enough, the respondent-Contractor even not sought the condonation of delay as occurred in filing the counter-claims within the meaning of Section 5 of the Limitation Act. It is significant to note that in terms of Clause 25 of the contract agreement, any disputes having arisen in relation to the terms of contract, specifications, design, drawings and instructions of the work to be executed under the agreement, the aggrieved party has to seek the appointment of an Arbitrator to refer such dispute(s) for adjudication within a period of 90 days from the day such dispute(s) having arisen.

21. In the case in hand, the contract was rescinded on 23.03.1992. Therefore, had there been any dispute or claims of the respondent-Contractor against the petitioner-Board, he should have approached the competent authority for appointment of the Arbitrator within the period of 90 days from the date thereof and also preferred his claims. He has neither sought the appointment of Arbitrator nor preferred his claims till 28.06.2002. The counter-claims, he preferred, therefore, are definitely beyond the period of limitation. The apex Court in ***Voltas Limited*** versus ***Rolta India Limited (2014) 4 SCC 516*** has supplied emphasis on the law laid down in ***State of Goa*** versus ***Praveen Enterprises (2012) 12 SCC 581***, which reads as follows:

> 23. Thereafter, addressing the issue pertaining to counterclaims, the Court observed as follows: (Praveen Enterprises case, SCC pp. 590-91, para 20)
>
> > "20. As far as counterclaims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of the Limitation Act, 1963 provides

> that in regard to a counterclaim in suits, the date on which the counterclaim is made in court shall be deemed to be the date of institution of the counterclaim. As the Limitation Act, 1963 is made application to arbitrations, in the case of a counterclaim by a respondent in an arbitral proceeding, the date on which the counterclaim is made before the arbitrator will be the date of 'institution' insofar as counterclaim is concerned. There is, therefore, no need to provide a date of 'commencement' as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counterclaims. There is however on exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counterclaim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under Section 11 of the Act, the limitation for such counterclaim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counterclaim."
> (Emphasis supplied)

22. Applying the principle settled in **Parveen Enterprises's** case supra and applying the same to the given facts and circumstances in the case before it the apex Court has observed that in a case of counter-claims by a respondent in arbitral proceedings, the date on which the counter-claim is made before the Arbitrator will be the date of institution of the counter-claims and the respondent can wriggle out from the rigor of the limitation, only if he had also made a claim against the claimant and sought arbitration by serving a notice to the claimant. In the case before the apex Court, the appellant (respondent in the Court below) had also raised the counterclaims and sought arbitration by expressing its intention on number of occasions. It is in that backdrop the counterclaims in that case were held to be within the period of limitation. In the case in hand, however, as noticed supra, the respondent-Contractor never preferred the claims nor made any request for appointment of Arbitrator and rather preferred the counterclaims much after the arbitration proceedings commenced on the request made by the petitioner-Board. The counterclaims, therefore, without there being any reasons for condonation of delay should have not been entertained, what to speak of adjudication thereof. The Arbitrator while deciding issue No. 2 has held as follows:

> "**Issue No. 2**: Counterclaim of the Respondent is admissible in view of the permission granted by the Arbitrator Er. S.R. Khitta. In case the claimant had any objection to grant of permission by the Arbitrator to the Respondent, it should have been filed before the Arbitrator at that time itself. This was not done. This issue has not been contested even during the proceedings. This counter claim has been objected to only in the written arguments. ***As such I allow the counter claim of the Respondent***."

23. As a matter of fact, the Arbitrator had no authority or jurisdiction to condone the limitation at his own and without any case thereto made out.

24. In view of what has been said hereinabove, the Arbitrator has erred himself and also mis-conducted while adjudicating the dispute *inter-se* the parties being barred not only under the terms of the contract but also the law of limitation. The award, as such, is set aside. The petition stands accordingly disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Sh. Kaula Ram ...Appellant
Versus
Smt. Kusum Sood & others ..Respondents

FAO No. 145 of 2007
Decided on : 19.12.2014.

Motor Vehicle Act, 1988—Section 166- Claimant sustained injury in the collision between the bus and Swaraj Mazada- his claim petition was dismissed on the ground that bus was not involved in the accident but the accident was caused by the Driver of Swaraj Mazada- it was established that the driver of Swaraj Majda had died in the accident- a closure report was filed before the Court- held, that it was the duty of the Presiding Officer of the Claim Tribunal to provide an opportunity to claimant to array the owner and insurer of the vehicle as respondent in the claim petition- hence, matter remanded with the direction to afford an opportunity to the claimant to array the owner and insurer in the claim petition. (Para- 7 to 10)

For the appellant: Mr. Anupinder Rohal, Advocate vice
Mr. Tek Chand Sharma, Advocate.
For the respondents: Mr. Suneet Goel, Advocate, for respondent No. 1.
Nemo for respondent No. 2.
Mr. Harish Behl, Advocate, for respondent No. 3.
ASI Krishan Lal, I/O, Police Station Sadar, Kullu in person.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this appeal is to the award, dated 26.02.2007, passed by Motor Accident Claims Tribunal-II, Fast Track Court, Kullu, Himachal Pradesh, (for short, 'the Tribunal'), in M.A.C. Petition No. 93/2004, RBT No. 19-2005, titled as Kaula Ram versus Smt. Kusum Sood & others, whereby the claim petition came to be dismissed (for short, the 'impugned award').

Brief facts:

2. Shri Kaula Ram became victim of a vehicular accident, which was allegedly caused by Dhan Raj, driver, while driving bus bearing registration No. HP-34-A-1025, rashly and negligently, on 16.11.2003, at about 2.45. p.m., at village Dhunkhra, near Village Pirdi, Tehsil and District Kullu, which collided with Swaraj Mazda bearing registration No. HP-32-5758, in which the claimant sustained injuries. The claimant filed the claim petition, seeking compensation to the tune of Rs.2.00 lacs, as per the break-ups given in the claim petition.

3. The respondents, i.e. the insured-owner, the driver and the insurer-United India Insurance Company contested the claim petition on the grounds taken in their memo of objections.

4. Following issues came to be framed by the Tribunal on 21.06.2005:

"1. Whether the petitioner suffered injuries due to rash and negligent driving of the bus No. HP-34-A-1025 by respondent No. 2?... OPP

2. If issue No. 1 is proved in affirmative, to what amount of the compensation, the petitioner is entitled to and from whom?...OPP

3. Whether the respondent No. 2 was not holding a valid and effective driving licence at the time of accident?...OPR-3

4. Whether the petition is bad for non-joinder of the necessary parties?...OPR-3

5. Relief."

5. After scanning the evidence, oral as well as documentary, the Tribunal dismissed the claim petition on the ground that the bus was not involved in the accident, but the same was caused by driver Suresh Kumar, who was driving Swaraj Mazda bearing registration No. HP-32-5758.

6. I have gone through the impugned award and the record of the claim petition.

7. It is a fact that FIR No. 522/2003 was lodged in Police Station, Kullu, District Kullu. Investigation was conducted and during investigation, it was found that driver of the Swaraj Mazda, namely, Suresh Kumar, was involved in the accident, but he had died in the said accident. Challan, i.e. closure report was filed in the Court for the reason that the driver of the offending vehicle had died in the accident.

8. It appears that the Presiding Officer has not taken into consideration the aim and object of granting compensation. It was for the Tribunal to provide an opportunity to the claimant to array the owner and insurer of the offending vehicle, as party respondents, in the claim petition, in view of the mandate of Section 158(6) read with Section 166 (4) of the Motor Vehicles Act, 1988.

9. In the given circumstances, I deem it proper to set aside the impugned award and remand the case to the Tribunal, with a direction to afford an opportunity to the claimant to lay a motion for arraying the owner and insurer of the offending vehicle, as party respondents, in the claim petition.

10. The Investigating Officer, ASI Krishan Lal, Police Station, Sadar, Kullu, who is present in the Court, is directed to submit the copy of final report of FIR No. 522/2003 alongwith particulars of the owner and the insurer of the offending vehicle before the Tribunal, on the next date of hearing, enabling the claimant to do the needful.

11. The present respondents are deleted from the array of the respondents.

12. The claimant, through his counsel, is directed to cause appearance before the Tribunal on **2nd March, 2015.**

13. Registry to send the record of the case alongwith a copy of this judgment forthwith so as to reach the Tribunal below well before the date fixed.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Man Mohan Singh(deceased) through his LRs Smt. Asha Devi and others
...Appellants/Plaintiffs

Versus

Gopi Chand (deceased) through his LRs Sh. Daneshwar Singh and others.
.....Respondents/Defendants

R.S.A. No. 504 of 2001
Date of decision: 19.12.2014

Specific Relief Act, 1963- Section 38- Plaintiff claimed that suit land had fallen to the share of the plaintiff in a family partition and was bifurcated into two parts after the construction of Oddi-Bithal horticultural link road- settlement official carved out a new khasra number out of two khasra numbers and made the land compact, which was not permissible - plaintiff relied upon mutation in support of this submission- plaintiff had not examined the revenue official who had prepared field map of old khasra shown in mutation- held, that mutation entries do not confer any title- plaintiff had also not produced the report of the demarcation- hence, an adverse inference has to be drawn against him.

(Para-10 to 15)

Cases referred:

Sawarni (Smt.) vs. Inder Kaur (Smt.) and others (1996) 6 SCC 223
Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi, AIR 1917 PC 6
Hiralal & Ors. v. Badkulal & Ors., AIR 1953 SC 225
A Raghavamma & Anr. V. A. Chenchamma & Anr., AIR 1964 SC 136
The Union of India v. Mahadeolal Prabhu Dayal, AIR 1965 SC 1755
Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors., AIR 1968 SC 1413
M/s Bharat Heavy Electrical Ltd. v. State of U.P. & ors., AIR 2003 SC 3024
Musauddin Ahmed v. State of Assam, AIR 2010 SC 3813
Khatri Hotels Pvt. Ltd. & Anr. v. Union of India & Anr. (2011) 9 SCC 126

For the Appellants : Ms. Nisha Thakur, Advocate, vice
Mr. Mohan Singh, Advocate.
For the Respondents : Mr. Surinder Parkash Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (oral)

The plaintiffs are the appellants and have come up in appeal against concurrent findings recorded against them by the learned Courts below.

2. The facts, in brief, are that the predecessor-in-interest of the appellants late Sh. Man Mohan Singh filed a suit for permanent injunction against the predecessors-in-interest of the respondents on the allegations that he had been owner in possession of the land described in Khata Khatauni No. 42 min/86, Khasra Nos. 983/491 measuring 0-3 bigha and 984/491 measuring 0-13 bighas situated in Mauza Dalan, Pargana Kepu, Tehsil Kumarsain, District Shimla(hereinafter referred to as the 'suit land'). The suit land was owned and possessed by the plaintiff and other co-sharers. However, in family partition, the suit land had fallen to the share of the plaintiff. The plaintiff had been utilizing the usufruct of the suit land. In 1970-71 Oddi-Bithal horticultural link road stood constructed through old Khasra No. 491. As a result of construction of the said link road, Khasra No. 491 (old) owned and possessed by the plaintiff and other co-sharers had been bifurcated into two parts. Khasra No. 983/491 measuring 0-3 bigha had fallen on the upper side of Oddi-Bithal horticultural link road and Khasra No.984/491 measuring 0-13 bigha had fallen on the lower side of the said link road. Revenue estate Dalan had been subjected to settlement operation in 1994-95. At the time of the last settlement in 1994-95, new Khasra No.1075 measuring 0-06-73 hectares had been carved out of old Khasra No. 983/491 and 984/491 both measuring 0-16 bigha. It was averred that the settlement official had fallen into error in carving out new khasra No. 1075 out of 2 old Khasra Nos. 983/491 and 984/491 as these two old khasra numbers were not contiguous and could not have been formed one compact piece of land. Oddi-Bithal horticultural link road had bifurcated old Khasra No. 983/491 and 984/491. The defendants had no right, title or interest in the suit

land described in Khasra No. 983/491 measuring 0-3 bigha. On 5.5.1998, the defendants had trespassed into the suit land and had threatened to take away grass therefrom. The defendants had been requested not to commit mischief but without any result. The plaintiff prayed that the defendants be restrained from interfering with the ownership and possession of the plaintiff over the suit land.

3. The respondents/defendants contested the suit of the plaintiff by filing written statement. The defendants denied the ownership and possession of the plaintiff over the suit land described in Khasra No. 983/491 measuring 0-3 bigha situated on upper side of Oddi-Bithal horticultural link road. It was averred that the plaintiff had been owner in possession of Khasra No. 983/491 and 984/491 both measuring 0-16 bighas situated on the lower side of Oddi-Bithal horticultural link road. The defendants pleaded that they are owners in possession of the land described in Khasra Nos. 967, 968, 969, 970 and 974 measuring 0-14-31 hectares in revenue estate Dalan on the upper side of Oddi-Bithal horticultural link road. The plaintiff had not been owner in possession of any land above the aforesaid link road. The defendants had denied having interfered with the ownership and possession of the plaintiff on the suit land on 5.5.1998. The settlement official had rightly carved Khasra No. 1075 measuring 0-06-73 hectares out of two old khasra Nos. 983/491 and 984/491 measuring 0-16 bigha. The defendants had denied bifurcation of old khasra No. 491 as a result of construction of Oddi-Bithal horticultural link road so as to divide the remaining area of Khasra No. 491 into two parts viz., 983/491 on the upper side of the highway and Khasra No. 984/491 on the lower side of the highway. The defendants averred that no cause of action accrued in favour of the plaintiff to institute the suit. The plaintiff was not entitled to any relief much less to the discretionary relief of permanent injunction.

4. The plaintiff filed replication to the written statement filed by the defendants and the averments as made in the written statement were denied and those of the plaint were reiterated and re-affirmed.

5. On 17.11.1998 the learned trial Court framed the following issues:

1. *Whether the plaintiff is entitled to the relief of injunction, prayed for? OPP.*
2. *Whether during the settlement operation, the settlement agency wrongly and illegally denoted Khasra No. 983/491 and 984/491 as Khasra No. 1075 and that too below the road, as alleged? OPP*
3. *Whether middle portion of Khasra No. 491 was acquired by the Govt. and the portion that remained on the upper side of the road was given khasra No. 983/491 and the portion which remained on the lower side of the road was given khasra No. 984/491, as alleged? OPP*
4. *Whether the plaintiff has got no cause of action to file the present suit? OPD*
5. *Relief.*

6. The learned trial Court vide judgment and decree dated 22.11.1999 dismissed the suit of the plaintiff. Aggrieved by the judgment and decree passed by the learned trial Court, the plaintiff/appellants filed an appeal before the learned lower Appellate Court, who too vide judgment and decree dated 11.9.2000 has been pleased to dismiss the same.

7. Aggrieved by the judgments and decrees passed by the learned Courts below, the appellants/plaintiff is before this Court by way of present regular second appeal.

8. This Court vide order dated 16.11.2001 admitted the appeal on the following substantial question of law:

> *"Whether the learned Court below is justified in ignoring the contents of Ex.PC which is a certified copy of revenue record, attestation of mutation showing the exact location of the suit land and to which presumption of truth is attached under the Evidence Act?"*

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

10. Ms. Nisha Thakur, Advocate, learned vice counsel for the appellants has strenuously argued that as a result of construction of Oddi-Bithal horticultural link road, old khasra No. 491 of the plaintiff and other co-sharers got divided into two parts. Khasra No.983/491 measuring 0-3 bighas was on the upper side of the aforesaid road whereas khasra No. 984/491 measuring 0-13 bighas was on the lower side of the highway. She invited my attention to mutation No. 464 Ex.PC which shows that khasra No. 491 had been divided into two parts. The middle portion of khasra No. 491 had been acquired by the State for construction of the road leaving behind khasra No. 983/491 and 984/491 on left and right side of the road. At the time of settlement operations, new khasra No. 1075 measuring 0-06-73 hectares was shown to have been carved out of the two old khasra No. 983/491 and 984/491 measuring 0-16 bighas and shown to have constituted a compact piece of land. The learned trial Court as also the learned lower appellate Court discarded the record prepared during the settlement operation as admittedly there was a road in between these two khasra numbers. They further discarded mutation No. 464 (Ex.PC) by holding that too much importance could not attach to the field map since the dimensions of area had not been reflected therein. In absence of such dimensions of khasra Nos. 983/491 and 984/491 correctness of field map was open to question. .

11. A close scrutiny of the evidence on record shows that the plaintiff has not cared to examine the revenue official, who had prepared field map of old khasra No. 491 of mutation Ex.PC.

12. Even otherwise, it is settled law that mutation entries do not confer title and reference in this regard can conveniently be made to ***Sawarni (Smt.) vs. Inder Kaur (Smt.) and others (1996) 6 SCC 223*** wherein the Hon'ble Court held that "*mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. The learned Additional District Judge was wholly in error in coming to a conclusion that mutation in favour of Inder Kaur conveys title in her favour. This erroneous conclusion has vitiated the entire judgment".*

13. The learned counsel for the appellants would then contend that alongwith this appeal an application bearing CMP No. 843 of 2001 had been filed by the appellants for permission to adduce additional evidence and vide order dated 16.11.2001 this application had been ordered to be heard alongwith the appeal. I have gone through the application wherein it has been contended that the appellants had already produced on record the mutation Ex.PC and it was reasonably expected that the revenue record would reflect the exact measurements and it is now that the appellants have managed to get the exact measurements of the land trifurcated vide mutation Ex.PC.

14. As observed earlier, there is no presumption of truth attached to the mutation and the appellant/plaintiff was therefore, required to lead clear, convincing and cogent evidence to establish his claim. The appellant appears to be under misconception that mutation entries have presumptive value of title.

15. At this stage, it may be noted that the plaintiff in his evidence has admitted having got the suit land demarcated more than once. However, the plaintiff did not choose to place on record the copies of such demarcation which were admittedly prepared at his instance. Therefore, irresistible conclusion is that the demarcation of the suit land had gone against the plaintiff or else he would have produced the same.

Section 114 (g) of the Evidence Act, reads as under:

"114. Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

The Court may presume –

(a) to (f) xx xx xx

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

Generally, it is the duty of the party to lead the best evidence in his favour, which could throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw adverse inference under Section 114 (g) of the Evidence Act notwithstanding, that the onus of proof did not lie on such party and it was not called upon to produce the said evidence. (See: ***Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi, AIR 1917 PC 6; Hiralal & Ors. v. Badkulal & Ors., AIR 1953 SC 225 ; A Raghavamma & Anr. V. A. Chenchamma & Anr., AIR 1964 SC 136; The Union of India v. Mahadeolal Prabhu Dayal, AIR 1965 SC 1755; Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors., AIR 1968 SC 1413 ; M/s Bharat Heavy Electrical Ltd. v. State of U.P. & ors., AIR 2003 SC 3024; Musauddin Ahmed v. State of Assam, AIR 2010 SC 3813 and Khatri Hotels Pvt. Ltd. & Anr. v. Union of India & Anr. (2011) 9 SCC 126).***

The substantial question of law is accordingly answered against the appellants.

16. In view of detailed discussion above, I find no merit in the appeal and the same is dismissed, so also the pending applications. The parties are left to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd ...Appellant
Versus
Smt. Rikta alias Kritka & others ..Respondents

FAO No. 523 of 2007
Reserved on : 05.12.2014.
Decided on : 19.12.2014

Motor Vehicle Act, 1988—Section 149- Driver had a driving licence to drive light motor vehicle- he was driving Mahindra Jeep, which falls within the definition of light motor vehicle- held that Insurance Company is liable to indemnify the insured.

Motor Vehicle Act, 1988—Section 149- Claimants pleaded that deceased was travelling in the vehicle as an employee of the owner to deliver the goods- the vehicle met with an accident when he was returning after delivering the goods- driver also admitted that deceased was travelling in the vehicle as an employee of the owner- held, that when a person had hired the vehicle for transporting his goods and was returning in the same vehicle, then he cannot be held to be an unauthorized passenger. (Para- 16 to 20)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 SC 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217
National Insurance Co. Ltd. versus Kamla and others, 2011 ACJ 1550
National Insurance Co. Ltd. versus Cholleti Bharatamma, 2008 ACJ 268 (SC)

For the appellant: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.
For the respondents: Mr. Shashi Bhushan Singh, Advocate, for respondents No. 1 to 3.
Nemo for respondents No. 4 & 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

By the medium of this appeal, the appellant has questioned the award, dated 20th September, 2007, passed by the Motor Accident Claims Tribunal, Kullu, H.P., (hereinafter referred to as "the Tribunal") in Claim Petition No. 74 of 2006, whereby compensation to the tune of ` 2,66,000/- with interest at the rate of 7% per annum, from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-respondents 1 to 3 herein, with costs and the appellant-Oriental Insurance Company was saddled with the liability (for short, the "impugned award").

Brief Facts:

2. The claimants, being parents and minor brother of deceased Surjeet Singh, filed claim petition before the Tribunal, for grant of compensation to the tune of Rs.9,00,000/-, as per the break-ups given in the claim petition.

3. Precisely, the case of the claimants was that deceased Surjeet Singh was travelling in Mahindra Jeep bearing registration No. HP-34-3632, on 18.05.2006, with goods, which were to be delivered to consignee Shri Budh Ram, son of Shri Bhomti. After the said goods were delivered to said Shri Budh Ram, the driver lost control over the said vehicle, at Chowuki near B.S.N.L. Tower, at about 6.00 p.m. and the vehicle rolled down. Surjeet Singh sustained injuries, was taken to Primary Health Centre, Jari and thereafter was referred to Zonal Hospital Kullu, but died on the way. FIR No. 227/2006, under Sections 279 & 337 of the Indian Penal Code was registered against the driver and final charge-sheet was filed before the Chief Judicial Magistrate, Kullu. The deceased was 19 years of age at the time of accident and was earning Rs.3,500/- per month.

4. The respondents, i.e. the insured-owner, the driver and the insurer-Insurance Company contested the claim petition on the grounds taken in their memo of objections. Following issues came to be framed by the Tribunal on 01.03.2007:-

"1. *Whether the deceased Surjit died in a motor accident caused on 18.5.06 at Chowuki near BSNL Tower due to the rash and negligent driving of the jeep No. HP-34-3632 by its driver-respondent No. 2? ...OPP*

2. *If issue No. 1 is proved in affirmative to what amount of compensation the petitioners are entitled and from whom? ....OPP*

3. *Whether the driver of the offending vehicle was not holding a valid and effective driving licence at the time of the accident? OPR-3*

4. *Whether the vehicle was being plied in violation of the terms and conditions of insurance policy at the time of accident? ....OPR -3*

5. *Whether the deceased was traveling as an unauthorized/gratuitous passenger in the vehicle at the time of accident? If so, its effect? OPR-3*

6. *Relief."*

5. The claimants examined Head Constable Manoj Kumari (PW-1), Sher Singh (PW-3), Dr. Rituvesh Negi (PW-4), Gopi Chand (PW-5) and Dr. S.S. Pujara (PW-6). Claimant Rikta @ Kritka herself appeared in the witness box as PW-2. Respondents also examined Davinder Singh (RW-1), Kumari Aashita (RW-4) and ASI Khem Chand (RW-5). Owner Gopi Chand and driver Devinder Pal Singh also appeared in the witness box as RW-2 and RW-3, respectively. Parties also placed on record copies of FIR (Ext. PW-1/A), pariwar register (Ext. PW-2/A), death certificate (Ext. PW-2/B), MLC (Ext. PW-4/A), post mortem report (Ext. PW-6/A), driving licence (Ext. RW1/A), R.C. (Ext. RW-2/A), insurance cover note (Ext. RW-2/B) and insurance policy (Ext. R.X.).

6. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that the accident was outcome of the rash and negligent driving of driver, namely, Devinder Pal Singh, in which the deceased sustained injuries and succumbed to the injuries.

Issue No. 1

7. The appellant or any other party to the lis has not questioned the impugned award relating to this issue. Accordingly, the findings returned by the Tribunal on this issue are upheld.

Issue No. 2.

8. The claimants have proved by leading evidence, oral as well as documentary, that the age of the deceased was 19 years at the time of accident and was earning Rs.3,500 per month. The Tribunal, after making assessment, held that the loss of dependency towards the claimants was not less than Rs.16,000/- per annum. Thus, the multiplier of '16' was just and appropriate, while keeping in view the age of the deceased and the claimants.

9. The insured-owner, driver and the claimants have not questioned the assessment of the compensation made by the Tribunal, thus is not disputed.

10. After examining the evidence available on the record, I am of the considered view that the Tribunal has granted just and appropriate compensation to the tune of `2,56,000/- under the head "loss of dependency", Rs.5,000/- under the head "funeral expenses" and Rs. 5,000/- under the head "loss of estate", total amounting to Rs. 2,66,000/-, to the claimants. Accordingly, the findings returned by the Tribunal on this issue are upheld.

Issue No. 3.

11. The driver was having the driving licence to drive the "light motor vehicle", as per driving licence Ext. RW-1/A and the Mahindra Jeep is also a

"light motor vehicle" as held by this Court in **FAO No. 33 of 2010**, titled as the **United India Insurance Company Ltd.** versus **Shri Madan Lal & others** alongwith another connected matter, decided on 17.10.2014. The insurer has not led any evidence to prove this issue. Accordingly, the findings returned by the Tribunal on this issue are also upheld.

Issue No. 4.

12. The insurer has not led any evidence to prove that the offending vehicle was being driven in violation of the terms and conditions of the Insurance Policy read with the mandate of Section 149 of the Motor Vehicles Act, 1988, hereinafter referred to as "the Act".

13. It is a beaten law of land that the insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms contained in the Insurance Policy and mere plea here and there cannot be a ground for seeking exoneration.

14. My this view is fortified by the Apex Court judgment in a case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 SC 1531**. It is apt to reproduce the relevant portion of para 105 of the judgment, *supra,* herein: :

> *105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> (iii) .....
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

15. It is also profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** hereinbelow:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to*

> *satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

Accordingly, the findings returned by the Tribunal on this issue are upheld.

Issue No. 5.

16. Admittedly, the claimants have pleaded in the claim petition that deceased Surjeet Singh was travelling in the offending vehicle as an employee of the owner in order to deliver the goods to consignee Shri Budh Ram, son of Shri Bhomti, resident of Village Malana; while returning back after delivering the goods, the vehicle met with an accident and the deceased lost his life. The claimants have pleaded and proved the said fact. The insured-owner and the driver have also admitted that the deceased was travelling in the said vehicle as an employee of owner Gopi Chand and met with the accident after delivering the goods.

17. This Court in a case titled as **National Insurance Co. Ltd. versus Kamla and others,** reported in **2011 ACJ 1550,** has also discussed the same issue while referring to the judgment of the Apex Court in **National Insurance Co. Ltd. versus Cholleti Bharatamma,** reported in **2008 ACJ 268 (SC)** and held that a person who had hired the vehicle for transporting his goods for sale and was returning in the same vehicle, cannot be held to be an unauthorized/gratuitous passenger till he reaches the place of destination. It is apt to reproduce paras 8 to 11 of the judgment herein:

> *"8. Coming to the second plea taken by the learned counsel for the appellant that the deceased was a gratuitous passenger, a perusal of the reply filed by respondent No. 2, insurance company shows that they had only pleaded that the deceased was admittedly not employee of the insured and was traveling in the truck as a gratuitous passenger. Thus, it was submitted that the Insurance Company was not liable. Reliance was also placed upon the decision in **National Insurance Co. Ltd. v. Cholleti Bharatamma, 2008 ACJ 268 (SC)** wherein the plea was taken that the owner himself travel in the cabin of the vehicle and not with the goods so as to be covered under Section 147. However, in case the driver permits a passenger to travel in the tool box, he cannot escape from the liability that he was negligent in driving the vehicle and moreover, in a petition under Section 163-A of the Motor Vehicles Act, rash or negligent driving is not to be proved and, therefore, this decision does not help the appellant.*

*9. Learned counsel for the appellant had also relied upon the decision in **National Insurance Co. Ltd. v. Maghi Ram Ram**, 2010 ACJ 2096 (HP), wherein a learned Judge of this Court has considered the question and had observed that the Insurance Company is liable in respect of death or bodily injury to any person including the owner of goods or his authorized representative carried in the vehicle. It was observed that it is apparent that the goods must normally be carried in the vehicle at the time of accident.*

*10. The allegations made by the petitioners in the petition as well as in the evidence were that the deceased had gone after hiring the truck with his vegetable and was coming in the same vehicle when the accident took place. The learned counsel for the claimants/respondents No. 1 to 4 had relied upon the decision of Hon'ble Punjab & Haryana High Court in **National Insurance Co. Ltd. v. Urmila Urmila, 2008 ACJ 1381 (P&H) H)**, wherein, it was observed that a passenger was returning after selling his goods when the vehicle turned turtle due to rash and negligent driving. Insurance Company seeks to avoid its liability on the ground that the deceased was no longer owner of the goods as he had sold them off. It was observed that the deceased had hired the vehicle for transporting his animals for selling and was returning in the same vehicle. It was held that the deceased was not an unauthorized/gratuitous passenger in the vehicle till he reached the place from where he had hired the vehicle.*

11. The above decision clearly applies to the present facts, which are similar to the facts of the case and accordingly, I am inclined to hold that the deceased was not an unauthorized/ gratuitous passenger. No conditions of the insurance policy have been proved that the risk of the owner of goods was not covered in the insurance policy and as such, there is no substance in the plea raised by the learned counsel for the appellant, which is rejected accordingly."

18. This Court has also laid down the same principle in **FAO No. 9 of 2007**, titled as **National Insurance Company Limited** versus **Smt. Teji Devi & others**, alongwith another connected matter, decided on **22.08.2014.**

19. It was for the insurer to plead and prove that the deceased was travelling in the offending vehicle as a gratuitous passenger, has not led any evidence to this effect and has failed to prove it.

20. It is an admitted case of the parties that the deceased was travelling in the said vehicle at the time of accident; he was deputed as a representative of goods in the said vehicle by the owner in order to deliver the same to one Shri Budh Ram and while returning back after consigning the goods, the vehicle met with an accident. Thus, it cannot be said that the deceased was travelling in the offending vehicle as a gratuitous passenger. The Tribunal has rightly made discussion in para-14 of the impugned judgment and decided it against the insurer and in favour of the claimants. Accordingly, the findings returned by the Tribunal on this issue are upheld.

21. Having said so, the Tribunal has rightly passed the impugned award. Accordingly, the impugned award is upheld and the appeal is dismissed.

22. The Registry is directed to release the awarded amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees account cheque.

23. Send down the records after placing copy of the judgment on record.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company ...Appellant
Versus
Smt. Tanu Chauhan & others ...Respondents

FAO No. 186 of 2011 &
Cross Objections No. 365 of 2011
Reserved on : 05.12.2014
Decided on : 19.12.2014

Motor Vehicle Act, 1988—Section 171- Tribunal had granted interest on compensation at the rate of 9% per annum- held, that the rate of interest has to be granted at the rate of 7.5% per annum- accordingly, rate of interest reduced to 7.5% per annum. (Para-16)

For the appellant: Mr. G.C. Gupta, Senior non-objector Advocate with Ms. Meera Devi, Advocate.

For respondents: Mr. Sanjeev Kuthiala and Ms. Ambika Kotwal, Advocates. and cross objectors No. 1 to 3.
Nemo for respondents No. 4 & 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Challenge in this appeal is to the award, dated 1st March, 2011, passed by the Motor Accident Claims Tribunal, (1), Mandi, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 91 of 2007, whereby compensation to the tune of Rs. 4,39,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-respondents 1 to 3 herein and against the owner-insured, the driver and the insurer-appellant herein, (for short, the "impugned award").

Brief Facts:

2. The claimants, being the widow, son and mother of deceased Anil Kumar, filed claim petition before the Tribunal, for grant of compensation, as per the break-ups given in the claim petition, on the ground that driver Ishwar Chand, was driving bus bearing registration No. HP-68-0203, rashly and negligently, on 04.11.2006, at about 1.00 a.m., at Nabai Nag near Baijnath, District Kangra, H.P., caused the accident; one Anil Kumar, who was travelling in the said bus, sustained injuries and succumbed to the injuries and FIR No. 177/2006 was registered in Police Station, Baijnath, District Kangra.

3. The respondents, i.e. the insured-owner, the driver and the insurer-Insurance Company contested the claim petition on the grounds taken in their memo of objections. Following issues came to be framed by the Tribunal on 17.02.2009:-

"1. *Whether the bus No. HP-68-0203 was involved in the accident resulting into death of Anil Kumar? ...OPP*

2. *If issue No. 1 is proved, to what amount of compensation the petitioners are entitled to and from whom? ...OPP*

3. *Whether the driver of bus No. HP-68-0203 was not holding valid and effective driving licence to drive the bus at the time of accident? ...OPR*

4. Whether the driver was driving the bus No. HP-68-0203 without registration cum fitness certificate and route permit in violation of the terms and conditions of the insurance policy? ....OPR

5. Relief."

4. Claimants have examined Shri Guldev Singh (PW-2) and claimant Smt. Tanu Chauhan also appeared in the witness box as PW-1. The respondents examined Hakam Singh (RW-1) and the insured-owner Anupam Pal also appeared in the witness box as RW-2.

5. The claimants have filed the claim petition in terms of the mandate of Section 163-A of the Motor Vehicles Act, 1988, hereinafter referred to as "the Act", thus the question of driving the offending vehicle, rashly and negligently, cannot be gone through.

Issue No. 1.

6. The claimants have specifically pleaded in para-23 of the claim petition that deceased Anil Kumar was conductor by profession; was travelling in the said vehicle, which was being driven by driver Ishwar Chand, rashly and negligently; met with an accident and Anil Kumar sustained injuries and succumbed to the injuries.

7. The claimants have placed on record copies of FIR (Ex. PA), postmortem report (Ext. PB), birth certificates (Ext. PC & Ext. PD), marriage certificate (Ext. PE), abstract of family register (Mark-A) and experience certificate (Mark-B).

8. Claimant Tanu Chauhan and Guldev Singh, have stated that the deceased died in the road accident, on the fateful day, while travelling in the offending vehicle, which was being driven by driver Ishwar Chand, rashly and negligently.

9. The respondents have not led any evidence in rebuttal, but have stated that the deceased had stolen the offending vehicle and caused the accident.

10. It is an admitted case of the parties that the deceased had lost his life in the traffic accident by the use of the offending vehicle. Accordingly, the findings returned by the Tribunal on this issue are upheld.

11. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 & 4.

Issue No. 3 & 4:

12. The onus to prove these issues was upon the insurer. It has not led any evidence to the effect that driver of the offending bus was not having valid and effective driving licence to drive it, at the relevant time; the offending vehicle was being driven without registration-cum-fitness certificate and route permit and in violation of the terms and conditions of the Insurance Policy read with the mandate of Section 149 of the Act. Thus, the Insurance Company has failed to discharge the onus. Accordingly, the Tribunal has rightly decided these issues against the insurer and in favour of the claimants.

Issue No. 2.

13. The Tribunal, after taking note of the pleadings, the evidence, particularly the statement of PW-2 Guldev Singh and the documents available on the record, held that the deceased was earning Rs.3,000/- per month and the loss of dependency towards the claimants was not less than Rs.2,000/- per month or Rs.24,000/- per annum.

14. The claimants have pleaded in the claim petition that the age of the deceased, at the time of accident, was 25 years. As per the matriculation certificate, Ext. PC, the date of birth of the deceased is 20.09.1981. The accident occurred on 04.11.2006. Thus, the deceased was 25 years of age at the relevant time and the Tribunal has rightly determined the age of the deceased and applied the multiplier of '18', while assessing the compensation.

15. Having said so, I am of the considered opinion, that the Tribunal has rightly awarded compensation to the tune of Rs.4,32,000/- under the head "loss of dependency", Rs.5,000/- under the head "loss of consortium" and Rs.2,000/- under the head "last rites", to the claimants.

16. In the given circumstances, the amount awarded is not excessive, in any way. However, the Tribunal has fallen in error in granting interest at the rate of 9% per annum instead of 7.5% per annum. Accordingly, the rate of interest is reduced to 7.5% per annum.

17. Having said so, the claimants are entitled to compensation to the tune of Rs.4,39,000/- with interest at the rate of 7.5% per annum from the date of the claim petition.

18. The Registry is directed to release the awarded amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees account cheque. The excess amount be refunded to the insurer.

19. Accordingly, the impugned award is modified and the appeal is disposed of.

20. Send down the records after placing copy of the judgment on record.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Rama Nand Rathore
Vs.
State of H.P. & Others

Cr.MMO No. 276 of 2014
Decided on: 19th December, 2014

Code of Criminal Procedure, 1973- Section 154- Petitioner had applied for the copy of FIR but the copy was not supplied to him- held that, FIR is a public document and the accused is entitled to a copy of the same- he can file an application himself or through his representatives for getting the certified copy on which copy shall be supplied to him within 24 hours - accused can also get copy of FIR from a Magistrate within two working days- police directed to upload the FIR on the website except where a decision not to upload is taken by Deputy Superintendent of Police by a speaking order - a person can file an appeal before Superintendent of Police which shall be decided within three working days by a Committee of three higher Officer. (Para-2 to 21)

Cases referred:

Shyam Lal Vs. State of U.P. and others, 1998 Crl.L.J 2879
Chnnappa Andanappa Siddareddy and other Vs. State, 1980 Crl.L.J. 1022
Munna Singh Vs. State of M.P., 1989 Crl.L.J. 580

Present: Mr. Y.P.S. Dhaulta and Mr.Bhim Raj Sharma, Advocates, for the petitioner.

Ms.Meenakshi Sharma and Mr.Rupinder Singh, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General, for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J.

Democracy expects openness and openness is a concomitant of a free society and sunlight is the best disinfectant. It cannot be disputed that ordinary rule is that secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest.

2. These observations are being made in context of the present petition which seeks quashment of FIR No. 145 of 2014, dated 29.11.2014, registered under Sections 447 and 341 of the Indian Penal Code (for short 'IPC'), registered at Police Station East, Chhota Shimla. However, the copy of the FIR has not been placed on record. In response to the query as to why the copy of FIR has not been placed on record, the petitioner, who is present in person, has stated that he is senior citizen of 70 years of age and retired as Assistant Commissioner from the Department of Excise and Taxation, Himachal Pradesh. Being a respectable person, he is too scared to go to the Police Station to get a copy of the FIR, because he may be arrested, since the complainant happens to be none other, than the Superintendent of Police at Shimla. He further apprised this Court that he has already applied for the copy of the same through his counsel on 4.12.2014 under the Right to Information Act, 2005, but the copy thereof has not been made available to him ostensibly because as per the usual practice, the outer limit of 30 days for supplying information as provided under Section 7 of the Right to Information Act is always considered to be the inner limit by those in the helm of affairs.

3. Indisputably, for the present, there is no provision for providing First Information Report under the codified limit, but then the liberty of an individual is inextricably linked with his right to be aware how he has been booked, under which law and what are the allegations set out against him. Liberty in freedom is the strongest passion of men and many have sacrificed their lives for the cause of liberty.

4. At this stage, it would be appropriate to take note of the various provisions of the Code of Criminal Procedure (for short 'Code'):-

> ***"154:- Information in cognizable cases:-***
>
> *(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.*
>
> *(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant. (3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to*

in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

5. Section 154 of the Code provides for information as to the cognizable cases and investigation of such cases, whereas Section 156 of the Code provides for police officer's power to investigate cognizable cases. After investigation, final report is submitted by the police to the Magistrate having territorial jurisdiction. After completion of investigation and submission of charge-sheet, before trial, the accused is entitled to copies of the police report as provided in Section 207 of the Code. The said Section reads as follows:-

"207. ***Supply to the accused of copy of police report and other documents:-*** *In any case where the proceedings has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-*

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173;

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused.

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect if either personally or through pleader in Court."

6. Section 207 of the Code, therefore, mandates that after completion of investigation and submission of final form before the learned Magistrate, it is the duty of the learned Magistrate to furnish the accused a free copy of the documents, which includes police report, FIR, statements recorded under Sections 161 and 164 of the Code etc. However, this provision comes into play only after the investigation is over and after submission of the final form. Prior to that, as noted above, there is no

provision under the Code for an accused to be supplied with a copy of the F.I.R.

7. Now in absence of copy of F.I.R., does the accused have an effective right to defend himself, especially when he is not in possession to know the nature of allegations so that he can approach an appropriate form for obtaining necessary relief for protecting his right and liberty. Is not the copy of FIR a public document?

8. Section 74 of the Indian Evidence Act (for short 'Act') deals with public documents and reads as follows:-

> ***"74. Public documents. The following documents are public documents:-***
>
> *(1) documents forming the acts, or records of the acts:-*
>
> *(i) of the sovereign authority,*
>
> *(ii) of official bodies and tribunals, and*
>
> *(iii) of public officers, legislative, judicial and executive, (of any part of India or of the Commonwealth), or of a foreign country;*
>
> *(2) public records kept (in any State) of private documents."*

9. Section 76 of the 'Act' deals with certified copies of public documents and reads thus:-

> *"76.* ***Certified copies of Public Documents****- Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal frees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.*
>
> *Explanation- Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section."*

10. A Division Bench of Allahabad High Court in ***Shyam Lal Vs. State of U.P. and others,*** 1998 Crl.L.J 2879 has ruled that the First Information Report is a public document.

11. In ***Chnnappa Andanappa Siddareddy and other Vs. State,*** 1980 Crl.L.J. 1022 has held thus:-

> *"The FIR being a record of the acts of the public officers prepared in discharge of the official duty is such a public document as defined under Section 74 of the Evidence Act. Under Section 76 of the Evidence Act, every public officer having the custody of a public document, which any person has a right to inspect is bound to give such person on demand a copy of it on payment of the legal fees therefor."*

12. A Division bench of Madhya Pradesh High Court in ***Munna Singh Vs. State of M.P.,*** 1989 Crl.L.J. 580 has opined that a First Information Report is not a privilege document under the Evidence Act.

13. Learned Single Judge of the Calcutta High Court in ***Sardar Dapinder Singh Bath Vs. State of West Bengal*** writ petition (W) No. 5474 of 2007 has held that as soon as an FIR is registered, it becomes a public document and members of the public are entitled to have certified copy thereof. Thus there can be no trace of doubt that FIR is a public document as defined under Section 74 of the Evidence Act.

14. Now once it is concluded that FIR is a public document, then the accused at least should be entitled to the copy thereof. At this stage, it will be advantageous to make reference to a Division Bench of Delhi High Court in ***Court on its own Motion Vs. State,*** Writ Petition (Cr.) Nol. 468 of 2010, wherein the Court was seized with the same question and it was held as follows:-

> *"22. Presently, coming to the entitlement of the accused to get a copy of FIR, we may notice few decisions in the field.* ***In Dhanpat Singh v. Emperor****, AIR 1917 Patna 625, it has been held thus:*
>
> > *"… It is vitally necessary that an accused person should be granted a copy of the first information at the earliest possible state in order that he may get the benefit of legal advice. To put difficulties in the way of his obtaining such a copy is only creating a temptation in the way of the officers who are in possession of the originals."*
>
> *23. The High Court of Calcutta in* ***Panchanan Mondal v. The State****, 1971 Crl.L.J. 875 has opined that the accused is entitled to a copy of the FIR on payment of legal fees at any stage. After so opining, the learned Judge proceeded to deal with the facet of prejudice in the following terms:*
>
> > *"The question of prejudice of the accused on account of the denial of the copy of the FIR at the earlier stage therefore assumes greater importance and on a proper consideration thereof, I hold that it is expedient in the interests of justice that a certified copy of the first information report, which is a public document, should be granted to the accused on his payment of the legal fees therefor at any stage even earlier than the stage of S.173(4) of the Code of Criminal Procedure. At the later stage of accused will have the right to have a free copy but the same would not take away the right he already has in law to have a certified copy of the first information report on payment of the legal fees."*
>
> *24. In* ***Jayantibhai Lalubhai Patel v. The State of Gujarat****, 1992 Crl. L.J. 2377, the High Court of Gujarat has ruled thus:*
>
> > *"6. …whenever FIR is registered against the accused, a copy of it is forwarded to the Court under provisions of the Code; Thus it becomes a public document. Considering (1) of the provisions of Art.21 of the Constitution of India, (2) First Information Report is a public document in view of S.74 of the Evidence Act; (3) Accused gets right as allegations are made against him under provisions of S.76 of the Indian Evidence Act, and (4) FIR is a document to which S.162 of the Code does not apply and is of*

considerable value as on that basis investigation commenced and that is the first version of the prosecution, as and when application is made by accused for a certified copy of the complaint, the Court to which it is forwarded should give certified copy of the FIR, if the application and legal fees thereof have been tendered for the same in the Court of law..."

25. The situation can be viewed from the constitutional perspective. Article 21 of the Constitution of India uses the expression 'personal liberty'. The said expression is not restricted to freedom from physical restraint but Includes a full range of rights which has been interpreted and conferred by the Apex Court in a host of decisions. It is worth noting, the great philosopher Socrates gave immense emphasis on 'personal liberty'. The State has a sacrosanct duty to preserve the liberties of citizens and every act touching the liberty of a citizen has to be tested on the anvil and touchstone of Article 21 of the Constitution of India, both substantive and also on the canons of procedural or adjective law. Article 22 of the Constitution of India also has significant relevance in the present context inasmuch as it deals with protection against arrest and detention in certain cases. For the sake of completeness, we think it apposite to reproduce Articles 21 and 22 of the Constitution of India:

"21. Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

22. Protection against arrest and detention in certain cases –

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-(a) an Advisory Board consisting of persons who are, or have been, or

are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under subclauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

26. The Constitution Bench in ***Shri Gurbaksh Singh Sibbia and others v. State of Punjab****, (1980) 2 SCC 565 has held thus:*

"26. … No doubt can linger after the decision in Maneka Gandhi v. Union of India, (1978) 1 SCC 248, that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."

*27. In **Gudikanti Narasimhulu v. Public Prosecutor**, (1978) 1 SCC 240, it has been held thus:*

> *"…the issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process…. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Article 21 are the life of that human right."*

*28. In **Ranjitsing Brahmajeetsingh Sharma v. State of Maharashtra and another**, (2005) 5 SCC 294, while reiterating that presumption of innocence is a human right, the three-Judge Bench has held thus:*

> *"35. …Article 21 in view of its expansive meaning not only protects life and liberty but also envisages a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exit cogent grounds therefor."*

*29. In **State of West Bengal and others v. Committee for Protection of Democratic Rights, West Bengal and others**, (2010) 3 SCC 571, the Apex Court has expressed thus:*

> *"68(ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State."*

*30. In **Narendra Singh and another v. State of M.P.**, (2004) 10 SCC 699, the Apex Court has observed that presumption of innocence is a human right.*

*31. In this context, we may refer with profit the decision in Som **Mittal v. Government of Karnataka**, (2008) 3 SCC 753, wherein it has been stated thus:*

> *"46. The right of liberty under Article 21 of the Constitution is a valuable right, and hence should not be lightly interfered with. It was won by the people of Europe and America after tremendous historical struggles and sacrifices. One is reminded to Charles Dickens's novel A Tale of Two Cities in which Dr. Manette was incarcerated in the Bastille for 18 years on a mere lettre de cachet of a French aristocrat, although he was innocent."*

*32. The Apex Court in **D.K. Basu v. State of West Bengal**, AIR 1997 SC 610, while emphasizing on personal liberty in*

a civilized society on the backdrop of constitutional philosophy especially enshrined under Articles 21 and 22(1) of the Constitution of India, has expressed thus:

> *"22. … The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law."*

In the said case, regard being had to the difficulties faced by the accused persons and keeping in view the concept that the action of the State must be "right, just and fair" and that there should not be any kind of torture, their Lordships issued the following directions:

> *"36. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:*
>
> *(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.*
>
> *(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.*
>
> *(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to*

him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

33. Recently, in the decision rendered in ***Siddharam Satlingappa Mhetre v. State of Maharashtra and others*** *(Criminal Appeal No.2271/2010 decided on*

2.12.2010), the Apex Court, while dealing with the concept of liberty, has opined thus:

> *"41. All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty.*
>
> *42. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why "liberty" is called the very quintessence of a civilized existence.*
>
> *43. Origin of "liberty"' can be traced in the ancient Greek civilization. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 B.C., an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realize itself as fully as possible through the self-realization of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. According to Aristotle, as the state was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens so it was natural and necessary to man. Plato found his "republic" as the best source for the achievement of the self-realization of the people."*

After so holding, their Lordships referred to various jurisprudential thought expounded by eminent jurists which we think it condign to reproduce:

> *"53. Roscoe Pound, an eminent and one of the greatest American Law Professors aptly observed in his book "The Development of Constitutional Guarantee of Liberty" that whatever, `liberty' may mean today, the liberty is guaranteed by our bills of rights, "is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organized society to adjust that society to individuals."*
>
> *54. Blackstone in "Commentaries on the Laws of England", Vol.I, p.134 aptly observed that "Personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law".*
>
> *X X X X X X X X*

> *57. Eminent former Judge of this Court, Justice H.R. Khanna in a speech as published in 2 IJIL, Vol.18 (1978), p.133 observed that "liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body".*

Thereafter, their Lordships referred to life and liberty under our Constitution and opined thus:

> *"61. Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society."*

In this regard, we think it seemly to reproduce paragraphs 71 and 72 of the said decision:

> *"71. The object of Article 21 is to prevent encroachment upon personal liberty in any manner. Article 21 is repository of all human rights essentially for a person or a citizen. A fruitful and meaningful life presupposes full of dignity, honour, health and welfare. In the modern "Welfare Philosophy", it is for the State to ensure these essentials of life to all its citizens, and if possible to non-citizens. While invoking the provisions of Article 21, and by referring to the oft-quoted statement of Joseph Addision, "Better to die ten thousand deaths than wound my honour", the Apex court in Khedat Mazdoor Chetana Sangath v. State of M.P. and Others (1994) 6 SCC 260 posed to itself a question "If dignity or honour vanishes what remains of life"? This is the significance of the Right to Life and Personal Liberty guaranteed under the Constitution of India in its third part.*
>
> *72. This court in Central Inland Water Transport Corporation Ltd. and Another v. Brojo Nath Ganguly and Another (1986) 3 SCC 156 observed that the law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and justice, and unless there is anything to the contrary in the statute, Court must take cognizance of that fact and act accordingly."*

34. From the aforesaid enunciation of law, it is graphically vivid that fair and impartial investigation is a facet of Article 21 of the Constitution of India and presumption as regards the innocence of an accused is a human right. Therefore, a person who is booked under criminal law has a right to know the nature of allegations so that he can take necessary steps to safeguard his liberty. It is imperative in a country governed by Rule of Law as crusaders of liberty have pronounced 'Give me liberty, or give me death'.

Not for nothing it has been said that when a dent is created in t he spine of liberty, it leads to a rainbow of chaos.

35. At this juncture, we may profitably refer to a part of the first Menon & Pai Foundation Law Lecture delivered at Cochin by Lord David Pannick, Queen's Counsel, wherein he has spoken thus:

> *"We should respect human rights in difficult times as well as in tolerable times because we are battling against terrorism precisely so that we can maintain a democratic society in which we enjoy individual liberty, the right to debate and dissent, and all the other freedoms that we cherish and which the terrorists abhor. To discard those values even temporarily, devalues all of us. And it would hand a victory to the terrorists, part of whose goal is to destroy the values we cherish and they despise"*

The aforesaid luminously throws the laser beam on the cherished value of liberty.

36. In this context, it is apt to note that the right to know has its own signification. The protagonists of modern democracy plead and preach with immense enthusiasm and rationally support the principle that the collective has a basic and fundamental right to know about things which are supposed to be known by the society. In ***The State of Uttar Pradesh v. Raj Narain and others****, AIR 1975 SC 865, while dealing with a claim of privilege under Section 123 of the Evidence Act, their Lordships have held as follows:*

> *"41. The several decisions to which reference has already been made establish that the foundation of the law behind Sections 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The court will proprio motu exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. <u>Confidentiality is not a head of privilege. It is a consideration to bear in mind</u>. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demand protection. (See 1973 AC 388 (supra) at p. 40). To illustrate, the class of documents would embrace Cabinet papers, Foreign Office dispatches, papers regarding the security to the State and high level inter-departmental minutes. In the ultimate analysis the contents of the document are so described that it could be seen at*

> *once that in the public interest the documents are to be withheld. (See Merricks v. Nott Bower. [1964] 1 All ER 717."*

We have referred to the same only to show how a larger interest will prevail over the private interest. It is basically in the realm of the doctrine of striking of balance.

37. In ***S.P. Gupta v. Union of India and others****, AIR 1982 SC 149, their Lordships opined thus:*

> *"73. …Now we agree with the learned counsel on behalf of the petitioners that this immunity should not be lightly extended to any other class of documents, but, at the same time, boundaries cannot be regarded as immutably fixed. The principle is that whenever it is clearly contrary to the public interest for a document to be disclosed, then it is in law immune from disclosure. If a new class comes into existence to which this principle applies, then that class would enjoy the same immunity."*

Thereafter, their Lordships proceeded to state as follows:

> *"74. …It is necessary to repeat and re-emphasize that this claim of immunity can be justifiably made only, if it is felt that the disclosure of the document would be injurious to public interest. Where the State is a party to an action in which disclosure of a document is sought by the opposite party, it is possible that the decision to withhold the document may be influenced by the apprehension that such disclosure may adversely affect the head of the department or the department itself or the minister or even the Government or that it may provoke public criticism or censure in the legislature or in the press, but it is essential that such considerations should be totally kept out in reaching the decision whether or not to disclose the document. So also the effect of the document on the ultimate course of the litigation whether its disclosure would hurt the State in its defence - should have no relevance in making a claim for immunity against disclosure. <u>The sole and only consideration must be whether the disclosure of the document would be detrimental to public interest in the particular case before the Court."</u>*

> *[Emphasis supplied]*

38. In ***Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd. and others****, AIR 1989 SC 190, their Lordships, while dealing with the said issue, have ruled thus:*

> *"9. Elaborate arguments were advanced by counsel for both sides. It was contended that there was no contempt of Courts involved herein and furthermore, it was contended that pre-stoppage of newspaper article or publication on matters of public importance was uncalled for and contrary to freedom of Press enshrined in our Constitution and in our laws. The publication was on a public matter, so public debate*

> *cannot and should not be stopped. On the other hand, it was submitted that due administration of justice must be unimpaired. We have to balance in the words of Lord Scarman in the House of WP(Crl.) No.468/2010 Page 26 of 35 Lords in Attorney-General v. British Broadcasting Corporation, 1981 A.C. 303 at page 354, between the two interests of great public importance, freedom of speech and administration of justice. A balance, in our opinion, has to be struck between the requirements of free press and fair trial in the words of the Justice Black in Harry Bridges v. State of California, (86 Led 252 at page 260)."*

39. Thereafter, their Lordships referred to the decisions rendered in ***Express Newspapers (Pvt.) Ltd. v. The Union of India****, AIR 1958 SC 578,* ***State of Bombay v. R.M.D. Chamarbaugwala,*** *AIR 1957 SC 699,* ***In Re:*** *P.C. Sen, AIR 1970 SC 1821,* ***C.K. Daphtary v. O.P. Gupta****, AIR 1971 SC 1132****, Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India****, AIR 1986 SC 515,* ***Harry Bridges v. State of California****, 1941-86 Law ed 192,* ***Abrams v. United States****, (1918) 63 Law ed 1173,* ***John D. Pennekamp v. State of Flordia,*** *(1945) 90 Law ed 1295,* ***Nebraska Press Association v. Hugh Stuart,*** *(1976) 49 Law ed 2d 683,* ***Attorney General v. British Broadcasting Corpn****., (1979) 3 All ER 45,* ***Attorney General v. B.B.C.****, 1981 AC 303,* ***Attorney General v. Times Newspapers Ltd.,*** *(1974) AC 273,* ***Bread Manufacturers Ltd.****, (1937) 37 SR (NSW) 242 and eventually came to hold as under:*

> *"38. In this peculiar situation our task has been difficult and complex. The task of a modern Judge, as has been said, is increasingly becoming complex. Furthermore, the lot of a democratic Judge is heavier and thus nobler. We cannot escape the burden of individual responsibilities in a particular situation in view of the peculiar facts and circumstances of the case. There is no escape in absolute. Having regard, however, to different aspects of law and the several decisions, by which though we are not bound, except the decisions of this Court referred to hereinbefore, about which we have mentioned, there is no decision dealing with this particular problem, we are of the opinion that as the Issue is not going to affect the general public or public life nor any jury is involved, it would be proper and legal, on an appraisal of the balance of convenience between the risk which will be caused by the publication of the article and the damage to the fundamental right of freedom of knowledge of the people concerned and the obligation of Press to keep people informed, that the injunction should not continue any further."*

40. In ***Dinesh Trivedi, M.P. and others v. Union of India and others****, (1997) 4 SCC 306, while dealing with the facet of right to know, their Lordships have expressed thus:*

> *"16. In modern constitutional democracies, it is axiomatic that citizens have a right to know about*

the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognised limitations; it is, by no means, absolute. This Court has had many an opportunity to express itself upon this issue. In the case of State of U.P. v. Raj Narain, (1975) 4 SCC 428, Mathew, J. eloquently expressed this proposition in the following words:

> *"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal selfinterest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption." [Emphasis added]*

41. Be it noted, in the said case, their Lordships referred to the decision in S.P. Gupta (supra) opining that the ordinary rule is that secrecy must be an exception, justifiable only when it is demanded by the requirement of public interest and eventually came to hold that to ensure the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the Government and the basis thereof. Democracy, therefore, expects openness and openness is a concomitant of a free society and sunlight is the best disinfectant. After so stating, their Lordships have proceeded to state as follows:

> *"19. But it is equally important to be alive to the dangers that lie ahead. It is important to realise that undue popular pressure brought to bear on decision-makers in Government can have frightening side-effects. If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt. So we have two conflicting situations almost enigmatic and we think the answer is to*

maintain a fine balance which would serve public interest."

15. Articles 21 and 22 of the Constitution of India provide that liberty of a citizen cannot be interfered or curtailed lightly by the authorities, which reads as follows:-

"21. ***Protection of life and personal liberty:-*** *No person shall be deprived of his life or personal liberty except according to procedure established by law.*

22. ***Protection against arrest and detention in certain cases-***

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

16. The expression 'personal liberty' is not restricted to freedom from physical restraint but includes a full range of rights which has been interpreted and conferred by the Apex Court in a host of decisions. The State has a sacrosanct duty to preserve the liberties of citizens and every act touching the liberty of a citizen has to be tested on the anvil and touchstone of Article 21 of the Constitution of India, both substantive and also on the cannons of procedural or adjective law.

17. At this stage, it has be to be noted that a Right to Information Act, 2005 is in place, which has been enacted in order to ensure secure and more effective access to information. It is an act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authorities. It is specifically stated that democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed.

18. The Division bench of Delhi High court after taking into consideration large number of cases and Rules, has held that the accused is entitled to receive a copy of FIR even from the police, since FIR was a public document and therefore, persons who is in custody of the same is liable to give a copy thereof to the person who has interest in the same or whose interest is adversely affected by the same.

19. The Delhi High Court then issued directions regarding making available copy of First Information Report to the accused at an earlier state, as prescribed under Section 207 Cr.P.C. and also uploading the copies of FIR on the official website of the police. The decision of Delhi High Court inturn was followed by a Division Bench of Orrisa High Court in ***Arun Kumar Budhia Vs. State of Orissa and another*** (W.P.(Crl.) No. 1096 of 2011), and based on those two decisions, the Maharashtra Chief Information Commissioner (SCIC) directed the Director General of Police to publish all the First Information Reports (FIRs) except those decided by an Officer of Deputy Superintendent of Police level on its website. The Division Bench judgment of Delhi High Court has subsequently been followed by the Punjab and Haryana High Court and directions were issued to upload the FIRs on the official website of Police Department w.e.f. 1st July, 2013.

20. Now once it cannot be disputed that FIR is a public document, then why the same should be kept out from public domain. Notably, the FIRs are already uploaded on the official website of the Police Department, but with restrictive usage for intra departmental purpose only. Being a public document, the FIR cannot be withheld from public domain and

would not only lend credence but would bring transparency in the working of the Police Department in case the same is put in public domain.

21. In this background, it has become imperative that certain directions be issued. Therefore, taking cue from the judgment passed by the learned Division Bench of Delhi High Court, the following directions are issued:-

(i) ***The accused is entitled to get a copy of the First Information report at an earlier stage as prescribed under Section 207 of the Cr.P.C.***

(ii) ***An accused who has reasons to suspect that he has been roped in a criminal case and his name may be finding place in a First Information Report can submit an application through his representative/agent/parokar for grant of a certified copy before the concerned police officer or to the Superintendent of Police on payment of such fee which is payable for obtaining such a copy from the court. On such application being made, the copy shall be supplied within twenty-four hours.***

(iii) ***Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 of the Cr.P.C.***

(iv) ***The copies of FIR, unless reasons recorded regard being had to the nature of the offence that the same is sensitive in nature, should be uploaded on the Himachal Pradesh Police website within twenty-four hours of lodging of the FIR so that the accused or any person connected with the same can download the FIR and file appropriate application before the court as per law for redressal of his grievances.***

(v) ***The decision not to upload the copy of the FIR on the website of H.P. Police shall not be taken by an officer below the rank of Deputy Superintendent of Police and that too by way of a speaking order. A decision so taken by the Deputy Superintendent of Police shall also be duly communicated to the Area magistrate.***

(vi) ***The word 'sensitive' apart from the other aspects which may be thought of being sensitive by the competent authority as stated hereinbefore would also include concept of privacy regard being had to the nature of the FIR.***

(vii) ***In case a copy of the FIR is not provided on the ground of sensitive nature of the case, a person grieved by the said action, after disclosing his identity, can submit a representation with the Superintendent of Police who shall constitute a committee of three high officers and the committee shall deal with the said grievance within three days from the date of receipt of the representation and communicate it to the grieved person.***

(viii) ***The Superintendent of Police shall constitute the committee within eight weeks from today.***

(ix) ***In cases wherein decisions have been taken not to give copies of the FIR regard being had to the sensitive nature of the case, it will be open to the accused/his authorized representative/parokar to file an application for***

grant of certified copy before the court to which the FIR has been sent and the same shall be provided in quite promptitude by the concerned court not beyond three days of the submission of the application.

(x) The directions for uploading the FIR on the website of H.P. Police shall be given effect from 26.01.2015.

22. A copy of this order be sent to the Chief Secretary, Principal Secretary (Home) and the Director General of Police to take appropriate action to effectuate the directions in an apposite manner so that grievances of this nature do not travel to Court.

23. Compliance report on behalf of the Chief Secretary to the Government of Himachal Pradesh be filed before this Court on or before ***30.1.2015*** when the case for this purpose shall be listed before the Hon'ble Vacation Judge. Notice to respondent No. 5 returnable on ***8.1.2015*** be issued. Steps for service of said respondent be taken within one day.

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

Sanjeev Kumar .....Petitioner.

VERSUS

State of H.P. & others. .....Respondents.

Cr.W.P. No. 24 of 2014.
Decided on: 19.12.2014

Constitution of India, 1950- Article 226- Daughter of the petitioner was missing - petitioner lodged a missing report in Police Station, Bangana- petitioner suspected that respondent No. 7 had unlawfully detained his daughter with the help of respondents No. 8 to 15- direction was issued to the police to produce the daughter of the petitioner but the police failed to do so- police directed to hand over the complete record to CBI who will complete the investigation within the period of 15 days and will produce the daughter of the petitioner before the Court on 8.1.2015.

Cases referred:

State of West Bengal and others *vs.* Committee for Protection of Democratic Rights, West Bengal and others *(2010) 3 SCC 571*

Central Bureau of Investigation through S.P. Jaipur *vs.* State of Rajasthan and another, *(2001) 3 SCC 333*

For the Petitioner: Mr. Sumit Sharma, Advocate vice Mr. Sandeep Dutta, Advocate.

For Respondents: Mr.Anup Rattan, Addl.A.G. for the Respodnets-State.
Mr. Ashok Sharma, ASGI, for Central Bureau of Investigation.
Mr. N.K.Thakur, Sr. Advocate with Mr. Ramesh Sharma, Advocate for respondents No. 8 to 10.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

At the oral request of the learned counsel for the petitioner, Superintendent of Police, Central Bureau of Investigation, Shimla is arrayed as

party-respondent. Mr. Ashok Sharma, learned ASGI, appears and waives service of notice on behalf of the said respondent. The Registry is directed to carry out necessary correction in the memo of parties.

The writ petitioner is father of one Indu Bala, who is averred to have completed 18 years of age on 6.9.2014. She is averred to have joined Computer Centre owned by respondent No. 15 for the last five months and after completion of her computer classes, she is averred to have joined tailoring classes. Besides, the computer classes, she is averred to have joined a beautician course in Tehsil Bangana, two kilometers away from her native village. The father of Indu Bala was taken to carry in his car his daughter daily in the morning to the Computer Centre at 9.00 a.m. and after completion of tailoring classes, carry her back in his private car. However, on the fateful day on 1.11.2014, when the petitioner proceeded to the institution where his daughter was being imparted training in tailoring, he was apprised that she had not come to receive training in tailoring which led the petitioner to proceed to the Computer Centre, manned by respondent No. 15, who apprised the petitioner that she had left the Computer Centre at about 10.30 a.m. Since the daughter of the petitioner was found missing both from the Tailoring Institute as well as from Computer Centre, a missing report was lodged by the petitioner at Police Station, Bangana. However, the whereabouts of the daughter of the petitioner having remained unearthed, constrained the petitioner to institute the instant writ petition with a direction to the respondent-State to produce Indu Bala in Court. The petitioner avers that he suspected that the respondent No.7 Manjeet Kumar, aged about 19 years, has coaxed his daughter in his company and unlawfully detained her alongwith respondents No. 8 to 15. The petitioner also avers that respondent No.7 in connivance with respondents No.8 to 15, has facilitated the unlawful joining of his daughter in his company. Since a petition for habeas corpus is an ultra sensitive impinging upon the liberty of an individual, as such, bearing in mind its ultra sensitivity and also the prized asset of liberty of an individual, this Court was constrained to on 11.12.2014 direct respondent No.3 to produce Indu Bala by 12.12.2014 at 10.00 a.m. On 12.12.2014, the respondent No. 3 omitted to produce Indu Bala in Court. Therefore, a direction was rendered on 12.12.2014 to respondent No.2 to produce the girl in Court on 17.12.2014. On that day a detailed status report was filed by respondent No. 2, whose perusal constrained this Court to record that prima facie concerted efforts are being made by respondents aforesaid to produce Indu Bala in Court, nonetheless, respondent No. 3 Superintendent of Police was directed to produce the girl on 19.12.2014. She in compliance with the directions rendered by this Court to produce her remained un-produced at the instance of respondent No.3. However, a status report has been filed by respondent No.3, elucidating therein the measures and efforts made by them to locate and trace Indu Bala and then produce her in Court. However, without decommending the efforts made by respondent No.3, nonetheless it appears that for want of state of art wherewithals besides for want of state of art apparatus with respondent No.3, has defacilitated respondent No. 3 to locate and trace Indu Bala. The constraints of wherewithals as well as state of art apparatus with respondent No. 3 does hence affect as well as trammel respondent No.3 to trace and locate her. Hence, without construing that there has been any ineptitude or lack of concert on the part of respondent No.3 to locate the whereabouts of Indu Bala, this Court merely for the added leverage which the Central Bureau of Investigation has with it, it being a specialized agency having a nation wide rallying to hence carry out a nation wide effort to locate and trace Indu Bala. Besides with its being empowered with state of art apparatus and state of art wherewithals with which the respondent No. 3 is neither empowered with nor possessed hence, constraining its effort to locate Indu Bala. Consequently, this Court deems it fit, just and proper especially in the interest of justice to while treating it as a singular case to direct that the investigation be henceforth to locate missing Indu Bala be carried out by Superintendent of Police, Central Bureau of Investigation, Shimla. The exceptionality ingrained in the instant

case which prods it to handover henceforth investigation to the Central Bureau of Investigation is that it is an ultra sensitive matter pertaining to the liberty of an individual. Therefore, given the ultra sensitivity aforesaid as also for facilitating justice to the parties besides for enforcing the direction initially rendered for production of Indu Bala before the Court, this Court with the exceptionality of the apparatus and wherewithals with the Central Bureau of Investigation does feel constrained to render the aforesaid directions to the Superintendent of Police, Central Bureau of Investigation, Shimla. For taking the above view, this Court is supported by the judgments reported in **State of West Bengal and others *vs.* Committee for Protection of Democratic Rights, West Bengal and others *(2010) 3 SCC 571,* Central Bureau of Investigation through S.P. Jaipur *vs.* State of Rajasthan and another, *(2001) 3 SCC 333***

Respondent No. 3 is directed to handover within a period of two days complete records to the Central Bureau of Investigation, Shimla. Thereafter, the Superintendent of Police, CBI, Shimla shall carry out and complete the investigation within a period of fortnight and on conclusion whereof Ms. Indu Bala be produced in Court on 8.1.2015. However, it is expected that the Superintendent of Police, Central Bureau of Investigation, Shimla, shall carry out scientific investigation into the matter and as ventilated by Mr. Naresh Kumar Thakur, Sr. Advocate not subject any of the private respondents to any kind of torture.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Ashok Chauhan .....Applicant/plaintiff

Versus

M/s S.S.J.V Projects Pvt. Ltd., (a Body Cooperate) and others.

.....Respondents/defendants.

OMP No. 244 of 2012 in Civil Suit No. 63 of 2010
Order Reserved on 24.11.2014
Decided on: 23rd December, 2014

Indian Evidence Act, 1872- Section 65- An application was filed to permit the plaintiff to prove office note dated 31.3.2009 by leading secondary evidence- defendant denied the execution of the note and stated that no such office note is available in the record- the persons stated to have executed the note were not employees of the defendant and they had no power to make any financial commitment on behalf of defendant- held, that the denial of the defendant is not regarding the execution of the document but regarding the competency of the officer to execute any such note- question of leading the secondary evidence will only arise during the stage of the evidence and not prior to the same- application dismissed. (Para-7 to 9)

For the applicant/plaintiff: Mr. G.S. Rathore, Advocate.
For the respondents/ defendants: Mr. Karan Singh Kanwar, Advocate for respondents No. 1 and 2.

Ms. Shilpa Sood, Advocate for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

In this application, a prayer has been made to allow the applicant-plaintiff to prove office note dated 31st March, 2009 by way of leading

secondary evidence. The relief has been sought on the ground that the plaintiff, a Company engaged in the business of doing construction work was awarded the job of mucking of intermediate adit of (U/S & D/S) of Uhl Project @ Rs.150/- and `190/- per cubic meter in October, 2003 by defendant No. 1-Company. The plaintiff executed the work and submitted his claim in the month of July, 2008 in respect of the work to the tune of Rs.1,58,16,429/- to defendant No. 1-Company for payment. During the course of verbal negotiations held between Sh. Ashok Chauhan, a proprietor of the plaintiff-Company and Sh. N.N. Shetty, Director (projects) of defendant No. 1-Company, a consolidated sum of Rs.48,56,380/- was payable to the plaintiff in lumpsum towards its claim. An office note, dated 31.03.2009 duly signed by said Sh. N.N. Sheety, Sh. Ashok Chauhan, the proprietor of the plaintiff-Company witnessed by S/Sh. R.S. Kamal, General Manager, Sh. Dinesh Shetty, Project Manager of defendant No. 1-Company, defendants No. 3 and 4 respectively was executed to this effect. A copy of the note is Ext. AW1/A. Complaint is that the defendant-Company in the written statement to the suit has denied the execution of any such note and as regards, defendants No. 3 and 4 in written statement they filed have come-forward with the version that they never executed any such note dated 31.03.2009 and rather appended their signatures on the office note in the capacity of witnesses on the request and at the instance of Sh. N.N. Sheety, hence this application.

2. The defendant-Company by denying the execution of any such note has come forward with the version that no such office note is available in the record maintained by the Company. A copy of office note does not bear any number of the Company nor typed out on its letter head, hence not binding on the defendants. Sh. R.S. Kamal was never the employee of the Company and as regards, Sh. Dinesh Shetty, he had no power to make any financial commitment. In the written statement, the stand of defendant No.1-Company is that the office note dated 31.03.2009 is contrary to the terms of work order and was never executed with the express knowledge or approval of the replying defendant. The office note, according to defendant, No. 1, seems to be result of some kind of undue influence exercised by the plaintiff on the erstwhile officers of defendant No. 1, hence has no legal value nor binding on the defendants.

3. On the pleadings of the parties, following issues were framed in this application on 26.02.2014:

1. Whether the applicant/plaintiff is entitled to prove office note dated 31.3.2009, said to have been executed by him, defendants No. 3 and 4 and one Sh. N.N. Shetty, Director(P) of defendant No. 1-company, by way of secondary evidence under Section 65 of the Evidence Act? OPA.

2. Relief.

4. On behalf of the applicant-plaintiff its proprietor, Sh. Ashok Chauhan, has appeared in the witness box as AW-1 and proved the office note Ext. AW-1/A. On the other hand, the defendants examined Sh. Chandra Sekhar Das, Director, P&A as RW-1.

5. The evidence as has come on record by way of AW-1 and RW-1 is equally balanced because while AW-1 has supported the case as set out in the application, RW-1 has supported the case as pleaded in the reply to the application. There being nothing new in their statements, hence need not to be discussed in detail.

6. On hearing learned counsel on both sides and taking into consideration the evidence produced in this application, the findings on the above issues are as under:

ISSUE NO. 1

7. The onus to prove this issue is on the applicant-plaintiff. The plaintiff has set-up the plea of execution of the office note Ext. AW-1/A by Sh. N.N. Shetty, Director (Projects) of defendant No. 1-Company and S/Sh. R.S. Kamal, General Manager, Dinesh Shetty, Project Manager of defendant No. 1-Company. It is seen that defendant No. 1 has not disputed the execution of this document in the written statement and rather while denying the execution thereof by defendant No. 1, such note executed by Sh. N.N. Shetty, R.S. Kamal and Dinesh Shetty is not binding on the defendants for the reasons that neither of them had any financial power to make any financial commitment. Therefore, *prima-facie* the denial is not to the execution of the document, but the dispute is qua the competency of the officer to execute any such note and thereby to make financial commitment and bind defendant No. 1.

8. Significantly, the parties have not yet stepped into the witness box because the suit presently is at the stage of recording plaintiff's evidence. It is thereafter the defendants including defendants No. 3 and 4 will produce the evidence. The plaintiff can produce this office note at an appropriate stage in the suit i.e. at the time of producing evidence in support of its case. The plaintiff can put this document to the witnesses to be examined by the defendants including defendants No. 3 and 4. It is thereafter, if the execution of this document is disputed, the plaintiff may have an occasion to seek remedy in accordance with law including the one under Section 65 of the Indian Evidence Act. At this stage, when the existence of this document is not disputed and rather as per own version of defendant No.1 this document bearing signatures of Sh. N.N. Shetty, S/Sh. R.S. Kamal, General Manager, Sh. Dinesh Shetty, Project Manager of defendant No. 1-Company is not binding on it, in view of they were not having any authority to execute any such document and make any financial commitment binding thereby defendant No. 1-Company lead to the only conclusion that the existence of this document has not been disputed but it is the authority of the person who entered the same has been questioned in reply to this application and also the written statement. Above all, defendants No. 3 and 4, admit their signature on this document, however, as per their version in written statement, they put their signatures at the instance of Sh. N.N. Shetty in the capacity of witnesses. There was no occasion to the plaintiff to have filed this application at this stage.

9. As pointed out supra, occasion, if any, will arise at an appropriate stage i.e. on and after the parties produce the evidence in the main suit. The application at this stage, therefore, is mis-conceived and deserves to be dismissed. If not shocking it is painful to point out that it is on account of pendency of this application instituted on 30th August, 2012, the proceedings in the main suit are held up for a period over two years.

RELIEF:

10. With the above observations, this application fails and the same is accordingly dismissed.

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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.

Mustkeen son of Mr.Karimulla. ....Respondent.

Cr. Appeal No.488 of 2009
Judgment reserved on:8.10.2014.
Date of Decision: December 23, 2014.

N.D.P.S. Act, 1985- Section 20- Petitioner was found in possession of 150 grams of charas- independent witness did not support the prosecution version- there was contradiction between site plan and the seizure memo regarding the place of recovery- original seal was not produced before the Court for comparison- there was difference in weight of sample mentioned in the seizure memo and the sample received in the laboratory- there was contradiction regarding the re-seal impression, therefore, in these circumstances, acquittal of the accused was justified. (Para-12 to 16)

Cases referred:

Nanha Vs. State HLJ 2011 115
State of Rajasthan Vs. Gopal, 1998 8 SCC 449
Bhagwan Singh Vs. State of Rajasthan,1976 Cri.L.J 713
Gian Chand Vs. State of Rajasthan 1993 Cri. L.J. 3716
Anjlus Dungdung Vs. State of Jharkhand (2005) 9 SCC 765
Nanhar Vs. State of Haryana (2010) 11 SCC 423
Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116
Charan Singh Vs. The State of Uttar Pradesh, AIR 1967 SC 520
Gian Mahtani Vs. State of Maharashtra AIR 1971 SC 1898
State (Delhi Administration) Vs. Gulzarilal Tandon AIR 1979 SC 1382
Bhugdomal Gangaram and others Vs. The State of Gujarat AIR 1983 SC 906
State of UP Vs. Sukhbasi and others AIR 1985 SC 1224
Mookkiah and another Vs. State (2013) 2 SCC 89
State of Rajashthan Vs. Talevar and another 2011 (11) SCC 666
Surendra Vs. State of Rajasthan AIR 2012 SC (Supp) 78
State of Rajasthan Vs. Shera Ram @ Vishnu Dutt 2012 (1) SCC 602
Balak Ram and another Vs. State of UP AIR 1974 SC 2165
Allarakha K. Mansuri Vs. State of Gujarat (2002) 3 SCC 57
Raghunath Vs. State of Haryana (2003) 1 SCC 398
State of U.P Vs. Ram Veer Singh and others AIR 2007 SC 3075
S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others, AIR 2008 SC 2066,
Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra (2008) 11 SCC 186
Arulvelu and another Vs. State, (2009) 10 SCC 206
Perla Somasekhara Reddy and others Vs. State of A.P, (2009) 16 SCC 98
Ram Singh @ Chhaju Vs. State of Himachal Pradesh (2010) 2 SCC 445

For the appellant:	Mr.B.S.Parmar, Addl.A.G. with Mr.Ashok Chaudhary, Addl. AG Mr.Vikram Thakur, Dy.A.G and Mr.J.S.Guleria, Asstt.A.G.
For the respondent:	Mr.G.D.Verma, Sr. Advocate with Mr.B.C.Verma, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment passed by the learned Sessions Judge, Solan HP in case No.3-S/7 of 2008 titled State of HP Vs. Mushtkeen under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act')

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by prosecution that on dated 2.3.2008 at about 2.10 PM near Kasauli Chowk Dharampur accused was found in exclusive and

conscious possession of 150 grams of charas. It is alleged by prosecution that on dated 2.3.2008 PW8 Krishan Chand along with HHC Kanshi Ram and PW2 Constable Anil Kumar were on patrolling duty vide daily diary report Ext PW3/G. It is alleged by prosecution that on dated 2.3.2008 at about 2.10 PM when said patrolling party reached near Kasauli Chowk it noticed that accused was coming from Sukijohri side towards Kalka on National Highway No.22 and was in possession of red colour envelope in his left hand. It is alleged by prosecution that when accused saw police officials accused got frightened and suddenly turned towards Kasauli road and thereafter accused was apprehended. It is alleged by prosecution that PW8 Krishan Chand inquired from accused but accused could not give satisfactory answer to the question put by PW8 Krishan Chand and in the meantime PW1 Som Dutt and Chand Kishore Shopkeepers and other people also gathered at the spot. It is alleged by prosecution that on suspicion PW8 Krishan Chand conducted the search of the accused and charas was found inside the plastic envelope. It is alleged by prosecution that thereafter Chand Kishore was sent to bring weights and scales who brought the same and charas was weighed which was found 150 grams. It is alleged by prosecution that thereafter two samples of 25 grams charas were took out and remaining charas was also sealed in a parcel. It is alleged by prosecution that the sample impression of seal was obtained upon a piece of cloth Ext PW1/B and thereafter seal was handed over to PW1 Som Dutt. It is alleged by prosecution that seizure memo and NCB forms were prepared and rukka was sent through constable PW2 Anil Kumar to Police Station Dharampur for registration of FIR. It is alleged by prosecution that spot map Ext PW8/A was prepared. It is alleged by prosecution that special report was also handed over to Superintendent of Police Solan and report of chemical analyst was also sought from Forensic Science Laboratory Junga. Charge was framed against the accused under Sections 20 (b) (B) of the Narcotic Drugs and Psychotropic Substances Act, 1985. Accused did not plead guilty and claimed trial.

3. Prosecution examined as many as nine witnesses in support of its case:-

Sr.No.	Name of Witness
PW1	Som Dutt
PW2	Anil Kumar
PW3	Parveen Kumar
PW4	Rakesh Kumar
PW5	Padam Dev
PW6	Chaitanya Swroop
PW7	Prem Lal
PW8	Krishan Chand
PW9	Brijesh Sood

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description.*
Ext.PW1/A	*Search memo*
Ext PW1/B	*Sample seal*

Ext PW1/C	*Arrest memo*
Ext PY	*Examination report*
Ext.PZ	*Specimen seal.*
Ext.PW2/A	*Rukka*
Ext.PW3/A.	*FIR*
Ext.PW3/B.	*Endorsement*
Ext.PW3/C.	*Copy of RO*
Ext.PW3/D.	*Copy of Malkhana Register.*
Ext.PW3/D1	*Copy of Malkhana Register.*
Ext.PW3/E	*Special Report.*
Ext.PW3/F	*Test Memo.*
Ext.PZ 1	*Signature of police official*
Ext.PW3/G	*Copy of G.D. entry No.19 (a).*
Ext.PW3/H	*Certificate*
Ext.D1	*Statement constable Anil Kumar u/s 161Cr.PC.*
Ext.PW5/A.	*Signature*
Ext.PW6/A.	*Copy of G.D entry No. 27(A).*
Ext.PW6/B.	*Copy of G.D entry No.31(A)*
Ext.PW6/C	*Copy of G.D. entry No.7(A)*
Ext.PW6/D	*Copy of G.D entry No.13(A)*
Ext.PW6/E	*Copy of G.D entry No.41(A)*
Ext.PW8/A.	*Spot Map.*
Ext.PW8/B	*Seizer Memo.*
Ext.PW8/C	*Arrest Memo.*
Ext.PW9/A.	*Sample seal.*

5. Statement of the accused was also recorded under Section 313 Cr.P.C. Accused did not lead any defence evidence. Learned trial Court acquitted the accused under Section 20-B of the Narcotic Drugs and Psychotropic Substances Act 1985.

6. Feeling aggrieved against the judgment passed by the learned Sessions Judge Solan 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 the 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 Som Dutt has stated that he is shopkeeper and running a tea shop at Kasauli Chowk Dharampur for the last two years. He has stated that on dated 2.3.2008 at about 3 PM a person came from Sukhijohari side to Kasauli Chowk holding a plastic bag in his hand. He has stated that he could not state with certainty whether that person was accused or some other person. He has stated that police officials checked the plastic bag which was in the hand of accused. He has stated that bag was containing one muffler, one shawl, one handkerchief and some sticks. He has stated that he does not know what was those sticks. He has stated that when search took place by police officials he and Chand Kishore were present at the spot. He has stated that thereafter police officials sent Chand Kishore to bring weights and scales. He has stated that thereafter weights and scales were brought. He has stated that from the recovered contraband 50 grams contraband was divided into 25 grams each. He has stated that two samples were put into two packets separately and rest contraband was kept in another packet separately. He has stated that thereafter packets were sealed separately. He has stated that police arrested the accused and took him into custody. He has stated that arrest memo Ext PW1/C bears his signature. He has denied suggestion that he has deposed falsely in the present case at the instance of police officials. He denied suggestion that police did not recover any polythene bag from accused. He denied suggestion that no contraband was recovered from the accused. He denied suggestion that entire proceedings were took place in police station. He denied suggestion that nothing was done in the rain shelter. He denied suggestion that his signatures were obtained in police station.

9.1 PW2 Anil Kumar has stated that he remained posted in Police Station Dharampur in the year 2007-2008. He has stated that on dated 2.3.2008 he along with HHC Kanshi Ram and PW8 Krishan Kumar were on patrolling duty and were going towards Dharampur market. He has stated that they started from police station Dharampur at about 2.10 PM and stated that accused came from Sukhi Johari side and was going towards Kalka on National Highway No. 22. He has stated that accused was holding a red colour polythene envelope on his right hand and when accused saw police officials he turned towards Kasauli road and tried to run away from the spot. He has stated that thereafter accused was apprehended. He has stated that on inquiry from accused he could not give satisfactory answer about his whereabouts. He has stated that in the meanwhile people gathered at the spot. He has stated that Som Dutt and Chand Kishore shopkeepers also reached at the spot. He has stated that on suspicion the search of the plastic bag of accused was conducted. He has stated that during the search of the bag one shawl, a muffler, a handkerchief and a polythene bag containing charas in the form of sticks were recovered. He has stated that accused was brought to a rain shelter nearby the spot and Chand Kishore was deputed to bring weights and scales from the shop. He has stated that on weighing the charas it was found 150 grams. He has stated that out of the total recovered charas two samples 25 grams each were separated and same were kept into two packets. He has stated that thereafter bag and packets of charas was sealed with seal impression 'N'. He has stated that thereafter rukka was sent to police station and NCB form was also filled at the spot. He has denied suggestion that no charas was recovered from the accused. He denied suggestion that no search of the bag was conducted. He denied suggestion that Som Dutt was not present in the rain shelter. He denied suggestion that police officials demanded free bed sheets from the accused. He denied suggestion that accused refused to give bed sheets free of cost. He denied suggestion that accused was falsely implicated in the present case. He denied suggestion that no proceedings took place in the rain shelter. He denied suggestion that no sealing took place in the rain shelter. He denied suggestion that entire proceedings took place in the police station. He denied suggestion

that accused was not apprehended. He denied suggestion that nothing was recovered from exclusive and conscious possession of the accused.

9.2 PW3 Parveen Kumar has stated that he was posted as MHC in Police Station Dharampur since February 2008. He has stated that on dated 2.3.2008 at about 3.20 PM constable Anil Kumar deposited with him rukka Ext PW2/A which was sent by Head Constable Krishan Chand Police Station Dharampur. He has stated that on the basis of rukka FIR Ext PW3/A was recorded. He has stated that thereafter file was sent to Investigating Officer through aforesaid constable. He has stated that on the same day at about 6.30 PM SHO Brijesh Sood Police Station Dharmpur deposited with him three parcels along with NCB form in triplicate. He has stated that parcels were deposited in malkhana. He has stated that entry was recorded in the malkhana register at serial No.327. He has stated that thereafter on dated 3.3.2008 he deputed constable Rakesh Kumar to deposit sample of charas in Forensic Science Laboratory Junga for analysis vide RC No. 160 of 2008. He has stated that thereafter chemical report and NCB form were handed over to him and he made entry qua receipt in malkhana register. He has stated that on dated 3.3.2008 Station House Officer Police Station Dharampur had handed over special report to him. He has stated that attested copy of RC No. 160 of 2008 Ext PW3/C is true and correct as per original record. He has stated that attested copy of malkhana register Ext PW3/D and Ext PW3/D1 are true and correct as per original record. He has stated that sample parcels remained intact in his custody. He has denied suggestion that Station House Officer did not deposit with him anything. He denied suggestion that he did not send any document to the laboratory. He has denied suggestion that he did not receive anything from laboratory. He denied suggestion that he did not record daily diary No.19. He denied suggestion that he has deposed falsely being police officials.

9.3 PW4 Rakesh Kumar has stated that he was posted in Police Station Dharampur since 2006. He has stated that on dated 3.3.2008 he was deputed by MHC Police Station to deposit a parcel containing 25 grams charas sealed with four seal impressions 'H' in Forensic Science Laboratory Junga for analysis along with NCB form in triplicate vide RC No.160 of 2008. He has stated that on dated 11.4.2008 he was again deputed by MHC to collect sample parcel from FSL Junga and thereafter he collected the parcel from laboratory and thereafter handed over the same to MHC on the same day. He has stated that till the parcel remained with him no tampering was conducted. He has denied suggestion that no sample was given to him. He denied suggestion that sample was not deposited in the laboratory.

9.4 PW5 Padam Dev has stated that he remained posted in Police Station Dharampur since May 2005 to May 2008. He has stated that on dated 3.3.2008 special report of present case was handed over to him by MHC Parveen Kumar Police Station Dharampur which was placed before Superintendent of Police Solan. He has stated that on dated 3.3.2008 at about 11 AM he presented special report to S.P Solan and thereafter one copy of special report was handed over to him. He has stated that thereafter a copy of special report was also handed over by him to Investigating Officer Krishan Chand in Police Station. He has stated that copy of special report is Ext PW3/E and signature encircled at 'A' Ext PW5/A was made by S.P Solan in his presence.

9.5 PW6 Chaitanya Swroop has stated that he was posted as MC in Police Station Dharampur since 2006. He has stated that daily reports which were entered in the computer was handled by him and the same were also typed by him. He has stated that DD No.19 Ext PW3/G was entered in computer by him and copy which was attested by him bears his signature. He has stated that similarly rapat No.27 Ext PW6/A, rapat No.31 Ext PW6/B, rapat No.7 Ext PW6/C, rapat No.13 Ext PW6/D and rapat No.41 Ext PW6/E were attested by him and all bear his signatures and the same are true and correct as per original record.

9.6 PW7 Prem Lal has stated that he remained posted as Reader to S.P Solan w.e.f. June 2007 till March 2008. He has stated that on dated 3.3.2008 a special report in the present case under Section 20 of the Narcotic Drugs and Psychotropic Substance Act was submitted by Constable Padam Dev Police Station Dharampur to S.P Solan at about 11 AM. He has stated that after receipt of the same S.P Solan made his endorsement on the report and thereafter one copy was handed over to aforesaid constable and other copy was handed over to him by S.P Solan. He has stated that he affixed diary number upon both reports and kept one copy in his record. He has stated that special report Ext PW3/E and endorsement Ext PW5/A was made by S.P Solan in his presence. He has stated that he brought office copy Ext PW3/E which bears his signature.

9.7 PW8 Krishan Chand has stated that he remained posted as Investigating Officer in Police Station Dharampur since 2006 to May 2008. He has stated that on dated 2.3.2008 he along with HHC Kanshi Ram and Constable Anil Kumar were on patrolling duty. He has stated that at about 2.20 PM when he reached at Kasauli Chowk nearby Police Station Dharampur then from Sukhi Johari side accused was coming towards Kalka on National Highway No.22 who was holding a red colour envelope in his left hand. He has stated that as soon as accused saw police official accused got frightened and suddenly turned towards Kasauli road. He has stated that accused was apprehended near Kasauli chowk. He has stated that on inquiry from accused he could not answer satisfactorily. He has stated that in the meantime Som Dutt and Chand Kishore shopkeepers and other people also gathered at the spot. He has stated that on suspicion he conducted search of red colour envelope of accused. He has stated that during search of the envelope a muffler, shawl and a handkerchief including charas which was kept in a plastic envelope were found. He has stated that Chand Kishore was sent to bring weights and scales. He has stated that thereafter he brought weights and scales and recovered charas was weighed which was found to be 150 grams. He has stated that out of two samples of charas 25 grams each were separately taken and kept into two packets. He has stated that remaining charas, shawl, handkerchief and muffler were sealed in other parcels. He has stated that recovered material was took into possession vide seizure memo Ext PW1/A. He has stated that sample of seal Ext PW1/B bears his signature and the signature of the witness. He has stated that NCB form was also filled. He has stated that he also prepared rukka Ext PW2/A. He has stated that he inspected the spot and site plan Ext PW8/A was prepared. He has stated that marginal notes are correct as per spot position. He has stated that the value of the recovered charas was Rs.15,000/- (Rupee fifteen thousand). He has stated that he handed over case property along with sample parcels including sample of seal and NCB form in triplicate to SHO Police Station Dharampur. He has stated that he recorded the statements of the prosecution witnesses as per their versions and also prepared special report Ext PW3/E which bears his signature. He has stated that he obtained copy of RC Ext PW3/C and also obtained abstract Ext PW3/D and Ext PW3/D1 from MHC Police Station Dharampur. He has stated that he also obtained rapats Ext PW6/A to Ext PW6/E and Ext PW6/G. He has stated that after the receipt of FSL report Ext PZ1 and Ext PY and after completion of investigation he handed over case file to SHO Police Station Dharampur. He has denied suggestion that police officials demanded bed sheets from accused. He denied suggestion that accused refused to give bed sheets. He denied suggestion that accused was falsely implicated in the present case. He denied suggestion that no seal was handed over to Som Dutt. He denied suggestion that no sealing was conducted at the spot. He denied suggestion that he recorded the statement of the witness at his own. He denied suggestion that he did not hand over the case property to Station House Officer. He denied suggestion that a false case has been filed against accused. He denied suggestion that Som Dutt and Chand Kishore were not present at the spot. He denied suggestion that all the proceedings were

conducted in Police Station. He denied suggestion that present case filed against the accused due to revengeful attitude.

9.8 PW9 Brijesh Sood has stated that he was posted as SHO Police Station Dharampur till 2008. He has stated that on dated 2.3.2008 HC Krishan Chand presented three parcels sealed with seal impressions 'N' containing 100 grams charas, a muffler, shawl and handkerchief in bigger parcel which was sealed with nine seal impressions 'N' and remaining two parcels containing five seals of 'N' stated to have contained 25 grams sample of charas along with NCB forms in triplicate. He has stated that seals were found intact and tallied with sample of seal. He has stated that columns No. 9, 10 and 11 of NCB forms were filled in which bears his signature. He has stated that he deposited all the three parcels along with NCB forms in triplicate. He has stated that rapat Ext PW6/B was also recorded. He has stated that facsimile of seal 'H' was also affixed on the NCB form. He has stated that special report Ext PW3/E was also presented to him. He has stated that he has submitted the same to S.P Solan. He has stated that on the receipt of FSL report Ext PZ1 and Ext PY and after completion of investigation he prepared chargesheet and presented the same in Court. He has stated that report under Section 173 Cr PC bears his signature. He denied suggestion that case property was not produced by the Investigating Officer. He denied suggestion that he did not reseal the case property. He denied suggestion that he did not submit the case property to S.P Solan. He denied suggestion that accused was falsely implicated in the present case. He denied suggestion that entire proceedings were conducted in Police Station at his instance.

10. Statement of the accused under Section 313 Cr.PC was recorded. He has stated that a false case has been foisted against him. He has stated that he is innocent and falsely implicated in present case. Accused did not lead any defence evidence.

<u>Contradictory testimony of independent eye witness PW1 Som Dutt in examination in chief and cross examination is fatal to prosecution case</u>

11. In the present case as per prosecution story PW1 Som Dutt is the eye witness of the recovery of contraband. We have carefully perused the testimony of PW1 Som Dutt. PW1 has stated in positive manner in examination in chief that he could not state with certainty whether the person from whom the contraband was recovered was accused or some other person because he had seen the accused only for once. The above stated testimony of PW1 Som Dutt is fatal to the prosecution in examination in chief. We are of the opinion that testimony of PW1 is not sufficient to convict the accused and the testimony of PW1 did not inspire confidence of the Court in view of the contradictory statement given by PW1 in his testimony in examination in chief and cross examination.

Contradiction between the place of recovery in the site plan <u>and seizure memo is also fatal to the prosecution.</u>

12. We have carefully perused the search and seizure memo Ext PW1/A. In column No. 4 of seizure memo it has been specifically mentioned that contraband was recovered at National Highway No. 22 Dharampur Kasauli Chowk on dated 2.3.2008 at about 2.15 PM but in the site plan Ext PW8/A in column No. 4 it has been shown that recovery was effected in rain shelter shown at mark 'D' in the site plan. We are of the opinion that in view of the contradictory location of recovery shown in the seizure memo and site plan Ext PW8/A i.e. rain shelter it is not expedient in the ends of justice to convict accused in the present case.

<u>Non production of original seal for comparison in Court is also fatal to prosecution case</u>

13. As per prosecution story the original seal after use was handed over to PW1 Som Dutt. PW8 HC Krishan Chand has stated that original seal was

handed over to PW1 Som Dutt but on the contrary PW1 Som Dutt has stated that he does not know where the seal was kept by the investigating agency. In view of the contradictory statement qua the original seal between PW1 Som Dutt and PW8 Krishan Chand it is not expedient in the ends of justice to convict the accused in the present case. It was held in case report in Latest HLJ 2011 115 Nanha Vs. State that if the original seal is not produced in Court for comparison then conviction could not be recorded. Also see 1998 8 SCC 449 titled State of Rajasthan Vs. Gopal.

Investigation of the entire case by the complainant himself has caused miscarriage of justice to accused in the present case.

14. As per FIR Ext PW3/A complainant in the present case is Head Constable Krishan Chand. In the present case complainant has himself conducted the entire proceedings of the investigation i.e. preparation of search and seizure memo and NCB form from column No. 1 to 8. Complainant himself recorded the statement of the prosecution witnesses under Section 161 Cr.PC and complainant himself prepared site plan Ext PW8/A. Such practice of investigation is deprecated by the Hon'ble Supreme Court of India. In the present case complainant Krishan Chand himself investigated the entire present case and seized the contraband himself. He prepared the sample and sealed the same himself. He sealed the parcels himself and sent rukka himself. He prepared site plan and recorded the statement of the witness himself. He also himself deposited the seized contraband with MHC. In the present case whole investigation of the present case was contrary to criminal jurisprudence and ipso facto contrary to law. See 1976 Cri.L.J 713 titled Bhagwan Singh Vs. State of Rajasthan**.** Also see 1993 Cri. L.J. 3716 titled Gian Chand Vs. State of Rajasthan**.** It is not the case of prosecution that another investigating officer was not available. Criminal law requires that investigation of criminal case should be conducted by independent investigating officer. Complainant himself could not be independent investigating officer when punishment in criminal case is grave in nature.

Contradiction between the weights of sample of contraband sealed in a parcel and contradiction between the weights of contraband received in FSL Junga is also fatal to the prosecution case

15. As per prosecution story 25 grams of contraband was sealed for sample purpose and as per prosecution the parcel of sample of contraband was sent to the office of chemical analyst for chemical examination. As per prosecution story 25 grams of contraband was sealed in a parcel of sample but as per report of chemical analyst Ext PY 25.081 grams of sample was received in the State Forensic Science Laboratory Junga on dated 3.3.2008. We are of the opinion that above stated contradiction between the weights of sealed parcel mentioned in the seizure memo and receipt parcel in the office of State Forensic Science Laboratory Junga qua weight is also fatal to the prosecution in the present case.

Contradiction between the descriptions of reseal in the NCB form and report of chemical analyst is fatal to the prosecution case

16. As per NCB form the description of seal impression of reseal was 'H' but as per chemical analyst report the description of reseal was 'N'. The above stated contradiction qua reseal between NCB form and examination report submitted by FSL Junga is fatal to the prosecution.

17. Submission of learned Addl. Advocate General appearing on behalf of the State that the judgment passed by learned trial Court is wrong on facts as well as law and is based upon hypothetical reasoning, surmises and conjectures and learned trial Court has not properly appreciated the oral as well as documentary evidence placed on record and has not evaluated direct and cogent prosecution evidence is rejected being devoid of any force for the reason

hereinafter mentioned. We have carefully perused oral as well as documentary evidence adduced by the prosecution in the present case. As per prosecution story 150 grams charas was found in the exclusive and conscious possession of the accused on dated 2.3.2008 at about 2.30 PM at National Highway No. 22 Dharampur Kasauli Chowk. The prosecution has prepared the seizure memo Ext PW1/A placed on record. We have carefully perused seizure memo Ext PW1/A placed on record. As per seizure memo the witness of seizure memo are Som Dutt and Chand Kishore. The testimony of Som Dutt is not trustworthy, reliable and inspires confidence of the Court because PW1 Som Dutt has given contradictory statement in the examination in chief and cross examination. PW1 has stated in examination in chief in positive manner that he could not state with certainty whether the person from whom the contraband was recovered was accused or some other person. The above stated testimony of PW1 is not sufficient to convict the accused in the present case. Although the prosecution did not examine another independent witness i.e. Chand Kishore in the present case. Although on dated 20.11.2008 Sh Chand Kishore independent witness was present in Court but learned Public Prosecutor has given statement before the Court that he does not want to examine Chand Kishore another independent eye witness of the seizure memo being won over by the accused. It is well settled law that search and seizure memo is the substantive piece of evidence. Seizure memo Ext PW1/A is a substantive documentary evidence relied by the prosecution. It is well settled law that the contents of the documents should be proved by the testimony of witnesses who are signatory to search and seizure memo Ext PW1/A. Other prosecution witnesses PW2 Constable Anil Kumar and PW3 Parveen Kumar are not signatory to seizure memo Ext PW1/A placed on record and signatures of PW2 Anil Kumar and PW3 Parveen Kumar did not figure in search and seizure memo Ext PW1/A placed on record. It is well settled law that as per Chapter V of Indian Evidence Act 1872 contents of the documents should be proved by way of a person who is signatory to the document. Hence we are of the opinion that testimonies of PW2 Anil Kumar and PW3 Parveen Kumar are not helpful to prosecution for proving contents of document seizure memo because PW2 and PW3 are not signatory to seizure memo relied by prosecution.

18. Another submission of learned Additional Advocate General that learned trial Court has discarded the testimony of official witnesses without assigning any reason and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We are of the opinion that official witnesses are not signatory to search and seizure memo Ext PW1/A. We are of the opinion that contents of search and seizure memo could not be proved by way of official witnesses who are not signatory to seizure memo document. It is well settled law that search and seizure memo in Narcotic Drugs and Psychotropic Substance should be proved in accordance with law. Although Ext PW1/A has signed by Krishan Chand Investigating Officer but we are of the opinion that Krishan Chand Investigating Officer is a interested witness and is not impartial witness because he himself took active part in the preparation of search and seizure memo, sealing of charas parcels, preparation of site plan and recording statement of witnesses.

19. Another submission of learned Additional Advocate General that learned trial Court has wrongly given the benefit of doubt to accused regarding the place of recovery is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the search and seizure memo and site plan submitted by the prosecution. As per search and seizure memo Ext PW1/A the contraband was recovered from the possession of accused at National Highway No. 22 Dharampur Kasauli Chowk. Investigating Officer has specifically mentioned in column No.4 of search and seizure memo qua the place where the search and seizure memo was prepared. There is no reference in search and seizure memo that proceedings were conducted in the rain shelter. The word rain shelter is missing in search and seizure memo Ext PW1/A placed

on record. On the contrary in the site plan Ext PW8/A the Investigating Officer has specifically mentioned that recovery was effected in the rain shelter and no reason has been assigned by the Investigating Officer as to why he did not mention the word rain shelter in column No.4 of search and seizure memo. Non mentioning of word rain shelter in the search and seizure memo has cast doubt in the prosecution story.

20. Another submission of learned Additional Advocate General appearing on behalf of the appellant that there was bonafide mistake of chemical examiner qua mentioning reseal impression in chemical examination report is also rejected being devoid of any force for the reason hereinafter mentioned. In the present case the prosecution did not examine chemical examiner in order to prove that mentioning of description of reseal in the chemical examiner report was by mistake. No reason has been assigned by the prosecution as to why the prosecution did not examine the chemical examiner in order to prove that entry in the chemical analyst report qua description of reseal was by mistake.

21. Another submission of learned Additional Advocate General appearing on behalf of the State that there is no enmity with the accused and in view of the testimony of PW1 Som Dutt read as a whole appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We are of the opinion that prosecution is under legal obligation to prove its case beyond reasonable doubt. The testimony of PW1 Som Dutt qua identity of accused is not proved beyond reasonable doubt in the present case. PW1 has given contradictory statement in his testimony in examination in chief and cross examination when he appeared in Court qua the identity of the accused. It was held in case reported (2005) 9 SCC 765 titled Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in (2010) 11 SCC 423 titled Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defense. Also See: (1984) 4 SCC 116 Sharad Birdhichand Sarda Vs. State of Maharashtra**.** It is well settled law that conjecture or suspicion cannot take place of legal proof. See: AIR 1967 SC 520 Charan Singh Vs. The State of Uttar Pradesh**.** *Also See:* AIR 1971 SC 1898 Gian Mahtani Vs. State of Maharashtra**.** It was held in case reported in AIR 1979 SC 1382 State (Delhi Administration) Vs. Gulzarilal Tandon that suspicion however strong cannot take the place of legal proof. Also See: AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. The State of Gujarat See: AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others. It is well settled principle of law that vested right accrued in favour of the accused with the judgment of acquittal by learned trial Court. (See (2013) 2 SCC 89 titled Mookkiah and another Vs. State. See 2011 (11) SCC 666 titled State of Rajashthan Vs. Talevar and another. See AIR 2012 SC (Supp) 78 titled Surendra Vs. State of Rajasthan. See 2012 (1) SCC 602 titled State of Rajasthan Vs. Shera Ram @ Vishnu Dutt). It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned trial Court failed to take into consideration any admissible fact (iv) That learned trial court took into consideration evidence brought on record contrary to law. (See AIR 1974 SC 2165 titled Balak Ram and another Vs. State of UP, See (2002) 3 SCC 57 titled Allarakha K. Mansuri Vs. State of Gujarat, See (2003) 1 SCC 398 titled Raghunath Vs. State of Haryana, See AIR 2007 SC 3075 State of U.P Vs. Ram Veer Singh and others, See AIR 2008 SC 2066, (2008) 11 SCC 186 S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others. Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, See (2009) 10 SCC 206 titled Arulvelu and another Vs. State, See (2009) 16 SCC 98 titled Perla Somasekhara

Reddy and others Vs. State of A.P,See:(2010) 2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh).

22. In view of the above stated facts and case law cited supra we affirm the judgment passed by learned trial Court and dismiss the appeal filed by the State of Himachal Pradesh. Pending application(s) if any are also disposed of. Record of learned trial Court along with certified copy of judgment be sent back forthwith.

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

Union of India through its Secretary (Home)
to the Govt. of India and others ....Appellants.
Versus
Bali Ram .....Respondent.

LPA No.25 of 2009.
Judgment reserved on : 16.12.2014.
Date of decision: December 23, 2014.

Constitution of India, 1950- Article 226- Petitioner was enrolled in the Central Reserve Police Force as Constable- petitioner suffered from eye problem- he was found blind in left eye and partially blind in the right eye- he was found to be permanently incapacitated for further service and was invalidated from service - held that, petitioner had acquired disability during his service and he could not have been invalidated from the service on account of disability in view of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. (Para- 7 to 17)

Cases referred:

Dharamvir Singh versus Union of India and others (2013) 7 SCC 316

Kunal Singh versus Union of India and another (2003) 4 SCC 524

National Federation of Blind versus Union Public Service Commission and others (1993) 2 SCC 411

Javed Abidi versus Union of India (1999) 1 SCC 467,

Indian Banks' Association , Bombay and others versus Devkala Consultancy Service and others (2004) 11 SCC 1

For the Appellants : Mr.Ashok Sharma, Assistant Solicitor General of India.
For the Respondent : Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This Letters Patent Appeal is directed against the judgment passed by the learned writ Court whereby the writ petition filed by the writ petitioner came to be allowed and he was directed to be reinstated in service and the amount of terminal benefits received by him was ordered to be adjusted against the amount of his salary from 11.03.1998 onwards.

The facts, in brief, may be noticed thus.

2. The respondent is the writ petitioner (hereinafter referred to as writ petitioner) was enrolled in the Central Reserve Police Force (for short 'CRPF')

as a constable driver on 31.07.1985. At the time of enrollment, he was physically examined and found fit. In 1996, the writ petitioner suffered some problem in his eye and was medically examined at Government Medical College and Hospital, Jammu, where he was found suffering from Disseminated Choroiditis and Retinal Atrophic Patihics Macular involvement left eye. His visual acuity was 6/12 in right and 6/60 in left eye with no improvement with glasses i.e. he was found blind by left eye and partially blind in right eye. The Chief Medical Officer (NFSG) Station Hospital, GC, CRPF, Jammu, recommended his case to be put up before the Departmental Rehabilitation Board. The writ petitioner was declared unfit for driving as well as combatant duties and referred to Medical Invalidation Board on 17.01.1997 as per circulation order 28/29. The Medical Board constituted by Base Hospital-II, CRPF, Hyderabad, examined the writ petitioner on 10.04.1997 and found him to be permanently incapacitated for further service of any kind in the department. On the basis of such recommendations, a notice dated 12.02.1998 was served upon the writ petitioner by the respondent No.4 asking him to submit representation against the order of his medical invalidation. On 26.02.1998, the writ petitioner submitted application to the respondent No.4 wherein he sought full 100% financial benefits from the department on his invalidation from service. Vide order dated 11.03.1998, the writ petitioner was invalidated from service with effect from 11.03.1998. The writ petitioner on 15.10.2000 made a representation to the respondents which was rejected in December, 2000.

3. The writ petitioner thereafter approached this Court by filing CWP No.206/2003 which came up for consideration before this Court on 05.01.2005 and the following orders came to be passed:-

> *"When this case was taken up today, it was not disputed on behalf of the parties that after receipt of legal notice on behalf of the petitioner from his counsel Shri Sanjay Kalia, Advocate, Dharamshala, no decision had been taken on it till the date of swearing of affidavit, i.e. 12th July, 2004. Shri Baldev Singh, learned Addl. Central Government Standing Counsel, was not in a position to inform the Court whether any reply to this notice has been sent and/or whether the petitioner was found entitled to any relief in accordance with relevant rules and regulations.*
>
> *In this view of the matter and without having gone into merits of the case, this writ petition is disposed of by directing the respondents to take decision on the legal notice admittedly received by them. Decision will be taken by or before 15th February, 2005, and shall then be conveyed to the petitioner. In case petitioner is found entitled to any relief in accordance with law, needful will be done by the respondents by or before 31st March, 2005. In case legal notice has already been examined and decision taken on it before today, in such a situation, respondents are directed to forthwith convey such decision to the petitioner. If he (the petitioner) feels dissatisfied with the same, he will be entitled to have such recourse as available to him in law and in that event, this order will not come in his way.*
>
> *Writ petition is finally disposed of in these terms."*

4. In compliance to the orders passed by this Court on 31.03.2005, the respondents vide order dated 27.06.2005 again rejected the case of writ petitioner by according the following reasons:-

> *"2. You are hereby informed that your legal notice has been ignored being devoid of any merit as the disease suffered by you was not caused or attributable to service conditions. As per risk fund rules, you were entitled to Rs.15000/- only which has been paid to you in lumpsum and you are not entitled to Rs.1000/- PM as claimed by you. This is for your information."*

5. The learned writ Court after invoking the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, (for short the 'Act of 1995') allowed the writ petition by holding that the writ petitioner would be deemed to be in service and entitled to all annual increments till the date of his retirement. The amount received by way of terminal benefits was ordered to be adjusted against the amount of his salary from 11.03.1998 and he was directed to be continued in service till the actual date of his superannuation according to service record.

6. The writ respondents, who are appellants, (hereinafter referred to as writ respondents) have challenged the judgment passed by the learned writ Court on the ground that the services of the writ petitioner could not be utilized anyway in the department since he was totally disabled. It is further contended that the writ respondents could not be compelled to pay a person while sitting idle and that pension has already been paid to the writ petitioner. It was also stated that the provisions of the Act were not applicable to the Armed Forces and a specific notification exempting the Armed Forces from applicability of this Act had been issued by the Central Government.

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

7. It is not disputed that the writ petitioner was hale and hearty at the time of his enrollment with the writ respondents and, therefore, in absence of disability or disease noted or recorded at the time of entry into service/Armed Forces, there would be a presumption of sound physical and mental condition at the time of said entry in service and any disability, disease suffered by the writ petitioner later on would be deemed to be attributable or aggravated by the service.

8. In taking this view, we are fortified by the judgment of the Hon'ble Apex Court in ***Dharamvir Singh*** *versus* ***Union of India and others (2013) 7 SCC 316*** wherein after discussing relevant law on the subject, the Hon'ble Supreme Court culled out the following principles:-

> ***"29. A conjoint reading of various provisions, reproduced above, makes it clear that:***
>
> ***29.1. Disability pension to be granted to an individual who is invalidated from service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20% or over. The question whether a disability is attributable or aggravated by military service to be determined under the Entitlement Rules for Casualty Pensionary Awards, 1982 of Appendix II (Regulation 173).***
>
> ***29.2. A member is to be presumed in sound physical and mental condition upon entering service if there is no note or record at the time of entrance. In the event of his subsequently being discharged from service on medical grounds any deterioration in his health is to be presumed due to service. [Rule 5 read with Rule 14(b)].***
>
> ***29.3. The onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for non-entitlement is with the employer. A claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally. (Rule 9).***
>
> ***29.4. If a disease is accepted to have been as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and***

that the conditions were due to the circumstances of duty in military service. [Rule 14(c)].

29.5. If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an individual's discharge or death will be deemed to have arisen in service. [14(b)].

29.6. If medical opinion holds that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical Board is required to state the reasons. [14(b)]; and

29.7. It is mandatory for the Medical Board to follow the guidelines laid down in Chapter-II of the Guide to Medical Officers (Military Pensions), 2002-"Entitlement: General Principles", including Paras 7, 8 and 9 as referred to above (para 27)."

9. The need for a comprehensive legislation for safeguarding the rights of persons with disabilities and enabling them to enjoy equal opportunities and to help them to fully participate in national life was felt for a long time. The Disability Rights Movement in India commenced in 1977 of which National Federation of the Blind was an active participant. To realize the object that people with disabilities should have equal opportunities and keeping their hopes and aspirations in view, a meeting called the "Meet to Launch the Asian and Pacific Decades of Disabled Persons" was held in Beijing in the first week of December, 1992, by the Asian and Pacific countries to ensure "full participation and equality of people with disabilities in the Asian and Pacific Regions. A proclamation was adopted in the said meeting to which India was a signatory and they agreed to give effect to the same.

10. The launch of the Asian and Pacific Decade of Disabled Persons in 1993-2002 gave a definite boost to the movement. The main need that emerged from the meet was comprehensive legislation to protect the rights of persons with disabilities. In this light, the crucial legislation was enacted in 1995, viz. the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, which empowers persons with disabilities and ensures protection of their rights. This Act provides some sort of succor to the disabled persons.

11. Employment is a key factor in the empowerment and inclusion of people with disabilities. It is an alarming reality that the disabled people are out of job not because their disability comes in the way of their functioning rather it is social and practical barriers that prevent them from joining the workforce. As a result, many disabled people live in poverty and in deplorable conditions. They are denied the right to make a useful contribution to their own lives and to the lives of their families and community.

12. The learned Assistant Solicitor General of India has argued that the learned writ Court has wrongly applied the provisions of Act of 1995. The applicability whereof had been specifically excluded to the Armed Forces including the writ respondents.

13. It would be seen that the Act of 1995 came into force with effect from 7th February, 1996, while the writ petitioner was found unfit for driving and combatant duty by the Departmental Rehabilitation Board in its meeting held on 17.01.1997. Therefore, on the date on which the writ petitioner's medical condition had been adjudged, undisputedly, the provisions of Act of 1995 had already come into force. It was only on 28.03.2002 that the Ministry of Social Justice and Empowerment issued notification whereby in its exercise of powers conferred under Section 47 of the Act, the Central Government

having regard to the type of work carried out, exempted all the categories of posts of the combatant of the Armed Forces from the provisions of Section 47. Undisputedly, the notification was only prospective in nature. Thus, it can safely be concluded that the Act of 1995 was applicable to the CRPF at the time when the decision was taken by the writ respondents to invalidate the writ petitioner with effect from 11.03.1998.

14. The learned Assistant Solicitor General thereafter has strenuously argued that the writ petitioner had already been paid the entire retiral benefits and was getting full pension and, therefore, was not entitled to re-employment. We are afraid that these submissions cannot be countenanced and have to be rejected outrightly in view of the following observations of the Hon'ble Supreme Court in ***Kunal Singh*** *versus* ***Union of India and another (2003) 4 SCC 524*** wherein the Hon'ble Supreme Court observed as under:-

> ***"11.We have to notice one more aspect in relation to the appellant getting invalidity pension as per Rule 38 of the CCS Pensions Rules. The Act is a special Legislation dealing with persons with disabilities to provide equal opportunities, protection of rights and full participation to them. It being a special enactment, doctrine of generalia specialibus non derogant would apply. Hence Rule 38 of the Central Civil Services (Pension) Rules cannot override Section 47 of the Act. Further, Section 72 of the Act also supports the case of the appellant, which reads:-***
>
> > ***"72. Act to be in addition to and not in derogation of any other law:- The provisions of this Act, or the rules made thereunder shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefits of persons with disabilities."***
>
> ***12.Merely because under Rule 38 of CCS (Pension) Rules, 1972, the appellant got invalidity-pension is no ground to deny the protection, mandatorily made available to the appellant under Section 47 of the Act. Once it is held that the appellant has acquired disability during his service and if found not suitable for the post he was holding, he could be shifted to some other post with same pay-scale and service benefits; if it was not possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. It appears no such efforts were made by the respondents. They have proceeded to hold that he was permanently incapacitated to continue in service without considering the effect of other provisions of Section 47 of the Act."***

15. We cannot be insensitive to the cases like that of the writ petitioner. In ***National Federation of Blind*** *versus* ***Union Public Service Commission and others (1993) 2 SCC 411***, the Hon'ble Supreme Court directed the Government and the UPSC to permit blind and partially blind eligible candidates to compete and write in Civil Services Examination in Braille script or with the help of a scribe. It also recommended to the Government to decide the question of providing reservations to visually handicapped persons in Group 'A' and 'B' posts in the government and public sector enterprises.

16. In ***Javed Abidi*** *versus* ***Union of India (1999) 1 SCC 467***, the Hon'ble Supreme Court directed the Indian Airlines to give concessions to orthopaedically handicapped persons suffering from locomotor disability to the extent of 80% for travelling by air in India. The Court was mindful of the financial position of Indian Airlines and yet felt that this direction was in

keeping with the objectives of the Act and was in consonance with the concession already given by the Indian Airlines to visually disabled persons.

17. In ***Kunal Singh's case*** (supra), the Hon'ble Supreme Court was seen as interpreting the Disabilities Act in the manner so as to further its objectives when the Hon'ble Supreme Court held that Section 47 of the Act mandates that an employee, who acquires disability during service must be protected. If such an employee is not protected, he would not only suffer himself, but all his dependants would also undergo sufferings. Therefore, merely granting him pension would not suffice, but there must also be an attempt to secure him alternative employment.

18. In ***Indian Banks' Association , Bombay and others*** *versus* ***Devkala Consultancy Service and others (2004) 11 SCC 1***, the Hon'ble Supreme Court expressed its dismay over the implementation of the Act of 1995 by observing that "*despite the progressive stance of the Court and the initiatives taken by the Government, the implementation of the Disabilities Act is far from satisfactory. The disabled are victims of discrimination inspite of the beneficial provisions of the Act*". The Court further went on to create a fund for the aforesaid purpose for the implementation of the Act and the Comptroller and Auditor General of India was requested to effect recoveries of all the excess amount realized by the Union of India by way of interest tax and interest by the banks and other financial institutions and create the corpus of such fund therefrom. The Indian Banks' Association and other appellants in the case were also directed to contribute to the extent of `50 lacs each in the said fund. The Comptroller and Auditor General of India was made Chairman of the said Trust and the Finance Secretary and the Law Secretary of the Union of India were made its ex-officio members. The corpus so created could invest in such a manner so as to enable the trustees to apply the same for the purpose of giving effect to the provisions of the Act.

19. Reverting to the case, it can safely be concluded that merely granting invalidity pension is no ground to deny the protection mandatorily made available to the writ petitioner under Section 47 of the Act. Further, once it is held that the writ petitioner had acquired disability during his service and he was not suitable for the post he was holding, he could be shifted to some other post with same pay scale and service benefits. If it was not possible to adjust the writ petitioner against any post, even then he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. This being the mandate of law, the writ respondents cannot contend that the writ petitioner being under disability, his services cannot be utilized anyway in the department.

20. In view of the aforesaid discussion, we find no infirmity in the judgment passed by the learned writ Court and the appeal being devoid of any merit is dismissed as such leaving the parties to bear their own costs. The pending application (s), if any, also stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Smt. Dashoda alias Yashoda Devi & another ..Appellants

Versus

Shri Ramesh and others ..Respondents

RSA No.312 of 2003
Judgment reserved on: 19.11.2014
Date of Decision: 24.12.2014

Indian Succession Act, 1925- Section 63- Will was witnessed by one marginal witness- the other person had put his signature above the words "***Shinakhat Karta***, (identifier) - held, that even if it is believed that Lambardar was only an Identifier, one of the marginal witnesses had stepped into witness box and had deposed about the execution and attestation of the Will- execution and attestation of the Will was duly proved. (Para-29 to 30)

Cases referred:

Swapan Kumara and others Vs. Sanjay Kumar and another, 2002(3) Shim. L.C. 294

S.R. Srinivasa and others Vs. S. Padmavathamma, (2010) 5 SCC 274

N. Kamalam (dead) and another Vs. Ayyasamy and another, (2001) & SCC 503

For the Appellants:	Mr. Bhupender Gupta, Senior Advocate with Mr. Janesh Gupta, Advocate.
For the Respondents:	Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate for respondents No.1 to 4. Respondent No.6 ex parte.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge *(oral)*

Plaintiffs No.1 and 2 Shri Ram Singh and Smt. Dashoda alias Yashoda Devi are in second appeal before this Court. They are aggrieved by the judgment and decree dated 5.5.2003, passed by learned District Judge, Solan in Civil Appeal No.40-S/13 of 2001, whereby the judgment and decree passed by learned Sub Judge, 1st Class, Arki, dated 29.6.2001 in Civil Suit No.192/1 of 1994, has been affirmed and the appeal dismissed.

2. The challenge to the impugned judgment and decree is on the grounds, inter alia, that both Courts below have committed material illegality and irregularity while returning findings on issues No.4 and 5 in ignorance of cogent and reliable evidence comprising oral as well as documentary available on record. Both Courts allegedly erred while recording the findings that the Will Ext.DW1/A is a valid document duly executed by Shri Geeta Ram in violation of the provisions contained under Section 63 of the Indian Succession Act. In this regard, it is pointed out that one of the witnesses Shri Shiv Ram is not an attesting witness and rather he has signed the Will in the capacity of an identifier as he was Numberdar at the relevant time. The signature of the scribe on the Will is also in the capacity of a document writer and not as an attesting witness. Since the Will was signed only by one of the attesting witnesses, therefore, it could have not been held as a legal and valid document. Also that in the absence of the pleadings and the evidence, it cannot be said that Shri Shiv Ram DW4 had animus to sign the Will in the capacity of a marginal witness. The plaintiffs, except for plaintiff No.1 Ram Singh, had not stepped into the witness box and as such an adverse inference should have been drawn against them. The Courts below allegedly got influenced merely by the fact that the Will Ext.DW1/A was a registered document. Affidavit Ext.PW2/A of testator Shri Geeta Ram that he had cordial relations with the plaintiffs has erroneously been ignored. On the other hand, the defendants have miserably failed to prove that it is they alone who were rendering services to the deceased during his life time. This aspect of the matter has not been appreciated. The factum of the suit land being in possession of plaintiff No.1 in the capacity of a tenant duly proved on record has also not been appreciated in its right perspective and recorded the findings to the contrary which has resulted in miscarriage of justice to the appellants-plaintiffs.

3. Appeal has been admitted on the following substantial questions of law:

1. Whether the Will in question has not been duly executed and attested in accordance with law?

4 It is thus seen that the only legal question, which needs adjudication in the present lis is as to whether the Will Ext.DW1/A has been executed in accordance with law or not. The adjudication thereof takes us to the given facts and circumstances of the case and also the evidence available on record.

5 The dispute pertains to the inheritance of the estate of deceased Geeta Ram. He was exclusive owner in possession of land measuring 6 Biswas, bearing Khasra No.54 and co-owner of land measuring 37 bighas 14 biswas bearing Khasra Nos.49, 52, 56, 57, 62, 67, 69, 72 and 81 to the extent of ½ share, co-owner-cum-mortgagor of land measuring 1 Bigha 6 Biswas, bearing Khasra Nos.74 and 82 to the extent of ½ share and co-owner of land measuring 5 Bighas 14 Biswas, bearing Khasra No.78 to the extent of 1/6th share, situated in village Rehawan, Pargana Sendhurath, Tehsil Arki District Solan. He had two wives. Plaintiffs No.2 and 3 were born to him out of his wedlock with his previous wife. On her death, he married with defendant No.5 Smt. Mahantu Devi. Kanshi Ram was real brother of deceased Geeta Ram. Defendants No.1 to 4 are sons of said Shri Kanshi Ram. Defendant No.5 Mahantu Devi had cordial relations with Kanshi Ram. Defendants No.1 to 4 taking undue advantage of the relations of defendant No.5 with their father, managed to execute the Will by deceased Geeta Ram qua the suit land on 26.4.1994, in their favour. It is on 31.7.1994, defendants No.1 to 4 threatened the plaintiffs to take over the possession of the suit land forcibly on the basis of Will in question.

6 While according to the plaintiffs, the Will is a forged and fictitious document having not been executed by deceased Geeta Ram in favour of defendants No.1 to 4 and that the suit land was in possession of plaintiff No.1 in the capacity of tenant and hence, the defendants have nothing to do therewith, at the same time, the defendants claimed that it is they who used to look after and maintain deceased Geeta Ram during his life time and as such, he being happy and satisfied with the services rendered by them, executed the Will in their favour voluntarily while in a sound disposing mind. According to them, the execution of the Will has been witnessed by two witnesses and hence, is a legally and validly executed document.

7 On such pleading of the parties, learned trial Court has framed the following issues:

1. Whether the plaintiffs are entitled for the relief of permanent prohibitory injunction, as claimed? OPP.
2. Whether the plaintiffs are entitled for the relief of declaration, as alleged? OPP.
3. Whether the plaintiff was tenant of deceased Geeta Ram in the suit land, as claimed? OPP
4. Whether late Shri Geeta Ram had executed a legal and valid Will on 224.4.1994? OPD
5. Whether the will is result of mis-representation, fraud etc.? OPD
6. Whether the suit is not maintainable? OPD
7. Whether the suit is bad for mis-description of the parties? OPD
8. Whether the plaintiffs have no locus-standi to file the present suit? OPD

9. Whether the plaintiffs are estopped to file the present suit by their own acts and conduct and acquiescences? OPD

10. Whether the suit is bad for the non-joinder of necessary parties? OPD

11. Whether the suit is properly valued for the purpose of court fee and jurisdiction? OPD

11A. Whether the plaintiffs are entitled to the relief of possession by way of alternative relief as alleged? OPP.

12. Relief.

8. The parties, when put to trial, have produced oral as well as documentary evidence, in support of their respective case. S/Shri Krishan Chand and Sushil Kumar, PW-1 and PW-2, respectively, have examined themselves to prove the factum of transfer of a gun by Geeta Ram in the name of plaintiff No.1, who himself has stepped into the witness box as PW-3 in support of the case, as set out in the plaint. The plaintiffs have also examined Mohan Lal PW-4 to prove that it is they who used to cultivate the suit land and maintain deceased Geeta Ram during his life time.

9. In rebuttal, plaintiff No.1 has again stepped into the witness box and also examined one more witness PW-5 Dina Nath. They also placed reliance on the affidavit Ext.DW1/A of deceased Geeta Ram.

10. On the other hand, Shri Kamlesh Kumar, Document Writer has stepped into the witness box as DW-1 and proved Will Ext.DW1/A. The attesting witnesses S/Shri Prem Lal and Shiv Ram have also stepped into the witness box as DW-3 and DW-4 respectively. Defendant No.1 Shri Chet Ram while in the witness box as DW-2 has also supported the entire case as set out in the written statement.

11. Learned trial Judge, while deciding issues No.4 and 5 in favour of defendants has arrived at a conclusion that the defendants have successfully pleaded and proved the execution of Will Ext.DW1/A by Shri Geeta Ram in a sound disposing mind in presence of the witnesses. This document, therefore, has been held to be legal and valid. The suit, therefore, was dismissed.

12. Though the judgment and decree passed by learned trial Court was assailed in learned lower appellate Court, however, unsuccessfully, as the appeal has been dismissed vide the judgment and decree, which is under challenge in the present appeal.

13. Shri Bhupender Gupta, learned Senior Advocate has emphasized mainly that the Will in question is not at all proved, as according to him, even if it is presumed to be executed by deceased Geeta Ram, the execution thereof has been witnessed only by one marginal witness, i.e. DW-3 Prem Lal, as according to Mr. Gupta, the other witness DW-4 Shiv Ram has signed the will in the capacity of an identifier. There is no clarification given by the scribe DW-1 Kamlesh Kumar that words "***Shinakhat Karta***, (identifier) below the signature of Shiv Ram came to be recorded by way of an inadvertent mistake. As regards the scribe DW-1 Kamlesh Kumar, it is pointed out that the scribe may be a witness; however, there must be animus to append his signature on the Will like a marginal witness. The scribe, according to Mr. Gupta, has not signed the Will with an intention to witness the execution thereof in the capacity of a marginal witness. Since Shiv Ram belongs to a distant place, his testimony cannot be relied upon.

14 On the other hand, Shri G.D. Verma, learned Senior Advocate, while repelling the contentions raised on behalf of the appellants-plaintiffs has strenuously contended that without there being any evidence available on

record, it cannot be said that the plaintiff was in possession of the suit land in the capacity of a tenant. Plaintiff No.1, according to Mr. Verma, has no locus-standi to assail the legality and validity of the Will as he had nothing to do with the property belonging to Shri Geeta Ram. It is only the daughters of deceased Geeta Ram, plaintiffs No.2 and 3 alone, who had the cause of action and locus-standi, if any, to have challenged the same. It has also been pointed out that the validity of a Will is not a question of law, but facts. The genuineness and authenticity of the Will, in question, cannot be doubted on the ground that only one marginal witness is associated or examined. According to Mr. Verma, otherwise also, the concurrent findings recorded by both Courts below on appreciation of the pleadings and evidence available on record, cannot be interfered with in a second appeal.

15. Thus, the only legal question, which needs adjudication in the present lis is as to whether the Will Ext.DW1/A has not been executed and attested in accordance with law. The pre-requisites for execution of a legal and valid Will find mention in Section 63 of the Indian Succession Act, which reads as follows:

> "**63. Execution of unprivileged Wills.**
>
> Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged] or a mariner at sea, shall execute his Will according to the following rules:—
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
>
> (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

16. Another legal provision to constitute the execution of a legal and valid Will is enshrined under Section 68 of the Evidence Act, which reads as follows:

> **68. Proof of execution of document required by law to be attested.**
>
> If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.
>
> Provided that it shall be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

17 Besides, Section 30 of the Hindu Succession Act provides that 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 provision of the Indian Succession Act or any other law for the time being in force and applicable to Hindus.

18 Now, if the execution and attestation of the Will in question is seen in the light of the above legal proposition and the evidence available on record, the defendants have examined the scribe of the Will DW-1 Kamlesh Kumar. As per his version, the Will was reduced into writing at the instance of the testator deceased Geeta Ram. The same was read over and explained to him in vernacular. He, on hearing the contents of the Will and admitting the same to be correct, thumb marked the same. The marginal witnesses DW-4 Shiv Ram, Numberdar and DW-3 Prem Lal were also present. They both also signed the Will after going through the contents thereof. Shri Geeta Ram, the testator had thumb-marked the Will in the presence of the witnesses, who had also put their signatures on the Will in the presence of said Shri Geeta Ram. Although DW-1 Kamlesh Kumar has been cross-examined, however, in sundry and not qua the aspect that the testator was seen by the witnesses while putting his thumb mark on the Will and he saw the witnesses putting their signatures on this document.

19 DW-3 Prem Lal one of the marginal witnesses also tells us that he had seen Geeta Ram while putting his thumb impression on the Will who, according to this witness, was illiterate. As per his further version, the contents of the Will were read over and explained to him and that he had signed the same in the presence of Geeta Ram and Shiv Ram, Numberdar. He has also identified his signature and also that of Shiv Ram on the Will, in question. He further tells us that the Will thereafter was produced by Shri Geeta Ram in his presence and that of Shiv Ram, Numberdar before the Tehsildar for attestation by informing the Tehsildar and he had executed the Will in favour of the children of his brother. On this the Tehsildar attested the Will. He signed the Will as a witness before the Tehsildar at point "F" encircled red. He also identified the thumb mark of Geeta Ram at point "G" encircled red on the Will which he had put on the Will in the presence of Tehsildar. He has also identified the signatures of Shiv Ram, Numberdar at point "H" encircled red, which he had put on the Will before the Tehsildar.

20 DW-3 Prem Lal has also been subjected to lengthy cross-examination, however, again in sundry and not qua the relevant aspect, i.e. mode and manner in which the Will was executed and produced before Tehsildar, Arki, for attestation.

21 Shiv Ram has stepped into the witness box as DW-4. According to him also, the Will was reduced into writing at the instance of Geeta Ram, who had put his thumb impression on the Will, after admitting the contents thereof to be true and correct in their presence and he as well as DW-3 Prem Lal both had seen him while putting his thumb impression thereon. Similarly, Geeta Ram had also seen them putting their signatures on the Will. As per his version also, it was about 3 p.m. when the Will was produced for attestation before the Tehsildar by Geeta Ram. The Tehsildar had enquired from Geeta Ram as to what he was doing to which he answered that he was executing a Will in favour of his nephews. He has identified Geeta Ram's thumb impression, which he had put on the Will in the presence of Tehsildar and also his signatures as well as that of DW3 Prem Lal.

22 The Will in question is Ext.DW1/A. The original thereof is also available on record. The same has been thumb marked by the testator on each and every page and also before the Tehsildar.

23 Although the plaintiffs claim that deceased Geeta Ram used to put his signature and not thumb mark, yet plaintiff No.1 Ram Singh while in the witness box as PW-3 has admitted that Geeta Ram was illiterate. If coming to affidavit Ext.PW2/A, the same though bears signature allegedly that of Geeta

Ram, however, no cogent and reliable evidence has come on record that these are the signatures of Geeta Ram alone.

24 True it is that plaintiffs No.2 and 3 are the daughters of Geeta Ram from his previous wife and it is they who alone could have inherited his estate and not the plaintiff No.1, however, plaintiffs No.1 and 2 have not opted for stepping into the witness box and it is plaintiff No.1 who has appeared as PW-1. Even one of the plaintiffs, i.e. plaintiff No.3 Smt. Ajudhia Devi has not opted to file any appeal in this Court, as she is proforma respondent herein. Moreover, had the exclusion of plaintiffs No.2 and 3 from the suit property by way of Will Ext.DW1/A been not correct or if the Will was result of fraud, mis-representation or shrouded by suspicious circumstances, it is the plaintiffs No.2 and 3, who would have entered into the witness box and deposed so on oath. Non appearance of the said plaintiffs as witnesses, leads to the only conclusion that Will Ext.DW1/A was the last will of deceased Geeta Ram and executed by him in favour of his nephews, the defendants No.1 to 4.

25 Interestingly, deceased Geeta Ram as per own admission of plaintiff No.1 Ram Singh was hale and hearty at the time of his death and according to him, he died due to stomach ache. Though he claims that Geeta Ram was not in sound disposing mind, however, he has not produced any evidence in this regard.

26 As regards the plea that it is plaintiff No.1 who had been cultivating the suit land for the last 25-26 years, the same has no grain of truth and rather palpably false.

27 Therefore, in the given facts and circumstances of this case and also the evidence available on record as well as the legal provisions discussed hereinabove, the execution and attestation of Will Ext.DW1/A stands duly proved in accordance with law.

28 In ***Swapan Kumara and others*** *Vs.* ***Sanjay Kumar and another, 2002(3) Shim. L.C. 294***, having identical question of law formulated for adjudication, a coordinate Bench of this Court found the question of law so framed of no avail and held that the question whether a Will can be believed or not is not a question of law nor the High Court will re-appraise the evidence to ascertain whether the Will should be believed or not.

29 Learned counsel, representing the appellants has placed reliance on the judgment of Apex Court in ***S.R. Srinivasa and others*** *Vs.* ***S. Padmavathamma***, ***(2010) 5 SCC 274***, The ratio of law laid down by the Apex Court in this judgment is, however, not attracted in the given facts and circumstances of the case for the reason that none of the attesting witnesses were examined in that case and the statement of the scribe, who alone stepped into the witness box, was not taken to be that of an attesting witness, as he never signed the Will in the capacity of an attesting witness. This, however, is not the position in the case in hand, as even if it is believed that Shiv Ram Numberdar was only an identifier, one of the marginal witnesses DW3 Prem Lal has appeared into the witness box and categorically deposed about the execution and attestation of the Will in so many unambiguous words. To the similar effect is the ratio of judgment of the Apex Court in ***N. Kamalam (dead) and another*** *Vs.* ***Ayyasamy and another***, ***(2001) & SCC 503,*** which is also of no help to the case of the appellants-plaintiffs.

30 In view of what has been said hereinabove, the execution and attestation of the Will in question stands satisfactorily proved in the case in hand. There is no question of law, much less a substantial question of law involved for adjudication in the present appeal. The judgments and decrees passed by both Courts below call for no interference and deserve to be upheld.

31 For all the above reasons, this appeal fails and the same is accordingly dismissed, however, with no order as to costs.

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

Dinesh Kumar S/o Sh. Ratti Ram Sharma. ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1332 of 2014
Order Reserved on 12th December, 2014
Date of Order 24th December, 2014

Code of Criminal Procedure, 1973 - Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 147, 148, 149, 323, 353, 332, 506, 427 and 307 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- object of bail is to secure the presence of the accused during the trial- in the present case, investigation is complete and challan has already been filed in the Court- other accused have already been released on bail- mere pendency of criminal cases against the petitioner is not sufficient to decline the bail to the petitioner-considering that petitioner had joined the investigation, petitioner is ordered to be released on bail.

(Para-7 and 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179.

The State Vs. Captain Jagjit Singh AIR 1962 SC 253

Sanjay Chandra vs. Central Bureau of Investigation (Apex Court)2012 Criminal Law Journal 702

Manoj Narula vs. Union of India 2014 (9) SCC

For the Applicant: Mr. B.R. Sharma, 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 is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 78 of 2014 dated 9.6.2014 registered under Sections 147, 148, 149, 323, 353, 332, 506, 427 and 307 of IPC registered with police of Police Station Theog, District Shimla, H.P.

2. It is pleaded that applicant is innocent and has been falsely implicated in the present case. It is further pleaded that investigation is complete and applicant is not required for any other purpose. It is further pleaded that nothing is to be recovered from the applicant and it is further pleaded that the applicant is ready and willing to join the investigation of the case and undertakes that applicant will not tamper with the prosecution witnesses in any manner. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. There is recital in the police report that FIR No. 78 of 2014 dated 9.6.2014 was registered against the applicant under Sections 147, 148, 149, 323, 353, 332, 506, 427 and 307 of IPC registered with police of Police Station Theog District Shimla H.P. There is further recital in the police report that on 8.6.2014 at about 11.05 in the night a telephone received that one person is dealing in illegal business of wine. There is further recital in the police report that after receipt of information ASI Sunil Kumar along with HHC Madan Singh No. 1046 went to the place of incident and when they were standing in front of house of Sanjay Chauhan at 12.30 a.m. one Balwant Singh @ Danu along with 15/18 persons came at the spot. There is further recital in the police that Balwant Singh @ Danu and other 15/18 persons were having sticks in their hands and they attacked the complainant Sh. Brij Lal and also attacked Sandeep and Manohar Singh. There is further recital in the police report that when the police officials tried to rescue then accused persons also quarrel with ASI Sunil Kumar. There is further recital in police report that ASI Sunil Kumar also sustained incised injuries. There is further recital in the police report that accused also broken the mirror of motor vehicle No. HP 09B-0906. After registration of the FIR criminal was investigated. Site Plan was also prepared. Photographs took place and statements of witnesses were also recorded. There is further recital in the police report that during investigation complainant Brij Lal told that by mistake he mentioned the name of Balwant Singh @ Danu as prime accused instead of Dinesh Kumar @ Guddu. There is further recital in the police report that nine criminal cases have been registered against the applicant. There is further recital in the police report that other co-accused have been released on bail by learned Additional Sessions Judge CBI. There is further recital in the police report that challan already stood filed on 30.9.2014 before the Court of learned Additional Chief Judicial Magistrate Theog. There is further recital in the police report that applicant is a quarrelsome person and if he is released on bail then applicant will induce and threat the prosecution witnesses and 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. Submission of learned Advocate appearing on behalf of the applicant that challan already stood filed in the Court and no recovery is to be effected from the applicant 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. In view of the fact that investigation is already completed in the present case and in view of the fact that challan already stood filed in the criminal Court and in view of the fact that other co-accused already stood released on bail by the competent Court of law and in view of the fact that trial in 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. Court is of 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 nine criminal cases are still pending against the applicant and on this ground bail application filed by the applicant be rejected is devoid any force for the reasons hereinafter mentioned. It is well settled law that accused is presumed to be innocent till convicted by the competent Court of law. There is no recital in the police report that applicant has been convicted by any criminal Court of law. It was held in case reported ***2014 (9) SCC titled Manoj Narula*** vs. ***Union of India*** that accused is presumed to be innocent until convicted by competent Court of law. It was held that this concept would apply to a person accused of one or multiple offences.

9. Submission of learned Additional Advocate General that if the applicant is released on bail then applicant will induce and threat the prosecution witnesses and will also commit the similar offence and on this ground bail application be rejected is devoid of any force for the reasons hereinafter mentioned. Conditional bail will be granted to applicant. Court is of the opinion that if the applicant will flout the terms and conditions of bail order then prosecution will be at liberty to file application for cancellation of bail order in accordance with law. In view of the above stated facts point No.1 is answered in affirmative.

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. 1 lac 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. (vi) That applicant will not quarrel with complainant Brij Lal. (vii) That applicant will not damage the vehicle of the complainant in any manner. 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 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.

Gulchen Singh son of Suram Singh. ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1331 of 2014
Order Reserved on 10.12.2014
Date of Order 24th December, 2014

Code of Criminal Procedure, 1973 - Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 363 and 366 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 during the trial and investigation, reasonable apprehension of the witnesses being tampered with and larger interest of the public and State- In the present case, investigation was complete- challan has been filed- therefore, it would not be proper to keep applicant in custody- bail granted. (Para-7)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179.
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Criminal Law Journal page 702 Apex Court

For the Applicant: Mr. S.C. Sharma, 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 is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with FIR No. 142 of 2014 dated 10.7.2014 registered under Sections 363 and 366 of the Indian Penal Code at Police Station Nalagarh District Solan H.P.

2. It is pleaded that applicant has been falsely implicated in the present case and it is further pleaded that applicant has nothing to do with the alleged criminal offences. It is further pleaded that the applicant belongs to a reputed family in the locality. It is further pleaded that applicant has old parents dependent upon him and applicant is only bread earner in the family. It is further pleaded that prosecutrix in her statement clearly stated that she left her house at her own. It is further pleaded that applicant is not required for investigation purpose. It is further pleaded that no recovery is to be effected from the applicant and it is further pleaded that applicant will not tamper the

prosecution evidence in any manner. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. As per police report case FIR No. 142 of 2014 dated 10.7.2014 under Sections 363 and 366 was registered at Police Station Nalagarh District Solan H.P. There is recital in the police report that during investigation medical examination of the prosecutrix was conducted and as per report of Medical Officer no sexual intercourse was committed. There is further recital in the police report that accused was working in Himachal Pradesh and was tenant in the house of parents of prosecutrix. There is further recital in the police report that accused and prosecutrix were familiar with each other for 6/7 months. There is further recital in the police report that on 7.7.2014 accused called the prosecutrix from his mobile phone to Pathankot and thereafter took the prosecutrix to Jammu. There is further recital in the police report that thereafter accused took the prosecutrix to Delhi. There is further recital in the police report that accused and prosecutrix were caught at Delhi. There is further recital in the police report that learned Additional Chief Judicial Magistrate refused to record the statement of prosecutrix under Section 164 Cr.P.C. and there is further recital in the police report that thereafter birth certificate of the prosecutrix was obtained from Panchayat and Primary School. There is further recital in the police report that challan already stood filed in the competent Court of law on 27.9.2014 and there is further recital in the police report that accused is lodged in Sub Jail, Solan. There is further recital in the police report that if accused is released on bail then he would again took prosecutrix. 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 the applicant that applicant is innocent and did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits by learned trial Court after giving due opportunities to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that no recovery is to be effected from the applicant and investigation is complete and challan already stood filed in the competent Court of law 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 page 702 Apex Court, 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 investigation is already completed in the present case and in view of the fact that challan already stood filed in the criminal Court and in view of the fact that Medical Officer has opined that no sexual intercourse was committed upon the prosecutrix and in view of the fact that accused is presumed to be innocent till 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 it is expedient in the ends of justice to release the applicant on bail. 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 threat the prosecution witnesses and will also commit the similar offence and on this ground bail application be rejected is devoid of any force for the reasons hereinafter mentioned. Conditional bail will be granted to applicant. Court is 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. In view of the above stated facts point No.1 is answered in affirmative.

Point No. 2

Final Order

9. In view of my findings on point No.1 bail application filed by 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. 1 lac with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will 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. (vi) That applicant will not meet or take away prosecutrix during the trial of the case in any manner. Applicant will be released only if he is not required in any other criminal case. Bail application filed under Section 439 Cr.P.C. 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 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.

Hans Raj son of Sh Gokal Ram. .....Petitioner.

Vs.

HPSEB and another. ...Respondents.

CWP No. 9844 of 2012.
Order reserved on:31.10.2014
Date of Order: December 24, 2014.

Constitution of India, 1950- Article 226- Petitioner was appointed as temporary employee in the year 1981- his service was regularized w.e.f. 9.9.1997 – he was retired from service in July 2003, the period from 1981 to 9.9.1997 was not counted for pay fixation, increments and pensionary benefits- it was proved on record that petitioner was appointed as T-mate on work charge basis- petitioner challenged the status of T-mate after the gap of 15 years- held that service rendered by government employee as daily wages cannot be counted for pensionary benefits- further, no representation was filed for redressal of the grievances by the petitioner- no explanation was given for the delay- in these circumstances, petitioner was not entitled for any relief- petition dismissed.

(Para-5)

Cases referred:

State Bank of India Vs. L. Kannaiah and others, AIR 2003 SC 3860

P.S.Sadasivaswamy Vs. State of Tamil Nadu (Apex Court of India), 1976 (1) Service Law Reporter 53

Satija Rajesh Vs. State of Himachal Pradesh and others, AIR 2014 (Suppl.) Him L.R. (DB) 2422

M/s Rup Diamonds and others Vs. Union of India, AIR 1989 SC 674

State of Karnataka and others Vs. S.M.Kotrayya and others, 1996 (6) SCC 267

Jagdish Lal and others Vs. Vs. State of Haryana, AIR 1997 SC 2366

For the petitioner: Mr. A.K.Gupta, Advocate.
For respondents: Mr.Rajpal Singh Thakur, Advocate.

The following judgment of the Court was delivered:

P.S.Rana,Judge.

Present petition is filed under Article 226 of the Constitution of India. It is pleaded that petitioner was appointed as temporary employee in the year 1981. It is pleaded that services of the petitioner was regularized w.e.f. 9.9.1997. It is pleaded that petitioner was retired from service in July 2003. It is pleaded that petitioner was illegally treated as daily wage employee. It is pleaded that period w.e.f. 1981 to 9.9.1997 has not been counted for pay fixation, increments and pensionary benefits. It is pleaded that entire period of service of the petitioner w.e.f. 1981 to 9.9.1997 should be treated for pay fixation, increment and grant of pay scale and allowances from the initial appointment till the services of the petitioner was regularized. It is pleaded that period of service of the petitioner w.e.f. 1981 to 9.9.1997 be also counted for the purpose of pensionary benefits. Prayer for acceptance of writ petition sought.

2. Per contra reply filed on behalf of the respondents pleaded therein that present petition is barred on the concept of delay and laches. It is pleaded that petitioner is estopped to file present petition on his act and conduct. It is pleaded that petitioner has not completed qualifying service of ten years. It is further pleaded that petitioner is not entitled for the benefit of pensionary benefits in view of the decision rendered by Division Bench of Hon'ble High Court of HP in CWP No. 3493 of 2011 and in view of settlement arrived by Hon'ble Apex Court of India in civil writ petition Nos. 788 of 1987, 705 of 1987 and 398 of 1981. It is further pleaded that petitioner was appointed as work charge T-mate vide order dated September 1997 and petitioner was offered work charge status. It is pleaded that work charge employee is not entitled for pensionary benefits. Prayer for dismissal of writ petition sought.

3. Court heard learned Advocate appearing on behalf of petitioner and learned counsel appearing on behalf of respondents and also perused the record carefully.

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

(1) Whether relief after fifteen years from date of cause of action is barred on the concept of delay, laches and acquiescence as alleged?

(2) Final order.

Finding upon point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioner that the services of the petitioners for the period w.e.f. 1981 to 9.9.1997 be counted for the purpose of pay fixation and increment and the said period be also counted for the purpose of pensionary benefits is rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that petitioner was appointed as T-Mate on work charge basis. It is proved on record that thereafter petitioner voluntarily accepted the post of T-Mate on work charge basis. Petitioner did not challenge the status of T-Mate on work charge from 1997 till 11.11.2012. It is proved on record that petitioner has challenged the status of T-Mate after a gap of fifteen years. It is also proved on record that petitioner has voluntarily received the salary of T-Mate on work charge status. It was held in case reported in AIR 2014 Patna 208 titled The State of Bihar Vs. Bhagwan Singh (since dead) by legal heirs that service rendered by government employee as daily wages could not be counted for pension benefit and it was held that service of the employee for pension benefit would be calculated from the date of appointment of the employee upon a substantive post. It was held by Division Bench of Hon'ble High Court of HP in CWP No. 180 of 2001 titled State of HP and another Vs. Ram Lal and others decided on 31.5.2012 that Pension Chapter of the Civil Service Regulations which governed the employees earlier stood repealed after the enforcement of the Central Civil Service (Pension) Rules, 1972 and the savings portion of Rule 89 of the 1972 Rules does not save the office Memorandum No. F.12(1)E.V/68 dated 14.5.1968 and it was held that the service rendered on daily wages basis by the employees before their regularization/grant of work charged status could not be counted for their qualifying service for grant of pension under the Central Civil Services (Pension) Rules, 1972. It was held in case reported in AIR 2003 SC 3860 titled State Bank of India Vs. L. Kannaiah and others that clubbing of past service for the purpose of pension in the absence of rule is not permissible. In the present case petitioner did not challenge the status of his service even after his regularization on 9.9.1997. It was held in case reported in 1976 (1) Service Law Reporter 53 titled P.S.Sadasivaswamy Vs. State of Tamil Nadu (Apex Court of India) that relief should be declined to the petitioner if writ petition is not filed expeditiously. It was held that normally writ petition should be filed within six months or at the most within one year after the arisen of cause action. It was held in case reported in AIR 2014 (Suppl.) Him L.R. (DB) 2422 titled Satija Rajesh Vs. State of Himachal Pradesh and others that delay is important factor in writ petition and it was held that delay defeats equity and it was held that delay could not be brushed aside without plausible explanation. In view of the above stated facts it is not expedient in the ends of justice to grant relief to the petitioner on the concept of delay, laches and acquiescence. There is no plausible explanation of delay for about fifteen years after cause of action given by petitioner. Petitioner did not place on record any document in order to prove that petitioner had filed any representation before competent authority of law in order to redress his grievance in order to condone delay from date of cause of action. It was held in case reported in AIR 1989 SC 674 titled M/s Rup Diamonds and others Vs. Union of India that Court has consistently rejected the contention that petition should be considered ignoring delay and laches in case petitioner approaches the Court after coming to know of the relief granted by Court in similar case. It was held that the same is not proper explanation of delay and laches. It was held that litigant could not wake up from deep slumber

and could not claim impetus from the judgment in cases where some diligent person had approached within reasonable time. See 1996 (6) SCC 267 titled State of Karnataka and others Vs. S.M.Kotrayya and others See AIR 1997 SC 2366 titled Jagdish Lal and others Vs. Vs. State of Haryana. Hence point No.1 is decided against the petitioner and in favour of respondents.

Final Order.

6. In view of my findings upon point No.1 civil writ petition filed under Article 226 of the Constitution of India is dismissed on the concept of delay, laches and acquiescence. In the present case delay of more than fifteen years is writ large from the date of cause of action. No order as to costs. Writ petition disposed of. Pending application(s) if any are also disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Kali Dass & ors. ..... Petitioners.
Vs.
Shobha Ram & anr. ..... Respondents

Cr.MMO No.170 of 2014.
Judgement reserved on: 19.12.2014
Date of decision: 24.12.2014.

Code of Criminal Procedure, 1973- Section 482- Complaint was filed against the petitioners for the commission of offences punishable under Sections 451, 323, 506 and 141 read with Section 149 of IPC- Magistrate found sufficient grounds to summon the petitioners for the commission of offences punishable under Sections 451, 323, 506 and 141 read with Section 149 of IPC- it was contended that the order passed by the magistrate was bad as no reasons were given for summoning the accused- held, that there is no legal requirement to pass a detailed and speaking order while issuing the process- however, when the Investigating Agency had submitted a closure report, it was appropriate though not imperative for the Magistrate to record reasons but the order is not vitiated merely because of absence of reasons- petition dismissed.
(Para-8 to 21)

Cases referred:
Dhanalakshmi vs. R.Prasanna Kumar and others 1990 Supp 1 SCC 686
Chand Dhawan vs. Jawahar Lal and Ors. 1992 AIR (SC) 1379
Radhey Shyam Khemka vs.State of Bihar, (1993) 3 SCC 54
Mushtaq Ahmad vs. Mohd. Habibur Rehman Faizi and others (1996) 7 SCC 440
Binod Kumar & Ors. vs. State of Bihar & Anr. JT 2014 (12) SC 286
Kanti Bhadra Shah vs. State of W.B. (2000) 1 SCC 722
U.P. Pollution Control Board vs. Mohan Meakins Ltd. (2000) 3 SCC 745
Chief Controller of Imports & Exports vs. Roshanlal Agarwal (2003) 4 SCC 139
Bhushan Kumar vs. State (NCT of Delhi) (2012) 5 SCC 424.
Nupur Talwar vs. Central Bureau of Investigation and another (2012) 11 SCC 465

For the petitioner : Mr. Sanjeev Kuthiala, Advocate.
For the respondents : Mr. Ajay Sharma, Advocate, for respondent No.1.
Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals with Ms. Parul Negi, Dy. Advocate General, for respondent No. 2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This petition, under section 482 of the Code of Criminal Procedure (for short, the Code) read with Article 227 of the Constitution of India seeks quashment and setting –aside the complaint dated 12.6.2007 (Annexure P-3) made by respondent No. 1 before the learned Judicial Magistrate Ist Class, Amb, District Una, H.P., order dated 6.5.2008 (Annexure P-8) issued by the learned Magistrate whereby he issued process against the petitioners and order dated 10.3.2011 (Annexure P-11) whereby the petitioners were summoned for offences, under sections 451, 323, 506, 148 read with section 149 IPC and lastly the order dated 30.6.2014 (Annexure P-16) passed by learned Additional Sessions Judge (II), Una, whereby the revision petition preferred by the petitioners against the summoning order has been ordered to be dismissed.

2. The parties are co-owners of certain land situate in Lower Lohara, Tehsil Amb, District Una. Respondent No. 1 appears to have initiated partition proceedings with respect to the land during the course whereof it is alleged that respondent No. 1 alongwith his son was seeking to change the nature of joint land which constrained respondent No.2 to file a suit for permanent injunction. The suit was instituted on 31.5.2007 and order of status quo was passed by the learned court on 11.6.2006, which order was subsequently confirmed on 3.8.2007.

3. Case of the complainant who is respondent No. 1 herein is that on 1.6.2007, while he was lying in the verandah of his house, the petitioners came there and gave him beatings. The petitioners No. 1 to 5 were having dandas in their hands, whereas petitioner No. 6 was alleged to be armed with Drat. They hurled filthy abuses upon respondent No.1 and his mother and sisters and it is also alleged that petitioner No. 1 gave "Lathi" blows to the wife of respondent No.1. It is further alleged that all the petitioners ran behind her and after entering the house of the complainant they again gave "Lathi" blows to respondent No.1. It is also alleged that respondent No. 1 went to lodge an FIR at the police station on 1.6.2007, but was asked to come on 3.6.2007. When he went again on 3.6.2007, he was asked to come on 5.6.2007 and thereafter lastly on 8.6.2007 when the police refused to take any action and asked respondent No.1 to file a complaint.

4. On the basis of such allegations complaint (Annexure P-3) came to be filed on 12.6.2007. The learned Magistrate recorded the statement of the complainant and one Ashok Kumar on 2.6.2007, while the statement of another witness Sh. Desh Kumar was recorded on 29.6.2007. The Magistrate thereafter sent the copy of the complaint for investigation to the police under section 202 of the Code. The police reported that allegations made in the complaint were totally unsubstantiated and the complainant was wasting the time of the court. The respondent No. 1 filed objections to the report and thereafter the Magistrate summoned the petitioners under sections 148, 451, 323 read with section 149 IPC and held that there was no ground for proceeding against the petitioners under section 147, 323, 452 and 341 IPC. This order of the Magistrate was challenged in revision before the Additional Sessions Judge, Una, who vide order dated 19.11.2009 allowed the revision by relegating the parties to the position as it existed on 7.3.2008 and Magistrate was directed to proceed from the aforesaid date in order to determine whether sufficient grounds exist to proceed against the petitioners.

5. The Magistrate vide order dated 10.3.2011 found sufficient grounds to summon the petitioners for offence under sections 451, 323, 506, 148 read with section 149 IPC. This order too came to be challenged in revision before th learned Additional Sessions Judge, who vide order dated 30.6.2014 dismissed the same.

6. It is contended by the learned counsel for the petitioners that allowing the criminal proceedings to continue against the petitioners, when pre-summoning evidence does not make out any offence would tantamount to abuse of process of court, inasmuch as, a false case has been made out against the petitioners. It is further contended that in the teeth of the order passed by the then Additional Sessions Judge, whereby specific directions had been issued to the Magistrate to record reasons for issuing process, the order was not sustainable for want of reasons. It is also argued that impugned order does not reflect that the Magistrate has recorded his satisfaction before summoning the petitioners.

7. Sh. Ajay Sharma, learned counsel for respondent No.1 on the other hand has contended that present petition under section 482 of the Code read with Article 227 of Constitution which is akin to a second revision is not maintainable in view of specific bar imposed under the Code. He further submitted that since there is no irregularity much-less illegality committed by the courts below, therefore, these orders should not be interfered with.

8. Indisputably judicial process should not be an instrument of oppression or needless harassment. The court should be circumvent and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of private complainant as vendetta to harass the persons needlessly.

9. It is equally well settled that summoning of an accused in a criminal case is a serious matter and the order taking cognizance by the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. Section 482 of the Code empowers this court to exercise its inherent powers to prevent abuse of process of the court and to quash the proceedings instituted on complaint, but such powers can be exercised only in cases where the complaint does not disclose any offence or is vexatious or oppressive. If the allegations as set out in the complaint do not constitute the offence for which cognizance is taken by the Magistrate, it is open to this court to quash the same in exercise of powers, under sections 482 of the Code.

10. In the Case of **Dhanalakshmi** vs. **R.Prasanna Kumar and others 1990 Supp 1 SCC 686,** a three Judge Bench of Hon'ble Supreme Court held as under:-

> "3. Section 482 of the Code of Criminal Procedure empowers the High Court to exercise its inherent powers to prevent abuse of the process of the Court. In proceedings instituted on complaint exercise of the inherent power to quash the proceedings is called for only in cases where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which the cognizance is taken by the Magistrate it is open to the High Court to quash the same in exercise of the inherent powers under Section 482. It is not, however, necessary that there should be a meticulous analysis of the case, before the trial to find out whether the case would end in conviction or not. The complaint has to be read as a whole. If it appears on a consideration of the allegations, in the light of the statement on oath of the complainant that ingredients of the offence/offences are disclosed, and there is no material to show that the complaint is mala fide frivolous or vexatious, in that event there would be no justification for interference by the High Court**."**

11. In the case of **Chand Dhawan** vs. **Jawahar Lal and Ors. 1992 AIR (SC) 1379,** the Hon'ble Supreme Court while considering the power of the High Court under Section 482 Code of Criminal Procedure and quashing the

criminal proceedings, observed that when the High Court is called upon to exercise its jurisdiction to quash the proceedings at the stage of the Magistrate taking cognizance of the offence, the High Court is guided by the allegations, whether those allegations, set out in the complaint or the charge-sheet, do not in law constitute or spell out any offence and that resort to criminal proceedings would, in the circumstances, amount to an abuse of the process of Court or not.

12. In **Radhey Shyam Khemka** vs.**State of Bihar, (1993) 3 SCC 54,** the Hon'ble Supreme Court held as under:-

> **"**8. The complaint made by the Deputy secretary to the government of India to the CBI mentions different circumstances to show that the appellants did not intend to carry on any business. In spite of the rejection of the application by the Stock Exchange, Calcutta they retained the share moneys of the applicants with dishonest intention. Those allegations were investigated by the CBI and ultimately charge-sheet-has been submitted. On basis of that charge-sheet cognizance has been taken. In such a situation the quashing of the prosecution pending against the appellants only on the ground that it was open to the applicants for shares to take recourse to the provisions of the Companies Act, cannot be accepted. It is a futile attempt on the part of the appellants, to close the chapter before it has unfolded itself. It will be for the trial court to examine whether on the materials produced on behalf of the prosecution it is established that the appellants had issued the prospectus inviting applications in respect of shares of the Company aforesaid with a dishonest intention, or having received the moneys from the applicants they had dishonestly retained or misappropriated the same. That exercise cannot be performed either by the High court or by this court. If accepting the allegations made and charges levelled on their face value, the court had come to conclusion that no offence under the Penal Code was disclosed the matter would have been different. This court has repeatedly pointed out that the High court should not, while exercising power under Section 482 of the Code, usurp the jurisdiction of the trial court. The power under Section 482 of the Code has been vested in the High court to quash a prosecution which amounts to abuse of the process of the court. But that power cannot be exercised by the High court to hold a parallel trial, only on basis of the statements and documents collected during investigation or inquiry, for purpose of expressing an opinion whether the accused concerned is likely to be punished if the trial is allowed to proceed."

13. In the case of **Mushtaq Ahmad** vs. **Mohd. Habibur Rehman Faizi and others (1996) 7 SCC 440,** the Hon'ble Supreme Court made the following observations:-

> *"3. Having perused the impugned judgment in the light of the complaint and its accompaniments we are constrained to say, that the High Court exceeded its jurisdiction under Section 482, Cr. P.C. in passing the impugned judgment and order. It is rather unfortunate that though the High Court referred to the decision in State of Haryana v. Bhajan Lal, 1992 Supp(1) SCC 335: (1992 AIR SCW 237), wherein this Court has enumerated by way of illustration the categories of cases in which power to quash complaint or FIR can be exercised, it did not keep in mind-much less adhered to-the following note of caution given therein (SCC p.379, para 103)*
>
> *"We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or*

genuineness or other wise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice".

14. The scope of exercising of powers under section 482 Cr.P.C. was subject matter of recent decision of the Hon'ble Supreme Court in **Binod Kumar & Ors.** vs. **State of Bihar & Anr. JT 2014 (12) SC 286** wherein it has been observed as follows:-

"9. In proceedings instituted on criminal complaint, exercise of the inherent powers to quash the proceedings is called for only in case where the complaint does not disclose any offence or is frivolous. It is well settled that the power under Section 482 Cr.P.C. should be sparingly invoked with circumspection, it should be exercised to see that the process of law is not abused or misused. The settled principle of law is that at the stage of quashing the complaint/FIR, the High Court is not to embark upon an enquiry as to the probability, reliability or the genuineness of the allegations made therein. In Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi (1976) 3 SCC 736, this Court enumerated the cases where an order of the Magistrate issuing process against the accused can be quashed or set aside as under:

"(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complainant does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is a sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects such as, want of sanction, or absence of a complaint by legally competent authority and the like."

9.1. The Supreme Court pointed out that the cases mentioned are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash the proceedings.

10. In Indian Oil Corporation vs. NEPC India Ltd. And Ors. , (2006) 6 SCC 736, this Court has summarized the principles relating to exercise of jurisdiction under Section 482 Cr.P.C. to quash complaints and criminal proceedings as under:-

"The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few— Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre [JT 1988 (1) SC 279], State of Haryana v. Bhajan Lal ,1992 Supp (1) SCC 335; Rupan Deol Bajaj v. Kanwar Pal Singh Gill (1995) 6 SCC 194, Central Bureau of Investigation v. Duncans Agro Industries Ltd (1996) 5 SCC 591;State of Bihar v. Rajendra Agrawalla (1996) 8 SCC 164 , Rajesh Bajaj v. State NCT of Delhi, (1999) 3 SCC 259; Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd (2000) 3 SCC 269 Hridaya Ranjan Prasad Verma

v. State of Bihar (2000) 4 SCC 168 , M. Krishnan v. Vijay Singh (2001) 8 SCC 645 and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque (2005) 1 SCC 122 . The principles, relevant to our purpose are:

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides /malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not."

15 The learned counsel for the petitioners has strenuously argued that once the learned Additional Sessions Judge vide his order dated 19.11.2009 had set-aside summoning order of the Magistrate dated 6.5.2008, it was not open to the learned Magistrate to have passed the subsequent order in complete defiance of the order of learned Additional Sessions Judge.

16. Here it shall be apt to reproduce the reasons recorded by the then learned Additional Sessions Judge for setting aside the order passed by the learned Magistrate on 6.5.2008:-

"9. No doubt, even if the police report states that no case was made out, still the Magistrate can take cognizance and issue process. But before resorting to the said action, the Ld. Magistrate will have to pass a speaking order holding that the findings of the inquiry conducted by the police were incorrect and not worth any credence. As is the present case, the Ld. Magistrate could have either suo-motu passed a reasoned order

differing with the report of the police or allowed the protest preferred by the complainant. Moreso, the allegations in the complaint and the testimony of two witnesses were already on record before the Ld. Magistrate. After assessing the merits of the two conflicting premises the Ld. Magistrate had to come to a specific finding either relying on the inquiry report or rejecting it before proceeding any further. The Ld. Magistrate could not have read both simultaneously. Only after having brushed aside the findings of the inquiry, the Ld. Magistrate could have summoned the other witnesses of the complainant. To this limited extent, the Ld. Court below has failed to exercise discretion vested in him under law."

17 It is settled law that there is no legal requirement imposed on a Magistrate for passing a detailed and speaking order while issuing process. As a matter of fact at the stage of issuing process to the accused, the Magistrate is not required to record any reasons. (Ref: **Kanti Bhadra Shah** vs. **State of W.B. (2000) 1 SCC 722, U.P. Pollution Control Board** vs. **Mohan Meakins Ltd. (2000) 3 SCC 745, Chief Controller of Imports & Exports** vs. **Roshanlal Agarwal (2003) 4 SCC 139** and **Bhushan Kumar** vs. **State (NCT of Delhi) (2012) 5 SCC 424.**

18. But the question which arises for determination is as to whether the Magistrate while differing with the report filed by the Investigating Agency is required to record reasons while issuing process. This precise question has been dealt with in detail in **Nupur Talwar** vs. **Central Bureau of Investigation and another (2012) 11 SCC 465** wherein it has been categorically held that where the Investigating Agency had submitted a closure report, it was only appropriate though no imperative for the Magistrate to record reasons for differing with the prayer made in the closure report. But at the same time, it was also emphasized that an order issuing process cannot be vitiated merely because of absence of reasons.

19 The Code of Criminal Procedure expressly delineates irregularities in procedure which would vitiate proceedings. Section 461 thereof, lists irregularities which could lead to annulment of proceedings. Section 461 aforesaid is extracted hereinunder:

"461. Irregularities which vitiate proceedings- If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:-

(a) attaches and sells property under section 83;

(b) issues a search-warrant for a document, parcel or other thing in the custody of a postal or telegraph authority;

(c) demands security to keep the peace;

(d) demands security for good behaviour;

(e) discharges a person lawfully bound to be of good behaviour;

(f) cancels a bond to keep the peace;

(g) makes an order for maintenance;

(h) makes an order under section 133 as to a local nuisance;

(i) prohibits, under section 143, the repetition or continuance of a public nuisance;

(j) makes an order under Part C or Part D of Chapter X;

(k) takes cognizance of an offence under clause (c) of sub- section (1) of section 190;

(l) tries an offender;

(m) tries an offender summarily;

(n) passes a sentence, under section 325, on proceedings recorded by another Magistrate;

(o) decides an appeal;

(p) calls, under section 397, for proceedings; or

(q) revises an order passed under section 446, his proceedings shall be void."

20 In a situation as the one in hand, Section 465(1) of the Code, protects orders from errors, omissions or irregularities unless "a failure of justice" has been occasioned thereby. Most certainly an order delineating reasons cannot be faulted on the ground that it has occasioned failure of justice. **[**Ref: **Nupur Talwar** vs. **Central Bureau of Investigation and another** (supra) **].**

21. In view of the aforesaid detailed discussion, I find no illegality or infirmity with the orders of the learned courts below and the present petition being devoid of any merit is dismissed.

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

Kehar Singh ...Appellant.
Versus
State of H.P. ...Respondent.

Cr.Appeal No.3 of 2012
Reserved on: 18.12.2014.
Decided on: 24.12.2014

Indian Penal Code, 1860- Section 376- Prosecutrix returned with her friends- she forgot her bag and returned to retrieve it-Accused met her with his friends on the way and told her that he had not seen any bag- Accused took prosecutrix on his scooter - he stopped the scooter on the way and raped the prosecutrix in the jungle- prosecutrix narrated the incident to her aunt and her parents- held that none of the friends of the prosecutrix was examined to corroborate her version- prosecution had also not examined the persons with whom accused was present- thus, genesis of the occurrence had become doubtful and leads to an inference that prosecutrix had met the accused alone for a specific purpose- testimony of the aunt was not satisfactory, which creates doubt that she had ever met prosecutrix or the prosecutrix had narrated any incident to her- prosecutrix admitted that she had fallen down the scooter which shows that prosecutrix had inculpated the accused when an inquiry was made from her by her parents-no injuries were found on the private parts of the prosecutrix which shows that she was a consenting party. (Para-10 to 13)

For the Appellant: Mr.N.K Thakur, Sr. Advocate with Mr. Rohit Bharol, Advocate.
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, rendered on 30.11.2011, by the learned Additional Sessions Judge (I), Kangra at Dharamshala, H.P. in Sessions Case No. 43 of 2011, whereby, the accused/appellant has been convicted and sentenced to undergo rigorous

imprisonment for ten years and to pay a fine of Rs.30,000/- under Section 376 IPC and in default of payment of fine, he has been sentenced to further undergo simple imprisonment for a period of six months.

2. The brief facts of the case are that prosecutrix PW-1 was attending tailoring session at Dadasiba with her aunt, Smt. Meena Kumari (PW-7). It is alleged that on 24.11.2010 the prosecutrix had gone with her aunt for training but her aunt had returned home around 12.00 a.m. and the prosecutrix was returning home around 3.00 p.m. with her friends in a tractor trolley and alighted at Gurala, as they did not find a bus. At that time, the prosecutrix found that her bag was missing and thereafter she proceeded on foot towards Dadasiba. It is further alleged that around 3-3.30 p.m. Tarsem Singh (PW-8) Pammi, Subhash and accused Kehar Singh were sitting by the road side, some two kilometers behind Dadasiba towards Gurala. It is alleged that on her way, the prosecutrix met the above persons and accused Kehar Singh and they asked her as to where she was going, on which the prosecutrix told that she was going in search of her bag. It is alleged that thereafter these persons told that they had come from that side and they did not find her bag. Thereafter, Pammu asked accused Kehar Singh to take the prosecutrix to village Gurala on his scooter. It is alleged that though the accused took the prosecutrix on his scooter, but at some distance he stopped the scooter in the jungle, where there were bushes. It is alleged that thereafter accused Kehar Singh caught hold of the prosecutrix from her arms and took her towards the jungle even though, she objected to the act of the accused. Thereafter the accused laid the prosecutrix on the ground and committed rape on her. It is further alleged that thereafter accused brought the prosecutrix on his scooter up to Gurala and pushed her down from the scooter and fled away on his scooter. It is alleged that on her way to her home, the prosecutrix met her aunt (PW-7) Meena Kumari and wife of Tarsem, while she was weeping and told them about the above incident. It is alleged that Tilak Raj (the father of the prosecutrix) reached his home around 6-6.30 p.m and the prosecutrix also came weeping home and she told her father and mother about the entire incident. It is further alleged that Tilak Raj talked about the incident with Ward Panch Kashmir Singh and after arranging a vehicle Tilak Raj alongwith Kashmir Singh, the prosecutrix and her aunt went to Police Station, Dehra and lodged F.I.R Ext.PW-1/A around 12 in the night. It is alleged that the prosecutrix was got medically examined at Civil Hospital, Dehra and Dr. Anita Mahajan opined that the possibility of sexual intercourse could not be ruled out, as per MLC Ex.PW-1/B. It is alleged that the police came to prosecutrix's house on the next day and she produced her clothes i.e. Salwar Ex.P1 and Kameej Ex.P2, which were taken into possession vide memo Ext.PW-1/C by the I.O. in the presence of witnesses. It is alleged that the accused took the police to the spot and the police took photographs of spot and prepared spot map. The police had also taken into possession the birth certificate of the prosecutrix. It is alleged that the clothes of the prosecutrix and accused were seized and sent to the FSL for examination and human semen was detected on shirt and salwar of the prosecutrix and underwear of accused Kehar Singh.

3. On conclusion of investigation into the offences, allegedly committed by the appellant/accused, challan was filed under Section 173 of the Code of Criminal Procedure.

4. The accused was charged for his having committed offence punishable under Section 376 IPC by the learned trial Court, to which he pleaded not guilty and claimed trial.

5. In proof of the prosecution case, the prosecution examined as many as 14 witnesses. On closure of the prosecution evidence, statement of appellant/accused under Section 313 Cr.P.C. was recorded by the Court in which he claimed false implication and pleaded innocence. He did not choose to lead evidence in defence.

6. On appraisal of evidence on record, the learned trial Court convicted and sentenced the accused for his having committed the offence, aforesaid.

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

8. On the other hand, the learned Deputy Advocate General, appearing for the respondent-State, has, with considerable force and vigour, contended that the findings of conviction, recorded by the Court below, are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

9. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

10. The prosecution case can succeed in the event an incisive discernment of the testimony of the prosecutrix unravels the fact of her testimony being both inspiring credible and trustworthy. Trustworthiness in its entirety would be imbued to her deposition comprised in her examination in chief in the event of hers having not contradicted it in her deposition comprised in her cross-examination. Besides even the deposition of the prosecutrix comprised in her examination-in-chief has also to be subjected to an incisive analysis for unearthing whether the story propounded by her therein is bereft of unnaturalness as also does not smack of any prevarication so as to erode the genesis of the prosecution version. The prosecutrix in her examination-in-chief had portrayed therein that on the fateful day she had gone with her aunt for receiving training in tailoring at Dadasiba. However, her aunt had returned home at about 12.00 a.m. She proceeds to depose that their class ended around 3.00 p.m and that on closure of the training session for the day she alongwith her friends Shilpa and others were waiting for alighting a bus at Dadashiba for its commuting them to their native place. However, since the bus did not arrive, they boarded a tractor Trolley wherefrom they alighted at Gurala. She deposes that since she there noticed that her bag was missing, she hence proceeded towards Dadasiba on foot to locate it. However the genesis of the prosecution version of hers returning in the company of Shilpa and others after closure of training session in tailoring at 3 p.m. and theirs having waited for a bus at Dadasiba, which however not having arrived, they were constrained to board a Tractor Trolley which they alighted at Gurala, where she has noticed her bag to be missing which constrained her to proceed on foot towards Dadsiba, to gain credibility necessitated recording of the statements by the Investigating Officer of Shilpa and other friends in whose company she boarded the tractor trolley which they alighted at Gurala, at which latter place the prosecutrix having noticed that her bag was missing, constrained her for locating/detecting to proceed on foot towards Dadasiba. The recording of the statements of aforesaid Shilpa and other friends and their consequent examinations-in-chief would have given immense weight, probative force and sinew to the version as disclosed by the prosecutrix in her examination-in-chief of hers having alighted at Gurala from a Tractor Trolley which they boarded in the face of non-arrival of bus to commute them to their respective homes, she there having noticed that a bag was missing led her to retrace on foot towards Dadasiba to detect it. Consequently, the non-recording of the statements of the aforesaid and their consequent non-examination rather fillips an inference that as a matter of fact the prosecutrix had not on the fateful day on closure of the training sessions in

tailoring returned home in the company of Shilpa and others nor also it can boost the further concomitant inference that she alighted from the tractor trolley at Gurala where she noticed that her bag was missing for whose detection she retraced her steps towards Dadasiba. Consequently, the genesis of the prosecution story which dominantly portrays the factum of hers having alighted the tractor trolley at Gurala where she noticed a bag was missing, for whose detection she retraced her steps towards Dadasiba, comes to suffer emasculation. Further more, if the above inference or deduction is ensueable, the further factum of hers having met on her retracing her steps towards Dadasiba for detecting her bag, the accused, along with Subhash Chand, Billu and Pammu, also loses credibility. Moreso, in the face of the Investigating Officer having omitted to examine Subhash Chand, Billu and Pammu in whose company the accused was when on hers retracing her steps towards Dadasiba for locating her missing bag she met him. As a corollary the non-recording of the statements of the aforesaid by the Investigating Officer and their non-examination, hence constrains this Court to conclude that the accused when admitted by the prosecutrix to be known to her for the last 3-4 years had met the prosecutrix alone. Besides an inference also ought to be drawn especially in the face of genesis of the prosecution story for want of recording of the statements of class mates in whose company she was purportedly returning home in a tractor trolley till Gurala where she alighted and detected that her bag was missing and for whose detection she retraced her steps towards Dadasiba and the consequent non-examination, as such, renders the said factum to have remained unsubstantiated. The ensuing deduction is that the meeting interse the prosecutrix and the accused was prearranged and that too for a specific purpose. Though the prosecution has examined one Tarsem Singh (PW-8) to portray the fact in substantiation of the version in the examination-in-chief of the prosecutrix of hers having while she was retracing her steps towards Dadasiba on hers alighting at Gurala where she met PW-8 alongwith accused and Subhash Chand, Billu and Pammu where the accused offered the prosecutrix a seat on his scooter for detecting her missing bag. Nonetheless when the prosecutrix has omitted to name PW-8 to be one of the persons in whose company the accused was when she met him renders his deposition qua the factum in purported corroboration of the deposition of PW-1 of hers having lost her bag, she having detected the factum of its being lost at Gurala which led her to retrace her steps towards Dadasiba to locate it, wherein she met the accused along with PW-8, , to be incredible. It appears that PW-8 is merely a planted witness to lend corroboration to the slanted version of PW-1.

11. Consequently, hence reinforcingly, it can be concluded that as a matter of fact the prosecutrix was un-accompanied by her class mates on closure of training Sessions in tailoring for the day, besides a conclusion can also be formed that she did not meet the accused at Gurala rather she met him outside the premises of the institute where she received training in tailoring. With renewable vigour, it can be said that the prosecutrix has invented a false pretext of hers having alighted from the Tractor Trolley alongwith her classmates at Gurala where she detected the factum of her bag being lost for whose location she retraced her steps towards Dadasiba for locating it and enroute she having met the accused. Rather, when this Court concludes that the said factum is invented and manufactured, it can be firmly concluded that the meeting interse the prosecutrix and the accused was prearranged at a place other than Gurala.

12. The prosecutrix discloses in her examination in chief that on the consummation of the offence at the instance of the accused in a Jungle whereto both proceeded when they both alighted from the scooter, while she was returning home, she having met her aunt named Meena Kumari to whom a disclosure qua the incident was made also appears to be prevaricated and invented especially in the face of the appraisal of the examination-in-chief of PW-7 Meena Kumari portraying that the prosecutrix met her around 4-4.30 p.m. whereas it appears in the cross-examination of PW-7 and also in the

examination in chief of PW-2 (the father of the prosecutrix) that the prosecutrix had returned home at about 6-6.30 p.m., hence, rendering untruthful the factum of hers having met PW-7 on consummation of the offence at a time much prior to the returning home of the prosecutrix. Consequently, in face thereof, more especially when the prosecution has not brought home any evidence portraying that the distance of the shops near Gurala where PW-7 met the prosecutrix and where the latter disclosed the occurrence to her and the home of the prosecutrix where she had returned at about 6-6.30 p.m. is improximately located so as to consume 2-2 ½ hours therefrom till her home. Obviously, in the absence of above evidence a firm conclusion which is to be drawn that PW-7 never met the prosecutrix near the shop at Gurala at 4-4.30 p.m., besides it has also to be concluded that no disclosure of the occurrence was made by PW-1 to PW-7. Moreover what aggravates an inference of the prosecutrix having never met PW-7 is the factum as divulged in the cross-examination of PW-7 of hers not having on the day the police visited the village disclosed to them the factum of a disclosure having been made by the prosecutrix to her of the occurrence. Omission by PW-7 to disclose to the police immediately on theirs visiting the village rather her statement having come to be recorded 2 days subsequent to the occurrence constitutes it to be gripped with the vice of premeditation and concoction rendering hence the version as deposed by her in unison with PW-1 of the former having disclosed to the latter the factum of the alleged occurrence having taken place to be also incredible. In face thereof, the deposition of the prosecutrix qua the fact aforesaid comes to be ridden with falsity.

13. The prosecutrix in her cross-examination deposes that while she was astride the scooter, she fell down and sustained injuries. The factum of existence of injury on her face was noticed by her parents. It appears hence that when she apprised them the cause of the injuries inasmuch as hers having gained them while having fallen from the scooter of the accused on which she was astride enraged them, besides it appears that it led to an incisive effort on the part of her parents to elicit from her the factum of the occurrence, on such elicitation it appears that the prosecutrix contrived a version so as to inculpate the accused. Besides the factum of as emanating on a reading of the cross-examination of PW-4 of one Gyan Chand having seen the factum of the prosecutrix occupying the scooter along with the accused aroused the sense of honour and indignity of the family which constrained the prosecutrix to inculpate the accused. However such inculpation is a sheer machination on the part of the prosecutrix, in the face of aforesaid discussion unfolding the factum of hers while having known the accused for the last 3-4 years, she having had a prearranged encounter with him where-after she given the evident fact of hers having arrived at the age of consent consensually succumbed to his sexual overtures. The testimony of PW-9, the Doctor, though unfolds the factum of sexual intercourse having taken place nonetheless the further factum of absence of injuries other than injury No.1 which was noticed on the face and had occurred demonstrably as apparent from a disclosure in the cross-examination of the prosecutrix of her having fallen from the scooter of the accused on which she was astride repulses the factum of the accused having perpetrated forcible sexual intercourse on the victim. Besides no injury having been noticed on the private part of the prosecutrix personificatory of the prosecutrix having consented to the sexual overtures of the accused does impel this Court to conclude that the prosecutrix did not resist the sexual overtures of the accused rather she consensually succumbed to the same. In sequel when she was a consensual partner to the sexual overtures of the accused no inference of the accused having committed the offence can be drawn.

14. In view of the above discussion, the appeal is allowed and the impugned judgment is set aside. The appellant is acquitted of the offence charged. He be set at liberty forthwith, if not required in any other case.

15. The Registry is directed to prepare the release warrant of the appellant and send it to the Superintendent of the Jail concerned, in conformity with this judgment forthwith. Records of the trial Court be sent down forthwith.

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

Sh. Krishan Chand son of late Sh. Ram Rakhu. ....Petitioner.
Vs.
HPSEB Limited and another ....Respondents.

CWP No. 1893 of 2013.
Order reserved on:31.10.2014
Date of Order: December 24,2014.

Constitution of India, 1950- Article 226- Petitioner claimed that he was appointed as temporary employee- he is entitled for the pay and allowances at par with the temporary employees and his entire services should be counted for the purpose of pension, gratuity and other service benefits- petitioner was regularized on 14.2.1992 and he filed writ petition on 2.4.2913, after the gap of 21 years- no explanation was given for the delay- hence, petition is liable to be dismissed on this short ground alone. (Para-5)

Cases referred:

P.S.Sadasivaswamy Vs. State of Tamil Nadu (Apex Court of India), 1976 (1) Service Law Reporter 53

Satija Rajesh Vs. State State of Himachal Pradesh 2014 (Suppl) Him L.R. (DB) 2422

M/s Rup Diamonds and others Vs. Union of India, AIR 1989 SC 674

State of Karnataka and others Vs. S.M.Kotrayya and others, 1996 (6) SCC 267

Jagdish Lal and others Vs. Vs. State of Haryana AIR 1997 SC 2366

For the petitioner: Mr. A.K.Gupta, Advocate.
For respondents: Mr.Raj Pal Thakur, Advocate.

The following judgment of the Court was delivered:

P.S.Rana,Judge.

Present petition is filed under Article 226 of the Constitution of India. It is pleaded that petitioner was working continuously in the regular establishment of HP State Electricity Board (HPSEB) from the date of his initial engagement w.e.f. 21.12.1984 till his services were regularized in the year 1992. It is pleaded that petitioner was not a daily wage employee but petitioner was temporary employee in the regular establishment and he is legally entitled for the pay and allowances at par with the temporary employees. It is pleaded that entire services of the petitioner be counted for the purpose of pension, gratuity and other service benefits and entire arrears be ordered to be paid to petitioner. Prayer for acceptance of petition sought.

2. Per contra reply filed on behalf of respondents pleaded therein that writ petition is not maintainable. It is pleaded that petition suffers from delay and laches and the same is barred by limitation. It is pleaded that petitioner was engaged on daily wages and worked w.e.f. 21.12.1984 to 13.2.1992. It is pleaded that thereafter the services of the petitioner were regularized on 14.2.1992. It is pleaded that petitioner is estopped to file present petition in view of his act and conduct and acquiescence. It is pleaded that petitioner was engaged as lower division Clerk on daily wages w.e.f. 21.12.1984

and thereafter petitioner was regularized on and w.e.f. 14.2.1992. Prayer for dismissal of petition sought.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of respondents and also perused the record carefully.

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

(1) Whether relief is barred after twenty one years from date of cause of action on the concept of delay, laches and acquiescence as alleged?

(2) Final order.

Finding upon point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioner that service of petitioner be treated w.e.f 21.12.1984 to 13.2.1992 for pay fixation, pension, gratuity and other service benefits is rejected being devoid of any force for the reason hereinafter mentioned. In the present case petitioner was regularized on dated 14.2.1992. Petitioner filed present petition on dated 2.4.2013 after a gap of twenty one years for fixation of pay scale relating to his service tenure. No plausible explanation given by petitioner for filing present civil writ petition at belated stage from the date of cause of action. It was held in case reported in 1976 (1) Service Law Reporter 53 titled P.S.Sadasivaswamy Vs. State of Tamil Nadu (Apex Court of India) that relief should be declined to the petitioner if writ petition is not filed expeditiously. It was held that normally writ petition should be filed within six months or at the most within one year after the arisen of cause action It was held in case reported in 2014 (Suppl) Him L.R. (DB) 2422 titled Satija Rajesh Vs. State State of Himachal Pradesh that delay is important factor in writ petition and it was held that delay defeat the equity. It was further held that delay could not be brushed aside without plausible explanation. In the present case petitioner did not place on record any document in order to prove that he had filed any representation before competent authority of law for redressal of his grievance in order to condone delay. It was held in case reported in AIR 1989 SC 674 titled M/s Rup Diamonds and others Vs. Union of India that Court has consistently rejected the contention that petition should be considered ignoring delay and laches in case petitioner approaches the Court after coming to know of the relief granted by Court in similar case. It was held that the same is not proper explanation of delay and laches. It was held that litigant could not wake up from deep slumber and could not claim impetus from the judgment in cases where some diligent person had approached within reasonable time. See 1996 (6) SCC 267 titled State of Karnataka and others Vs. S.M.Kotrayya and others See AIR 1997 SC 2366 titled Jagdish Lal and others Vs. Vs. State of Haryana. Hence point No.1 is decided against the petitioner and in favour of respondents.

Final order.

6. In view of my findings upon point No.1 civil writ petition filed under Article 226 of the Constitution of India is dismissed on the concept of delay, laches and acquiescence. In the present case delay of more than twenty one years is writ large from the date of cause of action. No order as to costs. Writ petition disposed of. Pending application(s) if any are also disposed of.

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

Kunal Jaggi S/o Sh Ajay Jaggi ....Applicant.
Vs.
State of Himachal Pradesh. ....Non-applicant.

Cr.MP(M) No.1297 of 2014.
Order reserved on:5.12.2014.
Date of Order: December 24 ,2014,

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for commission of offences punishable under Sections 420 and 120-B 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 accused are regarding the embezzlement of Rs. 1 lac- hence, in these circumstances, custodial interrogation of the accused is necessary- bail rejected. (Para-7)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179

The State Vs. Captain Jagjit Singh AIR 1962 SC 253

For the applicant: Mr.B.M.Chauhan, Advocate.
For the respondent: Mr.R.P.Singh, Asstt. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present petition filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with FIR No. 66 of 2014 dated 28.10.2014 registered under Sections 420 and 120-B of the Indian Penal Code at Police Station Darlaghat District Solan HP.

2. It is pleaded that applicant is innocent and he has been falsely implicated in the present case. It is pleaded that no recovery is to be effected from the applicant. It is pleaded that applicant is a student of Civil Engineering. It is pleaded that applicant will join investigation of the case. It is pleaded that applicant will not tamper with prosecution evidence. It is pleaded that applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report in connection with FIR No. 66 of 2014 dated 28.10.2014 registered under Sections 420 and 120-B of the Indian penal Code at Police Station Darlaghat, District Solan HP filed. There is recital in police report that applicant Kunal Jaggi is the prime accused and he has connection with other co-accused who recorded entry of pet coke trucks illegally. There is recital in police report that factually the pet coke truck did not unload in the office of Company. There is recital in police report that applicant upon his mobile No. 8557880001 remained practically in contact with other co-accused Harish and truck driver Sunil Kumar since 19.10.2014. There is recital in police report that applicant has caused financial loss to the Company to the tune of Rs.8,00,000/- (Rupee eight lacs) by way of committing cheating in furtherance of criminal conspiracy. There is recital in police report that custodial investigation of the applicant is essential in the present case in order

to ascertain the involvement of other co-accused persons in the criminal offence of cheating and criminal conspiracy. Prayer for rejection of anticipatory bail application sought.

4. Following points arise for determination in the present bail application:

(1) Whether anticipatory bail application filed under Section 438 of the Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of bail application.

(2) Final Order.

5. Court heard learned Advocate appearing on behalf of applicant and learned Assistant Advocate General appearing on behalf of State and also perused entire record carefully.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case and on this ground present anticipatory bail application be allowed is rejected being devoid of any force for the reason hereinafter mentioned. Fact whether applicant is innocent or not cannot be decided at this stage. Same fact will be decided when the case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties.

7. Another submission of learned Advocate appearing on behalf of the applicant that applicant is a student and he will join the investigation as and when required by the investigating agency and applicant will not tamper with the prosecution witness and will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors are to be considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In the present case allegations against the applicant are very heinous and grave in nature qua embezzlement of Rs.8,00,000/- (Rupee eight lac). Court is of the opinion that custodial investigation of the applicant is essential in the present case in order to ascertain the involvement of other co-accused persons in the commission of offence punishable under Section 420 read with Section 120-B IPC. Court is of the opinion that if anticipatory bail application is granted to the applicant at this stage then investigation of the case will be adversely effected. Court is also of the opinion that if anticipatory bail application is allowed at this stage then interest of the State and general public will also be adversely effected.

8. Submission of learned Assistant Advocate General appearing on behalf of the State that if the applicant is released on bail at this stage then applicant will induce and threat the prosecution witness is accepted for the reason hereinafter mentioned. There is apprehension in the mind of the Court that if the applicant is released on bail at this stage then applicant will induce and threat the prosecution witness. In view of the fact that investigation is in initial stage of case and in view of the fact that allegations against the applicant are very serious and grave in nature qua cheating and criminal conspiracy of huge amount of Rs.8,00,000/- (Rupee eight lacs) it is not expedient in the ends of justice to release the applicant on anticipatory bail at the initial stage of the investigation. Court is of the opinion that custodial investigation of the applicant is essential in the ends of justice because an amount of Rs.8,00,000/- (Rupee

eight lacs) is involved in the present case. Hence Point No.1 is answered in negative.

Final Order

9. In view of my findings upon point No.1 present anticipatory bail application filed under Section 438 of the Code of Criminal Procedure 1973 by the applicant is rejected. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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

Moti Ram Kainthla son of late Shri Rulda Ram ....Petitioner

Versus

State of H.P. and others ....Respondents

CWP No. 6363 of 2013

Order Reserved on 28st November,2014

Date of Order 24th December, 2014

Constitution of India, 1950- Article 14- Petitioner pleaded that he was asked to perform duty of Assistant Collector (Printing) w.e.f. 5.10.1992 till 21.2.1994 and no benefit of pay was granted to him- petitioner made a representation but no decision was conveyed to him- he applied under RTI and was informed that his case was rejected on the ground that no ex-post-facto sanction could be granted in case of promotion- however, such ex-post-facto sanction was granted to one 'S'- petitioner claimed the benefit of higher scale- respondent stated that 'S' had performed the duties of Assistant Collector till his retirement and no order was passed directing the petitioner to hold the charge of Assistant Controller- it was proved on record that the petitioner had performed the duties of Assistant Collector in addition to his work- held, that the petitioner is entitled to the salary of Assistant Controller on the principle of equal pay for equal work. (Para-5)

Cases referred:

Vijay Kumar and others vs. State of Punjab and others, AIR 1994 SC 265

Harbans Lal and others vs. State of H.P. and others (1989)4 SCC 459

Grih Kalyan Kendra Workers' Union vs. Union of India and others AIR 1991 SC 1173

State of Madhya Pradesh and another vs. Pramod Bhartiya and others AIR 1993 SC 286

U.P. Rajya Sahakari Bhoomi Vikas Bank Ltd., U.P. vs. Its Workmen AIR 1990 SC 495

For the Petitioner: Mr. R.K. Gautam Sr. Advocate with Mr. Gaurav Gautam, Advocate.

For Respondents: Mr. Puneet Razta, Deputy Advocate General with Mr. J.S. Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India pleaded therein that on dated 15.12.1954 petitioner was appointed as compositor in the Printing and Stationery Department which is Class III post and on dated 16.12.1961 petitioner joined the department of Industry Government of Himachal Pradesh and served there till the year 1972. It

is pleaded that on dated 30.11.1972 petitioner joined back the Printing and Stationery Department as computer and thereafter petitioner was promoted as Assistant Section Holder in July 1973. It is also pleaded that on dated 28.10.1978 petitioner was promoted as Section Holder on adhoc basis and thereafter on regular basis on 19.11.1979 and thereafter petitioner was promoted as General Foreman on dated 27.2.1986. It is pleaded that on dated 5.10.1992 one Shri Gurbachan Singh Assistant Controller (Printing) had attack of paralyses and he could not join back his duties till his retirement and due to this reason petitioner was asked to perform the duty of Assistant Controller (Printing) being the senior most Section Foreman and petitioner performed the duty of Assistant Controller (Printing) till dated 31.3.1994 but no benefit of additional pay was granted to petitioner as provided under the provision of FR 49 (iii) by the respondent department. It is pleaded that on dated 31.3.1994 petitioner retired from the service of respondent department after attaining the age of superannuation. It is also pleaded that on dated 29.8.1994 petitioner submitted a representation to the Hon'ble Chief Minister of Himachal Pradesh for the payment of officiating pay against the post of Assistant Controller (Printing) w.e.f. 3.10.1992 to 31.3.1994 and on dated 4.3.1996 petitioner once again made a representation on the same ground as was submitted on dated 29.8.1994 but nothing was conveyed to the petitioner. It is pleaded that petitioner sought information from the State Government regarding his case which was supplied to petitioner vide letter dated 9.5.2013 and after perusal of information petitioner came to know that case of petitioner was rejected on the ground that no ex-post-facto sanction could be granted in the matter of promotion. It is pleaded that on dated 15.6.2013 petitioner was informed by the respondent department under RTI that ex-post-facto sanction was granted to one Shri Som Dutt Sharma against the post of Controller w.e.f. 28.11.1990 vide notification dated 26.9.2012. It is pleaded that rejection of claim by respondent department for grant of ex-post-facto sanction to the post of Assistant Controller (Printing) be quashed and further pleaded that respondent be directed to give all benefits to the petitioner to the post of Assistant Controller (Printing) w.e.f. 3.10.1992 to 31.3.1994 and petitioner be granted all service consequential benefits. Prayer for acceptance of writ petition sought.

2. Per contra reply filed on behalf of respondents Nos. 1 to 3 pleaded therein that petitioner has retired from service on dated 31.3.1994 after serving for 34 years and further pleaded that present petition is filed after 20 years of superannuation which is barred by delay and latches. It is admitted that petitioner was promoted on regular basis to the post of Section Holder in the year 1978. It is pleaded that Shri Gurbachan Sharma remained on medical leave w.e.f. 3.10.1992 to 7.7.1994 and thereafter retired on medical ground on 8.7.1994. It is pleaded that during medical leave of Deputy Controller Shri Som Dutt performed the duties of Assistant Controller (Printing) upto his retirement on dated 31.1.1993. It is pleaded that no orders were issued by the competent authority directing the petitioner to hold the charge of Assistant Controller (Printing). It is pleaded that petitioner could not be allowed to get the benefit of higher post. Prayer for dismissal of petition sought.

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

4. Following points arise for determination in this civil writ petition:-

5. Whether petitioner is entitled for the salary for the post of Assistant Controller (Printing) w.e.f. 1.2.1993 to 31.3.1994 as alleged?

6. Final Order.

<u>Findings on point No.1</u>

5. Submission of learned Advocate appearing on behalf of the petitioner that petitioner had worked as officiating Assistant Controller (Printing)

w.e.f. 1.2.1993 to 31.3.1994 and he is entitled for the salary of the post of Assistant Controller (Printing) on the concept of equal pay for equal work is accepted for the reasons to be recorded hereinafter. It is proved on record that Moti Ram Kainthla petitioner was Senior General Foreman in the department of Printing and Stationery department and he retired from service on 31.3.1994. It is also proved on record that Shri Gurbachan Sharma the then Assistant Controller (Printing) had applied for two days casual leave for 3.10.1992 and 5.10.1992. It is pleaded that thereafter Gurbachan Sharma suffered the paralyses attack and he remained on leave upto 7.7.1994 and thereafter he took voluntary retirement on dated 8.7.1994. It is also proved on record that during the leave period of Gurbachan Sharma Moti Ram Kainthla petitioner worked as Assistant Controller (Printing) in addition to his duties and it is also proved on record that petitioner received the information under RTI Act from the department and department had submitted written report that Shri Moti Ram Kainthla had worked upon the post of Assistant Controller (Printing) w.e.f. 1.2.1993 to 31.3.1994. Thereafter case was forwarded for additional salary to the petitioner qua additional charge of post of Assistant Controller (Printing). Thereafter competent authority observed that retrospective promotion should not be encouraged. Thereafter case of petitioner for payment of additional salary for the post of Assistant Controller (Printing) was rejected. After rejection of case petitioner filed present civil writ petition. It was held in case reported in ***AIR 1994 SC 265 titled Vijay Kumar and others vs. State of Punjab and others*** that as per Article 39(d) of the Constitution of India there shall be equal pay for equal work for both men and women. It was held in case reported in ***(1989)4 SCC 459 titled Harbans Lal and others vs. State of H.P. and others*** that as per Articles 14 and 16 and 39(d) of Constitution of India there should be equal pay for equal work. It was held in case reported in ***AIR 1991 SC 1173 titled Grih Kalyan Kendra Workers' Union vs. Union of India and others*** that as per Articles 14, 16, 12 39(d) of Constitution of India there should be equal pay for equal work. It was held that this right has assumed the status of fundamental right and it was held that this right is applicable to the establishment of State. It was held in case reported in ***AIR 1993 SC 286 titled State of Madhya Pradesh and another vs. Pramod Bhartiya and others*** that employee is entitled for equal pay for equal work in view of Articles 14, 16(1) and 39(d) of Constitution of India. It was held in case reported in ***AIR 1990 SC 495 titled U.P. Rajya Sahakari Bhoomi Vikas Bank Ltd., U.P. vs. Its Workmen*** that employee is entitled for equal pay for equal work. In view of admission of fact by competent authority in the information given under RTI Act that petitioner had worked as Assistant Controller (Printing) w.e.f. 1.2.1993 to 31.3.1994 in addition to his own work it is held that petitioner is entitled for additional salary for the post of Assistant Controller (Printing) w.e.f. 1.2.1993 to 31.3.1994.

6. Submission of learned Deputy Advocate General appearing on behalf of the respondents that petition has been filed at belated stage and same be dismissed on the concept of delay and latches and acquiescence is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that representation was filed by the petitioner before the competent authority for redressal of his grievances and it is also proved on record that result of representation was not communicated to the petitioner with reasons and thereafter petitioner obtained the information under RTI Act and thereafter after obtaining the information under RTI Act petitioner had filed present petition expeditiously. Hence delay is properly explained in present petition and delay if any is condoned in the ends of justice keeping in view the fact that petitioner is an old and senior citizen of India and keeping in view that representation was filed by petitioner within time and decision of representation was not communicated to petitioner. Point No. 1 is answered in affirmative.

Final Order

7. In view of findings on point No. 1 it is held (1) That petitioner is entitled for salary for the post of Assistant Controller (Printing) w.e.f. 1.2.1993 to 31.3.1994 with interest at the rate of 9% per annum. It is further held that salary already received by the petitioner as General Foreman during the aforesaid period will be calculated for determining the salary for the post of Assistant Controller (Printing). Rejection of claim of petitioner for the salary by respondent is quashed. Arrears of salary will be paid to petitioner within one month from today with interest at the rate of 9% per annum. (2) It is further held that petitioner will not be entitled to any other service benefits because no promotional order of petitioner was passed by competent authority upon the post of Assistant Controller (Printing). Petition stands disposed of. No order as to costs. Pending miscellaneous application(s) if any also stands disposed of.

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

State of Himachal Pradesh. .....Appellant.

Vs.

Ajay Shakti and another. ....Respondents.

Cr. Appeal No.754 of 2008.
Judgment reserved on: 28.10.2014
Date of Decision: December 24, 2014.

Indian Penal Code, 1860- Sections 382, 341, 506 and 323 read with Section 34 IPC- Accused had committed theft of Rs. 6,700/- after having made preparation for causing hurt- testimony of eye-witness was contradictory in examination-in-chief and cross-examination- recovery witness also denied the recovery- FIR was not lodged immediately on the date of incident- held, that in these circumstances, prosecution version was not proved and the acquittal of the accused was justified.

(Para-11 to 14)

Cases referred:

Anjlus Dungdung Vs. State of Jharkhand, (2005) 9 SCC 765
Nanhar Vs. State of Haryana, (2010) 11 SCC 423
Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116
Charan Singh Vs. The State of Uttar Pradesh AIR 1967 SC 520
Gian Mahtani Vs. State of Maharashtra, AIR 1971 SC 1898
State (Delhi Administration) Vs. Gulzarilal Tandon AIR 1979 SC 1382
Bhugdomal Gangaram and others Vs. The State of Gujarat, AIR 1983 SC 906
State of UP Vs. Sukhbasi and others, AIR 1985 SC 1224
Mookkiah and another Vs. State (2013) 2 SCC 89
State of Rajashthan Vs. Talevar and another, 2011 (11) SCC 666
Surendra Vs. State of Rajasthan, AIR 2012 SC (Supp) 78
State of Rajasthan Vs. Shera Ram @ Vishnu Dutt, 2012 (1) SCC 602
Balak Ram and another Vs. State of UP AIR 1974 SC 2165
Allarakha K. Mansuri Vs. State of Gujarat (2002) 3 SCC 57
Raghunath Vs. State of Haryana (2003) 1 SCC 398
State of U.P Vs. Ram Veer Singh and others AIR 2007 SC 3075
S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others, AIR 2008 SC 2066,
Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, (2008) 11 SCC 186.
Arulvelu and another Vs. State (2009) 10 SCC 206

Perla Somasekhara Reddy and others Vs. State of A.P. (2009) 16 SCC 98
Ram Singh @ Chhaju Vs. State of Himachal Pradesh (2010) 2 SCC 445

For the appellant: Mr.Ashok Chaudhary, Addl. AG Mr. Vikram Thakur, Dy.A.G and Mr.Puneet Razta, Dy.A.G and Mr. J.S.Guleria, Asstt.A.G.

For the respondent: Mr.Anup Chitkara, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment passed by the learned Sessions Judge Hamirpur in Criminal Appeal No. 22 of 2008 titled Ajay Shakti and another Vs. State of HP.

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by prosecution that on dated 10.12.2004 at about 8.30 PM near Sankat Mochan temple police station Sujanpur H.P accused persons in furtherance of common intention had committed theft of Rs.6,700/- (Six thousand seven hundred) from the property of complainant Baldev Singh after having made preparation for causing hurt. It is alleged by prosecution that on the same date, time and place accused persons have wrongfully restrained complainant Baldev Singh from proceeding further on his way. It is alleged by prosecution that thereafter accused persons in furtherance of common intention had voluntarily caused hurt to complainant Baldev Singh and beaten him. It is alleged by prosecution that thereafter accused persons in furtherance of common intention threatened complainant Baldev Singh to do away with his life. It is alleged by prosecution that FIR Ext PW4/A was registered against accused persons and spot map Ext PW12/A was prepared and MLC of complainant Baldev Singh Ext PW12/B was obtained. It is alleged by prosecution that jacket took into possession vide seizure memo Ext PW4/A and cash to the tune of Rs.6,700/- (Six thousand seven hundred) was also took into possession vide seizure memo Ext PW7/A. It is alleged by prosecution that sample of seal on a piece of cloth Ext PW12/C and Ext PW12/D also obtained and statements of prosecution witnesses recorded as per their versions. It is alleged by prosecution that complainant Baldev Singh was medically examined by medical officer Rajinder Kumar CHC Hamirpur who issued MLC Ext PW7/A and X-ray Ext PW7/B was obtained. It is alleged by prosecution that radiologist report Ext PW7/C and dental X-ray report Ext PW7/D were also obtained. Charge was framed against accused persons under Sections 382, 341, 506 and 323 read with Section 34 IPC. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined as many as thirteen witnesses in support of its case.

Sr.No.	Name of Witness
PW1	Kamal Singh
PW2	Rakesh Verma
PW3	Surjit Kumar
PW4	Baldev Singh
PW5	Raj Kumar
PW6	Goldi
PW7	Rajinder Singh

PW8	Ajay Kumar
PW9	Ram Dayal
PW10	Vijay Kumar
PW11	Vijay Kumar
PW12	Parkash Chand
PW13	Balwant Singh

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description.*
Ext PW4/A	*Copy of FIR*
Ext PW12/A	*Spot map*
Ext PW7/C	*X-ray form of Baldev Singh*
Ext.PW13/D	*X-ray film of Baldev Singh*
Ext PW7/B	*X-ray film of Baldev Singh*
Ext PW7/A	*MLC of complainant Baldev Singh*
Ext PW12/B	*Application*
Ext PW4/B	*Recovery memo*
Ext PW7/A	*Recovery memo*
Ext PW13/A	*Recovery memo*
Ext PW12/C &Ext.PW12/A	*Sample of seal on cloth*
Ext PW12/E	*Statement of Vijay Kumar*
Ext PW12/F	*Statement of Surjit Kumar*

5. Statement of accused persons also recorded under Section 313 Cr.PC. Accused persons did not lead any defence evidence. Learned trial Court convicted the accused persons under Sections 382, 341, 323, 506 read with Section 34 IPC and sentenced both accused persons with simple imprisonment for one year for the commission of offence punishable under Section 382 IPC and also imposed fine to the tune of Rs.5,000/- (Five thousand) to each. Learned trial Court further directed that in default of payment of fine both accused persons would undergo simple imprisonment for three months. Learned trial Court also sentenced both accused persons with simple imprisonment for six months for the offence punishable under Section 341 IPC and also sentenced both accused persons with simple imprisonment for six months each for the offence punishable under Section 506 IPC and also sentenced both accused persons with simple imprisonment for six months for the offence punishable under Section 323 IPC. Learned trial Court further directed that sentence would run concurrently.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court co-accused Ajay Shakti and co-accused Sanjeev Kumar filed criminal appeal before learned Sessions Judge Hamirpur under Section 374 of the Code of Criminal Procedure 1973 titled Ajay Shakti and another Vs. State of HP who accepted the appeal and quashed judgment of conviction and sentence

passed by learned trial Court and acquitted the accused persons from all the charges framed against them.

7. Feeling aggrieved against the judgment passed by learned Sessions Judge Hamirpur State of HP filed present appeal.

8. We have heard learned Additional Advocate General appearing on behalf of the State and learned Advocate appearing on behalf of the respondents and also perused entire record carefully.

9. Point for determination in the present appeal is whether learned Sessions Judge Hamirpur H.P did not properly appreciate the oral as well as documentary evidence adduced by the parties and caused miscarriage of justice by way of acquitting both accused persons as pleaded in memorandum of grounds of appeal.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

10. PW1 Kamal Singh has stated that about 6/7 months ago complainant Baldev Singh had gone to village Sandhol and when Baldev Singh came back at about 9 PM his path was blocked at place Bhaleth through Maruti van. He has stated that two persons were travelling in the Maruti Van. He has stated that he did not remember the registration number of the vehicle. He has stated that he does not remember thereafter what happened. He has stated that his brother Baldev Singh reached at Hamirpur at about 11.30 PM along with Raj Kumar and told that at place Bhaleth incident took place with Baldev Singh. He has stated that Baldev Singh was beaten by accused persons and amount of Rs.6,700/- (Six thousand seven hundred) was snatched from Baldev Singh. He has stated that Baldev Singh was also beaten by accused persons and also stated that accused persons have threatened Baldev Singh that they would kill Baldev Singh. He denied suggestion that his brother himself committed embezzlement of Rs.6,700/- (Six thousand seven hundred). He denied suggestion that complainant Baldev Singh has filed a false complaint in order to escape himself from criminal liability. PW1 is not eye witness of incident. PW1 has narrated hear say story.

10.1 PW2 Rakesh Verma has stated that he is running a shop of Electronic. He has stated that he made payment of Rs.2500/- (Two thousand five hundred) to the complainant Baldev Singh. Witness was declared hostile by prosecution. In cross examination he has admitted that he has not kept the record of payment but obtained signature on a copy of receipt. He has denied suggestion that he did not pay any money to Baldev Singh. He denied suggestion that complainant did not come to him. PW2 is also not eye witness of incident.

10.2 PW3 Surjit has stated that he does not know about the case. He has stated that no theft was committed in his presence. He has stated that he does not know that he has given payment of Rs.1700/- (One thousand seven hundred) to Baldev Singh on dated 10.12.2004. Witness was declared hostile by prosecution.

10.3 PW4 Baldev Singh has stated that on dated 10.12.2004 at about 9 PM his path was blocked through Maruti Van. He has stated that accused persons have beaten him. He has stated that there were three persons along with driver of the Van. He has stated that some intoxication was given to him. He has stated that accused persons also snatched Rs.6,700/- (Six thousand seven hundred) from his pocket. He has stated that he had also sustained injury upon his teeth. He has stated that his jacket with blood clots was also took into possession by investigating agency vide seizure memo Ext PW4/B. He has stated that jacket is Ext P2. He has stated that a quarrel took place for half an hour. He has denied suggestion that his money was not snatched. He denied suggestion that he was not beaten by accused persons. He denied suggestion that no incident took place.

10.4 PW5 Raj Kumar has stated that on dated 10.12.2004 complainant Baldev Singh came to him at about 11 PM and told that he was beaten by accused persons and his money snatched. He has stated that clothes of Baldev Singh were clotted with blood. He has stated that investigating agency took into possession jacket of complainant Baldev Singh vide seizure memo Ext PW5/A. He has stated that he signed the seizure memo. He has stated that complainant Baldev Singh used to work along with him. He has stated that Baldev Singh came at Hamirpur on scooter at about 11.30 AM. He has stated that he does not know that complainant Baldev Singh was driving the vehicle in an intoxication condition. He has denied suggestion that complainant himself has committed embezzlement of the amount and a false case has been filed against accused persons.

10.5 PW6 Goldy star independent eye witness of alleged incident has stated that two boys met him. He has stated that the name of one boy is Bholu. He has stated that both boys told him that they would go to Hamirpur as their relative was sick. He has stated in examination in chief recorded on dated 21.8.2006 that when they reached 3/4 Kms ahead from Sujanpur towards Hamirpur side one scooter owner was standing there. He has stated that thereafter accused persons have beaten him and also snatched his articles. He has stated that accused persons have also threatened to kill him. Thereafter cross examination of witness was deferred and cross examination of witness was recorded on 4.5.2007 by learned trial Court. In cross examination PW6 Goldy has stated that no quarrel and beating took place in his presence. He has stated in cross examination that complainant Baldev Singh was intoxicated. He has stated that scooter of complainant Baldev Singh skidded and fell into drain. He has stated that accused persons did not snatch money from complainant Baldev Singh.

10.6 PW7 Dr. Rajinder has stated that he examined complainant Baldev Singh on dated 11.12.2004 at 3.20 PM and found seven abrasions and contusion injuries**.** He has stated that weapon used was blunt and has stated that injuries Nos. 1,2,4,5 and 6 were simple in nature. He has stated that opinion qua injury No.3 was to be given after expert dental opinion. He proved MLC Ext PW7/A placed on record. In cross examination he has admitted that all injuries mentioned in MLC are possible by way of fall from scooter.

10.7 PW8 Raj Kumar has stated that he has joined the investigation. He has stated that a sum of Rs.6,700/- (Six thousand seven hundred) was recovered at the instance of co-accused Ajay Shakti. He has stated that seizure memo Ext PW8/A was prepared and he signed the same as a marginal witness. He has denied suggestion that no recovery of Rs.6,700/- (Six thousand seven hundred) was effected as per disclosure statement of co-accused Ajay Shakti.

10.8 PW9 Ram Dayal has stated that he was posted as Station House Officer Police Station Sujanpur. He has stated that after completion of investigation he prepared challan.

10.9 PW10 Vijay Kumar has stated that he has signed seizure memo Ext PW7/A. He has stated that no recovery was effected in his presence. Witness was declared hostile. He has stated that he did not join investigation of present case. He has stated that he was summoned to Police Station. He has denied suggestion that he deposed falsely in order to save the accused persons.

10.10 PW11 Vijay Kumar has stated that in the year 2005 he was posted as S.I in Police Station Sujanpur. He has stated that case file was handed over to him for investigation. He has stated that he obtained X-ray report of injured from Hamirpur.

10.11 PW12 Parkash Chand has stated that he was posted as ASI in Police Station Sujanpur. He has stated that on the complaint of Baldev Singh he registered FIR Ext PW4/D on dated 11.12.2004 and investigated present case. He has stated that he prepared site plan Ext PW12/A. He has stated that

medical examination of complainant Baldev Singh was also got conducted. He has stated that he filed application to obtain MLC Ext PW12/B. He has stated that he took into possession jacket of the complainant vide seizure memo Ext PW4/B. He has stated that he also recovered Rs.6,700/- (Six thousand seven hundred) and also recorded the statement of prosecution witness. He has denied suggestion that he has not recorded the statement of prosecution witness as per his own version.

10.12 PW13 Balwant Singh has stated that on dated 10.12.2004 he came from Sujanpur H.P at about 8 PM in vehicle No. HP-22-6763. He has stated that PW6 Goldy was also along with him. He has stated that he parked his vehicle at bus stand Sujanpur. He has stated that when he came at 9 PM the vehicle and driver was not available at the bus stand. He has stated that on dated 11.12.2004 driver PW6 Goldy came to him and told that two boys namely Ajay Shakti and Sanjeev Kumar @ Bholu told him to take the vehicle to Hamirpur H.P. He has stated that his driver told him that he refused to take the vehicle to Hamirpur H.P but accused persons forcibly directed his driver PW6 Goldy to take the vehicle to Hamirpur H.P. He has stated that when the driver of the vehicle PW6 Goldy covered some distance of road then accused persons told PW6 Goldy to stop the vehicle. He has stated that PW6 Goldy told him that thereafter accused persons have beaten the scooter driver and also stolen Rs.6,700/-(Six thousand seven hundred) from scooter driver. He has stated that PW6 Goldy told him that thereafter accused persons also beaten PW6 Goldy driver of Maruti van and took the vehicle towards Hamirpur H.P and thereafter vehicle rolled down at place Anu near Hamirpur H.P. He has stated that Investigating agency took into possession clothes of complainant Baldev Singh and memo Ext PW13/A was prepared. He has stated that police took into possession mobile phone, driving license, identity card and diary. He has stated that complainant Baldev Singh was not known to him. He has denied suggestion that clothes were not sealed in his presence. He denied suggestion that accident was caused by the driver of Maruti van. He denied suggestion that complainant Baldev Singh was in intoxication condition. He denied suggestion that complainant Baldev Singh tried to overtake his scooter and fallen down in the drain from his scooter. He denied suggestion that he deposed falsely in order to save PW6 Goldy.

<u>Testimony of PW6 Goldy only eye witness of incident is fatal to the prosecution case being contradictory testimony in examination in chief and in cross examination</u>.

11. It is the case of the prosecution that PW6 Goldy is the eye witness of the incident. We have carefully perused the testimony of PW6 Goldy in examination in chief and cross examination. Statement of PW6 Goldy in examination in chief was recorded by learned trial Court on 21.8.2006 and cross examination of PW6 Goldy was recorded by learned trial Court on dated 4.5.2007. In examination in chief PW6 Goldy has stated that accused persons have beaten injured Baldev Singh and also snatched his articles and money. Thereafter when the cross examination of PW6 Goldy was recorded on 4.5.2007 he has stated in cross examination that no quarrel took place in his presence. He has stated that no beating was given in his presence to complainant Baldev Singh by accused persons. He has stated that scooter of the injured was skidded and fell in a drain. He has stated that Baldev Singh had abused accused persons. He has stated in cross examination that accused persons did not snatch money from complainant Baldev Singh. In view of contradictory testimony of PW6 in examination in chief and cross examination we are of the opinion that testimony of PW6 Goldy is not trustworthy and reliable and it is not expedient in the ends of justice to convict the accused persons on the contradictory testimony of PW6 in examination in chief and cross examination.

<u>Testimony of PW10 Vijay Kumar is also fatal to prosecution case</u>

12. It is the case of the prosecution that an amount to the tune of Rs.6,700/- (Six thousand seven hundred) was recovered from co-accused Ajay Shakti in the presence of Ajay Kumar and Vijay Kumar. PW10 Vijay Kumar has specifically stated that no recovery was effected in his presence and he has specifically stated in positive manner that he was called in Police Station and his signatures were obtained in police station. There are two witnesses of the recovery of Rs.6,700/- (Six thousand seven hundred) i.e. PW8 Ajay Kumar and PW10 Vijay Kumar. In view of the contradictory testimony of recovery witness i.e. PW8 Ajay Kumar and PW10 Vijay Kumar we are of the opinion that it is not expedient in the ends of justice to convict the accused persons on the ground of recovery of Rs.6,700/- (Six thousand seven hundred) from co-accused Ajay Shakti.

Testimony of PW2 Rakesh Verma is fatal to the prosecution qua payment of Rs.2500/- to injured Baldev Singh.

13. It is the story of prosecution that Rs.2500/- (Two thousand five hundred) was paid by PW2 Rakesh Verma to injured Baldev Singh for the supply of spare parts on the date of incident. We have carefully perused the testimony of PW2 Rakesh Verma. PW2 Rekesh Verma has specifically stated in examination in chief that he does not know who took the money from his shop thereafter witness was declared hostile by the prosecution and in cross examination he has stated that injured took Rs.2000/- (Two thousand) from him. In view of the contradictory testimony of witness in examination in chief and cross examination we are of the opinion that it is not expedient in the ends of justice to convict the accused persons.

Non filing of FIR in Police Station Sujanpur H.P immediately is also fatal to the prosecution

14. As per prosecution story incident took place on 10.12.2004 between 8.30 PM and 8.35 PM at Bhaleth near Sankat Mochan Temple Police Station Sujanpur District Hamirpur HP. As per copy of FIR Ext PW4/A placed on record the distance of Police Station Sujanpur Tira from the place of incident is 6 Kms. only. FIR was recorded on 11.12.2004 at 2.40 PM. No explanation has been given by the prosecution as to why injured Baldev Singh did not record FIR in Police Station Sujanpur H.P which was situated at a distance of 6 Kms only from alleged place of incident. It is proved on record that Baldev Singh preferred to go to Hamirpur H.P which is situated at the distance of more than 20 Kms. from the place of incident and stayed during night period at Hamirpur H.P. Hence delay in lodging FIR is also fatal to the prosecution case in the present case and delay has not been satisfactorily explained by complainant Baldev Singh in the present case. It is not the case of the prosecution that Baldev Singh became unconscious after the incident. On the contrary it is the case of the prosecution that Baldev Singh himself went to Hamirpur H.P in his vehicle which was situated at a distance of more than 20 Kms. from the place of alleged incident.

15. Submission of learned Additional Advocate General that learned Sessions Judge has illegally discarded the version of official witness and on this ground appeal be accepted is rejected being devoid of any force for the reason hereinafter mentioned. In the present case official witnesses are not eye witness of the incident and they are only corroborative witnesses. In the present case as per prosecution story the eye witness of the incident is PW6 Goldy. The testimony of PW6 is not trustworthy and reliable because PW6 Goldy has given contradictory testimony in examination in chief and cross examination qua the infliction of injury upon complainant Baldev Singh.

16. Another submission of learned Additional Advocate General appearing on behalf of the State that learned Sessions Judge Hamirpur has illegally disbelieved the testimony of Baldev Singh is also rejected being devoid of

any force for the reason hereinafter mentioned. As per prosecution story the eye witness of the incident is PW6 Goldy. In view of contradictory testimony of PW4 Baldev Singh and PW6 Goldy who are eye witness of incident it is not expedient in the ends of justice to convict accused persons. It is well settled law that benefit of doubt is always given to accused persons in criminal law.

17. Another submission of learned Additional Advocate General appearing on behalf of the State that delay has been properly explained by the prosecution because Baldev Singh has reported the matter in Police Station Hamirpur H.P is rejected being devoid of any force for the reason hereinafter mentioned. Prosecution did not place on record any FIR which was reported by Baldev Singh at Police Station Hamirpur H.P. Even prosecution did not examine any police officials from Police Station Hamirpur H.P in order to prove that FIR was lodged at Police Station Hamirpur H.P by complainant Baldev Singh. No copy of FIR registered at Police Station Hamirpur H.P placed on record by prosecution.

18. Another submission of learned Additional Advocate General appearing on behalf of the State that learned Sessions Judge has committed grave miscarriage of justice by way of not properly appreciating the testimony of PW6 Goldy driver of the Van and PW13 Balwant Singh owner of the Maruti Van is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of PW6 Goldy and PW13 Balwant Singh. PW6 Goldy driver of the Van has given contradictory testimony in his examination in chief and cross examination and his testimony is not trustworthy and reliable in view of the contradictory testimony in examination in chief and cross examination. PW13 Balwant Singh is not the eye witness of the incident and he was not present at the time of incident. His testimony is based upon hearsay evidence. It was held in case reported (2005) 9 SCC 765 titled Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in (2010) 11 SCC 423 titled Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defense. Also See: (1984) 4 SCC 116 Sharad Birdhichand Sarda Vs. State of Maharashtra. It is well settled law that conjecture or suspicion cannot take place of legal proof. See: AIR 1967 SC 520 Charan Singh Vs. The State of Uttar Pradesh. *Also See:* AIR 1971 SC 1898 Gian Mahtani Vs. State of Maharashtra. It was held in case reported in AIR 1979 SC 1382 State (Delhi Administration) Vs. Gulzarilal Tandon that even where the circumstances raise a serious suspicion against the accused it cannot take the place of legal proof. Also See: AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. The State of Gujarat See: AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others**.** It is well settled principle of law that vested right accrued in favour of the accused with the judgment of acquittal by learned Sessions Court. (See (2013) 2 SCC 89 titled Mookkiah and another Vs. State. See 2011 (11) SCC 666 titled State of Rajashthan Vs. Talevar and another. See AIR 2012 SC (Supp) 78 titled Surendra Vs. State of Rajasthan. See 2012 (1) SCC 602 titled State of Rajasthan Vs. Shera Ram @ Vishnu Dutt). It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned Courts below are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned Courts below failed to take into consideration any admissible fact (iv) That learned courts below took into consideration evidence brought on record contrary to law. (See AIR 1974 SC 2165 titled Balak Ram and another Vs. State of UP, See (2002) 3 SCC 57 titled Allarakha K. Mansuri Vs. State of Gujarat, See (2003) 1 SCC 398 titled Raghunath Vs. State of Haryana, See AIR 2007 SC 3075 State of U.P Vs. Ram Veer Singh and others, See AIR 2008 SC 2066, (2008) 11 SCC 186 S.Rama

Krishna Vs. S. Rami Raddy (D) by his LRs. & others. Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, See (2009) 10 SCC 206 titled Arulvelu and another Vs. State, See (2009) 16 SCC 98 titled Perla Somasekhara Reddy and others Vs. State of A.P. See: (2010) 2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh).

19. In view of the above stated facts and case law cited supra we dismiss the appeal filed by the State of HP and affirm the judgment passed by learned Sessions Judge Hamirpur H.P. It is held that judgment passed by learned Sessions Judge Hamirpur H.P is based upon oral as well as documentary evidence placed on record. It is held that no miscarriage of justice is caused to appellant. Pending application(s) if any are also disposed of. Records of learned trial Court and Sessions Judge Hamirpur H.P be sent back forthwith along with certify copy of judgment. Appeal filed by State of HP is 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
Jai Ram and others ...Respondents.

Cr. Appeal No.: 225 of 2013
Reserved on: 19.12.2014.
Date of Decision : 24.12.2014

Indian Penal Code, 1860- Section 306 read with Section 34- Deceased was married to 'A'- 'A' remained in the matrimonial home for 1-2 months- she was dropped at her parent's home- thereafter efforts were made to call her but she did not come- accused raised demand of Rs. 5 lacs- PW-1 had not stated before investigating officer that demand of Rs. 5 lacs was made- PW-2 deposed that demand of Rs. 3.5 lacs was raised- deceased had committed suicide after 3 years of raising demand - held, that there was no proximity in the demand and the suicide- therefore, it cannot be said that demand was an instigatory factor for the deceased to commit suicide. (Para-9)

For the Appellant: Mr. J.S.Guleria, Asstt. Advocate General.
For the respondents: Mr. Ashwani K. Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge*

This appeal is directed against the judgement of acquittal rendered on 29.12.2012 by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. in Sessions trial No. 7/7 of 2012 whereby he acquitted the respondents for theirs having committed offence punishable under Section 306 IPC read with Section 34 IPC.

2. The prosecution story, in brief, is that marriage of Jitender Kumar (deceased) was solemnized with Anita Kumari on 10.3.2007. Anita Kumari remained in the matrimonial home only for 1-2 months and thereafter on 29.5.2007 she was dropped at her parent's house in Ghumarwin. Thereafter, PW-1 (Amar Singh) alongwith PW-2 (Ramesh Chand), PW-3 (Ram Pal) and PW-10 (Onkar Singh) went to call Anita Kumari but she did not come. Accused Jai Ram and Veena Devi raised demand for money i.e. a sum of Rs.5 lacs and also sought transfer of property in the name of Anita Kumari. The accused party

have also demanded a sum of Rs.5 lacs for compromising the matter and getting divorce and thus alleging that Jitender Kumar was harassed by accused persons and he committed suicide on account of harassment caused to him by consuming poison on 28.5.2010 in village Kapahara. He was taken to C.H.Gumarwin for treatment. Dr. Sumit Verma (PW-5) had medically examined Jitender Kumar. He was thereafter referred for further treatment to Bilaspur, where ASI Pushp Raj (PW-11) recorded statement of Amar Singh and sent Rukka through constable Raj Kumar for registration of F.I.R. on which F.I.R. Ext.PW-8/A was registered. One suicide note Ext.PW-1/B was handed over to the police by Amar Singh which was taken into possession by the police vide recovery memo Ext.PW-1/C. Amar Singh had also produced admitted handwriting of Jitender Kumar to the police which are Ext.PW-1/D and Ext.PW-1/E and Ext.PW-1/G. In August, 2010 Amar Singh had found another suicide note Ext.PW-1/K written by his son addressed to him, which was also handed over to the police and taken through memo Ext.PW-1/J in the presence of Nirmla Devi and Raj Kumar. Dr. S.Sharad (PW-7) conducted post mortem examination of the dead body on 29.5.2010. Post mortem report Ext.PW-7/D given by him which reveals the cause of death was Coma due to poisoning. Dr. Minakshi Mahajan(PW-12) examined questioned item Ext.PW-1/B, suicide note and admitted items Ext.PW-1/D, Ext.PW-1/E and Ext.PW-1/G and given her report Ext.PW-11/C. Report reveals that admitted hand writings/signature and questioned item/suicide note, all have been written by one and the same person.

3. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court. The trial Court charged the accused for theirs having committed offence punishable under Section 306 read with Section 34 IPC, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 13 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C. were recorded, in which they pleaded innocence. On closure of proceedings under Section 313 Cr.P.C. the accused were given an opportunity to adduce evidence in defence and they chose not to adduce any evidence in defence.

5. On appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused/respondents.

6. The State of H.P. is aggrieved by the judgement of acquittal, recorded by the learned trial Court. Shri J.S.Guleria, Assistant Advocate General, has concertedly and vigorously contended that the findings of acquittal, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of conviction and concomitantly an appropriate sentence be imposed upon the accused/respondents.

7. On the other hand, learned counsel appearing for the respondents-accused, has, with considerable force and vigour, contended that the findings of acquittal, recorded by the Court below, are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

8. This Court with the able assistance of the learned counsel on either side, has with studied care and incision, evaluated the entire evidence on record.

9. The deceased (Jitender Kumar) was married to Anita Kumari. She stayed in her matrimonial home for one and half months. Thereafter she settled at her parental house. Concerted attempts on the part of the PW-1 Amar Singh father of deceased Jitender Kumar to retrieve her to her matrimonial

home remained unsuccessful. The deceased committed suicide by consumption of poison, as is apparent on perusal of post mortem report Ext.PW-7/D. The ill-treatment and maltreatment which instigated and actuated the deceased to commit suicide is comprised in the testimonies of PW-1(Amar Singh), PW-2 (Ramesh Chand), PW-3 (Ram Pal) and PW-10 (Onkar Singh). The instigatory factor, which propelled the deceased to commit suicide is comprised in the factum as deposed by PW-1 of on his having visited the parental home of Anita Kumari, the latter having raised a demand of Rs.5 lacs and of transfer of land in her name for settling the marital issue inter se Jitender Kumar and his wife Anita Kumari. However, the occurrence of a statement in the examination-in-chief of PW-1 of the parents of the accused having raised a demand of Rs.5 lacs in lieu of settling the marital issue inter se Anita Kumari and Jitender Kumar appears to be an embellishment and an improvement, hence incredible in the face of PW-1 having omitted to state the fact aforesaid to the Investigating Officer. Consequently, the raising of a demand of Rs.5 lacs by the accused from PW-1 in lieu of settling the marital issue inter se deceased Jitender Kumar and Anita Kumari acquires no potency rather is prevaricated. Even PW-2 in contradistinction to PW-1 who deposed qua the factum of the accused having raised a demand of Rs. Five lacs from PW-1 in lieu of settling the marital issue inter se deceased Jitender Kumar and Anita Kumari, has deposed that a demand rather of Rs.3.50 lacs was raised by the accused for putting to rest the strife raging the matrimonial life of Jitender Kumar and Anita Kumari. Contradistinction, inter se the quantum of demand raised by the accused for settling the marital ties inter se Jitender Kumar and Anita Kumari propels an inference that hence PW-2 never accompanied PW-1 besides the testimony of PW-1 qua the factum of a demand having been raised to the tune of Rs. 5 lacs by the accused to douse the estranged marital ties inter se Jitender Kumar and Anita Kumari, stands dispelled. Moreover, existence of a statement, in the deposition of PW-1, of the accused having raised a demand from PW-1 of property being transferred in the name of Anita Kumari, too stands not corroborated by PW-2, hence for lack of corroboration to the said factum by PW-2 to the said fact as deposed by PW-1, renders it also incredible. In face of rife contradictions existing inter se PW-1 and PW-2 qua the demands raised by the accused to ebb the marital strife inter se the deceased Jitender Kumar and Anita Kumari, which contradiction hence belies the presence of PW-2 alongwith PW-1 at the house of the accused, consequently when PW-10 and PW-3 depose qua the factum of PW-2 accompanying him to the house of the accused, their presence, too at the house of the accused alongwith PW-1 garners an aura of doubt. PW-10 too has deposed in purported corroboration to the testimony of PW-1 qua the demands raised by the accused to settle the marital issue inter se deceased Jitender Kumar and accused Anita Kumari, nonetheless when he in his examination-in-chief omits to name PW-3 to be also the person accompanying him to the house of the accused for improving the marital relations inter se deceased Jitender Kumar and accused Anita Kumari, an obvious conclusion which is to be formed is that PW-10 and PW-2 did not accompany PW-1 to the house of the accused. In sequel the version rendered by PW-2, PW-3 and PW-10 in purported corroboration to the deposition of PW-1, appears to be incredible. Even otherwise assuming that confabulations were underway inter se PW-1 and accused for ebbing the strife in the estranged marital relations inter se Jitender Kumar and Anita Kumari and assuming that some demand was raised by the accused to settle the marital strife, inter se them, nonetheless the demands as purportedly raised appear to have been raised to secure the future marital prospects of accused Anita Kumari, as such, when there is no colour of untenability or illegality, imbueable to the demands, as such, they cannot constitute any actuatory factor for the deceased to take his life. Moreso, when it has not been established that even if such demands were raised, either PW-1 or the deceased Jitender Kumar were financially disempowered to meet or comply with the demands of the accused, as such, they felt the pressure of the demands and Jitender Kumar reeling under the

pressure of the demands was instigated to hence commit suicide, does not render the purported demands to be acquiring the potency to foment the deceased to commit suicide. Besides, when the demand as purportedly raised by the accused was made on the purported visit of PW-1 purportedly alongwith PW-2, PW-3 and PW-10 to the house of the accused on 11.11.2007. However, the deceased committed suicide on 28.05.2010. Consequently, given the improximity in time inter se the purported demand and the accused ultimately taking to commit suicide, an apt conclusion which is to be formed is that the demand as purportedly raised by the accused from PW-1 for making accused Anita Kumari relent to join her matrimonial home did not constitute the instigatory or actuatory factor for the deceased to commit suicide especially when proximity inter se the demand and Jitender Kumar having been purportedly instigated by them to commit suicide, is the germane probative factor to be borne in mind by courts of law to construe that hence the purported demand inflamed Jitender Kumar to commit suicide.

10. The prosecution anvils its case on Ext.PW-1/B purportedly attributed to the deceased in which he inculpates the accused. However, even if PW-12 has in her report comprised in Ext.PW-11/C opined therein that the admitted writings of the deceased comprised in Ext.PW-1/D, Ext.PW-1/E and Ext.PW-1/G on comparison with writings of the deceased comprised in Ext.PW-1/B portray that all are authored by the same person. However, the report of the handwriting expert would carry immense probative worth only in the event of it having come to be established by cogent evidence comprised in the deposition of persons acquainted with his handwritings and theirs deposing that the purported admitted handwritings attributed to the deceased belonged to him, besides in best evidence comprised in the Investigating Officer, given the employment of the deceased in the territorial army having procured from the place of service of the deceased, the admitted handwriting of the deceased. However, PW-11 the Investigating Officer has deposed that he omitted to verify from any of the relatives of the deceased, acquainted with the handwriting of the deceased, the fact which the handwriting purportedly attributed to the deceased comprised in Ext.PW-1/D, Ext.PW-1/E, and Ext.PW-1/G, belonged to him. Besides there is no endeavour on the part of the Investigating Officer to collect the admitting handwritings of the deceased from the place of his service. Absence of the aforesaid concerted efforts on the part of the Investigating Officer to elicit the aforesaid best evidence qua the factum of the admitted handwritings purportedly attributed to the deceased comprised in Ext.PW-1/D, Ext.PW-1/E and Ext.PW-1/G belonging to him constrains this Court to conclude that the purported admitted handwritings ascribed to the accused comprised in Ext.PW1/D, Ext.PW1/E and Ext.PW-1/G were not his admitted handwritings. Consequently, for want of cogent and best evidence displaying that Ext.PW1/D, Ext.PW1/E and Ext.PW-1/G are the admitted handwriting of the deceased, their comparison, if any, with the suicide note not constituting the admitted handwriting of the deceased was untenable. Besides the opinion rendered by the handwriting expert comprised in Ext.PW-11/C conveying that the handwritings borne on Ext.PW-1/B on comparison with the purported admitted handwritings of the deceased comprised in Ext.PW-1/D, Ext.PW-1/E and Ext.PW-1/G are authored by the same person does not lend credibility to the factum of the suicide note having been authored by the deceased.

11. In view of the above discussion, the learned trial Court is to be concluded to have appreciated the evidence in a mature and balanced manner and its findings, hence, do not necessitate interference. The appeal is dismissed being devoid of any merit and the findings rendered by the learned trial Court are affirmed and maintained.

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

1.Sh.Sukhdarshan Singh son of
Late Sh Ishwar Singh.
2. Sh. Balbir Singh son of
Sh. Netar Singh .....Petitioners.
Vs.
HPSEB Limited and another. ....Respondents.

CWP No. 5701 of 2013.
Order reserved on: 31.10.2014.
Date of Order: December 24, 2014.

Constitution of India, 1950- Article 226- Petitioners claimed that they were appointed as temporary employees w.e.f. 1.11.1986 and 13.12.1985 respectively- petitioners were conferred the work charge status w.e.f. 3.1.1998- they claimed that services rendered by them till conferment of work charge status should be counted for the purpose of pay fixation, increments and other benefits as well as pensionary benefits- it was proved on record that petitioners were offered the post of T-mate on work charge status –work charge status would come to an end after the completion of the work- petitioners had not challenged the work charge status for 15 years- no explanation was given for the delay- petition dismissed on this short ground alone. (Para-5)

Cases referred:

P.S.Sadasivaswamy Vs. State of Tamil Nadu (Apex Court of India), 1976 (1) Service Law Reporter 53

Satija Rajesh Vs. State of Himachal Pradesh and others, 2014 (Suppl.) Him L.R. (DB) 2422

State of Bihar and another Vs. Bhagwan Singh, AIR 2014 Patna 208 (Full Bench)

M/s Rup Diamonds and others Vs. Union of India, AIR 1989 SC 674

State of Karnataka and others Vs. S.M.Kotrayya and others 1996 (6) SCC 267

Jagdish Lal and others Vs. Vs. State of Haryana AIR 1997 SC 2366

For the petitioner: Mr. A.K.Gupta, Advocate.
For respondents: Mr. Raj Pal Thakur, Advocate.

The following judgment of the Court was delivered:

P.S.Rana,Judge.

Present petition is filed under Article 226 of the Constitution of India. It is pleaded that petitioners were appointed as temporary employees in the permanent establishment w.e.f. 1.11.1986 and 13.12.1985 respectively. It is pleaded that services of the petitioners were brought on work charge establishment w.e.f. 3.1.1998 and thereafter petitioners were retired from service. It is pleaded that period of service rendered by the petitioners from the dates of their joining till their regularization w.e.f. 3.1.1998 be treated as service for the purpose of pay fixation, increments and other service allowances and for purpose of pensionary benefits. Prayer for acceptance of petition sought.

2. Per contra reply filed on behalf of the respondents pleaded therein that writ petition suffers from delay and laches. It is pleaded that writ petition has been filed after a lapse of fifteen years from the date of cause of action. It is pleaded that petitioners are estopped to file present petition due to their act and conduct. It is pleaded that petitioners were offered the post of T-Mate on work

charge basis vide offer dated 2.1.1998 and the said offer was accepted by the petitioners. It is pleaded that petitioners were engaged on daily wage basis and thereafter respondent-Board regularized the daily wage workmen on various categories against the available vacancies. It is pleaded that petitioners were regularized on 3.1.1998. Prayer for dismissal of petition sought.

3. Court heard learned Advocate appearing on behalf of petitioners and learned Advocate appearing on behalf of respondents and also perused the record carefully.

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

(1) Whether relief is barred after fifteen years from date of cause of action on the concept of delay, laches and acquiescence as alleged?

(2) Final order.

Finding upon point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioners that services of the petitioners be counted w.e.f. 1.11.1986 and 13.12.1985 till their services were regularized on dated 3.1.1998 for the purpose of pay fixation, increments and pensionary benefits is rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that offers were given to the petitioners for the post of T-Mates on work charge status and petitioners have accepted the post of T-Mates on work charge status in the year 1998. It is well settled law that there is difference between the status of work charge employee and the status of temporary employee. It is well settled law that the services of the work charge employee would automatically come to an end after the completion of specific work. It is proved on record that petitioners themselves have accepted the post of T-Mates on work charge status and thereafter petitioners have also received the salary of T-Mates on work charge status. Petitioners did not challenge the post of T-Mates on work charge status for about fifteen years. It was held in case reported in ***1976 (1) Service Law Reporter 53 titled P.S.Sadasivaswamy Vs. State of Tamil Nadu (Apex Court of India)*** that relief should be declined to the petitioner if writ petition is not filed expeditiously. It was held that normally writ petition should be filed within six months or at the most within one year after the arisen of cause action. It was held in case reported in ***2014 (Suppl.) Him L.R. (DB) 2422 titled Satija Rajesh Vs. State of Himachal Pradesh and others*** that delay is important factor in writ petition and it was held that delay defeats equity and it was also held that delay should not be brushed aside without plausible explanation. It was held that principle of waiver and estoppel also applies in the writ petition. Petitioners did not challenge their status even after the regularization of their services on dated 3.1.1998. Petitioners have challenged their status of service on dated 29.7.2013 after a gap of more than fifteen years. It was held in case reported in ***AIR 2014 Patna 208 (Full Bench) titled State of Bihar and another Vs. Bhagwan Singh*** that service rendered by government employee as daily wages could not be counted for pension benefit. It was held that service of employee for pension benefit would be calculated from the date of appointment of the employee upon the substantive post. Petitioners did not challenge their status of service w.e.f. 3.1.1998 till 29.7.2013. No plausible explanation given by petitioners for filing of present writ petition after more than fifteen years after cause of action. There is no evidence on record in order to prove that petitioners have also filed any representation before competent authority of law for redressal of their grievance w.e.f. 3.1.1998 to 29.7.2013. Hence it is held that it is not expedient in the ends of justice to grant relief to the petitioners on the concept of delay, laches and acquiescence. It was held in case reported in ***AIR 1989 SC 674 titled M/s Rup Diamonds and others Vs. Union of India*** that Court has consistently rejected the contention

that petition should be considered ignoring delay and laches in case petitioner approaches the Court after coming to know of the relief granted by Court in similar case. It was held that the same is not proper explanation of delay and laches. It was held that litigant could not wake up from deep slumber and could not claim impetus from the judgment in cases where some diligent person had approached within reasonable time. See ***1996 (6) SCC 267 titled State of Karnataka and others Vs. S.M.Kotrayya and others*** See ***AIR 1997 SC 2366 titled Jagdish Lal and others Vs. Vs. State of Haryana***. Hence point No.1 is decided against the petitioners and in favour of the respondents.

Final Order.

6. In view of my findings upon point No.1 civil writ petition filed under Article 226 of the Constitution of India is dismissed and relief sought is declined on the concept of delay, laches and acquiescence after fifteen years from date of cause of action. In the present case delay of more than fifteen years is writ large from the date of cause of action. No order as to costs. Writ petition disposed of Pending application(s) if any are also disposed of.

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

Surjit Singh .....Petitioner.
Versus
Sachin Raizada & ors. .....Respondents.

CMPMO No. 06 of 2014.
Reserved on: 17.11.2014.
Decided on: 24.12.2014.

Himachal Pradesh Court Fees Act, 1968- Article 13(vi)- Plaintiff filed a suit for partition of the land claiming that land is coparcenary property and that the plaintiff had acquired a right in it by birth- defendant claimed that suit was not properly valued and market value of the suit land is not less than Rs. 2,53,83,000/- held, that plaintiff would be deemed to be in constructive joint possession of the suit property- he is liable to pay the Court fees in accordance with Section 13(vi) and not in accordance with Section 7(iv)(b) or Section 7(v) of the Court Fees Act.
(Para- 8 to 18)

Cases referred:

Asa Ram and others vrs. Jagan Nath and ors., AIR 1934 Lahore 563 (Full Bench),

Shankar Maruti Girme vrs. Bhagwant Gunaji Girme and others, AIR (34) 1947 Bombay 259

Nagorao Bapu and ors. Vrs. Mahadeo Bapu Doma Bapu and others, AIR (37) 1950 Nagpur 81

Onkar Mal and others vrs. Ram Sarup and others, AIR 1954 Allahabad 722

Mahadeo Ganesh and another vrs. Sadashiv Khanderao and ors., AIR 1953 M.B 151

Karibasappa vrs. Jademallappa & ors., AIR 1955 Mysore 140

Mina Ram vrs Amolak Ram & ors, AIR 1966 Himachal Pradesh 4

For the petitioner: Mr. N.K.Thakur, Sr. Advocate, with Mr. Rohit Bharoll, 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 petition has been filed for modification of order dated 31.10.2013, rendered by the learned Civil Judge (Jr. Divn.), Court No. IV, Una in CMA No. 155 of 2013 in Civil Suit No. 30 of 2013.

2. Key facts, necessary for the adjudication of this petition are that the respondent-plaintiff (hereinafter referred to as the plaintiff for convenience sake) has filed suit for partition of land measuring 1-69-22 hectares, as per the details given in the plaint against the petitioner and proforma respondents. The petitioner is father of respondents. The relevant pedigree table as per the plaint is as under:

Tarlok Singh
|
Ran Singh
|
Ram Rakha
|
Surjit Singh
|

| | |
Sachin Monika Vandana

3. The land was owned and possessed by Tarlok Singh, common ancestor. It devolved upon Ran Singh, thereafter on Ram Rakha and thereafter on Surjit Singh-petitioner. The plaintiff, by virtue of Hindu Law (Mitakshra School), has acquired the right in the property by birth. The suit property is coparcenary property in the hands of the petitioner. The plaintiff and proforma respondens, being coparceners have 1/4th share each in the coparcenary property. The plaintiff wanted the partition of the coparcenary property.

4. The written statement was filed by the petitioner. A preliminary objection was taken that the suit property was not properly valued for the purpose of court-fee and jurisdiction. The value of the suit is not less than Rs. 2,53,83,000/- (Two crores fifty three lacs eighty three thousands). It was denied that the parties were governed by the Hindu Mitakshara Law. According to the petitioner, the parties were governed by Hindu Succession Act, 1956. He is the only son, who succeeded to the property from his father under Hindu Succession Act, 1956. It was denied that the property in dispute was coparcenary property. His father has executed a registered "Will" in favour of three sons, including the petitioner. The mutation to this effect was sanctioned in the revenue record vide mutation No. 2018. All the coparceners including the petitioner partitioned the land and mutation to that effect was sanctioned in the revenue record in respect of co-owners including the petitioner and the suit land fell into the share of the petitioner.

5. The petitioner filed an application under Order 7 Rule 11 CPC for rejection of the plaint. It was specifically averred in the application that the minimum market value of the property was Rs. 1500/- per sq. meter and total gross value of the suit land comes to Rs. 2,53,83,000/-. According to the petitioner, the plaintiff was required to correct the valuation of the suit land and to affix the *ad valorem* court-fee on the market value of the suit property. The application was contested by the plaintiff. The learned trial Court passed the order in CMA No. 155 of 2013 dated 31.10.2013. According to the operative portion of the order dated 31.10.2013, the present case was covered as per Section 7(v) and the plaintiff was required to properly value the suit. The

application was allowed as per the operative portion and the plaintiff was asked to make proper valuation of the suit by affixing necessary court-fee.

6. The core issue involved in this petition is whether the court-fee was payable under Section 7 (iv)(b) or Section 7(v) or Schedule II, Article 13(vi) of the H.P. Court Fees Act, 1968.

7. The case of the plaintiff, precisely, is that the suit land is a coparcenary property. The parties are governed under the Mitakshara Law. The petitioner is the *'Karta'* of the family. He started alienating the suit property. According to the plaintiff, he along with proforma respondents have 1/4th share in the suit land and they wanted separate share of the property. According to the petitioner, the suit property was not coparcenary property. He has got this property on the basis of the registered "Will' executed by his father.

8. Section 7 (iv) (b) of the H.P. Court Fees Act, 1968 (hereinafter referred to as "the Act") reads as under:

> "**7. Computation of fees payable in certain suits-**
>
> **.....**
>
> **(iv)-in suits-**
>
> **(b) to enforce a right to share in joint family property;** to enforce the right to share in any property on the ground that it is joint family property;"

9. Section 7(v) and Schedule II-13 (vi) of the Act reads as under:

> "**7 (v). for possession of land, houses and gardens;** In suits for the possession of land houses and gardens- according to the value of the subject matter and such value shall be deemed to be-
>
> Where the subject matter is land, and-
>
> (a) where the land forms an entire estate, or a definite share of an estate paying annual revenue to Government; or
>
> forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue,
>
> and such revenue is permanently settled-ten times the revenue so payable;
>
> (b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government or forms part of such estate and is recorded as aforesaid;
>
> and such revenue is settled, but not permanently- ten times the revenue so payable;
>
> (c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue;
>
> and net profits have arisen from the land during the year next before the date of presenting the plaint fifteen times such net profits, but where no such net profits have arisen therefrom-the amount at which the court shall estimate the land with reference to the value of similar land in the neighbourhood;
>
> (d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as above mentioned-the market-value of the land;

Explanation- The word "estate", as used, in this paragraph means any land subject to the payment of revenue, for which the proprietor or a farmer or ryot shall have executed as separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue;

(e) **for houses and gardens;** where the subject matter is house or garden-according to the market-value of the house or garden;

....

THE SECOND SCHEDULE

13. Plaint or memorandum of appeal in each of the following suits:-
(i).....
.....
(vi) every other suit where it is not possible to estimate at a money value the subject matter in dispute and which is not otherwise provided for by this Act." Nineteen rupees fifty paise.

10. In the case of ***Asa Ram and others vrs. Jagan Nath and ors.,*** reported in ***AIR 1934 Lahore 563 (Full Bench),*** the Full Bench has held that in a suit to enforce the right to share in joint family property, i.e., a suit to be restored to joint possession or enjoyment of joint family property, court-fee would be payable under S. 7(iv)(b), ad valorem on the value of the relief as fixed by the plaintiff; and in a suit for partition of joint property, whether owned by a joint family or otherwise, where the plaintiff alleges that he is in actual or constructive possession thereof, court-fee payable would be Rs. 10 under Art. 17(vi), Sch. 2, Court-fees Act.

11. In the present case, the case of the plaintiff is that the suit property is coparcenary property. He would be deemed to be in constructive joint possession of the suit property. He has merely asked for partition of the joint Hindu property.

12. In the case of ***Shankar Maruti Girme vrs. Bhagwant Gunaji Girme and others,*** reported in ***AIR (34) 1947 Bombay 259,*** the Full Bench has held that a partition suit, where the plaintiff under accepted principles of Hindu law is in constructive joint possession of the whole property, is not a suit in ejectment in the ordinary sense of the term. The plaintiff in constructive possession of the whole seeks that the mode of enjoyment of the property by himself and by other members of his family shall be changed, and that, instead of enjoying joint possession of the whole, his possession shall be altered to separate possession of a part. Hence a suit for partition of joint family property, when the plaintiff is in constructive possession, is not a suit for the possession of property within the meaning of para (v) of S. 7, Court-fees Act. As such a suit falls under Sch. II, Art. 17, cl. (vii). It has been held as follows:

> "4. As to whether a suit for partition of joint family property can properly be said to be a suit for possession of property, a suit for possession of immovable property is usually termed a suit in ejectment, and its ordinary significance is that the plaintiff is out of possession, that the defendant is wrongfully in possession, and that the plaintiff seeks that possession should be taken from the defendant and be given to him. But a partition suit, where the plaintiff under accepted principles of Hindu law is in constructive joint possession of the whole property is certainly not a suit in ejectment in the ordinary sense of the term. The plaintiff in constructive possession of the whole seeks that the mode of enjoyment of the property by himself and by other members of his family shall be

changed, and that, instead of enjoying joint possession of the whole, his possession shall be altered to separate possession of a part. An extreme and no doubt unusual but by no means impossible example of partition suit is one by a manager in physical possession of the whole of the joint family property who nevertheless may seek the assistance of the Court for partition and for his separate possession of only a fraction of the property. All the High Courts other than Bombay, on the above line of reasoning, have accepted that a suit for partition of joint family property, when the plaintiff is in constructive possession, is not a suit for the possession of property within the meaning of para (v) of Section 7 of the Court-fees Act, and this reasoning may also be applied to cases where the joint family property is entirely movable property.

Candy J. then went on to hold that, as the plaintiffs claimed partition and possession of a definite share in certain lands and houses, which could be valued, ad valorem court-fee was leviable on the principle laid down in Mahadeva Balwant Karandikar v. Laxuman Balwant Karandikar. In Dagdu v. Tolaram (1909) I.L.R. 33 Bom. 658, S.C. 11 Bom. L.R. 1074 reference was not made either to Mahadeva Balwant Karandikar v. Laxuman Balwant Karandikar or to Balwant Ganesh v. Nana Chintamon. It appears that, between the time of the decision in Balwant Ganesh v. Nana Chintamon and the year 1909, when Dagdu's case came up, opinion had been expressed in one case, Motibhai v. Haridas (1896) I.L.R. 22 Bom. 315, that a partition suit falls within Section 7(iv)(b) of the Court-fees Act. The point in Motibhai v. Hondas was not really one of court-fees, but of jurisdiction. Batchelor J. dealt with Motihbai's case in Dagdu v. Totaram and held that the suit contemplated by Section 7(iv)(b) was one to enforce the right to "share" in property, and not the right to "a share" in property, and expressed the opinion that a suit falling under Clause (b) is one for the enforcement of what one might call an abstract claim or right, which conclusion, as he pointed out, brings Clause (b) into proper logical neighbourhood with the other clauses of paragraph (iv). Having rejected the only argument which appears to have been addressed, namely, that the decision in Motibhai v. Haridas should be followed, Batchelor J. seems to have concluded that the suit then must necessarily fall under paragraph (v) of Section 7 as being a suit for the possession of land. Of course as Clause (vi) of Article 17 of Schedule II is a residuary clause, if the suit can properly be brought under any of the sections of the Act, the question of this clause does not arise, but it may at least be said that the existence of a residuary clause was not at all considered in Dagdu's case.. The Calcutta High Court, in a series of decisions ending with Nandalal Mukherji v. Kalipada Mukherji (1931) I.L.R. 59 Cal. 313 already referred to, but also apparently based on Kirty Churn Mitter v. Aunath Nath Deb. has held that Article 17, el. (vi), Schedule II applies to a suit such as the present. It is a matter for some surprise that one decision, namely, that in Kitty Churn Mitter v. Aunath Nath Deb, appears to be the foundation stone of the two opposing views taken by the Calcutta and the Bombay High Courts, for the difference between the Dayabhaga and Mitakshara schools in that under the former the share of a coparcener is defined while under the latter it is not, does not appear to be substantial, if any, ground for general distinction. In Bengal the Legislature in the year 1935, by amendment of the Court-fees Act, accepted and adopted the view which the Calcutta High Court had always taken. By Bengal Act VII of 1935, among other amendments to Section 7 of the Court-fees Act was added a el. (vi)(A) which provides that in suits for partition and separate possession of a share of joint family property, or of joint property, or to enforce a right to "a share" in any property on the ground that it is joint family property or joint property, if the plaintiff has been excluded from possession of the property in which he claims to be a coparcener or coowner, the court-fee is to be according

to the market value of the share in respect of which the suit was instituted. Also to Article 17 of Schedule II of the Act, after the entry (v) was added an entry (v)-A, whereby a fee of Rs. 15 is prescribed as the court-fee in suits for partition and separate possession of a share of joint family property or of joint property or to enforce a right to a share in any property on the ground that it is joint family property or joint property if the plaintiff is in possession of the property in which he claims to be a coparcener or co-owner. The decisions of the other High Courts on the point are set out at length in the latest Madras full bench ruling, and no possible distinction can be made to these cases on grounds of differences in the Mitakshara and Dayabhaga schools of law. It appears that, before this latest decision, the 'Madras High Court had held in accordance with the one Bombay decision, Motibhai v. Haridas, that suits such as the present fell within Section 7(iv)(b) of the Court-fees Act. The view expressed by Batchelor J. in Dagdu's ease as to the inapplicability of Clause (b) of paragraph (iv) of Section 7 was approved by the full bench, but the Bombay view that partition suits fall under Section 7, paragraph (v), was emphatically dissented from. As I have already stated, the basis of all the decisions of the other High Courts is that a suit for partition is not a suit for possession when a plaintiff in constructive possession seeks to have the mode of his possession changed, and it is held that paragraph (v) of Section 7 must be restricted to the suits which of their essential nature are suits for possession. It is also held by those High Courts that the second condition of Article 17 (vi) of the second schedule, or Clause (vii) as it is by the recent Bombay amendment of the second schedule, that it is; not possible to estimate at A money-value the subject-matter in dispute, is also satisfied; for the value of a change in the mode of possession is not capable of being expressed in money. I think that these decisions are right, and it does appear that the Bombay view, although it has stood for so many years is based on three decisions, two of which rest upon a Calcutta decision, which appears itself to suggest the opposite result, and a third which appears to have been given without taking into consideration Article 17 of Schedule II, and where it seems to have been assumed that, if suits of this nature do not fall under Clause (b) of paragraph (iv) of Section 7 of the Court-fees Act, they must necessarily fall under paragraph (v) of that section. In these circumstances, in view of the weight of authority, I think that it should now be declared that the Bombay decisions are not good law, and that this Court should fall into line with all other High Courts, and should hold that, where in a suit for partition the plaintiff claims to be in constructive possession with the other coparceners of the joint property, the suit falls under Schedule II, Article 17, Clause (vii) (according to the Bombay amendment) and the court-fee payable is the fixed fee, which under the present Act is Rs. 15."

13. In the case of ***Nagorao Bapu and ors. Vrs. Mahadeo Bapu Doma Bapu and others,*** reported in ***AIR (37) 1950 Nagpur 81,*** the learned Single Judge has held that where the plaint in a suit asserts a separation in status before the suit and prays for partition and separate possession of joint family property but the plaintiff does not admit that there is any denial of title, the position is exactly the same as the one which occurs when the family is joint. In such a case, the plaintiff merely seeks a change in the mode of enjoyment and that is incapable of valuation. Therefore, Art. 17(vi) is applicable and the court fee paid under that Article would be proper in the first instance. It has been held as follows:

"(11) But that does not settle the matter because the plaintiffs do not admit that there has been any denial of title. All they say is that the defendants have evaded partition. Even if they had refused partition that would not have amounted to ouster unless the plaintiff's title was denied.

Therefore the position is exactly the same as the one which occurs when the family is joint. In such a case it has been held that the plaintiff merely seeks a change in the mode of enjoyment and that that is incapable of valuation. Therefore Art. 17 (vi) is applied. See Santosh v. Rama, I.L.R. (1949) Nag. 35 at pp. 46, 48; (A.I.R. (86) 1949 Nag. 805). It follows that the court fee paid on the plaint was proper in the first instance.

(12) But, as explained in Santosh v. Rama I.L.R. (1949) Nag. 85: (A.I.R. (36) 1949. Nag. 805), it is also necessary to scan the defendants' written statement to see whether there is any allegation of ouster before suit. On looking through the written statements, I do not find any such allegation. The defendants deny the plaintiff's title to certain items of property and allege that they have no title because according to the defendants, these items were partitioned in 1939. But that is not enough to constitute ouster. It is not enough, as in a case of adverse possession, merely to deny the plaintiff's title and keep them out of possession , it is necessary to bring this home to the plaintiffs. See Santosh v. Rama, I.L.R. (1949) Nag. 35; (A.I.R. (86) 1949 Nag. 805). Tehre is no allegation to that effect in the written statement. Then against the ouster must have been before the suit ore ise ad valorem court fees are not payable. There is no allegation here that there was any denial of title before suit. In the circumstances I hold that Art. 17(vi) applies and that the fixed court fee of Rs. 20 paid on the plaint was proper."

14. In the case of ***Onkar Mal and others vrs. Ram Sarup and others,*** reported in ***AIR 1954 Allahabad 722,*** the Full Bench has held that the allegations in the plaint determine the court-fee. It has been held as follows:

"14. In the matter of computation of court-fee the aforesaid general principle cannot have so wide a scope as it has in determining the nature of the suit. After the category of the suit has been ascertained, the Court has to find out whether the plaintiff has correctly valued the relief for purposes of court-fees in the manner laid down in Section 7 of the Court-fees Act. This process also involves the examination of the plaint allegations and, if there is nothing to indicate otherwise, the plaintiff's valuation 'prima facie' is accepted as correct. Ordinarily, the Court would accept court-fee paid in the first instance as correct, but if it transpires subsequently that an allegation of fact on the basis of Which the court-fee was computed is not correct, then it is within the power of the Court to demand additional court-fee before the judgment is pronounced.

Section 6, Court-fees Act directs that no document (which term includes a plaint) which is not properly stamped shall be received unless it bears proper court-fee paid according to the provisions of the Court-fees Act. It was with a view to recognise the power of a Court to realise additional court-fee that the Legislature thought it proper to enact Order 7, Rule II (c) as also Section 149, Civil P. C. Take for instance a case in which the plaintiff sues for possession of a house which he values at its. 500/-. If the defendant contests this valuation, the Court must first determine the market value of tile house in the manner laid down in Section 10, Court-fees Act, and if it comes to the conclusion that the market value of the house for the purpose of court-fee is Rs. 1,000/-, it has the power to demand the additional court-fee which if not paid would entitle the Court to reject the plaint.

It is thus evident that the general rule that the payment of the court-fee must abide by the allegations in the plaint in all circumstances cannot be accepted as correct. Where the court has reason to think on the material placed before it that the plaintiff has made false or incorrect allegations with a view to avoid payment of Court-fee, the Court has

power to intervene and realise court-fee at any stage of the proceedings in the case. If, however, the mistake is not detected by the trial Court and also by the appellate Court, the power of the High Court to require payment of the court-fees that should have been paid in the lower Courts is expressly recognised in the second part of Section 12, Court-fees Act. It is, therefore, not correct to say that even in the matter of computation of court-fee, plaint allegations should be accepted as the last word on the question of the payment of court-fee."

15. In the case of ***Mahadeo Ganesh and another vrs. Sadashiv Khanderao and ors.,*** reported in ***AIR 1953 M.B 151,*** the Division Bench has held that the expression "to enforce the right to share in the property", imply that plaintiff has been excluded from enjoyment of common property. Clause does not apply to a suit for partition by co-owner who has not been excluded from enjoyment of common property. Such a suit comes under clause (vi) of Art. 17 of Schedule II corresponding to Art. 11(vi) of Indore Court-fees Act. It has been held as follows:

"(5) Turning now to the ground urged by Mr. Kulkarni we may point out that under Art. 11 of the Indore Court-fees Act the amount of court-fee payable by a defendant who is a party to the suit for partition and files an appeal against the decision given against him would depend entirely on the amount of the court-fee that was paid by the plaintiff. Article 11 opens with these words:

"Plaint or memorandum of appeal in each of the following suits."

It is cl. VI of this Article which according to Mr. Newaskar applies to this case. It runs:

"Every other suit where it is not possible to estimate at a money-value(?) the subject-matter in dispute and which is not otherwise provided for by this Act.":

As observed by Chitaley and Rao in their commentary on the Court-fees Act, 1944 Edition page 128 (notes on section 7 (IV)(b) note (2), it is now generally settled in most of the High Courts that this clause (clause 7(IV)(b) does not apply to a suit for partition by a co-owner who has not been excluded from the enjoyment of the common property. This view, the commentators added is based on the ground that the words in the clause "to enforce the right to share in the property" imply that the plaintiff has been excluded from the enjoyment of such property and are inapplicable to a case in which he has not been so excluded. Reference in support of this view is made to a number of cases including – "Kameshwar Singh v. Rajbansi Singh'. AIR 1943 Pat 433 (438) (A); -- 'In re Nandlal' AIR Nath', AIR 1934 Lah 563 (573) (FB) (C) and – 'Bhagwan Appa Wani v. Shivalla Wani' AIR 1927 Nag 248 (249) (D). See also in – 'Ma Ma Nyun v. Maung Mya', AIR 1938 Rang 76 (78) (E). It has been held by Madras and Allahabad High Courts as well as in Sind that such a suit comes under cl. (VI) of Art. 17 of the II schedule which is the same as article 11 (VI) of the Indore Court-fees Act. See – 'Mallayya v. Jagannadhamma', AIR 1942 Mad 10-3 (1) (F); -- 'Narain ohan Dev v. Mt. Krishna Ballabhi Dvi ', AIR 1935 All 292-293 (G) and – 'Haji Yusuf v. Ghulam Hussain Kassim', 16 Ind case 771 (772) (Sind)(H). We respectfully agree with the view taken in these decisions as to the applicability art. 17 of II schedule to such cases. In the case before us admittedly Keshav was in joint possession and accordingly a court-fee of Rs.15/- was paid."

16. In the case of ***Karibasappa vrs. Jademallappa & ors.,*** reported in ***AIR 1955 Mysore 140,*** the learned Single Judge has held that a member of the joint family who files a suit for a declaration that he is entitled to a share in

the joint family properties and seeks for division of the properties by metes and bounds and alleges that he is in constructive possession of the properties is liable to pay fixed court fee under Sech. II Art. 17(vi). It has been held as follows:

> "3. The short question that arises for consideration in this revision petition is whether a member of the joint family who files a suit fur a declaration that he is entitled to a share in the joint family properties and seeks for division of the properties by metes and bounds and alleges that he is in constructive possession of the properties described in the schedule is liable to pay ad valorem Court fee or fixed Court fee under Article 11-B, Schedule II. Mysore Court Fees Act (Article 17 of the Central Act).
>
> The Petitioner had alleged in his plaint in unequivocal terms that he was in joint possession of the properties along with Defendants 1 to 5. What the Petitioner wanted was division of the properties by metes and bounds and delivery of his 1/3 share. The question whether the Plaintiff is in possession of the joint family propertied constructively or otherwise for the purposes of levying Court fee should be determined oh the allegations made in the plaint.
>
> Merely because the defendants deny that the Plaintiff was in joint possession of the suit schedule properties, the nature of the suit i3 not altered. (Vide -- 'Asa Bam v. Jagan Nath,' AIR 1934 Lah 563 (FB) (A), and In the matter of Nand Lal Mukherjee, AIR 1932 Cal 227 (B). It is fairly well settled law that it is the allegation in the plaint that should be looked into and that the denial of the allegation by the defendants does not in any way take away the suit out of of the scope of Article 11-B, Schedule II Court Fees Act (Vide --- 'Manghamnal v. Tolaram,' 16 Ind Cas 773 (Sind) (C).
>
> Therefore the learned District Judge was not justified in taking into, consideration the statements made by the Defendants in their written statement that the Petitioner was not in actual or constructive possession of any of the suit schedule items and proceeding to hold an enquiry as to whether he was in possession of all the suit items and whether the Court fee paid by him was sufficient. The learned District Judge has been entirely influenced by the fact that the Defendants denied that the Plaintiff was in constructive possession of any of the items and by the evidence adduced by them to establish that the Petitioner was In possession of only a house belonging to the joint family and was not in actual physical possession of the other items.
>
> He seems to have been further influenced by the fact that the Petitioner had omitted to give a full description of the suit schedule items attached to the plaint in his suit that he had filed before the Munsiff, Tarikere at the first instance.
>
> The fact that it is the substance of the plaint and not to the mere shape given to it in the plaint that has to be looked into for purposes of assessment of Court-fee has been decided in --'Aswathanarayana Rao v. Makam Suriya Setty,' 56 Mys. H. C. R. 67 (D). The fact that the order passed by the learned District Judge directing payment of ad valorem Court fee on the value of the 1/3 share of the Petitioner is erroneous is clear from the decision of this Court reported in -- 'Krishnappa v. Bhasyam Iyengar,' 44 Mys H. C. R. 203 (E).
>
> It was held in that case that where a co-owner, co-sharer or co-tenant alleges that he is in joint possession of the property in suit and wants his share to be separated and put into his possession, a fixed Court-fee under Article 11-B is sufficient. The several decisions of the other High

Courts in India have all been reviewed in the above case and this Court has laid down that when a suit is for partition by a Plaintiff who is in possession of the property, there is no question that Article 17 (11-B of our Act) would apply. It has been further held that even when the propertv is not joint family property and the Plaintiff is not a coparcener, is only a co-sharer he is entitled to maintain a suit for partition without paying ad valorem Court-fee, if his possession of the Joint property is admitted or can be gathered by the allegations made in the plaint. To the same effect is the decision reported in -- 'Nagendriah v. Ramachandriah,' AIR 1953 Mys 108 (F).

It is laid down by this Court in this case that if a Plaintiff alleges himself to be a co-sharer and to be in joint possession of the plaint schedule properties with the defendants and brings a suit for partition and possession of his snare he is entitled to pay a fixed Court fee under Article 11-B, Court Pees Act (Article 17 of the Central Act). It has been further laid down that even after the trial Court found that the Plaintiff was not in possession of some of the items of the suit schedule properties and was not entitled to claim or get any share in them and the suit in respect of those properties is dismissed the Plaintiff is entitled to pay a fix Court fee on the memorandum of appeal against the decree.

The several decisions of the other High Courts in India including a decision of this High Court reported in 44 Mys HCR 203 (E), have all been reviewed in the above case. In the light of the above decisions, the order passed by the learned District Judge that because the Defendants had denied that the Plaintiff was in possession of the properties or that the evidence recorded by him disclosed that the Plaintiff was not in actual physical possession of the suit schedule properties he is liable to pay ad valorem Court fee on the value of his share is untenable.

Reference in this connection may also ba made to a decision reported in -- 'Premananda v. Dhirendra Nath,' (G) Wherein it has been observed:

'The question as to what Court fees are payable on a plaint has to be decided on the allegation in the plaint and the nature of the relief claimed, whatever may transpire in the evidence, the plaint remains the same until and unless it is amended".

It has been further held in this Calcutta case that so long as the plaint is not amended, no ad valorem Court fee is payable. All that the Defendants pleaded, in their written statement was that they had given away a share to the Petitioner in all the suit schedule properties. They had not disclosed what items of the suit schedule properties had actually fallen to the share of the Petitioner and were in his actual physical possession.

On a consideration, therefore, of the several authorities, I am of opinion that the Order passed by the learned District Judge, Shimoga directing the Petitioner to pay ad valorem Court fee calculated on the value of his share cannot be supported and is liable to be set aside. The Petitioner is entitled to pay a fixed Court fee under Article 11-B of Schedule II, Court Fees Act and maintain his suit."

17. In the case of ***Mina Ram vrs Amolak Ram & ors,*** reported in ***AIR 1966 Himachal Pradesh 4,*** it was held that court-fee is to be determined in the light of averments made in the plaint, uninfluenced by the pleas in the written statement. Where the allegations in the plaint, read as a whole, amount to an averment that the plaintiff is in actual possession of some property and in constructive possession of the other, the relief of partition which is claimed by him, does not fall within either S. 7(iv)(b) or S. 7(v). The relief falls within the four corners of Article 17(vi) of Schedule -II. It has been held as under:

"14. The learned counsel for respondent No. 1 invited the attention of the Court to paragraph 11 of the plaint wherein it is stated that respondent No. 1 had refused to render accounts after 1960 and to paragraph 12 wherein it is stated that respondent No. 1 had denied the right of the petitioner, and contended that the clear inference from the aforesaid statements was that the petitioner admitted in the plaint that he had been ousted from the enjoyment of the joint property, and that, therefore, either Section 7 (iv) (b) or Section 7 (v), and not Article 17(vi), Schedule II, of the Court-Fees Act, was applicable to the relief of partition. The contention of the learned counsel does not appear to be correct. A reading of the plaint, as a whole, shows that the allegations of the petitioner were that he had been occasionally visiting the property in suit which was being managed by respondent No. 1, on behalf of and for the benefit of the joint Hindu family, that he had been receiving profits of the orchard and that it had become difficult to enjoy the property jointly. The petitioner did not state in the plaint that he had been ousted from possession of the property. The refusal to render accounts and denial of title, by respondent No. 1, had furnished cause of action to the petitioner, for the suit. Those facts were stated, in the plaint, in that context. The allegations, in the plaint, read as a whole, amounted to an averment that the petitioner was in actual possession of some property and in constructive possession of the other. Therefore, the relief of partition, claimed by the petitioner, did not fall within the ambit of either Section 7 (iv) (b) or Section 7 (v) of the Court-Fees Act, but fell within the four corners of Article 17 (vi), Schedule II."

18. The case projected by the plaintiff is that he was in constructive possession of the suit property under the joint family property and he wanted his separate share for enjoyment of the same. Thus, his case would not fall either under Section 7 (iv)(b) or Section 7(v) of the Act. It would fall under Article 13 (vi) of Schedule II of the H.P. Court Fees Act, 1968. The learned trial Court has not correctly appreciated the legal position in view of the averments made in the plaint and has passed a very vague order.

19. Accordingly, the petition is dismissed. The trial Court is directed to proceed with the matter in accordance with the observations made hereinabove with regard to the payment of the court-fee under the H.P. Court Fees Act, 1968, by the plaintiff.

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

Susheel Kumar ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.432 of 2009

Reserved on : 10.12.2014

Date of Decision : December 29, 2014

Indian Penal Code, 1860- Section 376(2)(f) – Accused took the prosecutrix to the back side of the temple and sexually assaulted her- PW-2 heard the cries of the prosecutrix and went to the spot- accused ran away on seeing PW-2- prosecutrix was minor- medical evidence proved that blood detected on vaginal swab was on account of micro haemorrhage, which could be caused by the sexual attempt- held, that mere absence of injury cannot be a ground to disbelieve the testimony of the prosecutrix- testimony of the prosecutrix was corroborated by PW-1, Pardhan who deposed that in the meeting of the Panchayat, accused had admitted his mistake- in these circumstances, conviction of the accused was justified. (Para-10 to 27)

Cases referred:
State of M.P. v. Pappu, (2008) 16b SCC 758
State of M.P. v. Ghanshyam Singh, (2003) 8 SCC 13
State of M.P. v. Babbu Barkare, (2005) 5 SCC 413
State of M.P. v. Sk. Shahid, (2009) 12 SCC 715
State of M.P. v. Munna Choubey, (2005) 2 SCC 710
Pushpanjali Sahu v. State of Orissa and another, (2012) 9 SCC 705
Tulshidas Kanolkar v. State of Goa, (2003) 8 SCC 590
Ramesh v. State through Inspector of Police, (2014) 9 SCC 392
Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546
Perminder alias Ladka Pola v. State of Delhi, (2014) 2 SCC 592
State of H.P. v. Gian Chand, (2001) 6 SCC 71
Puran Chand v. State of Himachal Pradesh, (2014) 5 SCC 689
Rai Sandeep alias Deepu v. State (NCT of Delhi), (2012) 8 SCC 21
State of H.P. v. Asha Ram, (2005) 13 SCC 766
Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 171
State of M.P. v. Ramesh, (2011) 4 SCC 786
Rajkumar v. State of Madhya Pradesh, (2014) 5 SCC 353

For the Appellant : Mr. Ajay Sharma, Advocate.
For the Respondent : Mr. B.S. Parmar,, Mr. V.S. Chauhan, Additional Advocates General, Mr. Vikram Thakur & Mr. Puneet Rajta, Deputy Advocates General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Susheel Kumar, hereinafter referred to as the accused, has assailed the judgment dated 20.11.2009, passed by Additional Sessions Judge, Fast Track Court, Hamirpur, Himachal Pradesh, in Sessions Trial No.12 of 2009, titled as *State of H.P. v. Sushil Kumar*, whereby he stands convicted of the offence punishable under the provisions of Section 376(2)(f) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of ten years and pay a fine of Rs.10,000/- and in default thereof to further undergo simple imprisonment for a period of four months.

2. It is the case of prosecution that on 30.5.2009, prosecutrix (PW-3), aged six years, had gone to pay obeisance at the temple of Lord Shiva in her village Baleta Khurd. Finding her to be alone, accused took her to the back side of the temple and sexually assaulted her. Ms Sapna (PW-2), who independently had gone to the temple, heard cries of the prosecutrix and went where prosecutrix was sitting. Seeing her, accused ran away. Thereafter, Sapna led the prosecutrix to her house. When Smt. Meera Devi (PW-1), mother of the prosecutrix, learnt about the incident, she immediately called her husband Sunil Kumar (PW-4), who lodged report with the Panchayat in the shape of complaint (Ex. PW-4/A). Meeting of Panchayat took place, where after on 31.5.2009, Smt. Meera Devi (PW-1) moved an application (Ex. PW-1/A) before the District Police Officer, District Hamirpur, on the basis of which FIR No.172, dated 31.5.2009 (Ex.PW-14/A), under the provisions of Section 376/511 of the Indian Penal Code, was registered at Police Station, Sadar, District Hamirpur. Same day, prosecutrix was got medically examined from Dr. Archana Soni, who after receiving report (Ex. PA) of the Forensic Science Laboratory, pertaining to the vaginal swab (containing human blood) and other material, issued report (Ex.PW-7/D), opining that possibility of sexual assault could not be ruled out. Police conducted investigation on the spot. Accused was also arrested and got

medically examined from Dr. K.S. Dogra, who issued MLC (Ex. PW-6/B). For determining the age of the prosecutrix, police took on record her birth certificate (Ex. PW-8/B). Her radiological age was also got determined from Dr. Sanjiv Sharma (PW-10). 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 376(1) 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 17 witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he pleaded innocence and false implication. No evidence in defence was led.

5. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused for having committed an offence punishable under the provisions of Section 376(2)(g) of the Indian Penal Code and sentenced him as aforesaid. Hence, the present appeal by the accused.

6. We have heard learned counsel for the parties as also perused the record.

7. Relying upon its earlier decisions rendered in ***State of M.P. v. Pappu, (2008) 16b SCC 758***; ***State of M.P. v. Ghanshyam Singh, (2003) 8 SCC 13***; ***State of M.P. v. Babbu Barkare, (2005) 5 SCC 413***; ***State of M.P. v. Sk. Shahid, (2009) 12 SCC 715***; and ***State of M.P. v. Munna Choubey, (2005) 2 SCC 710***, Hon'ble the Supreme Court of Indiathe Apex Court in ***Pushpanjali Sahu v. State of Orissa and another, (2012) 9 SCC 705***, has held that

> "12. Before parting, we wish to reflect upon the dehumanizing act of physical violence on women escalating in the society. Sexual violence is not only an unlawful invasion of the right of privacy and sanctity of a woman but also a serious blow to her honour. It leaves a traumatic and humiliating impression on her conscience- offending her self-esteem and dignity. This Court in State of H.P. v. Shree Kant Shekari, (2004) 8 SCC 153 has viewed rape as not only a crime against the person of a woman, but a crime against the entire society. It indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. It destroys, as noted by this Court in Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490 the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim's most cherished of the fundamental rights, namely, the right to life contained in Article 21 of the Constitution. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely."
>
> (Also see: *State of Uttar Pradesh v. Munesh,* (2012) 9 SCC 742; and *Jugendra Singh v. State of Uttar Pradesh,* (2012) 6 SCC 297).

8. The Apex Court in ***Tulshidas Kanolkar v. State of Goa, (2003) 8 SCC 590***, has drawn difference between "consent" and "submission" in a case of rape. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress or impaired due to mental retardation or deficiency cannot be considered to be a case of consent.

9. The Apex Court in ***Ramesh v. State through Inspector of Police, (2014) 9 SCC 392***, while dealing with a case where even though name of

the accused was initially not recorded in the FIR, but however, on the basis of last seen theory and another incriminating circumstance of the accused leading to recovery of incriminating material, on the basis of circumstantial evidence, accused was convicted for having committed an offence punishable under the provisions of Sections 376 & 302 of the Indian Penal Code. (See also: ***Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546***).

10. That prosecutrix was a minor is not disputed before us. In any event, Shri Ajay Kumar (PW-8), Assistant Secretary, Gram Panchayat Neri, Tehsil and District Hamirpur, Himachal Pradesh, has proved Birth Certificate (Ex. PW-8/B) of the prosecutrix, issued under the provisions of Registration of Birth and Deaths Act, 1969 and Rules framed thereunder. Prosecutrix was born on 25.10.2003. Dr. Sanjiv Sharma (PW-10) determined the radiological age of the prosecutrix to be between 4 and 8 years. Report (Ex.PW-7/B) and X-Ray (Ex. PW-10/A to D), conducted by Shri Suresh Guleria (PW-11) are on record to such effect.

11. Thus, it stands proved that as on the date of commission of crime, prosecutrix was six years old, which fact is also corroborated by her mother.

12. From the version of Dr. Archana Soni (PW-7), who issued the MLC (Ex.PW-7/D), pertaining to the prosecutrix, it is evidently clear that hymen was intact, but congestion was present on the inner side of labia minora. Child was well oriented to time, place and responding to verbal commands. Even though child was uncooperative, yet she disclosed being molested by Sushil Kumar (accused) on 30.5.2009, who also committed "bad act". The doctor opined that human blood detected on the vaginal swab was on account of "micro haemorrhage", which "could be caused by the sexual attempt". She categorically states that she noticed redness, though there was no swelling on the private parts of the prosecutrix. She states that from clinical examination, there was no evidence of penetration, but clarifies that touch of male organ with the private part amounts to rape. Suggestion though preposterous, that redness on the private part of the prosecutrix was on account of an ant bite or rubbing by fingers, is not supported by her.

13. In the instant case, the doctor has not found any traces of semen either on the clothes or private parts of the prosecutrix, but absence thereof would not negate the prosecution version of accused having committed an act of sexual assault, for we find other incriminating material on record against the accused. Proof of penetration is not necessarily linked to presence of spermatozoa in the private part of the victim.

14. Either non-rupture of hymen or absence of signs of injury on the body of the prosecutrix, in itself, cannot be a ground to disbelieve the otherwise inspiring testimony of the prosecutrix. In ***Perminder alias Ladka Pola v. State of Delhi, (2014) 2 SCC 592***, the Hon'ble Supreme Court of India has held as under:

> 10. PW-15, the doctor who conducted the medical examination of the prosecutrix on 31.01.2001, however, has stated that there was no sign of injury on the prosecutrix and the hymen was found intact. The High Court has considered this evidence and has held that the non-rupture of hymen is not sufficient to dislodge the theory of rape and has relied on the following passage from Modi in Medical Jurisprudence and Toxicology (Twenty First Edition):
>
> > "Thus, to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without

emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genital or leaving any seminal stains."

11. Section 375, IPC, defines the offence of 'rape' and the Explanation to Section 375, IPC, states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. This Court has accordingly held in Wahid Khan v. State of Madhya Pradesh [(2010) 2 SCC 9] that even the slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial. In the aforesaid case, this Court has relied on the very same passage from Modi in Medical Jurisprudence and Toxicology (Twenty Second Edition) quoted above. In the present case, even though the hymen of the prosecutrix was not ruptured the High Court has held that there was penetration which has caused bleeding in the private parts of the prosecutrix as would be evident from the fact that the underwear of the prosecutrix was stained by blood. In our considered opinion, the High Court was right in holding the appellant guilty of the offence of rape and there is no merit in the contention of the learned counsel for the appellant that there was only an attempt to rape and not rape by the appellant.

15. In ***State of H.P. v. Gian Chand, (2001) 6 SCC 71***, the Apex Court has held as under:

"17. In State of Punjab v. Gurmit Singh, (1996) 2 SCC 384 : (1996 AIR SCW 998 : AIR 1996 SC 1393 : 1996 Cri LJ 1728) , one of us, Dr. A.S. Anand, J. (as His Lordship then was) has thus spoken for the Court "A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case." The approach adopted by the High Court runs into the teeth of law so stated and hence stands vitiated."

16. In ***Puran Chand v. State of Himachal Pradesh, (2014) 5 SCC 689***, the apex Court held that:

"15. In fact, at this stage, the amendment introduced in the Indian Evidence Act, 1872 in Section 114-A laying down as follows is worthwhile to be referred to:-

"**114-A.** ***Presumption as to absence of consent in certain prosecutions for rape***.-In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub- section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent."

1. Section 114-A no doubt addresses on the consent part of the woman only when the offence of rape is proved but it also impliedly would be applicable in a matter of this nature where the victim girl had gone to the extent of committing suicide due to the trauma of rape and yet is sought to be disbelieved at the instance of the defence that she weaved out a concocted story even though she suffered the risk of death after consuming poison. If this were to be accepted, we fail to

understand and lament as to what is the need of incorporating an amendment into the Indian Evidence Act by incorporating Section 114A which clearly has been added to add weight and credence to the statement of the victim woman who suffers the offence of rape and a claustrophobic interpretation of this amended provision cannot be made to infer that the version of the victim should be believed relating merely to consent in a case where the offence of rape is proved by other evidence on record. If this view of the matter is taken into account relying upon the amended Section 114-A of the Indian Evidence Act which we clearly do, then even if there had been a doubt about the medical evidence regarding non rupture of hymen the same would be of no consequence as it is well settled by now that the offence of rape would be held to have been proved even if there is an attempt of rape on the woman and not the actual commission of rape. Thus, if the version of the victim girl is fit to be believed due to the attending circumstances that she was subjected to sexual assault of rape and the trauma of this offence on her mind was so acute which led her to the extent of committing suicide which she miraculously escaped, it would be a travesty of justice if we were to disbelieve her version which would render the amendment and incorporation of Section 114A into the Indian Evidence Act as a futile exercise on the part of the Legislature which in its wisdom has incorporated the amendment in the Indian Evidence Act clearly implying and expecting the Court to give utmost weightage to the version of the victim of the offence of rape which definition includes also the attempt to rape."

17. In ***Rai Sandeep alias Deepu v. State (NCT of Delhi), (2012) 8 SCC 21***, the Apex Court has reiterated its decision in ***State of H.P. v. Asha Ram, (2005) 13 SCC 766***, wherein it is held that even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. (See also: ***Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 171***).

18. Relying upon its earlier decision in ***State of M.P. v. Ramesh, (2011) 4 SCC 786***, the Apex Court in ***Rajkumar v. State of Madhya Pradesh, (2014) 5 SCC 353***, has held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age or extreme old age or disease or because of his mental or physical condition. Therefore, Court has to form an opinion from the circumstances as to whether the witness is able to understand the duty of speaking the truth, and further in a case of child witness, Court has to ascertain whether the witness is tutored or not. Evidence of a child witness must be evaluated more carefully and with greater circumspection as a child is susceptible to be swayed by others sayings. Trial court must ascertain whether child is able to discern between the right and/or wrong, which can be so done only by putting questions to such witness. Deposition of a child witness may require corroboration, but in case deposition inspires confidence, and there is no embellishment or improvement therein, Court may rely upon his testimony. Only in case where there is evidence on record to show that a child has been tutored, Court can reject his statement either in part of wholly. As to whether child stands tutored or not, can be inferred from the contents of his deposition.

19. Since much emphasis has been laid on the version of prosecutrix, we deem it to be appropriate to reproduce her entire testimony as under:

"Question: Do you know the accused Sushil Kumar present in the Court?

Ans. (No answer given. The child started weeping.

Question: What do you know about the case?

Ans. One Golu has put his 'Lari' (penis) on my place of urination. I felt pain. Golu had also touched my place of urinatin. This was done behind the temple of "Shiva", which is away from my house. I had worn shirt and Salwar on that day. The salwar Ext. P.1 belongs to me. Golu had put off my salwar. I had wept. Sapna had reached the spot who is present in the court today. Kumari Sapna had sent me to my house. My mother had met me outside my house. I narrated these facts to my mother. Golu is present in the Court. (witness pointed out towards the accused in attendance).

XXX XXX XXX

(By Shri Madan Chauhan, counsel for the accused).

I had gone to the temple all alone. No other person was present in the temple at that time. It is correct that I offered water in the temple and then returned. It is correct that police people had told me that Golu had done like this. It is correct that my mother had also tought me such statement. It is incorrect that I had fall on the material date and I felt pain. It is correct that the ant had given bite at the place of my urination. (The child witness admitted the suggestion by gestures).

20. Though the trial Court recorded the child not to have understood the sanctity of oath, yet finding the witness to be capable of being examined in Court, recorded here statement. Also, her statement has to be read, understood and appreciated as a whole. There cannot be part dissection, as the learned counsel wants us to do so. On a Court query, as to whether accused was present in the Court or not, child started weeping, and then clearly, confidently and unequivocally deposed that Golu (here she refers to the accused) had touched her place of urination behind the temple of Shiva. After putting off her salwar, when he put his 'Lari' (penis) on her place of urination, she wept. Sapna (PW-2) reached the spot and sent her home. When she met her mother outside her house, she narrated the entire incident to her. In our considered view, witness has withstood the test of cross-examination. She is categorical of having gone to the temple alone and none was present there at that time. Though in her innocence, she does state that police and her mother had "told" and "taught" her to make her statement, but then this fact itself would not establish that the witness is tutored. After all she is a child. The incident took place on 30.5.2009 and she was deposing in the Court on 8.10.2009. Refreshing one's memory cannot be said to be tutoring.

21. We find that presence of accused and the prosecutrix, at the time of occurrence of crime, at the temple, situated in the village, is corroborated by Ms Sapna (PW-2), who also states that prosecutrix, who was weeping, asked her to leave her home and she led her to the path to her house.

22. Now, Smt. Meera Devi (PW-1) categorically states that on 30.5.2009 at about 8/9 a.m., prosecutrix had gone to the temple. Finding her not to have returned home, she went towards the temple and on way met her. Prosecutrix, who was weeping, informed that behind the temple, accused after opening her salwar, put his penis on her vagina. She was told that when Sapna saw them, accused ran away. On checking private parts of the prosecutrix, she noticed redness. She immediately informed her husband Shri Sunil Kumar (PW-4), who after reaching home, informed Pradhan of the Gram Panchayat, Neri. The Panchayat advised that the matter be reported to the police. Accordingly, on 31.5.2009, application (Ex. PW-1/A) was filed.

23. Testimony of Smt. Meera Devi stands corroborated by her husband Shri Sunil Kumar (PW-4), who clarifies that the incident was inquired into by members of the Panchayat.

24. Now, when we examine testimony of Pradhan Ms Pushpa Thakur (PW-5), we find that meeting of Panchayat was called, in which accused admitted his mistake, and when the Panchayat found the matter to be beyond their competence, decision was taken to report the matter to the police. Witness clarifies that though accused disappeared in the midst of proceedings, his grandfather remained present throughout.

25. Mere delay in lodging the FIR, if satisfactorily explained, is not a mitigating circumstance, in a case of rape. Application (Ex. PW-4/A) moved before the Panchayat, statements of Rafi Ram (Ex.PW-5/A) (grandfather of the accused) and Ms Sapna (Ex.PW-5/B), recorded during the proceedings before the Panchayat, were taken on record by the police vide memo (Ex. PW-5/C). We have not lent much credence to such statements, but however from the testimonies of Smt. Meera Devi,Shri Sunil Kumar and Smt. Pushpa Thakur, and the proceedings which took place before the Panchayat, it is evidently clear that the matter was immediately reported to the authorities and thus delay of one day in reporting the matter to the police, in the instant case, stands sufficiently explained. Pradhan has explained that her house is at a distance of 2 kms from the place of occurrence of crime and the Panchayat proceedings, which went on for two hours, commenced only at 1.30-2 p.m. After all, one cannot ignore the fact that parties hail from rural background and are not fully educated. Father of the prosecutrix has studied only upto 8th Class and mother not studied beyond 12th Class.

26. Much emphasis is laid on the admission made by the prosecutrix and Inspector Kamla Devi (PW-17), who investigated the matter, that there are houses of persons near the temple and persons were found working in the fields, at the time of occurrence. In our considered view, this fact by itself would not be sufficient to render the prosecution story to be doubtful, for it has not come on record that in the fields, adjoining to the temple, tillers/ owners were present, who could hear cries of prosecutrix and/or see the temple. Through the uncontroverted testimony of the prosecutrix and Sapna, it has come on record that none other than the accused and the prosecutrix were in the temple, at the time of occurrence of incident. Trial Court has rightly observed that had Ms Sapna not reached the spot, perhaps accused would have fully penetrated the private part of the prosecutrix, which would have been extremely fatal.

27. Thus, in our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that on 30.5.2009 at Temple of Shiva, situated in village Baleta Khurd, he committed rape on the prosecutrix, who was a minor.

28. We find that there is one glaring error in the judgment and that is the accused, who was charged for having committed an offence punishable under the provisions of Section 376(1), stands convicted for having committed an offence under the provisions of Section 376(2)(f) of the Indian Penal Code, which in fact was also not the case of prosecution. There is no evidence on record that accused committed rape during communal or sectarian violence. As such, we modify the order of conviction and hold the accused guilty of offence punishable under the provisions of Section 376(1) of the Indian Penal Code.

29. For all the aforesaid reasons, we find no reason to interfere with the findings returned by the Court below, except for a limited extent, as noted above. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is disposed of accordingly.

Appeal stands disposed of, so also pending application(s), if any.

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

Cr. Appeal No. 114 of 2011 a/w
Cr. Appeal No. 131 of 2011
Judgment reserved on: 10.12.2014
Date of Decision: December 30, 2014

1. **Cr.Appeal No.114 of 2011**

Manoj Kumar ...Appellant.
Versus
State of Himachal Pradesh. ...Respondent.

2. **Cr.Appeal No.131 of 2011**

Ashok Kumar ...Appellant.
Versus
State of Himachal Pradesh. ...Respondent.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3.5 kg of charas in the vehicle- independent witness had not supported the prosecution version- there are material contradictions, improvement, embellishment and falsehood in the testimonies of the police officials- there is contradiction regarding the handing over of the case property to MHC- held, that in these circumstances, prosecution version cannot be relied upon- accused acquitted.

(Para-10 to 24)

Cases referred:

Lal Mandi v. State of W.B., (1995) 3 SCC 603

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

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

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

Aher Raja Khima v. State of Saurashtra, AIR 1956

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

For the Appellants: Mr.P.P. Chauhan and Mr.V.K. Vashishta, Advocates, for the appellants.

For the Respondent: M/s B.S. Parmar, Ashok Chaudhary and V.S.Chauhan, Addl. AGs., with M/s Vikram Thakur and Mr.Puneet Rajta, Dy. AGs., for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In these appeals filed under Section 374 Cr.P.C., convicts Manoj Kumar and Ashok Kumar have assailed judgment dated 09.05.2011, passed by Special Judge, Una, District Una, H.P., in Sessions Case No.23/2010, titled as State of Himachal Pradesh Versus Ashok Kumar & another, whereby they stand convicted for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as NDPS Act) and sentenced to undergo rigorous imprisonment for a period of ten years each and pay fine of Rs.1,00,000/- (rupees one lac) each and in default thereof, further undergo rigorous imprisonment for a period of three years.

2 It is the case of prosecution that on 07.09.2010, police party headed by SI Harjit Singh (PW.8) of Police Station, Sadar, Una, accompanied by Albel Singh (PW.1) and Purshotam Lal (not examined), was on routine patrol duty. While they were standing on the road at a place known as Pir Nigah Talab, a vehicle (Tata Sumo) bearing No.HP-01B-0326 came from Pir Nigah side, which on signal stopped and on enquiry, driver disclosed his name as Manoj Kumar and the passenger sitting next to him disclosed his name as Ashok Kumar. On suspicion, police party, after joining Piare Lal (PW.7), an independent person present on the spot, searched the vehicle. One red coloured bag concealed below the driver's seat was recovered. Ashok Kumar (accused) also got down from the vehicle. Just as the bag was about to be checked, Manoj Kumar (accused) drove the vehicle away. On the asking of Harjit Singh, Albel Singh followed Manoj Kumar, but after some time returned empty handed. Harjit Singh telephonically requested SHO, Police Station, Bilaspur, to apprehend Manoj Kumar. Thereafter, in the presence of witnesses, bag was searched from which contraband substance, which appeared to be charas, in the shape of sticks, was recovered. When weighed it was found to be 3.5 kgs. The entire parcel was sealed with seal bearing impression 'A' and taken into possession vide seizure memo (Ex.PB). Impression of seal was taken on a piece of cloth (Ex.PC), also NCB forms filled up. Original seal was entrusted to Albel Singh vide memo (Ex.PD). Rukka (Ex.PW.8/A) was sent through Constable Purshotam Lal, on the basis of which FIR No.288 dated 07.09.2010 (Ex.PW.9/A) was registered at Police Station, Sadar, Una, H.P., under the provisions of Section 20 of the NDPS Act, against the accused. Accused Ashok Kumar was arrested on 08.09.2010 vide memo (Ex.PW.8/D) and searched vide memo (Ex.DB), information pertaining to which was furnished to his brother Ashwani Kumar vide memo (Ex.PW.8/D). Harjit Singh entrusted case property to SHO, Ruldu Ram (PW.9), who resealed it with his seal bearing impression 'B' and after making entries in the NCB forms, handed over the same to MHC Ajaib Singh (PW.2). For getting the stuff chemically examined Ajaib Singh handed over the bulk parcel to Constable Naveen Kumar (PW.3), who deposited the same at the State Forensic Science Laboratory, Junga. Harjit Singh, then proceeded to Bilaspur, where accused Manoj Kumar was apprehended and detained by ASI Ajit Singh (PW.6). Manoj Kumar was then arrested on 08.09.2010 vide memo (Ex.PW.8/E) and searched vide memo (Ex.DC). Report of the Chemical Analyst (Ex.PD) was obtained by the police. With the completion of investigation, which *prima facie* revealed complicity of the accused in the alleged crime, *Challan* was presented in the Court for trial.

3 The accused were charged for having committed an offence punishable under the provisions of Section 20 of the NDPS Act, to which they did not plead guilty and claimed trial.

4 In order to establish its case, in all, prosecution examined as many as nine witnesses. Statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded, in which they took plea of innocence and false implication. No evidence in defence was led.

5 Trial Court, after appreciating the testimony of prosecution witnesses, convicted the accused of the charged offence and sentenced them as aforesaid. Hence the present appeal.

6 We have heard Mr. P.P. Chauhan and Mr.A.K. Vashishta, Advocates, on behalf of the convicts as also M/s B.S. Parmar, Ashok Chaudhary, V.S. Chauhan, learned Addl. AGs., assisted by M/s Vikram Thakur and Puneet Rajta, learned Dy. AGs., on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that the reasoning adopted by the trial Court is perverse and is not based on correct and complete appreciation of testimonies of the witnesses. Judgment in question is not based on correct and complete appreciation of

evidence and material placed on record, causing serious prejudice to the accused, resulting into miscarriage of justice.

7 The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to an accused.

8 While convicting the accused two factors heavily weighed with the trial Court: (i) testimonies of police officials, fully inspiring in confidence, proved the prosecution case beyond reasonable doubt. (ii) There was no interpolation of documents i.e. memos (Ex.DB and Ex. DC), of personal search of the accused.

9 We are constrained to observe that in the impugned judgment there is hardly any discussion of the evidence. Only testimonies of witnesses stand reproduced. Clearly from the testimonies of police officials and independent witness two views, rendering the prosecution story to be extremely doubtful have emerged on record.

10 Testimony of the Investigating Officer, is disbelievable on three counts, rendering the genesis of the prosecution story to be false: (i) His version of having associated independent witness, in whose presence search and seizure operations were conducted, stands belied by the very same witness; (ii) His version of having reported the matter to the police officials of Police Station, Bilaspur, outside his District, is neither corroborated nor proved by any documentary evidence; and (iii) His version of having prepared material documents on different dates, stands falsified not only by the documents but oral testimonies of the witnesses.

11 In the instant case, despite extensive cross-examination by the Public Prosecutor, Piare Lal (PW.7) in our considered view, has said nothing in favour of the prosecution. On the contrary he goes to state that he was on his way to the temple, when near bus-stand, Una, Police officials made 3-4 persons sit in a vehicle and took them to Police Station, Una. Unambiguously he states that nothing was recovered in his presence from anyone. Categorically he states that police made him sign documents at the Police Station and no search and seizure operations were conducted in his presence. He was not even aware of contents of the documents pertaining to search and seizure operations (Ex.PA, Ex.PB and Ex.PC) so signed by him. He is an illiterate person and a rustic villager. He stands convicted of an offence under the provisions of NDPS Act, though appeal against such conviction is pending. Now why would police associate such a person as a witness remains unexplained. After all, his place of residence falls within the very same District over which the Investigating Officer had jurisdiction. Police ought to have known his credentials. He categorically states that under threat of false implication in a case, police made him sign the documents in question. Significantly, it has come on record through the testimony of police officials i.e. the Investigating Officer Harjit Singh (PW.8) and his associate Albel Singh (PW.1) that just at a short distance from the place where contraband substance was recovered, there is a Sarai and shops. Also people in large number come to pay obeisance at Pir Nigah which also is closeby. It has also come on record that Police Station, Una was just at a distance of 7-8 kms from there. Now why is it that police did not associate any person other than Piare Lal (PW.7), as an independent witness in carrying out search and seizure operations has not been explained.

12 Significantly, it has come on record through the testimony of Albel Singh that before the bag was searched, Manoj Kumar fled away in the vehicle, leaving Ashok Kumar behind. He chased him and returned after 15 minutes and only thereafter Harjit Singh searched the bag. Harjit Singh could inform Police Station, Bilaspur, for apprehending Manoj Kumar but not call any other person for being associated as an independent person in carrying out

search and seizure operations. Presence of Piare Lal on the spot remains unexplained by the prosecution, for after all he is not a local resident nor has it come on record that he had come to Pir Nigah for some work. He is a resident of Una, which is at a distance of 7-8 kms from the spot. Recovery was not effected during the day, but in the night at 8.30 PM. Thus, prosecution story of having associated Piare Lal as an independent witness, at the time of carrying out search and seizure operations, is rendered to be doubtful, if not false. Through his testimony, in our considered view, two views on the issue of conduct of search and seizure operations have emerged on record. And if recovery itself is in doubt benefit has to go to the accused. However, independently we have analyzed the testimonies of police officials; for after all they have no interest in false implication.

13 It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

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

15 Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction.

[See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

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

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some

> independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

17 Even while applying the aforesaid principles of law, on close scrutiny and examination of testimony of police officials Harjit Singh (PW.8) and Albel Singh (PW.1), we find them to be witnesses not worthy of credence or their testimonies believable. There are material contradictions, improvements, embellishments and falsehood in their testimonies further rendering the prosecution case to be doubtful.

18 Harjit Singh states that on 07.09.2010, he was on patrol duty. Police officials Albel Singh and Purshotam Lal (not examined) were with him. But then there is nothing on record to corroborate such version of his. Entry, if any, made at the Police Station, was neither placed nor proved on record, in accordance with law. Harjit Singh further states that on signal, vehicle in question, stopped and two occupants, disclosed their names as Manoj Kumar and Ashok Kumar. One bag lying under the seat of Manoj Kumar, who was on the wheel, was recovered. Also accused Ashok Kumar got down from the vehicle. Just before the bag could be searched, Manoj Kumar fled away in his vehicle. Witness further states that in his personal vehicle, he sent Albel Singh to chase Manoj Kumar, who after some time returned empty handed. "Thereafter", he telephonically informed the SHO, Police Station, Sadar, District Bilaspur, requesting him to apprehend accused Manoj Kumar and his vehicle. Then the bag was opened and checked, from which charas in the shape of sticks was recovered. With the weights and scales kept in the I.O. kit, charas was weighed and found to be 3.5 kgs. The same was packed in a cloth parcel and sealed with seven seals of seal bearing impressing 'A' and taken into possession vide memo (Ex.PB). Original seal was handed over to Albel Singh vide memo (Ex.PD). Rukka (Ex.PW.8/A) sent through Constable Purshotam Lal led to registration of FIR (Ex.PW.9/A). Thereafter, he recorded statement of Piare Lal and arrested accused Ashok Kumar vide memo (Ex.PW.8/D). With the completion of investigation on the spot, he entrusted the case property to SHO, Ruldu Ram (PW.9), who resealed the parcel with his seal bearing impression 'B'. At 5.30 AM (08.09.2010) he reached Police Station, Bilaspur and at 9.30 AM arrested accused Manoj Kumar vide memo (Ex.PW.8/E) Whereafter he brought him back to Police Station, Sadar, Una, "where" he searched him and prepared memo (Ex.DC). Also he handed over special report (Ex.PW.4/A) to Santosh Patial, Superintendent of Police, Una, for perusal.

19 Thus far, he appears to have deposed truthfully. But from the cross-examination part of his testimony, we find it not to be so. He admits that no record of telephonic conversation which he had with the SHO, Police Station, Bilaspur, is placed on record by him. Why so? has not been explained. This was absolutely necessary as we would find from our discussions herein later. He admits to have prepared memos (Ex.DB and Ex.DC) of jamatalashi of accused Manoj Kumar and Ashok Kumar at different times. But however, bare perusal thereof only reveals them to have been prepared at the same time, which fact is so admitted by Albel Singh, who unambiguously, in his unrebutted testimony, states them to have been prepared, at the Police Station, on 07.09.2010. In fact, on memo Ex.DB there is overwriting. Now this totally belies the prosecution version, rendering the testimony of Harjit Singh to be unbelievable, for according to him, he arrested accused Manoj Kumar in the morning of 08.09.2010 at Police Station, Bilaspur, falling within the jurisdiction of another District and is

at a driving distance of three hours from Police Station, Sadar, Una. After all, from there it would have taken him three hours to return to Police Station, Una. We further find that Harjit Singh travelled to Bilaspur from Una in his personal vehicle. Now why would he do such a thing. It is not that no official vehicle was available at Police Station, Una. Also he states to have visited the place of Nakka in his personal vehicle, in which he had sent Albel Singh to hunt for Manoj Kumar. Now there is nothing on record to establish that police party left Police Station, Una, on a patrol duty, in a private vehicle. Witness admits not to have claimed any travelling allowance for said journey. This is very strange, for after all journey was counted in the course of official and not personal business.

20 We also do not find testimony of Harjit Singh to be inspiring in confidence for yet another reason. How did he come to know that accused Manoj Kumar had fled towards District Bilaspur or was its resident, for after all, even according to police officials, if one were to travel from Una/Pir Nigah to Bilaspur (which is another District), one would have to cross several Police Stations, including Bangana, Barsar, Shahtalai, Bharteen, Una and Mehatpur. Strangely this witness did not report the incident with any one of such Police Stations, including his own Police Station i.e. Una. Why did he not do so? He has not explained. It is here absence of record pertaining to telephonic conversation acquires significance. How did he gather information of detention of accused Manoj Kumar at Police Station, Bilaspur? Remains unexplained. It is not the case of prosecution that such information was given by officials of the Police Station. His testimony that he was carrying weights and scales in his investigation kit, cannot be said to be inspiring in confidence, for after all he had not gone for patrol duty in connection with detection of crime. Also witness does not assign reason for not informing the family of accused Ashok Kumar. He simply states that Ashwani Kumar, brother of Ashok Kumar, was at the Police Station. Now how would Ashwani Kumar know about arrest of his brother, has not been explained by the prosecution. Also why seal was not handed over to independent witness, has not been explained at all.

21 Witness Purshotam Lal has not been examined in Court. Why so? has not been explained.

22 Albel Singh (PW.1), in his examination-in-chief, has only deposed what the prosecution wants us to believe. But however, from the cross-examination part of his testimony, we find it not to be inspiring in confidence. Exaggerations are there, rendering him to be a witness, not worthy of credence. When confronted with his previous statement (Ex.DA), so recorded under Section 161 Cr.P.C., he admits not to have got recorded that he travelled in a private vehicle. Theory of having chased accused Manoj appears to have introduced after police gathered information of place of his residence in District Bilaspur. He also admits that just ahead of the Talab (Pond) towards Pir Nigah, there are houses and Sarai. Significantly witness admits that all the police officials present on the spot were having their mobile phones. Yet neither he nor Purshotam attempted to inform the officials at anyone of the Police Stations, including Una. Why so? he does not explain. All this casts serious doubt about the truthfulness of the prosecution case.

23 Purshotam Lal, author of seizure memo (Ex.PB), though a cited witness was not examined in Court. Testimonies of Albel Singh and Harjit Singh are not inspiring in confidence at all. Be that as it may, when independent witness Piare Lal did not support the prosecution, it became incumbent upon the prosecution to have examined Purshotam Lal for establishing the prosecution story of preparation of memo (Ex.PB) on the spot and carrying of Rukka (Ex.PW.8/A) to the Police Station. How did he travel to the Police Station? When he reached there? When did he return to the spot with the file? All this would have been explained by him. His testimony would have only corroborated the otherwise weak and frail testimony of the police officials.

24 It has come on record that Rukka was sent at 10.45 PM and information thereof received at Police Station, Una at 11.20 PM. The FIR was registered at 11.45 PM. There is no time mentioned in the endorsement on the Rukka by the SHO. No time of recovery is mentioned in the memo (Ex.PB). Case property was allegedly produced before the SHO at 1.15 AM. Evidently, resealing was done by the SHO at 1.45 AM (08.09.2010). Significantly, there is cutting on the NCB form. Be that as it may, what renders the prosecution story to be further doubtful is the time, i.e. 1.15 AM, of entrustment of the case property with MHC, as mentioned in Certificate (Ex.PW.9/B) which could not have been prior to 1.45 AM the time when it was resealed by the SHO. Contradiction is writ large and fatal. As per NCB form, recovery was effected at 9.30 PM, then why did police wait for 45 minutes on the spot, has also not been explained. All this renders the prosecution version to be extremely doubtful.

25 There is yet another reason for us to hold that prosecution has not been able to establish its case beyond reasonable doubt. Ajaib Singh (PW.2) is the MHC to whom case property was entrusted by the SHO in the night intervening 7/8.09.2010. He admits that in his statement under Section 161 Cr.P.C., with which he was confronted, there is no mention of filling up of NCB forms in triplicate or the fact that Harjit Singh (PW.8) came to the Police Station alongwith accused Ashok Kumar. Improvements/exaggerations/ are galore. Significantly, he admits that even in the Malkhana register, there is no reference of the NCB forms. He tries to explain that it is not so required to be done under law, but then, has not explained why there is no mention of seal, bearing impression 'B', in the Malkhana register. What is still intriguing, is the fact that name of the depositor or the time of deposit, of the case property is not recorded in the Malkhana register. Why it was not so done, has not been explained. Crucially we find that against the very next entry (1253) name of Harjit Singh, who purportedly deposited the articles recovered pursuant to conduct of personal search of accused Ashok Kumar, is so recorded. Further he states that he sent the contraband substance for chemical analysis to the State Forensic Science Laboratory, Junga, through Naveen Kumar (PW.3), who also verifies such fact. But then, who brought the report from the Laboratory, has not been explained by the prosecution witnesses. Police officials Ajaib Singh, Naveen Kumar, Harjit Singh and Ruldu Ram are silent on this aspect of the matter. Thus, even by way of link evidence, prosecution has not been able to establish its case beyond reasonable doubt.

26 Version of Harjit Singh handing over special report to Santosh Patial, Superintendent of Police, Una, in our considered view, is unbelievable. Santosh Patial, has not been examined in Court and his Reader ASI Surjit Singh (PW.4), admits that no register of receipt of special reports is maintained in the Office of Superintendent of Police, Una and file containing lose sheets (reports) is neither indexed nor paginated. Possibility of interpolation is not ruled out.

27 From the testimony of Constable Roshan Lal (PW.5) of Police Station, Bilaspur, prosecution wants us to believe that they received information of the vehicle, in question, to have been parked near Kandror Bridge (District Bilaspur, near Bilaspur Town). Report, in relation thereto, was recorded by him as Ex.PW.5/A. This document, so prepared on 07.09.2010 at 21.10 (9.10 PM), totally belies the prosecution case. For according to Ajaib Singh, it would take two hours for a vehicle to reach Bilaspur and that too at full speed. How can almost at the same time very same vehicle could be present at two different places, has not been explained. Also who gave information, so recorded in Ex.PW.5/A, has not been proved on record.

28 Through the testimony of ASI Ajit Singh (PW.6), Investigating Officer, Police Station, Sadar, Bilaspur, prosecution wants us to believe that accused Manoj Kumar was arrested from his village Delag (Bilaspur) at about 11.45 PM. Question which arises for consideration is as to how did this witness know that Manoj Kumar was a resident of this village. Except for the name of

the driver, police had no clue of his identity. It is not that Ashok had disclosed the same. Further witness states that based on information of Manoj Kumar being required in a case registered under the provisions of NDPS Act, he detained him at Police Station, till such time, Harjit Singh came and arrested him. Intriguingly no memo of detention was prepared by him. Why so? has not been explained. Further, who gave this information that accused was required in an NDPS case is not proved on record, for it is not the case of prosecution that after the bag was searched and contraband substance recovered, another telephone call was made to SHO, Police Station, Bilaspur, furnishing such. Significantly Albel Singh admits of having called SHO, Police Station Sadar, Bilaspur, much before search of bag and recovery of contraband substance. This also renders the version of Harjit Singh to be unbelievable.

29. Thus for all the aforesaid reasons, findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stand wrongly convicted for the charged offence.

30. Hence, for all the aforesaid reasons, appeals are allowed and the judgment of conviction and sentence, dated 09.05.2011, passed by Special Judge, Una, District Una, Himachal Pradesh, in Sessions Case No.23/2010, titled as *State of Himachal Pradesh v. Sh.Ashok Kumar & another*, is set aside and both accused Manoj Kumar and Ashok Kumar are acquitted of the charged offences. They be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to them accordingly. Release warrants be immediately prepared.

Appeal stands disposed of, so also pending application(s), if any.

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

ITA No.12 of 2014 with ITA Nos.15, 4 and 13 of 2014.
Reserved on: 09.12.2014.
Pronounced on: December 31, 2014.

1. ITA No.12 of 2014:
Commissioner of Income Tax .....Appellant.
versus
RFCL Limited .....Respondent.

2. ITA No.15 of 2014:
Commissioner of Income Tax .....Appellant.
versus
RFCL Limited .....Respondent.

3. ITA No.4 of 2014:
Commissioner of Income Tax .....Appellant.
versus
RFCL Limited .....Respondent.

4. ITA No.13 of 2014:
Commissioner of Income Tax .....Appellant.
versus
RFCL Limited .....Respondent.

Income Tax Act, 1961- Section 260-A- Assessee is entitled to depreciation on goodwill or other intangible assets. (Para- 8 to 15)

Cases referred:
Techno Shares and Stock Ltd. vs. Commissioner of Income Tax, [2010] 327 ITR 323 (SC)
Commissioner of Income Tax vs. SMIFS Securities Ltd., [2012] 348 ITR 302 (SC)
Areva T and D India Ltd. vs. Deputy Commissioner of Income Tax, [2012] 345 ITR 421 (Delhi)

For the Appellant(s): Mr.Vinay Kuthiala, Senior Advocate, with Ms.Vandana Kuthiala, Advocate.
For the Respondent(s):Mr.R.P. Bhatt, Senior Advocate, with Mr.Vijay Verma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

All these appeals have been preferred by the Commissioner of Income Tax, Shimla, (hereinafter referred to as the Revenue), under Section 260-A of the Income Tax Act, 1961.

2. ITA Nos.12 and 15 of 2014 are directed against the composite order, dated 29th April, 2013, passed by Income Tax Appellate Tribunal, Chandigarh, (for short, the Appellate Tribunal), in ITA Nos.189 & 190/Chd/2013, pertaining to assessment years 2006-07 and 2009-10, while ITA Nos.4 and 13 of 2014 have been preferred by the Revenue against the common order, dated 2nd April, 2013, passed by the Appellate Tribunal, in ITA Nos.293 and 294/Chd/2012, qua the assessment years 2007-08 & 2008-09, whereby the appeals filed by the assessee (respondent herein) came to be allowed in terms of the impugned orders and the Assessing Officer was directed to allow the claim of the assessee vis.-a-vis. the depreciation on goodwill and also depreciation on intangible assets.

3. Feeling aggrieved, the Revenue has challenged the orders of the Appellate Tribunal by the medium of these appeals.

4. All these appeals have been admitted on the following analogous substantial questions of law, on 3rd September, 2014:

> *1. Whether the ITAT was justified in applying the ratio of the judgment in CIT vs. SMIFS Securities (SC) wherein there was a categorical finding by the CIT(A) that the difference between the cost of asset and total amount paid constituted goodwill whereas in the present case the finding of the CIT (A) is that the amount paid over and above the value of assets is nothing but a premium paid which has been given the nomenclature of 'goodwill' and does not comprise of any type of business or commercial rights u/s 32.*
>
> *2. Whether the impugned judgment is perverse as the ITAT failed to appreciate that the judgment in SMIFS Securities case was based on the finding of fact of the CIT(A) that the assessee had acquired capital right in the form of "goodwill" whereas in the present case the claim of the assessee of acquiring goodwill has not been accepted by the CIT(A).*

5. As common questions of law are involved in all these appeals, we deem it proper to determine all these appeals by this common judgment.

6. We have heard the learned counsel for the parties and have perused the record.

7. Mr.Vinay Kuthiala, learned Senior Advocate, appearing for the appellant-Revenue conceded that the Appellate Tribunal rightly came to the conclusion, in all the appeals, while directing the Assessing Officer to allow the claim(s) in regard to depreciation on goodwill.

8. Mr.Bhatt, learned Senior Advocate appearing for the assessee-respondent, while supporting the impugned orders, argued that in view of the latest judgments of the Apex Court, discussed by the Appellate Tribunal, the assessee was entitled to depreciation on goodwill, which was wrongly taken away by the Authorities below. It was further argued that the assessment came to be reopened, for which the foundation was made the decision of the Bombay High Court in Commissioner of Income Tax vs. Techno Shares and Stocks Ltd., which decision was set aside by the Apex Court, vide judgment dated 9th September, 2010, in **Techno Shares and Stock Ltd. vs. Commissioner of Income Tax, [2010] 327 ITR 323 (SC),** mention of which has been made by the Appellate Tribunal in the impugned order. It is apt to reproduce paragraph 25 of the said decision of the Apex Court hereunder:

> *"We answer the question at page 6 in the affirmative by holding that on the facts and circumstances of these cases the Tribunal was right in holding that depreciation was allowable on the cost of the membership card under Section 31(1)(ii) of the 1961 Act. Accordingly, the impugned judgment(s) of the Bombay High Court is set aside and the appeal(s) filed by the nominated non-defaulting continuing member stands allowed with no order as to costs."*

9. The Appellate Tribunal, after making discussions, in paragraphs 27 & 28 has rightly applied the ratio of the judgment of the Apex Court in **Commissioner of Income Tax vs. SMIFS Securities Ltd., [2012] 348 ITR 302 (SC),** and held that the authorities i.e. the Assessing Officer and the CIT(Appeals) have wrongly made the order and the Assessing Officer was directed to allow the claim of the assessee vis.-a-vis. the depreciation on goodwill. It is apt to reproduce paragraphs No.27 and 28 of the impugned order hereunder:

> *"27. The second aspect of the issue is that the assessee had booked the said consideration of Rs.12.62 crores as goodwill in its books of account. In this regard also the assessee is entitled to the claim of depreciation on the goodwill as the Hon'ble Supreme Court in CIT Vs. SNIFS Securities Ltd. (supra) held that the goodwill by itself was an intangible asset under Explanation 3(b) to section 32(1) of the Act and is eligible for deduction. The relevant portion of the ratio laid down by the Hon'ble Supreme Court is as under:*
>
> "The Assessing Officer held that goodwill was not an asset falling under Explanation 3 to Section 32(1) of the Income Tax Act, 1961 {'Act', for short}. We quote hereinbelow Explanation 3 to Section 32(1) of the Act.
>
> "Explanation 3- For the purpose of this sub-section, the expressions 'assets' and 'block of assets' shall mean- a} tangible assets, being buildings, machinery, plant or Furniture;
>
> {b} intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature."
>
> Explanation 3 states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature.

A reading of the words 'any other business or commercial rights of similar nature' in clause (b) of Explanation 3 indicates that goodwill would fall under the expression 'any other business or commercial right of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b).

In the circumstances, we are of the view that Goodwill' is an asset under Explanation 3(b) to Section 32(1) of the Act"

28. In view of the ratio laid down by the Hon'ble Supreme Court in CIT vs. SNIFS Securities Ltd. (supra), it is held that the goodwill simpliciter was eligible for depreciation and the assessee having paid consideration of Rs.12.74 crores for acquisition of the said goodwill and having accounted for the same in its books of account as goodwill, was entitled to the claim of depreciation. We accordingly direct the Assessing Officer to allow the claim of the assessee vis-a-viz the claim of depreciation on goodwill of Rs.12.74 crores."

10. The learned Senior Counsel appearing for the appellant-Revenue has stated that it is a fact that the judgment of the Bombay High Court stands set aside and the very foundation of the case has lost its efficacy.

11. Now, the only question remains to be determined is whether the respondent-assessee was entitled to depreciation on intangible assets. The Appellate Tribunal, while discussing the facts of the case and the effect of the judgment of the Bombay High Court, read with the judgment of the Apex Court, held that the assessee was also entitled to depreciation on intangible assets. The Appellate Tribunal had made discussion in paragraphs 28, 29, 33, 35 and 38 of the order impugned in ITA Nos.4 and 13 of 2014. We are of the considered view that the discussion made is based on facts, law applicable, read with the judgment of the Apex Court.

12. It is apt to record herein that the Delhi High Court in **Areva T and D India Ltd. vs. Deputy Commissioner of Income Tax, [2012] 345 ITR 421 (Delhi)** discussed and laid down what is the meaning of intangible assets and how the assessee is entitled to depreciation. It is apt to reproduce paragraphs 13, 14, 15 and 16 of the said decision hereunder:

"13. In the present case, applying the principle of ejusdem generis, which provides that where there are general words following particular and specific words, the meaning of the latter words shall be confined to things of the same kind, as specified for interpreting the expression "business or commercial rights of similar nature" specified in Section 32(1)(ii) of the Act. It is seen that such rights need not answer the description of "knowhow, patents, trademarks, licenses or franchises" but must be of similar nature as the specified assets. On a perusal of the meaning of the categories of specific intangible assets referred in Section 32(1)(ii) of the Act preceding the term "business or commercial rights of similar nature", it is seen that the aforesaid intangible assets are not of the same kind and are clearly distinct from one another. The fact that after the specified intangible assets the words "business or commercial rights of similar nature" have been additionally used, clearly demonstrates that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate. In the circumstances, the nature of "business or commercial rights" cannot be restricted to only the aforesaid six categories of assets, viz., knowhow, patents, trademarks, copyrights, licenses or franchises. The nature of "business or commercial rights" can be of the same genus in which all the aforesaid six assets fall. All the above fall in the genus of intangible assets that form part of the tool of

trade of an assessee facilitating smooth carrying on of the business. In the circumstances, it is observed that in case of the assessee, intangible assets, viz., business claims; business information; business records; contracts; employees; and knowhow, are all assets, which are invaluable and result in carrying on the transmission and distribution business by the assessee, which was hitherto being carried out by the transferor, without any interruption. The aforesaid intangible assets are, therefore, comparable to a license to carry out the existing transmission and distribution business of the transferor. In the absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee got an up and running business. This view is fortified by the ratio of the decision of the Supreme Court in Techno Shares and Stocks Ltd. [2010] 327 ITR 323 (SC) wherein it was held that intangible assets owned by the assessee and used for the business purpose which enables the assessee to access the market and has an economic and money value is a "license" or "akin to a license" which is one of the items falling in Section 32(1)(ii) of the Act.

14. In view of the above discussion, we are of the view that the specified intangible assets acquired under slump sale agreement were in the nature of "business or commercial rights of similar nature" specified in Section 32(1)(ii) of the Act and were accordingly eligible for depreciation under that Section.

15. In view of the above, it is not necessary to decide the alternative submission made on behalf of the assessee that goodwill per se is eligible for depreciation under Section 32(1)(ii) of the Act. In the circumstances, the substantial question of law is decided in the affirmative and this appeal is allowed in favour of the assessee and against the Revenue and the impugned order is set aside.

ITA No.1151/2010 and ITA No.1152/2010

16. In these appeals, the Income-tax Appellate Tribunal, relying upon the decision in assesse's own case I.T.A. No.336/Del/08 dated July 6, 2009, pertaining to assessment year 2005-06, held:-

> *"5.On careful consideration of rival submission, we are of view that learned Commissioner Income-tax (Appeals) has rightly allowed relief to the assessee after considering relevant facts and circumstances of the case. The assessee has not claimed depreciation on goodwill it acquired commercial rights to sell products under the trade name and paid consideration in dispute for acquiring marketing and territorial rights to sell through dealers and distributors i.e. the network created by the seller for sale in India. Under the agreement. It become entitled to use of infrastructure developed by the seller. Rights were acquired since April 1, 1998 and these rights have all along been treated as an asset entitled to depreciation and depreciation was actually allowed in the past. The learned Assessing Officer, in our view was not correct in making a departure from the past and in holding that payment was made for acquisition of "goodwill". Payment had been made for acquisition of commercial rights on which depreciation is permissible. The Assessing Officer was further not justified in treating entries in the books of account as conclusive and in taking payment in dispute as consideration for acquisition of goodwill. It is now more of less settled that entries in books cannot be treated as conclusive and true nature of transaction has to be determined with reference to law. The learned Commissioner of*

Income-tax (Appeals) in the impugned order examined the issue with reference to agreement and found that payment was made for acquisition of commercial rights. On facts and circumstances of the case, we do not find any error in the approach of the learned Commissioner of Income-tax (Appeals)). His action is hereby confirmed."

13. The judgment of the Delhi High Court supra was assailed by means of Special Leave Petition before the Apex Court, which stands dismissed on 23rd September, 2013 i.e. after the judgment made by the Appellate Tribunal.

14. The Appellate Tribunal has rightly discussed the facts, circumstances, the law applicable, including the judgments of the Bombay High Court and Delhi High Court and various other judgments, in paragraphs No.19, 20, 24, 25 and 26 in the order impugned in ITA Nos.13 and 4 of 2014, which are reproduced hereunder:

"19. The issue arising before us is whether the assessee is entitled to the claim of depreciation on the said acquisition of intangible assets in line with the acquisition of business of Animal Health Care and Diagnostics Business divisions of Ranbaxy and/or also whether the assessee is entitled to the claim of depreciation on the amount booked under the head goodwill simpliciter.

20. Under the amended provisions of section 32 of the Act w.e.f. 1.4.1999, ambit of depreciation has been enlarged to cover both the tangible and intangible assets. The depreciation on buildings, machinery plant of furniture being tangible assets was being allowed subject to satisfaction of the conditions laid down under section 32 of the Act i.e. the assets should be owned wholly or partly by the assessee and used for the purpose of business or profession of the assessee. The rate of depreciation for such assets was provided in Schedule attached to the Income Tax Act. However, after the amendment by the Finance (No.2) Act, 1998, w.e.f. 1.4.1999 the depreciation is also to be allowed on intangible assets i.e. know-how, patent and copyrights, trademarks, licences or franchises or any other business or commercial rights of similar nature. The Hon'ble Delhi High Court in Areva T and D India Ltd. Vs. DCIT (supra) applied the principle of ejusdem generic to interpret the expression "business or commercial rights of similar nature" referred to in section 32(I)(ii) of the Act and held that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate. The Hon'ble Court further held that in the circumstances, the nature of business or commercial rights could be of the same genus in which all the aforesaid six assets fall and thus intangible assets i.e. business claims; business information; business records;, contracts; employees; and know-how, were held to be assets which are invaluable and result in carrying on the business of the assessee, without any interruption and are comparable to a licence or akin to a licence which is one of the items falling in section 32(1)(ii) of the Act.

24. The above said ratio was referred to by Mumbai Bench of the Tribunal in M/s India Capital Markets P. Ltd. Vs DCIT (supra) wherein the purchase of clientele business by the assessee from M/s AFC was held to be right which could be used as a tool to carry on the business and the consideration paid for which was held eligible for depreciation.

25. As pointed out in paras hereinabove the assessee in addition to building plant & machinery, furniture, fixtures, vehicles and net current assets alongwith brands valued at Rs.49.26 crores had also acquired the under mentioned assets:

S.No	*Details of Intangible Assets acquired*	*Paper Book Reference Page Numbers*
1.	*Stockist Agreements*	*51-75*
2.	*Distribution Agreements*	*76-79*
3.	*Lease Agreements*	*81*
4.	*Distribution and Marketing Agreements*	*82*
5.	*List of Employees*	*83-86*
6.	*List of Licenses and Permissions (Export Registrations)*	*126*
7.	*Various Products – Enlarged product range and customer base*	*108-120*
8.	*Name license*	*45*
9.	*Manufacturing know bow, specifications and test methods, manufacturing and packaging instructions, master formulae, validations reports, stability data, analytical methods and any other documents necessary to manufacture, control and release the products.*	*36-37*

26. The perusal of the Schedules to BPA comprising of the above said list of Stockist Agreements, Distribution Agreements, Lease Agreements and also Distribution and Marketing Agreements, alongwith List of Licenses and Permissions and List of various Products, the name license and also the manufacturing know-how etc., alongwith List of employees are assets, which are invaluable and instrumental in carrying on the business of Animal Health Care and Diagnostics Business divisions acquired by the assessee from M/s Ranbaxy Laboratories Ltd. as per BPA. The acquisition of the above said items is bundle of rights acquired by the assessee for which lump sum price was fixed and no break up in the value of price was determined either by the assessee or by the auditors but the same constituted bundle of rights akin to a licence or comparable to a license to carry on the business of Animal Health Care and Diagnostics Business divisions which was being carried on by the seller i.e. M/s Ranbaxy Laboratories Ltd. the above said assets acquired by the assessee were the 'business or commercial rights or licence acquired' in order to carry on new business acquired by the assessee including list of employees and also various licences owned by Ranbaxy Laboratories Ltd. In line with the ratio laid down by the Hon'ble Delhi High Court in Areva T and D India Ltd. Vs. DCIT (supra), we are of the view that the consideration of Rs.12.74 crores paid by the assessee was for acquisition of the intangible assets on which the assessee is entitled to the claim of depreciation under section 32(1) (ii) of the Act."

15. In the given circumstances, the questions framed are decided in favour of the assessee/respondent and against the Revenue/appellant.

16. Having said so, the impugned orders made by the Appellate Tribunal need no interference and the same are upheld. Accordingly, the

appeals are dismissed. The Registry is directed to place a copy of this judgment on each file.

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

Commissioner of Income tax (TDS), Chandigarh. ...Petitioner.
Versus
State Bank of Patiala Sectt. Shimla ...Respondent.

ITA No.17 of 2014
Date of Decision: 31.12.2014

Income Tax Act, 1961- Section 194 A (3) (f)- 'B' and 'H' wholly financed and controlled establishment of the Government, had made certain deposits with the assessee- the assessee had not deducted the income tax at the sources at the time of disbursement- penal action was taken by ITO- assessee filed an appeal and the decision of ITO was reversed- an appeal was preferred before Income Tax Appellate Tribunal Chandigarh, which was also dismissed- Government had issued a notification under Section 194(A) covering any undertaking or body including a Society registered under the Societies Registration Act wholly financed by the Government- held, that once the notification had been issued, it is not necessary for the assessee to seek exemption from the Authorities under the Act or from the Central Government - therefore, the Appellate Authority had rightly allowed the Appeal and had set aside the order passed by ITO.
(Para- 3 to 9)

For the Petitioner: Mr. Vinay Kuthiala, Sr. Advocate with Mr.Diwan Singh Negi, Advocate vice Ms.Vandana Kuthiala, Advocate.
For the Respondent: Mr. Vishal Mohan, Advocate with Mr.Aditya Sood, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral)

This appeal stands admitted on the following substantial question of law:-

> "Whether for the purpose of obtaining exemption under Section 194A(3) (f) of the Income Tax Act, the assessee was required to apply for exemption and the same could only be granted to the assessee after the Central Government issued a notification in this behalf in the official gazette?"

2. Genesis of the dispute emanates with the alleged non-compliance of statutory provisions of Section 194A (1) of the Income Tax Act, 1961 (hereinafter referred to as the Act) by the assessee/respondent herein. M/s Biotech Biobusiness and HP SITEG, wholly financed and controlled establishment of the Government, had made certain deposits with the assessee, who at the time of disbursement did not deduct the component of income tax (TDS).

3. Finding such action of the assessee to be illegal, Revenue initiated proceedings with the issuance of notice under Section 201(1) /201(1A) of the Act. Vide order dated 15.12.2012, for the financial year 2010-11, Income Tax Officer (TDS), Shimla, raised demands and took penal action.

4. In an appeal filed by the assessee, Commissioner of Income Tax (Appeals), Shimla, vide order dated 14.12.2012, reversed such findings, which order stands affirmed by the Income Tax Appellate Tribunal Chandigarh Benches 'A' Chandigarh, vide order dated 10.07.2013, in ITA Nos. 323 & 324/CHD/2013, titled as *The ITO (TDS), Shimla Versus State Bank of Patiala.*

5. For the purposes of adjudication of the present appeal, relevant provisions of the Act, are reproduced as under:-

> "194A. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident ay income by way of interest other than income [by way of interest on securities], shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force: .....
>
> .....(3) The provisions of sub-section (1) shall not aply—.....
>
> .....(iii) to such income credited or paid to—.....
>
> .....(f) such other institution, association or body [or class of institutions, associations or bodies] which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette;"

6. It is not disputed that the Societies in question are wholly funded by the Government.

7. Evidently, as noticed by the Appellate Authority, by virtue of its power, in terms of Section 194A, Central Government has issued notification covering "Any undertaking or body including a Society registered under the Societies Registration Act, 1860 (XXI of 1860) financed wholly by the Government."

8. Now the language of Section 194A of the Act is simple, unambiguous and evidently clear. The Central Government has issued notification, specifically exempting, *inter alia,* Societies which are wholly financed by the Government, thus making the provisions of Section 1 of Section 194A inapplicable. In view of sub-section 3(iii) (f) of the said Section, in the instant case, assessee made payments, without deducting income-tax, to such Societies which stand exempted under the notification.

9. In our considered view, once the notification stands issued, it is not the requirement of the Act for the assessee to either apply or seek exemption from the Authorities under the Act or the Central Government. Expression "reasons to be recorded in writing" are in reference to the stage preceding issuance of notification by the Central Government. Reasons have to be that of the Central Government and not the assessee. With the issuance of notification by the Central Government, which is not the subject matter of challenge herein, provisions of Section 194(A) (1) of the Act, automatically becomes inapplicable.

10. Thus, order passed by the Appellate Authority is upheld and substantial question of law is answered accordingly. As such, appeal stands disposed of as also pending application(s), if any.

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

Commissioner of Income tax (TDS), Chandigarh. ...Petitioner.
Versus
State Bank of Patiala Sectt., Shimla. ...Respondent.

ITA No.22 of 2014
Date of Decision: 31.12.2014

Income Tax Act, 1961- Section 194 A (3) (f)- 'B' and 'H' wholly financed and controlled establishment of the Government, had made certain deposits with the assessee- the assessee had not deducted the income tax at the sources at the time of disbursement- penal action was taken by ITO- assessee filed an appeal and the decision of ITO was reversed- an appeal was preferred before Income Tax Appellate Tribunal Chandigarh, which was also dismissed- Government had issued a notification under Section 194(A) covering any undertaking or body including a Society registered under the Societies Registration Act wholly financed by the Government- held, that once the notification had been issued, it is not necessary for the assessee to seek exemption from the Authorities under the Act or from the Central Government - therefore, the Appellate Authority had rightly allowed the Appeal and had set aside the order passed by ITO.

(Para- 3 to 9)

For the Petitioner: Mr. Vinay Kuthiala, Sr. Advocate with Mr.Diwan Singh Negi, Advocate vice Ms.Vandana Kuthiala, Advocate.
For the Respondent: Mr. Vishal Mohan, Advocate with Mr.Aditya Sood, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral)

This appeal stands admitted on the following substantial question of law:-

> "Whether for the purpose of obtaining exemption under Section 194A(3) (f) of the Income Tax Act, the assessee was required to apply for exemption and the same could only be granted to the assessee after the Central Government issued a notification in this behalf in the official gazette?"

2. Genesis of the dispute emanates with the alleged non-compliance of statutory provisions of Section 194A (1) of the Income Tax Act, 1961 (hereinafter referred to as the Act) by the assessee/respondent herein. M/s Biotech Biobusiness and HP SITEG, wholly financed and controlled establishment of the Government, had made certain deposits with the assessee, who at the time of disbursement did not deduct the component of income tax (TDS).

3. Finding such action of the assessee to be illegal, Revenue initiated proceedings with the issuance of notice under Section 201(1) /201(1A) of the Act. Vide order dated 15.12.2012, for the financial year 2008-09, Income Tax Officer (TDS), Shimla, raised demands and took penal action.

4. In an appeal filed by the assessee, Commissioner of Income Tax (Appeals), Shimla, vide order dated 14.12.2012, reversed such findings, which order stands affirmed by the Income Tax Appellate Tribunal Chandigarh Benches 'A' Chandigarh, vide order dated 10.07.2013, in ITA Nos. 323 & 324/CHD/2013, titled as *The ITO (TDS), Shimla Versus State Bank of Patiala.*

5. For the purposes of adjudication of the present appeal, relevant provisions of the Act, are reproduced as under:-

> "194A. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident ay income by way of interest other than income [by way of interest on securities], shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force: .....
>
> .....(3) The provisions of sub-section (1) shall not aply—.....
>
> .....(iii) to such income credited or paid to—.....
>
> .....(f) such other institution, association or body [or class of institutions, associations or bodies] which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette;"

6. It is not disputed that the Societies in question are wholly funded by the Government.

7. Evidently, as noticed by the Appellate Authority, by virtue of its power, in terms of Section 194A, Central Government has issued notification covering "Any undertaking or body including a Society registered under the Societies Registration Act, 1860 (XXI of 1860) financed wholly by the Government."

8. Now the language of Section 194A of the Act is simple, unambiguous and evidently clear. The Central Government has issued notification, specifically exempting, *inter alia,* Societies which are wholly financed by the Government, thus making the provisions of Section 1 of Section 194A inapplicable. In view of sub-section 3(iii) (f) of the said Section, in the instant case, assessee made payments, without deducting income-tax, to such Societies which stand exempted under the notification.

9. In our considered view, once the notification stands issued, it is not the requirement of the Act for the assessee to either apply or seek exemption from the Authorities under the Act or the Central Government. Expression "reasons to be recorded in writing" are in reference to the stage preceding issuance of notification by the Central Government. Reasons have to be that of the Central Government and not the assessee. With the issuance of notification by the Central Government, which is not the subject matter of challenge herein, provisions of Section 194(A) (1) of the Act, automatically becomes inapplicable.

10. Thus, order passed by the Appellate Authority is upheld and substantial question of law is answered accordingly. As such, appeal stands disposed of as also pending application(s), if any.

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

LPA No. 216 of 2014 a/w LPA Nos. 217, 218, 219, 220, 221, 222, 223 and 224 of 2014
Reserved on: 23.12.2014
Date of decision: December 31, 2014

1. LPA No. 216 of 2014

Federal Mogul Bearing India Ltd. ... Appellant.

Vs.

Prit Pal .... Respondent.

2. LPA No. 217 of 2014
Federal Mogul Bearing India Ltd. ....Appellant
Vs.
Krishan Chand ....Respondent.
3. LPA No. 218 of 2014
Federal Mogul Bearing India Ltd. ....Appellant
Vs.
Mehar Chand ....Respondent
4. LPA No. 219 of 2014
Federal Mogul Bearing India Ltd. ...Appellant
Vs.
Dilbara Singh ...Respondent
5. LPA No. 220 of 2014
Federal Mogul Bearing India Ltd. ....Appellant
Vs.
Prit Pal ...Respondent
6. LPA No. 221 of 2014
Federal Mogul Bearing India Ltd. ...Appellant
Vs.
Krishan Chand ...Respondent.
7. LPA No. 222 of 2014
Federal Mogul Bearing India Ltd. ...Appellant
Vs.
Ram Chander ...Respondent.
8. LPA No. 223 of 2014
Federal Mogul Bearing India Ltd. ...Appellant
Vs.
Mehar Chand ...Respondent.
9. LPA No. 224 of 2014
Federal Mogul Bearing India Ltd. ...Appellant
Vs
Dilbara Singh ...Respondent.

Letters Patent Appeal- Clause 10- An order was passed by the Writ Court directing the re-instatement of the Workmen- an appeal was preferred against the order contending that Writ Court had granted the main relief sought in the petition, which was not permissible- held, that an appeal is competent from the decision of a Single Bench provided that such decision falls within the ambit of judgment- order must decide question in controversy in ancillary proceedings, in the petition itself or in the part of the proceedings and such adjudication must also decide and affect the rights of parties – further intermediary or interlocutory order cannot be regarded as judgment - only such order which decides or affects the rights of the parties and put to an end or terminate the proceedings can be treated as judgment- Workmen were ordered to be re-instated subject to the condition and order had not determined the rights or liabilities of the parties - hence, order cannot be termed to be a judgment. (Para-4 to 16)

Cases referred:

Shah Babulal Khimji vs. Jayaben D. Kania and another AIR 1981 SC 1786

Subal Paul vs. Malina Paul and another (2003) 10 SCC 361

Midnapore Peoples' Coop. Bank Ltd. and others vs. Chunilal Nanda and others (2006) 5 SCC 399

State of Rajasthan and others vs. M/s Swaika Properties and another (1985) 3 SCC 217

State of J & K vs. Mohd. Yaqoob Khan and others (1992) 4 SCC 167

Bank of Maharashtra vs. Race Shipping and Transport Company Pvt. Ltd. and another (1995) 3 SCC 257
P. R. Sinha and others vs. Inder Krishan Raina and others (1996) 1 SCC 681
Union of India and others vs. Modiluft Ltd. (2003) 6 SCC 65
State of U.P. and others vs. Ram Sukhi Devi (2005) 9 SCC 733

For the Appellant(s) : Mr. Rahul Mahajan, Advocate.
For the Respondent(s) : Mr. V.D. Khidtta, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The appellant(s) by medium of these appeals has challenged the order passed by the writ court on 17.11.2014, which is as follows:

> **CWP's No. 3441, 3442, 3443, 3444, 3878, 3879, 3881, 3883, 3884 of 2012**
>
> *"Services of the workmen in the above writ petitions have been terminated during the course of conciliation proceedings before Labour Officer-cum-Conciliation Officer. Thus, the employer is directed to reinstate the workmen. The workmen so reinstated/re-engaged will not involve themselves in any Union activities and will not cause any problem in the premises of the workplace. The employer will be at liberty to impose stringent conditions to avoid vitiating of industrial peace in the factory premises.*
>
> *To ensure that no trouble is caused by the re-engaged workmen, Labour Officer-cum-Conciliation Officer, Solan will visit the premises fortnightly and submit his report to this Court.*
>
> ***CWP's No. 3441 to 3444, 3878 to 3881, 3883 to 3885, 4084 and 9215 of 2012***
>
> *Parties are also directed to explore possibility of amicable settlement outside the Court in view of this order.*
>
> *List the cases for hearing in the first week of January 2015."*

2. It is contended that the aforesaid order is not sustainable in the eyes of law as it amounts to granting main relief which the respondents would otherwise be entitled to if the writ petitions were to be dismissed. The order has been challenged on various other grounds as taken in the memo of appeal.

Undisputedly, the writ petitions are pending before the learned writ Court and have been fixed for hearing in the first week of January, 2015.

3. We have heard learned counsel for the parties and perused the records.

4. Clause 10 of the Letters Patent Appeal, as applicable to Himachal Pradesh, reads thus:

> *"10. Appeals to the High Court from Judges of the Court – And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of Superintendence under the provisions of Section*

107 of the government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made on or after the first day of February, one thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or Successors in our or their Privy Council, as hereinafter provided."

5. Plain reading of Clause 10 makes it clear that an appeal is competent from the decision of a Single Bench provided such decision falls within the ambit of "judgment".

Therefore, moot question which arises for consideration is as to whether the impugned order falls within the ambit of "judgment".

6. The word "judgment" has been considered in detail and explained by the Hon'ble Supreme Court in ***Shah Babulal Khimji vs. Jayaben D. Kania and another AIR 1981 SC 1786*** in the following terms

"*106. Thus, the only point which emerges from this decision is that whenever a Trial Judge decides a controversy which affects valuable rights of one of the parties, it must be treated to be a judgment within the meaning of the Letters Patent.****,***

113. Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a court. As a judgment constitutes the reasons for the decree it follows as a matter of course that the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by sub-s. (2) of s. 2 cannot be physically imported into the definition of the word 'judgment' as used in cl. 15 of the Letters Patent because the Letters Patent has advisedly not used the term 'order' or 'decree' anywhere. The intention, therefore, of the givers of the Letters Patent was that the word 'judgment' should receive a much wider and more liberal interpretation than the word 'judgment' used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a Trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the Letters Patent. It seems to us that the word 'judgment' has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds :.

(1) A Final Judgment - A judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the Trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.

(2) A preliminary judgment-This kind of a judgment may take two forms-(a) where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the trial Judge would be a judgment finally deciding the cause so far as the Trial Judge is concerned and therefore appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res Judicata, a manifest defect in the suit, absence of notice under section 80 and the like, and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to larger Bench.

(3) Intermediary or Interlocutory judgment-Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by O. 43 R.1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the trial Judge in a suit under order 37 of the Code of Civil Procedure refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the Letters Patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an Order passed by the trial Judge would not amount to a judgment within the meaning of cl. 15 of the Letters Patent but will be purely an interlocutory order.

Similarly, suppose the trial Judge passes an Order setting aside an exparte decree against the defendant, which is not appealable under any of the clauses of O. 43 R.1 though an order rejecting an application to set aside the decree passed exparte falls within O. 43 R.l, cl. (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of Letters Patent. The

fact, however, remains that the order setting aside the ex-parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the trial Judge setting aside the ex parte decree vitally affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench.

119. Apart from the tests laid down by Sir White, C.J., the following considerations must prevail with the court:

(1) That the Trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the Trial Judge. The courts must give sufficient allowance to the trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is ex facie legally erroneous or causes grave and substantial injustice.

(2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.

(3) The tests laid down by Sir White, C.J. as also by Sir Couch, C.J. as modified by later decisions of the Calcutta High Court itself which have been dealt with by us elaborately should be borne in mind.".

7. The matter was subsequently considered by the Hon'ble Supreme Court in a number of decisions and we may with advantage refer to the observations made by the Hon'ble Supreme Court in ***Subal Paul vs. Malina Paul and another (2003) 10 SCC 361*** :

"32**.** *While determining the question as regards clause 15 of the Letters Patent, the court is required to see as to whether the order sought to be appealed against is a judgment within the meaning thereof or not. Once it is held that irrespective of the nature of the order, meaning thereby whether interlocutory or final, a judgment has been rendered, clause 15 of the Letters Patent would be attracted.*

33. The Supreme Court in Shah Babulal Khimji 's case (supra) deprecated a very narrow interpretation on the word 'judgment' within the meaning of clause 15.

34. This Court said: (SCC pp. 45-46, para 82)

"A court is not justified in interpreting a legal term which amounts to a complete distortion of the word 'judgment' so as to deny appeals even against unjust orders to litigants having genuine grievances so as to make them scapegoats in the garb of protecting vexatious appeals. In such cases, a just balance must be struck so as to advance the object of the statute and give the desired relief to the litigants, if possible."

35. In Shah Babulal Khimji 's case (supra), the Apex Court in no uncertain terms referred to the judgment under the Special Act which confers

additional jurisdiction to the High Court even in internal appeals from an order passed by the Trial Judge to a larger Bench. Letters Patent has the force of law. It is no longer res Integra. Clause 15 of the Letters Patent confers a right of appeal on a litigant against any judgment passed under any Act unless the same is expressly excluded. Clause 15 may be subject to an Act but when it is not so subject to the special provision the power and jurisdiction of the High Court under Clause 15 to entertain any appeal from a judgment would be effective.

38. The decision of this Court in Shah Babulal Khimji 's case (supra) has been considered in some details by a Special Bench of the Calcutta High Court in M/s. Tanusree Art Printers and Anr. v. Rabindra Nath Pal, [2000] 2 CHN 213 and 2000 (2) CHN 843. It was pointed out: (CHN p.233, para 67)

> *"If the right of appeal is a creature of a statute, the same would be governed by the said statute. Whether an appeal under Clause 15 of the Letters patent will be maintainable or not when the matter is governed by a Special Statue will also have to be judged from the scheme thereof, (e.g. despite absence of bar, a Letters Patent appeal will not be maintainable from a judgement of the learned Single Judge rendered under the Representation of People Act.)"*

39. It was pointed out that in Shah Babulal Khimji's case (supra) this Court posed three questions namely: (CHN p.227, para 42)

> *"(1) Whether in view of clause 15 of the Letters Patent an appeal under section 104 of the Code of Civil Procedure would lie? (2) Whether clause 15 of the Letters Patent supersedes Order 43 Rule 1 of the code of Civil Procedure? (3) Even section 104 of the CPC has no application, whether an order refusing to grant injunction or appoint a receiver would be a judgment within the meaning of Clause 15 of the Letters Patent?"*

40. The Apex Court answered each of them from a different angle: (CHN p.227, para 43)

> *(a) Section 104 of the Code of Civil Procedure read with Order 43 Rule 1 expressly authorizes a forum of appeal against orders falling under various clauses of Order 43 Rule 1 to a Larger Bench of a High Court without at all disturbing interference with or overriding the Letters Patent jurisdiction.*
>
> *(b) Having regard to the provisions of Section 117 and Order 49 Rule 3 of the Code of Civil Procedure which excludes various other provisions from the jurisdiction of the High Court, it does not exclude Order 43 Rule 1 of the CPC.*
>
> *(c) There is no inconsistency between section 104 read with Order 43 Rule I and the appeals under Letters Patent, as Letters Patent in any way does not exclude or override the application under section 104 read with Order 43 Rule 1 which shows that these provisions would not apply in internal appeals within the High Court "*

47. In Prataprai N, Kothari v. John Braganza, [1999] 4 SCC 403, even in a suit for possession only not based on title, a letters patent appeal was held to be maintainable.

48. The decision of this Court in Sharda Devi v. State of Bihar, [2002] 3 SCC 705 is also to the same effect, wherein in para 9 it was held: (SCC p. 709)

> *"9. A Letters patent is the charter under which the High Court is established. The powers given to a High Court under the Letters Patent are akin to the constitutional powers of a High Court. Thus*

when a Letters Patent grants to the High Court a power of appeal, against a judgment of a Single Judge, the right to entertain the appeal would not get excluded unless the statutory enactment concerned excludes an appeal under the Letters Patent."

49. Section 54 of the Land Acquisition Act, 1894 provides for an appeal before the High Court and thereafter to the Supreme Court and despite the same it was held that a letters patent appeal under clause 15 would be maintainable."

8. In ***Midnapore Peoples' Coop. Bank Ltd. and others vs. Chunilal Nanda and others (2006) 5 SCC 399*** the Hon'ble Supreme Court held that the term "judgment" occurring in clause 15 of the Letters Patent will take into its fold not only the judgments as defined in Section 2(9) CPC and orders enumerated in Order 43 Rule 1 CPC, but also other orders which, though may not finally and conclusively determine the rights of parties with regard to all or any matters in controversy, may have finality in regard to some collateral matter, which would affect the vital and valuable rights and obligations of the parties. It is apt to reproduce paras 15 and 16 of the report, which reads thus:

"15. Interim orders/interlocutory orders passed during the pendency of a case, fall under one or the other of the following categories:

(i) Orders which finally decide a question or issue in controversy in the main case.

(ii) Orders which finally decide an issue which materially and directly affects the final decision in the main case.

(iii) Orders which finally decide a collateral issue or question which is not the subject mater of the main case.

(iv) Routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment.

(v) Orders which may cause some inconvenience or some prejudice to a party, but which do not finally determine the rights and obligations of the parties.

16. The term "judgment" occurring in clause 15 of the Letters Patent will take into its fold not only the judgments as defined in Section 2 (9) CPC and orders enumerated in Order 43 Rule 1 CPC, but also other orders which, though may not finally and conclusively determine the rights of parties with regard to all or any matters in controversy, may have finality in regard to some collateral matter, which will affect the vital and valuable rights and obligations of the parties. Interlocutory orders which fall under categories (i) to (iii) above, are, therefore "judgments" for the purpose of filing appeals under the Letters Patent. On the other hand, orders falling under categories (iv) and (v) are not "judgments" for the purpose of filing appeals provided under the Letters Patent."

9. On the basis of the aforesaid exposition of law, it can safely be concluded that in order to fall within the meaning of "judgment" under Clause 10 of the Letters Patent Appeal, the order must contain the traits and trappings of finality either by deciding questions in controversy in ancillary proceeding or in the petition itself or in a part of the proceedings and such an adjudication must also decide and affect the rights of parties. It has also to be borne in mind that every intermediary or interlocutory order cannot be regarded as "judgment" but only such orders which decide or affect the rights of the parties and put to an end or terminate the proceedings can be treated as "judgment". The effect, rather than the form, of the adjudication has to be looked into, and if so done, the order appealed against is nothing but a step towards a final adjudication.

What must be looked into is general nature and effect of the order and the same has to be judged by the test as to whether adjudication of rights, proceedings are terminated if it is not so, such an order would not be a judgment within the meaning of Clause 10.

10. Coming to the facts of this case, it would be seen that in the writ petition preferred by the appellant(s) the award passed by the Industrial Tribunal-cum-Labour Court, Shimla (for short 'Tribunal') under Section 33 (2) of the Industrial Disputes Act, read with Rule 64 (2) of the H. P. Industrial Disputes Rules, 1974 has been assailed. The appellant(s) had approached the Tribunal for approval of their action in respect of dismissing the services of the respondents. This application came to be dismissed by the learned Tribunal and the respondents were ordered to be reinstated in service alongwith back wages @ 25%.

11. A perusal of the impugned order reveals that the respondents-workmen have been ordered to be reinstated with the condition that they will not involve themselves in any Union activities and would also not cause any problem in the premises of the workplace. At the same time, the appellant(s) has been granted liberty to impose stringent conditions on the workmen so that the respondents do not vitiate industrial peace in the factory premises. Not only this, the Labour Officer-cum-Conciliation Officer, Solan has been directed to oversee this arrangement and has been directed to visit the premises fortnightly and submit his report.

12. The appellant(s) has taken exception to this order by claiming that the order though on the face of it appears to be interlocutory but in fact it grants the main relief which the respondents would otherwise be entitled to if the writ petitions were ordered to be dismissed and, therefore, the order would fall within the ambit of "judgment" and, therefore, the appeal is competent.

13. In support of his submission, the appellant(s) has relied upon the judgment of the Hon'ble Supreme Court in ***State of Rajasthan and others*** vs. ***M/s Swaika Properties and another (1985) 3 SCC 217***, ***State of J & K*** vs. ***Mohd. Yaqoob Khan and others (1992) 4 SCC 167, Bank of Maharashtra*** vs. ***Race Shipping and Transport Company Pvt. Ltd. and another (1995) 3 SCC 257, P. R. Sinha and others*** vs. ***Inder Krishan Raina and others (1996) 1 SCC 681, Union of India and others*** vs. ***Modiluft Ltd. (2003) 6 SCC 65*** and ***State of U.P. and others*** vs. ***Ram Sukhi Devi (2005) 9 SCC 733.***

14. We have gone through these judgments. The sum and substance of these judgments is that the Hon'ble Supreme Court has time and again deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that of a prima facie case having been made out, without considering the balance of convenience, the public interest and a host of other considerations.

15. There is no quarrel with the aforesaid proposition of law, but at the same time, we fail to understand as to how the ratio of the same is applicable to the facts of the present case. Admittedly, it is the appellant, who happens to be the writ petitioner on whose asking the impugned order has been passed. The settled position of law is that the Courts are not to grant interim orders which practically give principal relief sought in the petition but the converse is not true. Meaning thereby that the appellant cannot be heard to complain that since the interim order on its asking has been passed, the same virtually amounts to dismissal of the petition itself. Further, the appellant cannot, as a matter of right, claim interim relief in its favour much less dictate the mode and manner in which interim relief is to be granted. Even otherwise, interim orders passed by the learned writ Court would not govern the

consideration for final relief and if found necessary, effect of interim order can always be reversed by way of restitution.

16. That apart, the impugned order does not determine the rights or liabilities of the parties affecting the merits of the controversy and, therefore, cannot be termed to be a "Judgment".

17. Having perused the impugned order, we have no hesitation to hold that the impugned order is a just, fair and equitable order calling for no interference. The learned writ Court had discretion to pass the impugned order and it cannot be said that such discretion has been exercised arbitrarily, capriciously, perversely or has been passed by ignoring the well settled principles of law.

18. Above all, the learned writ Court after taking into consideration the urgency of the matter has directed these cases to be listed for hearing in the first week of January, 2015. In such circumstances, we fail to understand that even if assuming that the impugned order is a judgment against which the present appeal is maintainable, even then, what prejudice and in what manner the rights of the appellant(s) have been effected so as to afford it a cause of action to file the present appeals. Having said so, we have no hesitation to conclude that these appeals are nothing but an abuse of process of the Court wherein the appellant(s) has sought to drag the hapless and helpless workmen into unwanted, unwarranted and otherwise avoidable litigation.

Accordingly, all these appeals are dismissed. Though this was a fit case for imposing cost, we refrain from doing so since we have not issued notice to the opposite party and the counsel for the respondents has put in appearance of his own. The pending applications, if any, are also disposed of. The Registry is directed to place a copy of this judgment on the files of connected matters.

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

CWP No. 9266 A/W CWP No.8368 of 2014.
Date of decision: 31.12.2014.

CWP No.9266/2014.
Harish Kumar and another .....*Petitioners*
Versus
State of H.P and others ...*Respondents*

CWP No.8368/2014.
Sudha and others .....*Petitioners*
Versus
State of H.P and others ...*Respondents*

Constitution of India, 1950- Article 226- Seniority was fixed on the basis of the date of joining and not on the basis of merit obtained in the selection process- petitioner claimed that the seniority list be issued on the basis of the merit obtained by the candidates in the selection process- held, that seniority list is to be drawn as per the merit obtained in the selection process and date of joining cannot determine the seniority- respondents directed to issue a fresh seniority list as per merit. (Para-7 to 12)

Cases referred:
Chairman, Puri Gramya Bank and another vs. Ananda Chandra Das and others (1994) 6 SCC 301

Bimlesh Tanwar vs. State of Haryana and others AIR 2003 SC 2000.
Suresh Chandra Jha versus State of Bihar and others (2007) 1 SCC 405

For the petitioner(s): Ms. Jyotsna Rewal Dua, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. Anup Rattan, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2-State.

Mr. Ashwani Kaundal, Advocate, for respondents No. 3 to 5 in CWP No.9266/2014.

Mr. Ajay Chauhan and Mr. Anupinder Singh Rohal, Advocates, for respondents No. 3 to 8 and 10 to 12 in CWP No.8368/2014.

Mr. Manish Kumar Gupta, Advocate, for respondent No. 9 in CWP No.8368/2014.

Mr. V.D. Khidtta, Advocate, for respondent No. 13 in CWP No. 8368/2014.

Mr. Naveen K. Bhardwaj, Advocate, in CMP No.21123/2014.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Similar questions of facts and law are involved in both these writ petitions thus; we deem it proper to determine both these writ petitions by this common judgment.

2. It is apt to reproduce reliefs as sought for in both the writ petitions, as under:-

CWP No.9266/2014.

"(i) Quashing annexure P-5 (colly) dated 21.10.2014 to the extent it promotes respondents No. 3-5, who are juniors to the petitioners as JBT teachers to the post of Trained Graduate Teachers (TGT) without promoting the petitioners as TGTs.

(ii) For directing the respondents to promote the petitioners as Trained Graduate Teachers (TGTs) w.e.f. 21.10.2014 i.e., the date their juniors (respondents 3-5) were promoted as TGTs alongwith all consequential benefits of seniority and financial benefits.

(iii) For directing the respondents not to treat the date of joining of the JBT teachers as the basis for consideration for making their promotion to TGT amongst petitioners and private respondents (i.e. those appointed vide same appointment order) in the facts and circumstances of the case and in view of submissions made in the writ petition. Respondents may kindly be directed to treat the order of merit, in which the candidates are placed in the appointment order at annexure P1, as the basis of seniority for making promotions to the post of TGT."

CWP No.8368/2014.

"(i) Quashing annexure P-3 (colly) dated 21.10.2014 to the extent it promotes respondents No. 3-12, who are juniors to the petitioners as JBT teachers to the post of Trained Graduate Teachers (TGT) without promoting the petitioners as TGTs.

(ii) For directing the respondents to promote the petitioners as Trained Graduate Teachers (TGTs) w.e.f. 21.10.2014 i.e., the date their juniors (respondents 3-12) were promoted as TGTs alongwith all consequential benefits of seniority and financial benefits.

(iii) For directing the respondents not to treat the date of joining of the JBT teachers as the basis for consideration for making their promotion to TGT amongst petitioners and private respondents (i.e. those appointed vide same appointment order) in the facts and circumstances of the case and in view of submissions made in the writ petition. Respondents may kindly be directed to treat the order of merit, in which the candidates are placed in the appointment order at annexure P1, as the basis of seniority for making promotions to the post of TGT."

3. In both the writ petitions, petitioners have called in question the action drawn by the respondents, whereby seniority came to be fixed on the basis of the date of joining and not as per the merit obtained in the selection process and prayed that the Tentative Seniority list issued by the Department vide office order No. EDN-SLN-Elem.(E-III) Sty—1/2014-15925-32 and office order No.EDN-H (2) 7/2014-Pro-JBT-NM dated 21.10.2014, so far it promoted the private respondents, be quashed and respondents be directed to issue fresh seniority list, strictly in terms of the merits obtained by the candidates in the selection process and thereafter promotions be made to the next cadre, as per the Rules, occupying the field.

4. Replies have not been filed in both the writ petitions.

5. The learned counsel for the private respondents stated at the Bar that they have no objections in case prayer in both the writ petitions is granted with the command to the respondents-State to frame seniority list, as per the merit list obtained in the selection process and entire exercise for grant of promotion, be made, in terms of merit list read with the Rules, occupying the field, within a time frame. Their statements are taken on record.

6. The learned Advocate General has vehemently argued that so many persons will be affected by this judgment and order, who are not before this Court and prayed that the seniority list qua those persons, who are ranking below in the merit list be quashed.

7. It is beaten law of the land that the seniority list is to be drawn as per the merit obtained in the selection process and date of joining cannot determine the seniority.

8. The apex Court in case *The Direct Recruit Class-II Engineering Officers' Association and others vs. State of Maharashtra and others* reported in *AIR 1990 SC 1607,* held that once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. It is apt to reproduce para 44-A of the said judgment herein:

> *"44.To sum up, we hold that:*
>
> *(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority."*

9. The apex Court in ***Chairman, Puri Gramya Bank and another vs. Ananda Chandra Das and others*** reported in *(1994) 6 SCC 301,* held that seniority among direct recruits has to be determined on the basis of ranking secured in the selection, subject to reservation and roster rules, and not on the basis of the dates of joining duty. It is apt to reproduce relevant portion of para 2 of the judgment herein:

> *"2..... The respondent and others were selected by direct recruitment as managers of Rural Bank. His rank was No. 9 in the merit list. He was directed to be given seniority on the basis of the date of his reporting to duty. It is reported that the first respondent is dead. The only question in this case is that what shall be the ranking among the direct recruits? Is it the date on which they joined duty or according to the ranking given by the Selection Board? On comparative evaluation of the respective merits of the candidates for direct recruitment, the Board had prepared the merit list on the basis of the ranking secured at the time of the selection. It is settled law that if more than one are selected, the seniority is as per ranking of the direct recruits subject to the adjustment of the candidates selected on applying the rule of reservation and the roster. By mere fortuitous chance of reporting to duty earlier would not alter the ranking given by the Selection Board and the arranged one as per roster. The High court is, therefore, wholly wrong in its conclusion that the seniority shall be determined on the basis of the joining reports given by the candidates selected for appointment by direct recruitment and length of service on its basis. The view, therefore, is wrong. However, we need not interfere with the order, since the first respondent has died."*

10. The same principles of law have been laid down by the apex Court in case titled ***Bimlesh Tanwar vs. State of Haryana and others*** reported in ***AIR 2003 SC 2000***. It is profitable to reproduce para 49 of the said judgment herein:

> *"49.In this case also, although there does not exist any statutory rule but the practice of determining inter se seniority on the basis of the merit list has been evolved on interpretation of the Rules. A select list is prepared keeping in view the respective merit of the candidates. Not only appointments are required to be made on the basis of such merit list, seniority is also to be determined on that basis as it is expected that the candidates should be joining their respective posts almost at the same time. Yet again in Chairman, Puri Gramya Bank & Anr. vs. Ananda Chandra Das & Ors. [1994(6) SCC 301] this court held:*
>
> > *"It is settled law that if more than one are selected, the seniority is as per ranking of the direct recruits*

subject to the adjustment of the candidates selected on applying the rule of reservation and the roster. By mere fortuitous chance of reporting to duty earlier would not alter the ranking given by the Selection Board and the arranged one as per roster. The High Court is, therefore, wholly wrong in its conclusion that the seniority shall be determined on the basis of the joining reports given by the candidates selected for appointment by direct recruitment and length of service on its basis."

11. The above principles of law have been followed by the apex Court in case titled ***Suresh Chandra Jha*** *versus* ***State of Bihar and others reported in (2007) 1 SCC 405.***

12. Accordingly, the writ petitions are allowed. The Tentative Seniority List issued vide office order No.EDN-SLN-Elem.(E.III) Sty—1/ 2014-15925-32 and office order No. EDN-H (2) 7/2014-Pro-JBT-NM dated 21.10.2014, in both the writ petitions, so far it relate to private respondents and the persons who are ranking below in the merit list, is quashed and respondents are directed to issue fresh seniority list, strictly as per the merit obtained, in terms of the selection process and make the promotions, strictly, as per the Rules, occupying the field.

13. It goes without saying that promotions of the persons, who are ranking above in the merit, to the writ petitioners, be kept in tact and the cases of only those persons, who are ranking below in the merit list, be considered, afresh while making exercise for promotions alongwith the writ petitioners and other persons eligible for consideration. The entire exercise be done within two months from today.

14. Having said so, both the writ petitions are disposed of, as indicated hereinabove, alongwith pending applications, if any.

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

Raj Kumar ..... Petitioner
Vs.
State of H.P. & ors. ..... Respondents.

CWP No. 8590 of 2014.
Judgement reserved on: 23.12.2014.
Date of decision: 31.12.2014.

Constitution of India, 1950- Article 226- Petitioner was transferred on the basis of U.O. Note received from the office of Chief Minister- respondents claimed that they had received numerous complaints against the petitioner from public representatives of nearest Panchayat, which compelled the authorities to effect the transfer- petitioner has remained in and around his home district- held, that transfer is an incident of service and can be effected on the basis of administrative exigency and taking into consideration the public interest- government servant has no vested right to remain posted at one place - courts should not interfere with the orders of transfer- however, if the exercise of power is based on extraneous considerations or for achieving an alien purpose or an oblique motive, it would amount to colourable exercise of power- transfer has been made on the basis of UO Note, no proposal for transfer had originated from the administrative department- hence, order is not sustainable.
(Para-4 to 21)

Cases referred:

Amir Chand vs. State of Himachal Pradesh 2013 (2) Him. L.R. (DB) 648

Ram Krishan vs. District Education Officer, ILR (Himachal Series) (1979) 8 HIM, 481

A.K.Vasudeva vs. State of H.P. and others ILR (Himachal Series) (1981) 10 HIM 359

Sant Ram Pant vs. State of H.P. and others 2009 (3) Shim. L.C. 206

Sanjay Kumar vs. State of H.P. & others Latest HLJ 2013 (HP) 1051

Somesh Tiwari vs. Union of India and others (2009) 2 SCC 592

For the petitioner : Mr. Sanjeev Bhushan, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma and Mr. M.A. Khan, Additional Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

It is for the second time that the petitioner has been compelled to approach this court seeking quashment of his transfer, which has been effected on the basis of U.O. Note No. Secy./C.M-7004/2012-VIP-B-143360 dated 17.6.2014 received from the office of Hon'ble Chief Minister.

2. Initially the petitioner vide order dated 7.2.2014 was ordered to be transferred from Horticulture Extension Centre, Sundla, Development Block Salooni, District Chamba to Plant Protection Centre, Ratnari Development Block, Jubbal & Kotkhai, District Shimla against the vacancy. This order had been effected on the basis of D.O. No. Secy/CM-07004/ 2012-VIP-B-114510 dated 10.01.2014. The petitioner approached this court by filing CWP No. 1261 of 2014 and the said transfer was cancelled on the basis of the decision of this court in **Amir Chand** vs. **State of Himachal Pradesh 2013 (2) Him. L.R. (DB) 648,** to which decision we shall advert to later.

3. Thereafter vide order dated 3rd August 2014 the petitioner was again transferred to the said station. This transfer has been assailed on the ground that the same is illegal, arbitrary and against the settled norms and the petitioner has been transferred to a distance of nearly 500 kilometers without taking into consideration that his children are studying in 9th and 6th class, respectively. These generalized grounds appear to have been taken because the office order dated 3.8.2014 on the face of it appears to be innocuous.

4. But then the cat is out of the bag when the respondents filed the reply wherein it has been averred that respondents had received numerous complaints against the petitioner from public representatives of nearby Panchayat(s), which compelled the authorities to effect the transfer. It is the further case of the respondents that right from the date of his appointment on 7.10.1988, the petitioner has remained in and around his home district i.e. Chamba. So far so good. The respondents then have placed on record letter dated 15th July 2014, a perusal whereof reveals that petitioner has again been transferred on the basis of U.O. note, as would be clear from the contents of letter, which is reproduced here in below:-

> "**Sir,**
>
> **On the above cited subject, the U.O. note No. Secy./C.M-7004/2012-VIP-B-143360, dated 17.6.2014 received from the office of Hon'ble Chief Minister H.P. vide which Sh. Raj Kumar, Horticulture Extension Officer has been transferred from Horticulture Extension Centre Sundla Distt. Chamba to Plant Protection Centre Ratnari in the Dev. Block Jubbal & Kotkhai area and be made effective.**

In this regard it is requested that Sh. Raj Kumar HEO had already been transferred vide this Directorate office order of even number dated 7.2.2014 in compliance to the U.O. dated 10.1.2014 (copy enclosed). Sh. Raj Kumar, HEO has challenged the transfer order in the Hon'ble High Court of H.P. on 5.3.2014 and as per the order passed by the Hon'ble Court of H.P. this Directorate has cancelled the office order of even number dated 7.2.2014 therefore, keeping in view decision of Hon'ble Court of H.P. it is not possible to issue the transfer order on the basis of received U.O. Note dated 17.6.2014 and if the transfer is necessary this can be made on administrative ground, the service Bio-data of the official is as under:-

Name of the official/Designation	Sh. Raj Kumar, Horticulture Extension Officer.
Date of Birth/ Retirement	15.5.1964/ 31.5.2022
Date of Appointment	7.10.1988
Home District	Chamba
Place of present posting with date	Horticulture Extension Centre Sundla w.e.f. 23.6.2008.
Previous three place of posting	1. Salooni 2/1997 to 11/2001 2. Sundla 11/2001 to 3/2005 3. Zeera 3/2005 to 8/2007
Place where from transfer proposed to.	Horticulture Extension Centre Sundla Dev. Block Salooni Distt. Chamba to Plant protection Centre Jubbal Kotkhai Distt. Shimla against vacancy.
Stay from court, if	The above official was transferred vide this Directorate office order of even No. dt. 7.2.2014, but the official has filed a CWP 1261/2014 before the Hon'ble High Court of H.P. and as per decision passed on 5.3.2014 by Hon'ble Court the transfer order passed on 7.2.2014 had been cancelled accordingly.
Distance of transfer	550 K.M.
Tribal served or not.	Yes
Proposal of Head of department	If, the compliance is necessary on the approval received from the office of the Hon'ble Chief Minister of H.P. then the administrative approval may be accorded to transfer the official, because the behaviour of the said official is not good with the local public as is evident from the representations received from the four Gram Panchayat's (copy enclosed)."

5. It is trite that transfer is an incidence of service and as long as the authority acts keeping in view the administrative exigency and taking into consideration the public interest as the paramount consideration, it has unfettered powers to effect transfer subject of course to certain disciplines. Once it is admitted that the petitioner is State government employee and holds a transferable post then he is liable to be transferred from one place to the other

within the District in case it is a District cadre post and throughout the State in case he holds a State cadre post. A government servant holding a transferable post has no vested right to remain posted at one place or the other and courts should not ordinarily interfere with the orders of transfer instead affected party should approach the higher authorities in the department. Who should be transferred where and in what manner is for the appropriate authority to decide. The courts and tribunals are not expected to interdict the working the working of the administrative system by transferring the officers to "proper place". It is for the administration to take appropriate decision.

6. Even the administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/ servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. Even if the order of transfer is made in transgression of administrative guidelines, the same cannot be interfered with as it does not confer any legally enforceable rights unless the same is shown to have been vitiated by malafides or made in violation of any statutory provision. The government is the best judge to decide how to distribute and utilize the services of its employees.

7. However, this power must be exercised honestly, bona fide and reasonably. It should be exercised in public interest. If the exercise of power is based on extraneous considerations without any factual background foundation or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose, such as on the basis of complaints. It is the basic principle of rule of law and good administration, that even administrative action should be just and fair. An order of transfer is to satisfy the test of Articles 14 and 16 of the Constitution otherwise the same will be treated as arbitrary.

8. Judicial review of the order of transfer is permissible when the order is made on irrelevant consideration. Even when the order of transfer which otherwise appears to be innocuous on its face is passed on extraneous consideration then the court is competent to go into the matter to find out the real foundation of transfer. The court is competent to ascertain whether the order of transfer is passed bonafide or as a measure of punishment.

9. The transfer in the present case evidently has not been effected in administrative exigencies or in public interest but has been made on the basis of U.O. Note. It is the specific case of the respondents themselves that petitioner was transferred on the basis of complaints received from the public representatives. Therefore, the question that falls for our consideration is as to whether such transfer can withstand judicial scrutiny and is permissible in law.

10. This precise question came up for consideration before this court more than three and half decades back in **Ram Krishan** vs. **District Education Officer, ILR (Himachal Series) (1979) 8 HIM, 481,** wherein this court held as follows: -

> "8. We hereby record our strong disapproval of such type of interference from outsiders in day today administration of the State. If such interference is to be allowed, it would only mean that the government servants should run after those who are taking part in public life and in politics for getting better terms of service and a better place for their postings, and should do everything to please them and not to please

the department by their ability, honesty and integrity. It need not be emphasized that such interference of outsiders in day--to-day administration of the State is highly detrimental to the public interest as it would result in nepotism and corruption wherein only those who can wield influence and purse, can succeed. Therefore, we want by this judgment to bring it to the notice of all concerned that sooner this type of interference is discouraged and stopped, the better for the administration and the people of this State."

11. In **A.K.Vasudeva** vs. **State of H.P. and others ILR (Himachal Series) (1981) 10 HIM 359,** this court while dealing with a case in which the transfer of a teacher had been made at the behest of a Member of the Legislative Assembly has held as follows:-

> 21. The practice of effecting transfers of teachers at the behest of every M.L.A. and other influential persons seems to be rampant in the department of Education in the State. The record is full of it. Indeed when the transfer proposals are prepared there is a column No. 8 which is to show "recommended / proposed by". I find that a transfer as been made even at the instance of the esident Youth Congress (I) Subathu of a teacher Alaxender from Kanda to Subathu. It appears that no transfer is made except at the instance of somebody. Why was Shri Chaman Lal reluctant to admit his role, and why did he depose that he had nothing to do with the posting and transfer of any teacher? I had expected him to come out openly and frankly. He is not only a member of the Legislative Assembly but at the moment owns a responsible position as Chairman of a public corporation."

12 Thereafter referring to the judgement in **Ram Krishan's** case (supra), this court went on to hold as follows:

> "28. It is unfortunate indeed that despite the aforementioned pronouncement by this Court the malady of the politicians interfering in the administration of the Education Department is as rampant as before, if not worse. Apparently no one is bothered about any discipline in this department and the teachers and others are perhaps encouraged by this method to be beholden to the political persons instead of relying on the honesty and the integrity of the Director of Education and other officers for administering the department and ordering transfers."

13. In CWP No. 1105 of 2006, titled **Sushila Sharma** vs. **State of H.P and others,** this court has held as follows:-

> "We, however, direct that a copy of this judgment be sent to the Chief Secretary to the Govt. of H.P., who shall ensure that a proper transfer policy is formulated to ensure that the transfers are made only on administrative grounds and not on any others grounds. In the policy to be framed, it shall be ensured that all the employees are treated fairly and equally and every employee during his tenure of service serves in tribal/ hard areas and also in remote /rural areas. When transfers are made, the administrative department

shall ensure that the employees who have already served in tribal/ hard areas as well as remote/ rural areas are not again sent to these areas and there is a continuous process of change whereby all the employees have a chance to serve in tribal/hard areas as well as remote/ rural areas. In the policy so framed, It should also be ensured that the transfer orders are not cancelled without making reference to the administrative department to putforth its views. In the policy, measures shall be provided to ensure that employees (obviously influential) who have managed to remain posted in the urban areas/cities are posted to rural/remote areas and hard/tribal areas in the transfer season when the transfers are made. The transfer policy should also ensure that people, who are posted in remote/rural areas, join their place of postings and do not manage to get their transfers cancelled on frivolous grounds as has happened in the present case. The policy be framed and filed in Court within two months from today." Consequent to these directions, a policy was framed, but has been observed more in breach."

14. In CWP No. 3530 of 2011 titled **Babita Thakur** vs. **State of H.P. and others,** a learned single Judge of this court held as follows:-

"9. It is true that it is for the employer to see where the Government servant is to be posted. However, it is equally true that there is no arbitrariness in the action. The transfer cannot be used as an instrument to accommodate/ adjust the persons without there being any administrative exigency. The underline principle for transfer is public interest or administrative exigency. In the instant case, neither there was any public interest nor any administrative exigency necessitating the transfer of the petitioner from government Primary School,Chadyara (Sadar) to G overnment Primary School, Khanyari (Chachoit1)."

15. In CWP No. 2844 of 2010 titled **Pratap Singh Chauhan** vs. **State of H.P. & others decided on 18.6.2011,** a learned single Judge of this court after considering various judgements of Hon'ble Supreme Court held as follows:-

"10. We are governed by the Constitution of India. As per the constitutional scheme there are three pillars of democracy; the Legislature; the Judiciary and the Executive. Each has to work in its own sphere. This is a system of checks and balances where each can check the other, but it must be clearly understood that none of the three organs can encroach upon the - jurisdiction of the other. The jurisdiction vested in this Court under Article 226 of the Constitution of India is indeed very wide. Wider the jurisdiction, more care should be taken to exercise it with greater discretion, so that questions are not raised about the functioning of the Judiciary. The Apex Court has in no uncertain terms laid down a note of caution that Courts should not interfere in transfer matters except on very strong grounds.

11. Having held so, this Court is also not oblivious to the factual position which exists on the spot and the

situation is that day in and day out this Court is flooded with writ petitions in which employees challenge the order of their transfer on various grounds. On more than one occasion this Court has found that there are notes sent by public representatives such as Members of the Legislative Assembly recommending the transfers. No doubt, public representatives have a right to make recommendations, but these can only be recommendations and cannot be taken to be the final word."

16. In **Sant Ram Pant** vs. **State of H.P. and others 2009 (3) Shim. L.C. 206,** a Division Bench of this court held as follows:-

" 8. When transfers are made, an employee may be aggrieved by his transfer. An employee has a right to make a representation against such transfer. It is also the right of the employer, including the State, to look into the grievances of the employees and if the grievance made by the employee is found to be genuine, the State is well within its right to redress the grievance of the employee and cancel the order of transfer. However, the grounds for passing an order of cancellation within two weeks of the original order must be borne out from some material on the record. In the present case, despite two opportunities being given the State has not produced any representation made by the respondent No. 3 or any other communication addressed to the office of the Hon'ble Chief Minister on behalf of the respondent No. 3 which would justify the issuance of the note dated 1.1.2009."

17. A treatise on this subject is a judgement of Division Bench of this court in **Amir Chand's** case (supra), wherein this court after taking into consideration the entire law as settled by the Hon'ble Supreme Court as also various High Courts including this court issued the following directions:-

"1. The State must amend its transfer policy and categorize all the stations in the State under different categories. At present, there are only two categories, i.e. tribal/ hard areas and other areas. We have increasingly found that people who are sent to the hard/ tribal areas find it very difficult to come back because whenever a person is posted there, he first manages to get orders staying his transfer by approaching the political bosses and sometimes even from the Courts. Why should the poor people of such areas suffer on this count. We are, therefore, of the view that the Government should categorize all the stations in the State in at least four or five categories, i.e. A, B, C, D and E also, if the State so requires. The most easy stations, i.e. urban areas like Shimla, Dharamshala, Mandi etc. may fall in category A and the lowest category will be of the must difficult stations in the remote corners of the State such as Pangi, Dodra Kawar, Kaza etc. At the same time, the home town or area adjoining to home town of the employee, regardless of its category, otherwise can be treated as category A or at least in a category higher than its actual category in which the employee would normally fall. For example, if an employee belongs to Ghumarwin, which is categorized in category B, then if the employee is serving in and around Ghumarwin, he will be deemed to be in Category A.

2. After the stations have been categorized, a database must be maintained of all the employees in different departments as to in which category of station(s) a particular employee has served throughout his career. An effort should be made to ensure that every employee serves in

every category of stations. Supposing the State decides to have four categories, i.e. A, B, C, D, then an employee should be posted from category A to any of the other three categories, but should not be again transferred to category A station. If after category A he is transferred to category D station, then his next posting must be in category B or C. In case such a policy is followed, there will be no scope for adjusting the favourites and all employees will be treated equally and there will be no heart burning between the employees.

3. We make it clear that in certain hard cases, keeping in view the problems of a particular employee, an exception can be made but whenever such exception is made, a reasoned order must be passed why policy is not being followed.

4. Coming to the issue of political patronage. On the basis of the judgements cited hereinabove, there can be no manner of doubt that the elected representative do have a right to complain about the working of an official, but once such a complaint is made, then it must be sent to the head of the administrative department, who should verify the complaint and if the complaint is found to be true, then alone can the employee be transferred.

5. We are, however, of the view that the elected representative cannot have a right to claim that a particular employee should be posted at a particular station. This choice has to be made by the administrative head, i.e. the Executive and not by the legislators. Where an employee is to be posted must be decided by the administration. It is for the officers to show their independence by ensuring that they do not order transfers merely on the asking of an MLA or Minister. They can always send back a proposal showing why the same cannot be accepted.

6. We, therefore, direct that whenever any transfer is ordered not by the departments, but on the recommendations of a Minster or MLA, then before ordering the transfer, views of the administrative department must be ascertained. Only after ascertaining the views of the administrative department, the transfer may be ordered if approved by the administrative department.

7. No transfer should be ordered at the behest of party workers or others who have no connection either with the legislature or the executive. These persons have no right to recommend that an employee should be posted at a particular place. In case they want to complain about the functioning of the employees then the complaint must be made to the Minister In charge and/ or the Head of the Department. Only after the complaint is verified should action be taken. We, however, reiterate that no transfer should be made at the behest of party workers."

(underlining supplied by us)

18. Here it is pertinent to observe that the aforesaid decision of this court has been affirmed by the Hon'ble Supreme Court as noted in para-22 of the judgement in **Sanjay Kumar** vs. **State of H.P. & others Latest HLJ 2013 (HP) 1051.**

19. Yet again the matter regarding transfer on the basis of D.O. Notes was the subject matter of consideration in **Sanjay Kumar's** case (supra) wherein after a lucid analysis and taking note of various judgements of Hon'ble Supreme Court and this court, it was held as follows:-

"30. The transfer at the instance of a person, who has no role to play in the Government, will not only be extraneous consideration, but also against public policy. It shakes the confidence of the people and creates an impression in the mind of a common man that the centre of power is somewhere else and not the Government. In order to curb this tendency and inspire confidence in general public and more particularly in the employees, it is necessary that no one should get an impression that

employee can be transferred for asking at the instance of a person, who has no concern with the Government. This, if goes unchecked, is bound to affect the morale of the employees and their independent working and will not be in the interest of general public. There is, however, one caveat. That, any person has a right to make a complaint against an employee regarding his conduct to his superior or Chief Minster and even request for his transfer. It is, however, only for the competent authority to consider the request and to take appropriate action in accordance with law. Further, it is unfathomable that such large number of transfers could be made at the instance of a person who is not in the Government, nor a people's representative as such. Issuing transfer orders at the instance of an outsider, who incidentally happens to be a Party worker, cannot be a co-incidence, but a concerted effort of the duty holders, who were otherwise responsible to preserve rule of law. Such action not only shakes the conscience of the Court, but also, inevitably, impinges upon the validity of such orders as the same are the product of colourable exercise of power."

20. Notably, the State government challenged the aforesaid decision before the Hon'ble Supreme Court which was dismissed vide order dated 27.9.2013 in the following terms:

> "Heard learned counsel for the petitioner. We do not see any cogent reason to interfere with the impugned judgement and order in these petitions. The special leave petitions are dismissed. However. We clarify that the State is entitled to make the transfer as per the transfer policy adopted by the State for the particular time and particular department."

21. Tested on the touchstone of aforesaid exposition of law, it can safely be concluded that the transfer of the petitioner cannot withstand judicial scrutiny as the basis and foundation of the transfer happens to be the various complaints made by the public representatives against the petitioner. The transfer has been made on the basis of the U.O. note issued by the office of Hon'ble Chief Minister and whereas, no proposal for transfer has been originated from the concerned administrative department. The impugned transfer order, therefore, is not sustainable being arbitrary and vitiated because the same has been issued under dictation.

22. The learned Advocate General would, however, contend that irrespective of the U.O. Note, the petitioner cannot have any grievance with regard to his transfer since there were numerous complaints against him and therefore, the employer has acted well within its rights to transfer such an employee.

23. We are afraid that this submission cannot be countenanced because it only leads to one inference that order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on irrelevant ground i.e. on the allegations made against the petitioner in the complaints. It is one thing to say that employer is entitled to pass an order of transfer in administrative exigency but it is another thing to say that order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set-aside being wholly illegal. (Ref: **Somesh Tiwari** vs. **Union of India and others (2009) 2 SCC 592).**

24. There is yet another reason why the aforesaid submission of the respondents cannot be accepted. In terms of the judgement passed by this court in **Amir Chand's** case (supra), the complaints as alleged to have been received against the petitioner by the respondents from various representatives were required to be sent to the head of the administrative department, who in turn was required to verify the same and if after associating the petitioner, the complaints were found to be true then alone could the petitioner have been ordered to be transferred. Admittedly, this exercise has not been undertaken by

the administrative department i.e. the respondents herein. Therefore also the order of transfer cannot be sustained having been passed capriciously and arbitrarily.

25. If the petitioner has been indulging in any conduct not befitting his office and contrary to public interest, the respondents- authority should have conducted an inquiry and imposed appropriate penalty as would be permissible under the rules. But then the transfer at the behest of the members of the public without any inquiry is not only against the interest of the concerned government servant but is also against public interest. It tends to destroy the morale of government servant and the same is otherwise illegal. Such a transfer can not get the seal of approval from this court.

26. Lastly, the learned Advocate General has strenuously contended that petitioner right from the date of his entry in service has remained posted in and around Chamba, which is his home district and for this purpose he has placed on record the details of up to date posting of the petitioner, which are as under:-

1.	7.10.1988 (date of appointment) to 11/1992 at Horticulture Extension Centre Kowas, Dev. Block Pangi District Chamba.
2.	11/1992 to 1/1997 HEC Chaklu District Chamba
3.	2/1997 to 11/2001 HEC Salooni District Chamba
4.	11/2001 to 03/2005 HEC Sundla District Chamba.
5.	03/2005 to 8/2007 HEC Jeera District Chamba
6.	8/2007 to 6/2008 Dev. Block Noorpur District Kangra.
7.	6/2008 to till date HEC Sundla District Chamba.

27. Such submission that too at the instance of the State cannot be maintained because it is settled law that an employee has no choice in the matters of posting and transfer, which powers are within the exclusive domain of the employer. Even if the petitioner has remained in and around his home district Chamba, it was only because the respondents desired so by posting him at such places. The petitioner of his own could not have joined at a station of his choice.

28. This case reflects a dismal state of affairs where despite repeated directions passed by this court from time to time over the last three and half decades, the respondents have shown scant regard to such directions and have not cared to follow the mandate of law in matters of transfer. This court has repeatedly held that any person has a right to make a complaint against an employee regarding his conduct to his superiors including the Hon'ble Chief Minister and even request for his transfer. It is, however, only for the competent authority i.e. administrative department to consider the request and take appropriate action in accordance with law. But when the administrative authorities do not perform their duties and resultantly fair play is denied by the administrative authorities, people turn up to the courts complaining of such blatant case of administrative excess compelling the courts to intervene in such matter. Once the State government has framed a transfer policy, then it is its duty to implement the same because the very purpose of framing a policy is to strike a balance between the rights of the employees and the State in matters relating to transfer so that the same is not misused.

29. For the reasons stated above, the writ petition is allowed. Accordingly, the impugned order of transfer dated 3.8.2014 is quashed and set-aside. However, the respondents are at liberty to transfer the petitioner in accordance with law. All pending application(s) , if any, also stands disposed of.

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

Ram Lal son of Sh Buaditta ....Applicant.
Vs.
State of Himachal Pradesh. ....Non-applicant.

Cr.MP(M) No.1397 of 2014.
Order reserved on:17.12.2014.
Date of Order: December 31,2014.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 354A, 306, 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 during 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 heinous and grave in nature- applicant had abetted the deceased to commit suicide – investigation is at initial stage, and allowing application will affect the investigation adversely- bail application dismissed. (Para- 7 and 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration, AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the applicant: Mr.Anuj Gupta, Advocate.
For the respondent: Mr. M.L.Chauhan, Addl. Advocate General with Mr.J.S. Rana Asstt. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana Judge.

Present application filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail qua FIR No. 188 of 2014 dated 17.10.2014 registered under Sections 354A, 306, 506 read with Section 34 of the Indian Penal Code at Police Station Indora District Kangra HP.

2. It is pleaded that applicant is innocent and he has been falsely implicated in the present case. It is pleaded that only allegation against the applicant is that applicant asked deceased Sunita Devi to stay away from his son. It is pleaded that applicant has also filed a complaint against deceased to the Pardhan Gram Panchayat Mohtali which was further sent to Police Station Damtal. It is pleaded that no recovery is to be effected from the applicant. It is pleaded that applicant will join investigation of the case. It is pleaded that applicant will not tamper with prosecution evidence. It is pleaded that applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case. It is pleaded that applicant is the only bread earner in his family. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report in connection with FIR No. 188 of 2014 dated 17.10.2014 registered under Sections 354A, 306, 506 read with Section 34 IPC at Police Station Indora District Kangra HP filed. There is recital in police report that on dated 17.10.2014 at about 9.30 AM deceased Sunita Devi informed police officials by way telephone that she would burnt herself because she was aggrieved from the act and conduct of co-accused Deepak and his

father co-accused Ram Lal. There is recital in police report that police officials went to the house of deceased Sunita and Sunita Devi was found burnt. There is recital in police report that deceased Sunita Devi was brought for her medical treatment to CHC Indora and statement of deceased Sunita Devi was recorded under Section 154 Cr.PC. There is recital in police report that deceased Sunita Devi was married with Ram Kumar in the year 2006. There is recital in police report that husband of deceased Sunita Devi is working at Soudi Arabia and deceased used to reside along with two children in her matrimonial house. There is recital in police report that co-accused Deepak son of Ram Lal who is driver by profession used to tell deceased Sunita Devi when Sunita Devi was alone at her matrimonial house to accept relations with co-accused Deepak otherwise he would defame deceased Sunita Devi in the society. There is recital in police report that deceased had also narrated entire facts to her elder sister-in-law but to save reputation of family in the society no further action was taken. There is recital in police report that co-accused Deepak had threatened the deceased that he would defame the deceased in society in such a manner that deceased would not be in a position to live in the society. There is recital in police report that co-accused Deepak also used to threat deceased Sunita Devi to kill her. Case under Sections 354A, 306, 506 read with Section 34 IPC was registered and investigation was conducted by SI Ashok Kumar. MLC of deceased Sunita Devi obtained and site plan was also prepared. There is recital in police report that articles lying on the spot were sent for chemical examination and statements of the prosecution witnesses were recorded under Section 161 Cr.PC. There is recital in police report that deceased died on dated 31.10.2014 in the hospital. There is recital in police report that post mortem of deceased Sunita Devi was conducted. There is recital in police report that diary of deceased Sunita Devi took into possession. There is recital in police report that deceased Sunita Devi had committed suicide due to mental harassment of co-accused Ram Lal and his son Deepak. There is recital in police report that diary of deceased Sunita Devi has been sent to RFSL Dharamshala for expert opinion. There is recital in police report that there is resentment in the locality. Prayer for rejection of anticipatory bail application sought.

4. Following points arise for determination in the present bail application:

(1) Whether anticipatory bail application filed under Section 438 of the Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of bail application.

(2) Final Order.

5. Court heard learned Advocate appearing on behalf of applicant and learned Additional Advocate General appearing on behalf of State and also perused entire record carefully.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case and on this ground present anticipatory bail application be allowed is rejected being devoid of any force for the reason hereinafter mentioned. Fact whether applicant is innocent or not cannot be decided at this stage. Same fact will be decided when the case shall be decided on merits by learned trial Court after giving due opportunity of hearing to both the parties.

7. Another submission of learned Advocate appearing on behalf of the applicant that any condition imposed by the Court will be binding upon the applicant and applicant had also made a complaint against deceased Sunita Devi to Pardhan Gram Panchayat Mohtali and applicant is the only bread earner in his family and no recovery is to be effected from the applicant and on this ground anticipatory bail application be allowed is rejected being devoid of any

force for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors are to be considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In the present case allegations against the applicant are very heinous and grave in nature. Applicant had abetted the deceased to commit suicide when she was under prime age of her life. The fact whether there is direct nexus between abetment and suicide cannot be decided at this stage. Same fact will be decided when the case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties. Court is of the opinion that if anticipatory bail is granted to the applicant at this stage then investigation of the case will be adversely effected. Court is also of the opinion that if anticipatory bail application is allowed at this stage then interest of the State and general public will also be adversely effected.

8. Submission of learned Additional Advocate General appearing on behalf of the State that if the applicant is released on bail at this stage then applicant will induce and threat the prosecution witness is accepted for the reason hereinafter mentioned. There is apprehension in the mind of the Court that if the applicant is released on anticipatory bail at this stage then applicant will induce and threat the prosecution witness. In view of the fact that investigation is in initial stage of case and in view of the fact that allegations against the applicant are very serious and grave in nature it is not expedient in the ends of justice to release the applicant on anticipatory bail at the initial stage of the investigation. Court is of the opinion that custodial investigation of the applicant is essential in the present case for proper investigation. Hence Point No.1 is answered in negative.

Final Order

9. In view of my findings upon point No.1 present anticipatory bail application filed under Section 438 of the Code of Criminal Procedure 1973 by the applicant is rejected. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. All pending application(s) 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.

Suman Sharma .....Petitioner
Versus
Union of India and others ....Respondents

CWP No. 3736/2009.
Judgment reserved on 16.12.2014.
Pronounced on: 31 .12.2014

Constitution of India, 1950- Article 226- Petitioner was appointed as TGT (Mathematics) for a period of two years- period of probation was extendable by another year at the discretion of the competent authority- period of probation was extended up to 2.4.2007 and thereafter it was extended for one year up to 31.3.2008- a show cause notice was served upon the petitioner- petitioner filed a reply to the notice but her services were terminated vide order dated 4.7.2008- it

was contended that petitioner was allowed to continue after probation and, therefore, she is deemed to be confirmed – petitioner further contended that her probation period could be extended by only one year and further extension of probation after one year was not permissible- held, that the services of a person can be confirmed by an order in writing- mere continuation beyond the probation period will not amount to deemed confirmation- petition dismissed.

(Para-11 to 26)

Cases referred:

Madhya Pradeshs Thru. Registrar and others v. Satya Narayan Jhavar reported in AIR 2001 SC 3234

The Commissioner of Police, Hubli and another v. R.S. More reported in AIR 2003 SC 983

Kendriya Vidyalaya Sangathan vs. Arunkumar Madhavrao Sinddhaye and another reported in (2007) 1 SCC 283

Kazia Mohammed Muzzammil vs. State of Karnataka and another reported in (2010) 8 SCC 155

Rajesh Kohli v. High Court of J & K & Anr., reported in 2010 AIR SCW 6877

Mohd. Salman v. Committee of Management & Ors., reported in 2012 AIR SCW 2527

Head Master, Lawrence School Lovedale vs. Jayanthi Raghu and another reported in (2012) 4 SCC 793

State Bank of India and Ors v. Palak Modi and Anr., reported in 2013 AIR SCW 76

For the petitioner:	Mr. Dilip Sharma, Sr. Advocate with Mr. Manish Sharma, Advocate.
For the respondents:	Mr.Ashok Sharma, Assistant Solicitor General of India.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Petitioner, by the medium of this writ petition has questioned the judgment and order made by the Central Administrative Tribunal, Chandigarh Bench (Circuit at Shimla) (hereinafter referred to as "the Administrative Tribunal", for short, in O.A. No. 475/HP/2008 dated 10.8.2009, whereby the O.A. filed by the petitioner came to be dismissed, hereinafter referred to as "the impugned judgment", for short, on the grounds taken in the writ petition.

2. A brief narration of the conspectus of facts are that the petitioner came to be appointed as TGT (Mathematics), vide appointment letter dated 5.3.2004, on probation, for a period of two years, as per the stipulations contained in the appointment order, which was extendable by another year, at the discretion of the competent authority. The petitioner, consequent upon his appointment, submitted his joining, on 2.4.2004. Thereafter the petitioner was transferred to Jawahar Navodaya Vidyalaya Kunihar, District Solan in the month of May, 2004. The competent authority, after noticing the work, conduct and performance of the petitioner, extended the period of probation upto 2.4.2007 vide order dated 24.5.2006. Thereafter, again, after noticing the work and conduct of the petitioner, the probation period of the petitioner was extended for a period of one year upto 31.3.2008, vide communication dated 28.12.2007.

3. It is worthwhile to mention here that before extension was granted to the petitioner on 24.5.2006 upto 2.4.2007, he was served with a show-cause notice dated 13.9.2004 and was asked to submit written explanation within ten days from the receipt of the notice. The petitioner had filed the reply to the said show-cause notice. After considering the reply and

other attending circumstances, the services of the petitioner came to be terminated by the respondents, vide termination order dated 4.7.2008, in terms of the Central Civil Services (Temporary Services) Rules, 1965, occupying the field at the relevant point of time.

4. The petitioner questioned the said termination order by the medium of O.A before the Administrative Tribunal, as stated supra.

5. The respondents filed reply to the Original Application before the Tribunal and the petitioner also filed rejoinder to the same. After examining the pleadings of the parties, documents and the law applicable, the Administrative Tribunal dismissed the O.A. vide order dated 10.8.2009 which is subject matter of the writ petition in hand.

6. Admittedly, the petitioner has not completed his first probation period of two years, in terms of the appointment order satisfactorily. It is apt to reproduce para 2 of the said appointment order herein:

> *"2.You will be on probation for a period of two years from the date of appointment extendable by another year at the discretion of the competent authority. Failure to complete the period of probation to the satisfaction of the competent authority or found unsuitable for the post during the probation period, will render you liable to discharge from service at any time without notice and without assigning any reason thereto."*

7. The period of probation of the petitioner was extended to one year upto 2.4.2007, vide order dated 24.5.2006. It is profitable to reproduce relevant portion of the said order herein.

> *"Consequent upon the recommendations of the Departmental Promotion Committee, the probation period of Ms. Suman Sharma, TGT (Maths), JNV Kunihar, Distt. Solan (HP) is hereby extended for one year i.e. upto 2.4.2007 as her performance has not been found satisfactory. During this period the teacher is advised to improve her work and conduct. This is also a final chance being given to her for improving her work and conduct."*

8. The said probation period was again extended vide order dated 28.12.2007, till 31.3.2008 and reasons were recorded for such extension, the relevant portion of the said order reads as under:

> *"Consequent upon the recommendations of the Departmental Promotion Committee, the probation period of Sh. Suman Sharma, TGT (Maths), JNV Kunihar, Distt. Solan (HOP) now at JNV Sarol, Distt. Chamba (HP) is hereby extended upto 31.3.2008 as his performance has not been found satisfactory. During this period the teacher is advised to improve his work and conduct. This is also a final chance being given to him for improving his work and conduct."*

9. The learned counsel for the petitioner vehemently argued that the services of the petitioner came to be terminated on 4.7.2008 and on that date, the period of probation of the petitioner was over, in view of the fact that his probation was only extended upto 31.3.2008 and he was allowed to continue after probation. It is a deemed confirmation and the services of the petitioner could not have been discharged, without full-dress regular enquiry.

10. The argument advanced by the learned counsel for the petitioner appears to be attractive but is devoid of any force, for the reasons recorded hereinafter.

11. The questions to be determined in this writ petition are whether it is a case of deemed confirmation or the order of confirmation was required in writing and whether the petitioner was still on probation.

12. The petitioner has specifically averred in para 13 (l) of the petition that the 2nd order of extension of period of probation (Annexure A-3 with P2) is wrong as he continued after completion of probation period and it is deemed confirmation. It is apt to reproduce para 9 (l) of the petition herein:

> *"9(l)Because the petitioner was appointed vide appointment letter dated 05.03.2004, therefore, the probation period of the petitioner for the first two years ended on 04.03.2006. The probation period of the petitioner was extendable for further one year and that period also ended on 03.03.2007. The office order (Annexure A-3 with P-2) dated 28.12.2007 extending the period of the application for probation till 31.03.2008 was, therefore, unauthorized and without competence. There was no power vested with the authority to extend the probation period beyond 04.03.2007. The petitioner continued serving the respondents beyond the extendable period of probation. There was no communication with the respondents even after 31.03.2008. The communication dated 28.12.2007 has been issued after the probation period was already completed by the petitioner on 04.03.2007 after a lapse of 9 months. Assuming that the probation period of the petitioner is to commence from the date of joining the service by the petitioner, then also the probation period of the petitioner (even extended period also) has come to an end on 01.04.2007. In this view of the matter the petitioner was deemed to have been confirmed with effect from 02.04.2007 and the services of the petitioner are not liable to be terminated thereafter. The probation period of the petitioner has come to an end on 02.04.2007, therefore, termination of the petitioner is invalid. It is well settled law that termination after the expiry of maximum period up to which probation could be extended is invalid, illegal and unconstitutional inasmuch as the employee is deemed to have been confirmed after the expiry of the probation period. It is brought into the kind notice of this Hon'ble Court that maximum probation period in case of the category of petitioner is two years which is further extendable for one year only. There is no power vested with the authorities in the rules to extend the probation period for another year. Therefore, after the expiry of the period of probation of the petitioner, the petitioner is deemed to have been confirmed and there is no authority vested with the respondents to keep the petitioner under probation after the expiry of the period of probation. In case the respondents have failed to pass any further order confirming the petitioner, the petitioner cannot be penalized for this. The petitioner has been deemed to have been confirmed as the petitioner has been allowed to continue in service beyond the period of probation. In this view of the matter the petitioner was confirmed employee for all intents and purposes and as such could not be terminated under the provisions of the CCS (Temporary Service) Rules, 1965, which are not applicable in the present case."*

13. The respondents have specifically replied the same in preliminary submissions. It is apt to reproduce preliminary submissions and relevant portion of reply on merits, as under:

> *"1.That by way of OA No.475/HP/2008 titled Suman Sharma vs. UOI, respondent/applicant approached the ld. Tribunal below stating therein that his services cannot be terminated under rules 5(1) of CCS (Temporary Service) Rules, 1965 because after completion of three years probation period as per terms and condition of appointment he is deemed to have been confirmed and his services cannot be terminated without following due process as per law. It is humbly submitted that applicant/respondent cannot be automatically deemed to have been confirmed unless some specific orders are passed by the competent authority for the confirmation of the employee. In catena of cases Hon'ble Apex Court as well as various High Courts have held that so long as specific order of confirmation is not passed after expiry of period of probation, a probationer shall continue and remain in service as probationer only.*
>
> *2.That in the present case respondent/applicant joined services with the respondent on 2.4.2004 on probation. During his probation period he was not found to be good teacher and instead of teaching the classes assigned to him he indulged in uncalled for activities. It is humbly submitted that whenever authorities asked him to improve, he leveled/filed false allegations/complaints against the Principal of School. It is ample clear from the records available with the school authorities that number of advisory notes were issued to respondent/applicant by the School Administration advising him to improve his working. Even when his probation period was extended for another one year Memorandum were issued to him. Record available with the school authorities would go to show that during year 2006 his work was also inspected by inspecting team and one of the member of the inspecting team namely Shri P.K. Puri, Principal Jawahar Navodyalaya, Nahan adversely commented against the working of respondent/applicant. Thereafter even after his transfer to Jawahar Navodya Vidyalya, Sarol, Distt. Chamba, working of respondent/applicant did not improve and Principal of the concerned School found the work of the applicant below average. Besides this, petitioner/applicant remained on 84 days leave during probation period besides availing the summer vacation and other Gazetted Holidays.*
>
> *3.That by way of O.A. filed before ld. Tribunal below, respondent/applicant alleged that he is being harassed by the respondents but not even a single instance has been quoted to substantiate his allegations which regard to harassment. To the contrary, there is ample evidence on record that school authorities have afforded him reasonable opportunities to improve his working. But instead of improving, petitioner/applicant started filing false complaints against the Principal JNV, Kunihar as well as answering respondent No.4. It is evident from the record that whenever the Principal of the concerned school tried to point out the deficiencies in the working of petitioner/applicant he has filed baseless complaints*

against the authorities concerned. In view of the fact that respondent/applicant was on probation and during probation he has not worked upto the satisfaction of the employer i.e.School Authorities, services of the petitioner/applicant has been rightly terminated by the respondents. Hence, the present petition deserves to be dismissed.

4.That the order passed under Rule 5(1) of CCS (TS) Rules, 1965 is appealable and appeal can be filed to next higher authority within a period of three months. But in the present case respondent/applicant without availing the remedy of appeal approached the ld. Tribunal below by way of O.A., hence petition deserves to be dismissed.

5.That the impugned order dated 10.8.2009 passed by the ld. Tribunal below in OA No.475/HP/2008 is based on correct appreciation of law and facts and same deserves to be upheld by this Hon'ble Court."

"..... ..... It is further submitted that petitioner/applicant was afforded number of opportunities by the replying respondent to improve his working but the petitioner/applicant instead of making any improvement in his work and conduct indulged in making false and frivolous complaints against the authorities. There is ample evidence on record to show that on number of accassions petitioner/applicant has remained absent from the duty without due permission from the quarter concerned. Replying respondents have already placed on record number of documents by way of filing written statement before the ld. CAT showing the misconduct of the petitioner/applicant and the same are not being reproduced for the sake of brevity. Very perusal of the documents on record would go to show that petitioner/applicant never performed his duties with sincerity, rather he took his duties very casually and failed to do justice to the number of students to whom he was supposed to teach. Replying respondent humbly submits that in case such teachers are allowed to continue to work is prestigious institutions like of Jawahar Navodya Vidyalayas, run by Ministry of HRD, Govt. of India, great injustice would be caused to the number of students studying in such schools. Hence, present petition filed by petitioner/applicant deserves to be quashed and set aside."

14. The Administrative Tribunal has discussed in detail at pages 7 and 8 of the judgment that in terms of Rule 5, mere expiry of initial period of probation is not a deemed confirmation because express order of confirmation was to be made in view of the said rule. It is profitable to reproduce relevant paras at pages 7 and 8 of the said judgment herein.

"(viii) A direct recruit who holds a lien on a post under the Central Government or any State Government or in the NVS may, while on probation, be reverted to such post at any time on grounds of any of the circumstances specified in sub-rule(iii) above.

Thus, as per Rule 5 aforesaid, a probationer can be discharged from service if his work and conduct is not found satisfactory. Even under Rule 5 of the CCS (TS)

Rules, services of a templorary employee can be dispensed with by giving him one month's notice or salary in lieu thereof on account of unsatisfactory work.

The applicant was on probation of two years. His probation was extended not once but twice. The probation has to be completed successfully and followed by an order in this regard. Satisfactory performance of work is another condition precedent. There cannot be automatic confirmation on expiry of prescribed period of probation as has been held by the Apex Court in the case of Shri Jai Kishan vs. Commissioner of Police & another (supra), wherein Dharm Singh's case (supra) was also considered. This was also the view taken by the Apex Court in Municipal Corporation, Raipur vs. Ashok Kumar Misra- AIR 1991 SC 1402 & Registrar, High Court of Gujarat and another vs. C.G. Sharma, AIR 2005 SC 344. The following observations made by the Apex Court in the aforesaid case are relevant to be noticed here:

"Exercise of the power to extend the probation is hedged with the existence of the rule in that regard followed by positive act of either confirmation of the probation or discharge from service or expiry of the period of probation. If the rules do not empower the period, or where the rules are absent about confirmation or passing of the prescribed test for confirmation or probation and inaction for a very long time may lead to an indication of the satisfactory completion of probation. However, rule 8 expressly postulates that the period of probation is subject to extension by order in writing for another period of one year. Passing the prescribed examinations and successful completion of probation and passing of an express order or confirmation are made condition precedent for conformation of probation under R.8 Mere expiry of the initial period of probation therefore does not automatically have the effect of deemed confirmation. An express order in that regard only confers status of an approved probationer. Before confirmation, the appointing authority is empowered to terminate the services of the petitioner by issuing one month's calendar notice in writing and on expiry thereof the service stands terminated without any further notice. As such the order terminating the services of a probationer was passed within three months from the date of expiry of original two years period of probation and within one year's period, the question of conducting an inquiry under the Classification, Control and Appeal (Rules) after giving an opportunity and that too for specific charges would not arise."

15. The Administrative Tribunal has also discussed what was the reasons for granting extension of probation period to the petitioner, which has been reproduced hereinabove and also that the authorities have rightly terminated the services of the petitioner.

16. The apex Court has also dealt with this issue in various judgments and held that order of confirmation should be made in writing and after expiry of probation period, it cannot be said that it is deemed confirmation.

17. In case titled *High Court of Madhya Pradeshs Thru. Registrar and others v. Satya Narayan Jhavar* reported in *AIR 2001 SC 3234,* it has been held as under:

> *"35. In the case of Dayaram Dayal (supra), a two Judge Bench of this Court was considering a case covered by Rule 24 of the Rules, in which the incumbent was appointed as Civil Judge Class II in M.P. Subordinate Judicial Service on 22nd Oct. 1985 and after completing six months training, he was put on probation for two years which period was completed on 22nd May, 1988. On 2nd March, 1990, he was placed under suspension pending some charges and in the year 1991 after inquiry, punishment of stoppage of two annual increments with cumulative effect was awarded. There were certain adverse remarks in ACRs between the years 1987-88 and 1992-93. On 3rd May, 1992, the Full Court having not found him fit for confirmation, deferred the matter to give one more opportunity. In the year 1993 again, the High Court did not find him fit for confirmation as such his services were terminated by paying one month's salary in lieu of notice as required under Rule 24. When the said order was challenged in a writ application, the same was dismissed and order of dismissal was affirmed in appeal. Thereafter, when the matter was challenged before this Court, the appeal was allowed, judgments of the High Court were set aside and order of termination was quashed holding that the incumbent would be deemed to have been confirmed on the expiry of four years maximum period of probation prescribed under the Rules following Constitution Bench decision of this Court in the case of Dharam Singh (supra) where Rules did not require an incumbent to pass any test or fulfil any other condition before confirmation, as noticed by the Constitution Bench itself in that case which goes to show that if the Rules would have required a person to pass any test or fulfil any other condition before confirmation. It was not possible to draw an inference that merely because an employee was allowed to continue on the post up on completion of the maximum period of probation, he was confirmed by implication. There the Court proceeded on the facts of that case, which do not show any assessment of work and conduct of the probationer being made and he being not found fit for confirmation by the competent authority during the period of probation. In the absence of any opinion formed after considering the performance of probationer, it was presumed in that case that there being nothing adverse against the officer, there was no compelling reason not to confirm him on the post inasmuch as there was no plea on behalf of the State that his work and conduct was not satisfactory. The Rules did not require any condition of assessment of work at the end of extended period of probation or passing of departmental examination. In the said case, order of termination was issued more than two years after the expiry of maximum period of probation which was completed on 1st Oct. 1960 and the order of termination was issued in 1963 without any assessment of his performance."*
>
> *36. In the case on hand, correctness of the interpretation given by this Court to Rule 24 of the Rules in the case of Dayaram Dayal (supra) is the bone of contention. In the*

aforesaid case, no doubt, this Court has held that a maximum period of probation having been provided under sub-rule (1) of Rule 24, if a probationer's service is not terminated and he is allowed to continue thereafter. It will be a case of deemed confirmation and the sheet anchor of the aforesaid conclusion is the Constitution Bench decision of this Court in the case of Dharam Singh (supra). But, in our considered opinion in the case of Dayaram Dayal (supra) Rule 24 of the Rules has not been interpreted in its proper perspective. A plain reading of different sub-rules of Rule 24 would indicate that every candidate appointed to the cadre will go for initial training for six months whereafter he would be appointed on probation for a period of 2 years and the said period of probation would be extended for a further period not exceeding 2 years. Thus, under sub-rule (1) of Rule 24 a maximum period of 4 years' probation has been provided. The aforesaid sub-rule also stipulates that at the end of the probation period the appointee could be confirmed subject to his fitness for confirmation and to have passed the departmental examination, as may be prescribed. In the very sub-rule, therefore, while a maximum period of probation has been indicated, yet the question of confirmation of such a probationer is dependent upon his fitness for such confirmation and his passing of the departmental examination by the higher standard, as prescribed. It necessarily stipulates that question of confirmation can be considered at the end of the period of probation, and on such consideration, if the probationer is found suitable by the Appointing Authority and he is found to have passed the prescribed departmental examination then the Appointing Authority may issue an order of confirmation. It is too well settled that an order of confirmation is a positive act on the part of the employer which the employer is required to pass in accordance with the Rules governing the question of confirmation subject to a finding that the probationer is in fact fit for confirmation. This being the position under sub- rule (1) of Rule 24, it is difficult for us to accept the proposition, broadly laid down in the case of Dayaram Dayal (supra) and to hold that since a maximum period of probation has been provided thereunder, at the end of that period the probationer must be held to be deemed to be confirmed on the basis of the judgment of this Court in the case of Dharam Singh (supra).

37-38.... ....

39. Apart from sub-rule (I) of Rule 24 of the Rules, the effect of sub-rule (3) may also be considered. Under sub-rule (3), if a probationer has been found unsuitable for the service during the period of probation or he has failed to pass the prescribed departmental examination then the Governor at any time thereafter may dispense with his service. The power for dispensing with services has been conferred upon the Governor to be exercised at any time after the period of probation if the probationer is found unsuitable or if he has failed to pass the prescribed departmental examination. If the interpretation given by this Court in the case of Dayaram Dayal (supra) to sub-rule (1) of Rule 24 is held to be correct then this power of the Governor under sub-rule

(3) would become otiose inasmuch as a probationer would acquire a deemed confirmation on the expiry of the maximum period of probation provided in sub-rule (1). Sub-rule (3) of Rule 24, therefore, is another inbuilt provision in the Rules which can be held to be a special provision to negative the inference of deemed confirmation on the expiry of the maximum period of probation indicated in sub-rule(1), as has been observed by this Court in the case of Dayaram Dayal (supra) also and which is in conformity with the decisions of this Court in the case of Shamsher Singh (supra), Sukhbans Singh (supra), G.S. Ramaswamy (supra) and AkbarAli Khan (supra). Rule 24 on a plain grammatical meaning being given to the words used therein does not provide for a deemed confirmation on expiry of the maximum period of probation, and on the other hand it contemplates a positive order of confirmation to be passed by the Appropriate Authority, if the Authority concerned is satisfied about the fitness of the probationer for confirmation, and if the probationer has passed the departmental examination, as prescribed. Mere continuance of the probationer after considering his case of confirmation during the period of probation and finding him unsuitable for confirmation by the decision of the Full Court, by no stretch of imagination can be construed to be a confirmation by implication, as was held by this Court in the case of Dharam Singh (supra) and that can never be the intention of the Rule Making Authority. If the Full Court would not have considered the suitability of the probationer for confirmation while the probation period was continuing, the matter might have stood on a different footing."

18. In *The Commissioner of Police, Hubli and another v. R.S. More* reported in *AIR 2003 SC 983,* the apex Court in para 8 held as under:-

"8. In our view, the case at hand falls under category 3. As noticed sub-rule (2) of Rule 5 requires that a probationer shall not be considered to have satisfactorily completed the probation unless a specific order to that effect is passed. No specific order having been passed by any authority, certifying the satisfactorily completion of probation period of the respondent, has been brought to our notice. Mr. Hegde, learned counsel, submitted that no order as contemplated under sub-rule (2) of Rule 5 has been passed by the competent authority. Admittedly, the order discharging the respondent, in exercise of powers under Rule 6, has been passed after the extended period of probation was over. In our view, however, that itself would not entitle the respondent to have claimed deemed confirmation in absence of the specific order to that effect. In service jurisprudence confirmation of service on a particular post is preceded by satisfactory performance of the incumbent unless service rules otherwise prescribe. In the instant case, sub-rule (2) of Rule 5 of the Rules provides that unless there is a specific order that the probationer has satisfactorily completed the period of probation, he shall not be entitled to be deemed to have satisfactorily completed the probation by reason of his being continued in service beyond the extended period of probation. The High Court has failed to consider this important aspect of the matter,

resulting in miscarriage of justice. In our view, the High Court fell into error resulting in miscarriage of justice."

19. The apex Court in *Kendriya Vidyalaya Sangathan vs. Arunkumar Madhavrao Sinddhaye and anothe*r reported in *(2007) 1 SCC 283*, in paras 11 and 17 held as under:

"11. The question which arises for consideration is, whether the order of termination of services of the respondent had been passed by way of punishment or it had been passed in accordance with the conditions mentioned in the appointment order by which the respondent had been appointed on a temporary post of Physical Education Teacher. If it is found that the termination of services was by way of punishment, another question may arise whether a formal departmental enquiry was held prior to the passing of termination order and whether the respondent was given adequate opportunity to defend himself in the said enquiry. It will be seen that the complaint made by Capt. B.K. Balasubramanyam about forcing his son Master V.K. Srinivasalu to do six rounds (4 Kms.) around the school when he was having chest pain and was unwell and further forcing him to do PT and other exercises in spite of advice of the doctor and also giving him beating was forwarded by the Principal to the Regional Office of Kendriya Vidyalaya Sangathan, Bombay. The Assistant Commissioner of the Kendriya Vidyalaya Sangathan asked the Principal to submit a report along with original statements of the students, who had been subjected to beating by the respondent. The Principal was not an eye witness to the incident relating to Master V.K. Srinivasalu and also of the corporal punishment which was awarded by the respondent to the other students. Therefore, in order to ascertain the complete facts it was necessary to make enquiry from the students concerned. If in the course of this enquiry the respondent was allowed to participate and some queries were made from the students, it would not mean that the enquiry so conducted assumed the shape of a formal departmental enquiry. No articles of charges were served upon the respondent nor were the students asked to depose on oath. The High Court has misread the evidence on record in observing that articles of charges were served upon the respondent. The limited purpose of the enquiry was to ascertain the relevant facts so that a correct report could be sent to the Kendriya Vidyalaya Sangathan. The enquiry held can under no circumstances be held to be a formal departmental enquiry where the non-observance of the prescribed rules of procedure or a violation of principle of natural justice could have the result of vitiating the whole enquiry. There cannot be even a slightest doubt that the Assistant Commissioner, Kendriya Vidyalaya Sangathan, Bombay Region, terminated the services of the respondent in accordance with the terms and conditions mentioned in his appointment order which expressly conferred power upon the appointing authority to terminate the respondent's services by one month's notice without assigning any reasons. The services of the respondent were, therefore, not terminated by way of punishment.

12-16..... ....

> *17. As shown above, the nature of enquiry conducted against the respondent was merely a preliminary or fact finding enquiry and no formal full scale departmental enquiry had been conducted against the respondent. In fact, the enquiry officer had himself recommended that disciplinary action be taken against the respondent. However, the authorities chose not to hold a disciplinary enquiry against the respondent and did not serve him with any article of charges or take any further steps in that regard. Instead they chose to exercise power under the terms and conditions of the appointment order. The termination order is wholly innocuous and does not cast any stigma upon the respondent nor it visits him with any evil consequences. The High Court seems to have proceeded on a wholly wrong basis and has treated the enquiry which was only a preliminary or fact finding enquiry into a regular disciplinary enquiry, which was not the case here. In these circumstances the judgment of the High Court is wholly erroneous in law and has to be set aside."*

20. Same principles of law have been laid down by the apex Court in *Kazia Mohammed Muzzammil vs. State of Karnataka and another* reported in *(2010) 8 SCC 155*. It is apt to reproduce paras 19,20,33 and 35 of the said judgment herein:

> *"19. Having discussed in some elaboration the conduct of the appellant as well as his antecedents, now we proceed to examine the merits of the legal controversy raised in the present case on behalf of the appellant in relation to `deemed confirmation'. The `deemed confirmation' is an aspect which is known to the service jurisprudence now for a considerable time. Both the views have been taken by the Court. Firstly, there can be `deemed confirmation' after an employee has completed the maximum probation period provided under the Rules where after, his entitlement and conditions of service are placed at parity with the confirmed employee. Secondly, that there would be no `deemed confirmation' and at best after completion of maximum probation period provided under the Rules governing the employee, the employee becomes eligible for being confirmed in his post. His period of probation remains in force till written document of successful completion of probation is issued by the Competent Authority.*
>
> *20. Having examined the various judgments cited at the bar, including that of all larger Benches, it is not possible for this Bench to state which of the view is the correct enunciation of law or otherwise. We are of the considered opinion, as to what view has to be taken, would depend upon the facts of a given case and the relevant Rules in force. It will be cumulative effect of these two basics that would determine the application of the principle of law to the facts of that case. Thus, it will be necessary for us to refer to this legal contention in some elucidation.*
>
> *21-32.... ....*
>
> *33. We have already noticed that two views are prevalent. Primarily, the Court has taken the diametrical opposite view. One which accepts the application of the deemed confirmation after the expiry of the prescribed period of*

probation, while the other taking the view that it will not be appropriate to apply the concept of deemed confirmation to the officers on probation as that is not the intent of law. In our opinion, the rules and regulations governing a particular service are bound to have greater impact on determining such question and that is the precise reason that we have discussed Rules 3 to 6 of the 1977 Rules in the earlier part of the judgment of this Court in Dharam Singh (AIR01213, Paras 8-9).

34. ....

35. We may refer to the following paragraphs of the judgment of this Court:

"8. The initial period of probation of the respondents ended on October 1, 1958. By allowing the respondents to continue in their posts thereafter without any express order of confirmation, the competent authority must be taken to have extended the period of probation up to October 1, 1960 by implication. But under the proviso to Rule 6(3), the probationary period could not extend beyond October 1, 1960. In view of the proviso to Rule 6(3), it is not possible to presume that the competent authority extended the probationary period after October 1, 1960, or that thereafter the respondents continued to hold their posts as probationers.

9. Immediately upon completion of the extended period of probation on October 1, 1960, the appointing authority could dispense with the services of the respondents if their work or conduct during the period of probation was in the opinion of the authority unsatisfactory. Instead of dispensing with their services on completion of the extended period of probation, the authority continued them in their posts until sometime in 1963, and allowed them to draw annual increments of salary including the increment which fell due on October 1, 1962. The rules did not require them to pass any test or to fulfil any other condition before confirmation. There was no compelling reason for dispensing with their services and re-employing them as temporary employees on October 1, 1960, and the High Court rightly refused to draw the inference that they were so discharged from services and re-employed. In these circumstances, the High Court rightly held that the respondents must be deemed to have been confirmed in their posts. Though the appointing authority did not pass formal orders of confirmation in writing, it should be presumed to have passed orders of confirmation by so allowing them to continue in their posts after October 1, 1960. After such confirmation, the authority had no power to dispense with their services under Rule 6(3) on the ground that their work or conduct during the period of probation was unsatisfactory. It follows that on the dates of the impugned orders, the respondents had the right to hold their posts. The impugned orders deprived them of this right and amounted to removal from service by way of punishment. The removal from service could not be made without following the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and without conforming to the constitutional requirements of

> *Article 311 of the Constitution. As the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 was not followed and as the constitutional protection of Article 311 was violated, the impugned orders were rightly set aside by the High Court."*

21. The apex Court in *Rajesh Kohli v. High Court of J & K & Anr.*, reported in *2010 AIR SCW 6877* held as under:

> *"23. In the present case, the order of termination is a fall out of his unsatisfactory service adjudged on the basis of his overall performance and the manner in which he conducted himself. Such satisfaction even if recorded that his service is unsatisfactory would not make the order stigmatic or punitive as sought to be submitted by the petitioner. On the basis of the aforesaid resolution, the matter was referred to the State Government for issuing necessary orders.*
>
> *24. ....*
>
> *25. The aforesaid submission of the petitioner is devoid of any merit in view of the fact that since the petitioner was continuing in service, therefore, the case for granting increment was required to be considered which was so granted. The mere granting of yearly increments would not in any manner indicate that after completion of the probation period the full court of the High Court was not competent to scrutinize his records and on the basis thereof take a decision as to whether or not his service should be confirmed or dispensed with or whether his probation period should be extended. The High Court has solemn duty to consider and appreciate the service of a judicial officer before confirming him in service. The district judiciary is the bedrock of our judicial system and is positioned at the primary level of entry to the doors of justice. In providing the opportunity of access to justice to the people of the country, the Judicial Officers who are entrusted with the task of adjudication must officiate in a manner that is becoming of their position and responsibility towards society."*

22. In *Mohd. Salman v. Committee of Management & Ors.*, reported in *2012 AIR SCW 2527*, the apex Court held as under:

> *"16. In the case of Kedar Nath Bahl Vs. The State of Punjab and Others reported in 1974 (3) SCC 21, this Court clearly laid down the proposition of law that where a person is appointed as a probationer in any post and a period of probation is specified, it does not follow that at the end of the said specified period of probation he obtains confirmation automatically even if no order is passed on that behalf. It was also held in that decision that unless the terms of appointment clearly indicate that confirmation would automatically follow at the end of the specified period or that there is a specific service rule to that effect, the expiration of the probationary period does not necessarily lead to confirmation. This Court went on to hold that at the end of the period of probation an order confirming the officer is required to be passed and if no such order is passed and if he is not reverted to his*

substantive post, the result merely is that he continues in his post as a probationer.

17. In our considered opinion, the ratio of the aforesaid decision is also clearly applicable to the facts of the present case. In the present case, in the appointment letter issued to the appellant, it was specifically mentioned that his service would be regularised only when his performance during the probation period is found to be good/satisfactory.

18. In view of the aforesaid stipulation, so long an order is not passed holding that the service of the appellant is good and satisfactory, it could not have been held that his service could be regularised automatically by a deeming provision."

23. In case titled *Head Master, Lawrence School Lovedale vs. Jayanthi Raghu and another* reported in *(2012) 4 SCC 793*, the apex Court in paras 31 and 37 held as under:

"31. Having so observed, we are only required to analyse what the words "if confirmed" in their contextual use would convey. The Division Bench of the High Court has associated the said words with the entitlement of the age of superannuation. In our considered opinion, the interpretation placed by the High Court is unacceptable. The words have to be understood in the context they are used. Rule 4.9 has to be read as a whole to understand the purport and what the Rule conveys and means.

32. In Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others, [(1987) 1 SCC 424], it has been held as follows:-

> *"33.Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, - context is what gives the colour. Neither can be ignored. Both are important. The interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."*

33. Keeping the said principle in view, we are required to appreciate what precisely the words "if confirmed"

contextually convey. Regard being had to the tenor of the Rules, the words "if confirmed", read in proper context, confer a status on the appointee which consequently entitles him to continue on the post till the age of 55 years, unless he is otherwise removed from service as per the Rules.

34. It is worth noting that the use of the word "if" has its own significance. In this regard, we may usefully refer to the decision in S.N. Sharma v. Bipen Kumar Tiwari and others, [(1970) 1 SCC 653]. In the said case, a three-Judge Bench was interpreting the words "if he thinks fit" as provided under Section 159 of the Code of Criminal Procedure, 1898. It related to the exercise of power by the Magistrate.

35. In that context, the Bench observed thus: -

> *"5. .....The use of this expression makes it clear that Section 159 is primarily meant to give to the Magistrate the power of directing an investigation in cases where the police decide not to investigate the case under the proviso to Section 157(1), and it is in those cases that, if he thinks fit, he can choose the second alternative. If the expression "if he thinks fit" had not been used, it might have been argued that this section was intended to give in wide terms the power to the Magistrate to adopt any of the two courses of either directing an investigation, or of proceeding himself or deputing any Magistrate subordinate to him to proceed to hold a preliminary enquiry as the circumstances of the case may require.*
>
> *6.Without the use of the expression "if he thinks fit", the second alternative could have been held to be independent of the first; but the use of this expression, in our opinion, makes it plain that the power conferred by the second clause of this section is only an alternative to the power given by the first clause and can, therefore, be exercised only in those cases in which the first clause is applicable."*

36. In State of Tamil Nadu v. Kodaikanal Motor Union (P) Ltd., [(1986) 3 SCC 91], the Court, while interpreting the words "if the offence had not been committed" as used in Section 10-A(1) of the Central Sales Tax Act, 1956, expressed the view as follows: -

> *"19. .....In our opinion the use of the expression `if' simpliciter, was meant to indicate a condition, the condition being that at the time of assessing the penalty, that situation should be visualised wherein there was no scope of committing any offence. Such a situation could arise only if the tax liability fell under sub-section (2) of Section 8 of the Act."*

> *37. Bearing in mind the aforesaid conceptual meaning, when the language employed under Rule 4.9 is scrutinised, it can safely be concluded that the entitlement to continue till the age of superannuation, i.e., 55 years, is not absolute. The power and right to remove is not obliterated. The status of confirmation has to be earned and conferred."*

24. In a recent judgment titled *State Bank of India and Ors v. Palak Modi and Anr.,* reported in *2013 AIR SCW 76*, the apex Court in paras 20 and 27 held as under:

> *"20.The ratio of the above noted judgments is that a probationer has no right to hold the post and his service can be terminated at any time during or at the end of the period of probation on account of general suitability for the post held by him. If the competent authority holds an inquiry for judging the suitability of the probationer or for his further continuance in service or for confirmation and such inquiry is the basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive. However, if the allegation of misconduct constitutes the foundation of the action taken, the ultimate decision taken by the competent authority can be nullified on the ground of violation of the rules of natural justice.*
>
> *21-26. ....*
>
> *27. The use of unfair means in the evaluation test/confirmation test held by the Bank certainly constitutes a misconduct. The Bank itself had treated such an act to be a misconduct (paragraph 10 of advertisement dated 1.7.2008). It is not in dispute that the services of the private respondents were not terminated on the ground that there was any deficiency or shortcoming in their work or performance during probation or that they had failed to satisfactorily complete the training or had failed to secure the qualifying marks in the test held on 27.2.2011. As a matter of fact, the note prepared by the Deputy General Manager, which was approved by the General Manager makes it crystal clear that the decision to dispense with the services of the private respondents was taken solely on the ground that they were guilty of using unfair means in the test held on 27.2.2011. To put it differently, the foundation of the action taken by the General Manager was the accusation that while appearing in the objective test, the private respondents had resorted to copying. IBPS had relied upon the analysis made by the computer and sent report to the Bank that 18 candidates were suspected to have used unfair means. The concerned authority then sent for the chart of seating arrangement and treated the same as a piece of evidence for coming to the conclusion that the private respondents had indeed used unfair means in the examination. This exercise was not preceded by an inquiry involving the private respondents and no opportunity was given to them to defend themselves against the charge of use of unfair means. In other words, they were condemned unheard which, in our considered view, was legally impermissible."*

25. The same principles of law have been laid down by the apex Court in *University of Rajasthan and another vs. Prem Lata Agarwal* alongwith

connected matters reported in *(2013) 3 SCC 705*. It is apt to reproduce para 43 of the said judgment herein.

> *"43. The High Court, as has been stated earlier, has pressed into service Regulation 23 and relying on the same, it has held that the services of the respondents shall be deemed to have been confirmed as in the instant cases the University has never opined that their services were not satisfactory. The language of Regulation 23 is couched in a different manner. It fundamentally deals with the computation of the period of service of an employee. That apart, Regulation 23(b) uses the words "if he is confirmed". It is a conditional one and it relates to officiating services. Both the concepts have their own significance in service jurisprudence. The respondents were not in the officiating service and by no stretch of imagination, could they have been treated to be confirmed because the words "if he is confirmed" required an affirmative act to be done by the University. The High Court, as we find, has applied the doctrine of deemed confirmation to the case at hand which is impermissible. In this context, we may, with profit, refer to the decision in Head Master, Lawrence School, Lovedale v. Jayanthi Raghu and another[(2012) 4 SCC 793] wherein it has been ruled thus: -*
>
> *"A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In our considered opinion, an order of confirmation is required to be passed."*
>
> *Thus analyzed, the conclusion of the High Court which also rests on the interpretation of the regulations does not commend acceptation."*

26. Applying the ratio and keeping in view the facts and circumstances of the case on hand, read with the discussion made by the Administrative Tribunal, we are of the considered view that the confirmation order in writing was must and mere continuance, after expiry of probation period, cannot be said to be deemed confirmation.

27. The petitioner has not made out a case for interference by this Court, not to speak of issuance of a writ of certiorari.

28. Having said so, we find that the order of termination is legal one, needs no interference. The impugned judgment is well reasoned, speaking and legal one, is upheld. Consequently, the writ petition merits dismissal and is accordingly, dismissed.

29. With the aforesaid observations, the writ petition is disposed of along with pending applications, if any.

****

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

Than Singh son of Sh. Sobha Ram ....Petitioner.

Versus

State of H.P. and others. .....Respondents.

CWP No. 910 of 2011.
Order reserved on: 26.11.2014.
Date of Order: December 31, 2014

Constitution of India, 1950- Article 226- Petitioner was appointed as a Gram Panchayat Vikas Adhikari – his name was sponsored by the Department for undergoing five years degree course in B.Sc. Agriculture - he was allowed study leave and he completed B.Sc. Agriculture by securing 70.1% marks- petitioner claimed that he is qualified to be appointed as Agricultural Development Officer by way of promotion under 5% quota- it was proved on record that no post was lying vacant- held that, petitioner cannot claim promotion. (Para-4 to 6)

Cases referred:

Chandra Gupta Vs. Secretary Government of India AIR 1995 SCC 23

State of Jharkhand Vs. Bhadey Munda and another 2014 (10) SCC 398

State Bank of India Vs. Kashinath Kher, AIR 1996 8 SCC 762

Indian Airlines Corporation Vs. K.C.Shukla 1993 1 SCC 17

S.L.Soni Vs. State of M.P. AIR 1996 SC 665

U.P.Jal Nigam Vs. Narinder Kumar Agarwal 1996 (8) SCC 43

D.C.Aggarwal (dead) through L.Rs Vs. State Bank of India and another, 2006 (5) SCC 153

State of HP Vs. Surinder Kumar, 1996 (1) SCC 650

S.B. Bhattacharjee Vs. S.D.Majumdar and others 2007 (10) SCC 513

Indian Airlines Corporation Vs. Capt. K.C.Shukla and others 1993 (1) SCC 17

For the petitioner: Mr. Adarsh K.Vashista, Advocate.
For Respondents. Mr. Puneet Rajta, Dy. Advocate General
with Mr.J.S.Rana, Asstt. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana Judge.

Present Civil Writ Petition filed under Article 226 of the Constitution of India. Brief facts of the case as pleaded are that petitioner was appointed as Gram Punchayat Vikas Adhikari (GPVA) on dated 14.10.1998. It is pleaded that in the year 2003 the name of the petitioner was sponsored by respondent department for undergoing five years degree course in B.Sc Agriculture and petitioner was allowed study leave and he completed B.Sc degree by scoring 70.1% marks. It is pleaded that in the year 2008 the Recruitment and Promotion Rules for the post of Agriculture Development Officer (Class-I Gazetted) provides two modes of recruitment to the post of Agriculture Development Officer. (1) 50% by way of direct recruitment (2) 50% by way of promotion. It is pleaded that in the recruitment by way of promotion 5% quota is reserved for the category of GPVA. It is pleaded that petitioner is qualified and eligible to be promoted for the post of Agriculture Development Officer (ADO) as per Recruitment and Promotion Rules. It is pleaded that on dated 7.3.2009 respondent department initiated the process for promotion to the post of Agriculture Development Officer Class-I Gazetted and the name of the petitioner was also mentioned in the panel at serial No.11. It is pleaded that respondents promoted as many as eleven similarly situated persons to the post of Agriculture Development Officer but the name of petitioner did not recommend for promotion for the post of Agriculture Development Officer. It is pleaded that in the year 2010 one Kaula Ram Agriculture Development Officer who belonged to the quota of the petitioner retired on 31.5.2010 and one Sh Arjun Singh Agriculture Development Officer who belonged from the same quota also retired in July, 2010. It is pleaded that two posts belonging to the category of petitioner have fallen vacant. It is further pleaded that despite the vacancy of two posts the petitioner was not promoted to the next higher post of Agriculture Development Officer in accordance with Recruitment and Promotion Rules. It is pleaded that on dated 29.8.2010 petitioner filed Civil Writ petition No.5130 of

2010 before Hon'ble High Court of HP which was decided on 23.8.2010. It is pleaded that on dated 28.12.2010 respondent No.2 has rejected the case of the petitioner in illegal manner. It is pleaded that Annexure P10 dated 28.12.2010 be quashed. It is pleaded that petitioner be promoted to the post of Agriculture Development Officer (Class-I Gazetted) with all consequential benefits. Prayer for acceptance of writ petition sought.

2. Per contra reply filed on behalf of respondents pleaded therein that petitioner was appointed as GPVA on dated 14.10.1998. It is pleaded that as per Recruitment and Promotion Rules for promotion to the post of Agriculture Development Officer 5% quota has been provided to the category of GPVA who possess B.Sc (Agri.) with seven years regular service. It is pleaded that twenty posts fall in the share of GPVA as per provision of Recruitment and Promotion Rules. It is pleaded that all posts have been filled up by way of promotion. It is pleaded that at present no post is lying vacant in the share of GPVA. It is pleaded that the claim of the petitioner is not maintainable. Prayer for dismissal of writ petition sought.

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

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

(1) Whether petitioner is entitled for promotion to the post of Agriculture Development Officer from the quota of GPVA as alleged?

(2) Final order.

Finding upon Point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioner that petitioner is legally entitled for promotion to the post of Agriculture Development Officer from the quota of GPVA is rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that petitioner filed CWP No. 5130 of 2010 before Hon'ble High Court of HP which was disposed of on dated 27.10.2010. Hon'ble High Court of HP directed the Secretary (Agriculture) Government of Himachal Pradesh to take a decision in the matter in view of the reply regarding the entitlement of the petitioner for promotion within a period of one month from the date of production of the copy of order. It is also proved on record that thereafter Secretary (Agriculture) to the Government of Himachal Pradesh in compliance to the direction of Hon'ble High Court of HP issued in CWP No.5130 of 2010 passed the order that no post of Agriculture Development Officer is vacant on dated 28.12.2010 from the share of GPVA and held that 20 GPVAs already stood promoted to the post of ADO from quota of GPVA who are working on regular basis and representation dated 22.11.2010 preferred by petitioner was rejected. It is proved on record that there are two modes for appointment for the post of Agriculture Development Officer (1) Direct recruitment (2) By way of promotion. It is proved on record that 50% quota is reserved for promotion from feeder cadre and 50% quota is reserved for direct recruitment for the post of Agriculture Development Officer. It is proved on record that 5% quota is reserved for GPVA category for promotion to the post of Agriculture Development Officer and 45% quota is reserved for Assistant Agriculture Development Officer. It is also proved on record that thereafter present CWP No. 910 of 2011-A was filed before Hon'ble High Court of HP and on dated 18.11.2011 Hon'ble High Court of HP directed respondent-State to verify the fact whether 19 candidates are occupying the posts of Agriculture Development Officer from 5% quota of GPVA. Hon'ble High Court of HP further directed that in case only 19 persons are occupying the posts of ADO under 5% quota of GPVA then the case of the petitioner would also be considered for promotion with all consequential benefits within a period of four weeks w.e.f.

18.11.2011. In compliance to the interim direction of Hon'ble High Court of HP passed in CWP No. 910 of 2011, Additional Chief Secretary (Agriculture) to the Government of HP passed order on dated 19.1.2012 that no post of Agriculture Development Officer in the quota of GPVA is lying vacant and held that one Sh Kartar Singh GPVA also stood promoted to the post of Agriculture Development Officer on dated 6.8.2010 on the recommendations of HPPSC. List of ADO promoted from 5% quota of GPVA submitted by respondents is quoted in toto:

Sr.No.	Name of ADO promoted from GPVAs.	Present place of posting.	Remarks.
1.	S/Sh Kewal Krishan	Seed Grading Centre, Pekhubela, Distt Una	
2.	Ram Pal	S.C.Section Dhaliara, Distt Kangra.	
3.	Surender Kumar	Placed as SDSCO, Una w.e.f.23.5.2011	
4.	Manoj Gautam	Dev Block, Nagar Distt.Kullu	
5.	Naresh Dutt	Nankhari Cir.Dev.Block, Rampur Distt.Shimla	
6.	Som Raj Negi	S.C.Section, Nichar, Distt Kinnaur.	
7.	Devi Chand Kashyap	S.C.Section Kuthar Distt. Solan	
8.	Yoginder Pal	Dev.Block, Bhedu Mahadev Distt. Kangra	
9.	Hakam Chand	Tiara Circle Dev. Block, Kangra Distt. Kangra	
10.	Shyam Lal	Chuhru Cir.Dev.Block, Amb, Distt Una	
11.	Hem Raj	S.C.Section, Jhandutta, Distt. Bilaspur.	
12.	Abhay Kumar	Dev. Block Hamirpur, Distt Hamirpur	
13.	Sita Ram	S.C.Section, Kandaghat, Distt. Solan	
14.	Nitin Kumar Sharma	S.C.Section, Bharmour, Distt. Chamba	
15.	Virender Singh	SDSCO, Shimla	
16.	Smt. Pushpa Devi	Sr. Analytical Chemist Howthorn Villa, Shimla-4	
17.	Durga Dutt	Darlaghat Circle, Dev. Block Kunihar Distt. Solan	
18.	Bhupender Singh	Dev. Block, Kaza Distt Lahaul & Spiti	
19.	Dev Raj	Jalog Cir. Dev. Block, Basantpur, Distt. Shimla	
20.	Kartar Singh	S.C.Section, Indora, Distt. Kangra	

6. It is well settled law that appointment upon public post is by way of two modes (1) Promotional mode (2) Direct recruitment mode and concept of rota and quota is applied when promotion is between feeder cadre and direct

recruitment. In the present case it is proved on record that 5% quota from the posts of GPVA is fixed for promotional post of Agriculture Development Officer. It is proved on record that 20 posts come to the share of GPVA. As per document placed on record there is no vacant post as of today in the quota of GPVA for promotional post of Agriculture Development Officer and as of today entire quota of GPVA in the promotional post of Agriculture Development Officer stood filled up. Details of twenty officials occupying 5% quota of GPVA are cited supra. It is well settled law that promotion in the public post is always given as per approval of recommendation of Department Promotion Committee constituted by appointing authority. It is well settled law that Department Promotion Committee is under legal obligation to recommend the name of officials for promotion keeping in view the ACRs of the officials and keeping in view the integrity of the officials suitable for public post. In the present case petitioner did not place on record any documentary evidence in order to prove that his case was recommended for appointment to the post of Agriculture Development Officer by Department Promotion Committee in preference to twenty candidates cited supra. Falling names of the officials in the zone of consideration for promotion and recommendation of the officials by Department Promotion Committee for appointment in promotional post are two entirely different concepts in the promotion process in the public post. Generally minimum three candidates falls in zone of consideration for one promotional post. It was held in case reported in AIR 1995 SCC 23 titled Chandra Gupta Vs. Secretary Government of India that no employee has a right or vested right of promotion. It was held in case reported in 2014 (10) SCC 398 titled State of Jharkhand Vs. Bhadey Munda and another that an employee has no fundamental right of promotion. It was held that employee has only a right to be considered for promotion. It was held in case reported in AIR 1996 8 SCC 762 titled State Bank of India Vs. Kashinath Kher that object of writing the confidential report is two folds (1) To give an opportunity to the officer to remove deficiencies and to inculcate discipline. (2) It seeks to serve improvement of quality and excellence and efficiency of public service. It was held in case reported in 1993 1 SCC 17 titled Indian Airlines Corporation Vs. K.C.Shukla that Court could not substitute its opinion and devise its own method for evaluation of fitness of candidate for a particular post. Also see AIR 1996 SC 665 titled S.L.Soni Vs. State of M.P. It was held in case reported in 1996 (8) SCC 43 titled U.P.Jal Nigam Vs. Narinder Kumar Agarwal that merit and integrity are the sole consideration for selecting the officials in a public post for promotion. Also see 2006 (5) SCC 153 titled D.C.Aggarwal (dead) through L.Rs Vs. State Bank of India and another. Also see 1996 (1) SCC 650 titled State of HP Vs. Surinder Kumar. Also See 2007 (10) SCC 513 titled S.B. Bhattacharjee Vs. S.D.Majumdar and others**.** Also see 1993 (1) SCC 17 titled Indian Airlines Corporation Vs. Capt. K.C.Shukla and others. In view of the fact that no vacancy is available in the quota of GPVA for promotional post of Agriculture Development Officer as of today and in view of the fact that petitioner did not implead Agriculture Development Officers as co-respondents to whom undue favour has been given by the respondents from the reserve quota of GPVA in the promotional post of Agriculture Development Officer to meet requirement of concept of audi alteram partem no relief could be granted in favour of the petitioner as sought. Hence point No.1 is answered in negative.

Final Order.

7. In view of my finding upon point No.1 civil writ petition filed by petitioner under Article 226 of the Constitution of India is dismissed with no order as to costs. Writ petition is disposed of. All pending application(s) if any are also disposed of.

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